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101. Hon'ble Mr. Justice Manish Kumar
102. Hon'ble Mr. Justice Samit Gopal

(2020)06ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Criminal Misc. Bail Application No. 56125 of 2019

Sandeep @ Kuldeep ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Santosh Kumar Dubey, Sri B.S. Tripathi, Sri Praveen Kumar Dubey

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

A. Testimony of witnesses yet to be recorded-and evidences yet to be considered-commercial quantity of ganja-20 kg-recovered 150kg.

Bail Application rejected. (E-9)

List of cases cited:-

1. Netram Vs. State of Rajasthan,2014 Criminal Law Report 163.

2. Union of india vs. Balmukund, 2009 (12) SCC 161

3. Om Praksh Bishnoi Vs. Union of India, 2019 SCC Online Rajasthan 1280

4.Manoj Chaudhari in Criminal Misc. Bail Application No. 16781 of 2018

5. Crl. Misc. Bail Application No. 3515 of 2020 (Shailendra Kumar Gupta @ Shailu Vs. State of U.P.)

(Delivered by Hon'ble Jayant Banerji, J.)

1. This bail application has been filed to enlarge the applicant on bail in Case Crime No. 224 of 2019, under Sections 18/20 of Narcotic Drug and Psychotropic Substances Act,19851, Police Station Site-5, Greater Noida, District Gautambudh Nagar.

2. The FIR dated 31.8.2019 has been lodged against the applicant and two others alleging recovery of 150 Kg 'Ganja' in 30 bags from the vehicle in which the applicant was traveling.

3. A perusal of the FIR reveals that the first informant, the Station House Officer of P.S. Greater Noida was patrolling the area falling under him in his official vehicle along with other police personnel. On reaching the Sirsa roundabout, a vehicle coming from the roundabout was stopped and checked which was being driven by one Susheel who said that the vehicle is loaded with coconuts. Since the season was not of coconuts, the matter became suspect. Two persons jumped off from the rear side of the vehicle and ran into the jungle in the direction of a flour mill. They were chased by two policemen but they could not be caught. The driver revealed his name as Bitti alias Suneel son of Satyaveer, resident of village Ghanghola, P.S. Site-5, District Gautam Budh Nagar and said that the vehicle was hired by him and it had bags of coconut and below the coconuts bags, packets of illicit 'Ganja' were present. Thereafter, the driver was informed that he could have his physical search done by a Magistrate or Gazetted Officer who could be called by the informant over phone. The driver said that since you have caught me and when full information has been disclosed to you, then you can search me physically as well as the vehicle. Then, the police personnel searched each other to confirm whether any of them had any illicit

Ganja. The Station Officer spoke to Circle Officer who said that he was busy with official work. The Gram Pradhan, Sirsa, Sri Prakash was also spoken over mobile about the incident but he also expressed his inability to come. Therefore, under the provisions of Section 50 of the N.D.P.S. Act, the consent letter was got prepared which was signed and then physical search of the vehicle was done. Under five bags of coconuts, 30 packets of illicit 'Ganja' were recovered and to weigh the 'ganja' the Head Constable was sent to village Sirsa to get a weighing scale. In the meantime, the members of the public moving on the road were asked to be witnesses of the incident. However, none of them agreed. The Head Constable returned with an electronic weighing scale and every packet was weighed. Each packet weighed 5 kg and a total of 150 kg 'ganja' was recovered. The driver of the vehicle was asked to tell the names of the persons who had jumped off the vehicle and run away. The names of his elder brother, Sandeep son of Satyaveer (the applicant), and of one Kullan alias Gulab Singh son of Suradpal Singh were disclosed by him. He said that the three of them were taking the narcotic substance to Ghanghola. The accused was informed about his offence under Section 18/20 of the N.D.P.S. Act and was arrested at 23.30 hours. From the recovered material, by way of sample, 100 gm of 'Ganja' were taken and kept in a polythene and sealed in a cloth after affixing stamp. The sample of the stamp was made and the rest of the recovered material was recorded and seized. During arrest, the orders and directions of the Human Right Commission and the Hon'ble Supreme Court were followed. The arrest memo was prepared at the site and was dictated by the Station Officer to the Senior Sub Inspector in the light of a torch on the bonnet of the vehicle. The information of arrest would be given as stated by the accused after reaching the police station. The memo was read out to the other police personnel who made their signatures thereon and a carbon copy of the memo was given to the accused.

4. Sri B.S. Tripathi, Advocate, holding brief of the learned counsel for the applicant has contended that the applicant was not arrested on the spot and no narcotic substance was recovered from his possession. It is contended that the mandatory provisions of Section 42 and 50 of the NDPS Act were not complied with. Learned counsel has referred to the Standing Instruction No.1 of 1988 of the Central Government, which, however, has not been produced for reference before the Court. It is his contention that only 100 gm of 'Ganja' as sample was taken, whereas the mandate of Standing Instruction No. 1 of 1988 is that where there are several packets of narcotic seized, the sample has to be taken from each individual packet and sent for analysis. The analysis has to be done by testing kits approved by the United Nations. It is contended by the learned counsel for the applicant that the co-accused in the matter namely Kullan @ Gulab Singh has already been enlarged on bail by this Court by means of an order dated 22.10.2019 in Criminal Misc. Bail Application No. 43996 of 2019.

5. It is stated that since the mandate of Standing Instruction No. 1 of 1988 has not been complied with, the recovery of 150 kg of 'Ganja' becomes suspicious and the applicant is entitled to be enlarged on bail. In support of his contention, learned counsel has referred to paragraph nos. 11,12 and 13 of the judgment of the High Court of Rajasthan in **Netram Vs. State of Rajasthan2,** paragraph nos. 10 and 16 of

the judgment of the Supreme Court in the matter of **Union of India Vs. Balmukund3**, the judgement of the High Court of Rajasthan in **Om Praksh Bishnoi Vs. Union of India4** and the order dated 22.5.2018 passed by this Court in the case of **Manoj Chaudhari in Criminal Misc. Bail Application No. 16781 of 2018.**

6. Sri Abhishek Singh, learned counsel, brief holder for the State, opposing the bail application, has stated that the charge sheet has already been filed in the trial court against the applicant. It is contended that as far as compliance of Section 42 and 50 of the N.D.P.S. Act is concerned, the consent letter of the applicant is the part of the case diary. He has further contended that the issues that are being raised by the applicant before this Court in support of the bail application, are to be looked into by the trial court during the trial. He contends that given the fact that the recovery of 'Ganja' from the possession of the accused-person exceeds the commercial quantity, strict view may be taken by the Court with regard to bail.

7. Though, admittedly, the applicant was not arrested on the spot, but he was named by his brother, the driver of the vehicle, Bitti alias Suneel. No material has been placed on behalf of the applicant to show whether during investigation, it emerged that the applicant was not present on the spot. In any view of the matter, the presence of the applicant or otherwise at the spot, false implication or not, both are disputed questions of fact. Whether the provisions of Standing Instruction No. 1 of 1988 were duly complied with or not while taking samples of the narcotic drug on the recovery being made from the vehicle is again a question of fact that can be looked into during trial. Further, it is no longer res-integra that compliance of section 50 of the N.D.P.S. Act is a subject matter of trial.

8. The judgement and orders in the case of **Netram (supra), Union of India Vs. Balmukund (supra)** which have considered Standing Instruction No. 1 of 1988, would not be applicable in the instant application. The judgement in the matter of **Netram** and **Balmukund** were delivered in Criminal Appeals that arose out of the judgements of conviction and acquittal respectively and not in bail applications. In those appeals the testimony of witnesses and evidence on record of the trials were noticed. Therefore, the applicant cannot derive any benefit from those judgements.

9. The order of the Rajasthan High Court in the case of **Om Praksh Bishnoi** and of this Court in **Manoj Chaudhari** are orders passed on the third Bail Application and on the first bail application respectively of the respective applicants therein granting bail. Reliance in these two orders has been placed on the Standing Instruction No. 1 of 1988 issued by the Narcotic Bureau, New Delhi. However, with due respect, I am unable to treat these two orders in **Om Praksh Bishnoi and Manoj Chaudhari** as precedents for the purpose of adjudication of the present bail application on merits.

10. Section 37 of the N.D.P.S. Act reads as follows:-

"37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the

Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under

section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail".

11. Liberal approach in the matter of grant of bail in the cases covered under the provisions of Section 37(1)(b) of the N.D.P.S. Act is not called for and the provisions require strict and mandatory compliance by the court where a person is accused of an offence punishable for offences under Section 19 or section 24 or Section 27A and also for the offences involving commercial quantity. In matters under the N.D.P.S. Act, a reverse onus is placed on the accused to substantiate that he is not guilty of the offences charged. The principles with regard to bail in such cases are no longer res nova, as held in the judgement of this Court dated 5.3.2020 passed in **Crl. Misc. Bail Application No. 3515 of 2020 (Shailendra Kumar Gupta @ Shailu Vs. State of U.P.)**. In the notification specifying small quantity and commercial quantity as published in the Gazette of India dated 19.10.2001, the commercial quantity of 'ganja' is shown at sl. no. 55 as 20 kg. The amount allegedly recovered from the vehicle is 150 kg. It is reiterated that whether the provisions of Standing Instruction No. 1 of 1988 were duly complied with or not while taking samples on recovered of the narcotic drug made from the vehicle, is a question of fact, that can be looked into during trial. The Court would be circumspect to look into disputed questions of fact in cases relating to bail in view of provisions of Section 37(1)(b) of the N.D.P.S. Act where testimony of witnesses is yet to be recorded and evidence is yet to be considered.

12. Though, as it appears from the perusal of the bail order enclosed as Annexure No.2 to the affidavit filed in support of the bail application, the co-accused Kullan alias Gulab Singh, who is also alleged to have jumped off the vehicle and run away, has been enlarged on bail by order of this Court dated 22.10.2019 in Criminal Misc. Bail application No. 43996 of 2019. However, with all due respect, I am not inclined to subscribe to the view taken by the learned Judge. In matters under the N.D.P.S. Act, as observed above, since a reverse onus is placed on the accused in view of Section 37(1)(b), no liberal view can be taken.

13. On perusal of the available record before this Court, no satisfaction can be recorded that there are reasonable grounds for believing that the applicant is not guilty of such offence. Moreover, the mere alleged fact that the applicant has no criminal history, does not, under the facts of the case, lead to a satisfaction that he is not likely to commit any offence while on bail. This bail application , is, accordingly, **rejected.**

14. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of this bail

application and must not be construed to have any reflection on the ultimate merits of the case.

(2020)06ILR A5
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 602 of 2020

Rajendra Singh & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Pradeep Kumar Singh

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

A. Final Report and further investigation- Final Report submitted-on the basis of dying declaration-contention of complainant-that there was no dying declaration -it is manufactured and frivolous-intact in the case diary-but Final Report was submitted-statement of complainant-not investigated-Magistrate rejected final report-with a direction of further investigation-no illegality.

Criminal Revision dismissed. (E-9)

Held, In the present case death by burn and injury caused by burn during treatment at Hospital within nine months of marriage is there. F.I.R. is with contention of dowry death. It was investigated. Final report was submitted and this conclusion was on the basis of statement made by deceased in her dying declaration. The contention of complainant was intact in case diary, but the final report was submitted. It was submitted by complainant that this dying declaration was manufactured and frivolous. There was no dying declaration of deceased. But this was not investigated by the 4 investigating officer. Under all above facts and circumstances, final report was rejected with a direction for further investigation and this order was with no illegality or irregularity or in irregular exercise of jurisdiction by Magistrate. (Para 8)

List of cases cited: -

1. Minu Kumari Vs. State of Bihar, (2006) 4 SCC 399

2. Kaptan Singh Vs. State of Madhya Pradesh (1997) 4 Supreme 211

3. Sri B.S.S.V.V.V. Maharaj Vs. State of U.P. 1999 Cr.L.J. 3661 (SC)

(Delivered by Hon'ble Ram Krishna Gautam,, J.)

1. This Criminal Revision u/s 397/401 Cr.P.C. has been filed by Rajendra Singh, Vimla Devi, Pankaj Singh and Km. Ranjana against order dated 04.12.2019 passed by learned C.J.M., Chitrakoot, in Final Report Case No. 406 of 2018 arising out of Case Crime No. 188 of 2018, u/s 498A, 304B I.P.C. and section 3/ 4 D.P. Act, P.S. Mau, District Chitrakoot, whereby learned Magistrate has rejected final report and ordered for further investigation.

2. Learned counsel for revisionists argued that it was a case of accident, wherein deceased was taken to hospital and was hospitalized there at. But unfortunately she succumbed to above burn injury. Her dying declaration was recorded by Executive Magistrate, wherein nothing incriminating was against the revisionists and on the basis of it, final report was submitted. However, protest petition was filed by informant and on the basis of contention of informant, the Magistrate passed the impugned order. Whereas the Magistrate was not competent to take prosecution version at the time of disposal

of final report supplemented by protest petition. Rather it was case diary and contents thereof, which was to be taken into consideration. The Magistrate may proceed under Chapter XV of the Code of Criminal Procedure by examining complainant u/s 200 Cr.P.C. and his witnesses u/s 202 Cr.P.C. But he cannot direct for further investigation particularly upon a particular fact. But in this regard too above impugned order has been passed. Hence this revision.

3. Learned AGA has vehemently opposed the revision.

4. Section 190 Cr.P.C. provides for cognizance of offence by Magistrate. Section 190 Cr.P.C. reads as under:

"190. **Cognizance of offences by Magistrates.**

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

5. Apex Court in ***Minu Kumari Vs. State of Bihar, (2006) 4 SCC 399*** *has propounded that a Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case. If he thinks fit and exercise his power under section 190(1)(b). The Magistrate is not bound in such situation to follow the procedure laid down in sections 200 and 202 of the Code for taking cognizance of a case under section 190(1)(a) though it is open to him to act under section 200 or section 202 also.*

6. Section 173 Cr.P.C. provides for a report of police officer on completion of investigation. This report may be either a charge sheet or a final report and if final report has been submitted, the Magistrate is not bound by conclusion drawn by the Investigating Officer. If evidence collected in case diary makes some offence then the cognizance may be taken as per section 190 Cr.P.C. of those offences. If investigation is not fair or in accordance with facts given in investigation then final report may be rejected and a direction for further investigation may be given or final report may be accepted. Even if police report i.e. result of investigation under Chapter XII of Cr.P.C. is a conclusion that an investigating officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance there upon under section 190(1)(b) of the Code and to proceed with the case for trial, and it cannot rely on the investigation or the result thereof, as has been propounded by Apex Court in ***Kaptan Singh Vs. State of Madhya Pradesh (1997) 4 Supreme 211.***

7. Apex Court in ***Sri B.S.S.V.V.V. Maharaj Vs. State of U.P. 1999 Cr.L.J. 3661 (SC)*** has propounded that power of police to conduct further investigation,

even after laying final report is recognized under section 173(8) Cr.P.C.

8. In the present case death by burn and injury caused by burn during treatment at Hospital within nine months of marriage is there. F.I.R. is with contention of dowry death. It was investigated. Final report was submitted and this conclusion was on the basis of statement made by deceased in her dying declaration. The contention of complainant was intact in case diary, but the final report was submitted. It was submitted by complainant that this dying declaration was manufactured and frivolous. There was no dying declaration of deceased. But this was not investigated by the investigating officer. Under all above facts and circumstances, final report was rejected with a direction for further investigation and this order was with no illegality or irregularity or in irregular exercise of jurisdiction by Magistrate.

9. Accordingly, this revision is **dismissed.**

9. Accordingly, this revision is **dismissed.**

(2020)06ILR A7
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 1008 of 1996

Sri Deepak Kumar ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri H.K. Sharma, Sri Ankit Agarwal, Sri Bharat Garg

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

A. Criminal Law-Chief Medical Officer granted sanction by signing virtually printed order-only name, address and authorization inserted-rest order printed-no failure of justice-sanction order legal.

Criminal Revision dismissed. (E-9)

List of cases cited:-

1. State of Maharashtra and Others Vs. Ishwar Piraji Kalpatri and Others 1996 (1) SCC 542

2. State of Orissa Vs. Mrutunjaya Panda 1998 (2) SCC 414

3. State of Madhya Pradesh Vs. Harishankar Bhagwan Pd. Tripathi 2010 (8) SCC 655

4.State of Bihar and Others Vs. Rajmangal Ram and Others 2014 (11) SCC 388,

5. State by Police Inspector Vs. T. Venkatesh Murthy (2004) 7 SCC 763

6.State of Madhya Pradesh Vs. Virender Kumar Tripathi (2009) 15 SCC 533

7. Neera Yadav Vs. C.B.I. (Bharat Singh) 2006 (ILR)1 All 490

8. Central Bureau of Investigation v. V.K. Sehgal and Another 1999 (8) SCC 501

9. Mohd. Waris and Others Vs. State 2019 (3) Crimes 476 (All)

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

1. Heard Sri Bharat Garg, learned counsel for revisionist and learned AGA for State of U.P.

2. This criminal revision under Section 397/401 Cr.P.C., has been filed aggrieved by judgment and order dated 23.07.1996. The IXth Additional Chief

Judicial Magistrate, Moradabad vide judgment and order dated 03.12.1993 passed in Case No. 694 of 1993, convicting revisionist and sentencing to undergo one year rigorous imprisonment *(hereinafter referred to as "R.I.")* under Section 7(1) read with Section 16(1)(a) of Prevention of Food Adulteration Act, 1954 *(hereinafter referred to as "Act, 1954")* with fine of Rs. 3000/- and in case of non-payment of fine, he shall further suffer three months R.I.. Thereagainst, accused preferred Criminal Appeal No. 115 of 1993 and Appellate Court while allowing appeal partly and modifying sentence to the extent that accused shall suffer six months R.I. instead of one year R.I. and fine of Rs. 3000/- is reduced to Rs. 1000/- and in case of non-payment of fine, he shall further suffer one month R.I. instead of three months R.I. Being aggrieved, Informant preferred present revision.

3. It is contended that Chief Medical Officer, Moradabad *(hereinafter referred to as "CMO")* in Sanction Order No. P.F.A./Abhi./91 dated 06.05.1991 (Ext. Ka-11), while granting sanction has signed a virtually printed order wherein only name, address and authorization has been inserted and rest of order is a printed order. Aforesaid exhibit reads as under:-

"In exercise of the powers vested to me under Section 20 of the Food Adulteration Act, 1954 vide U.P. Government Notification No. 6001/XVI-X-722-55 Dated 18-9-76 Published in U.P. Govt. Gazzet Dt. 13-11-76.

I Dr. आर.सी. कटियार Chief Medical Officer, Moradabad after perusal of all papers and records applying my own mind hereby give my written consent for prosecution of Sri दीपक कुमार s/o श्री बुद्धिसेन R/o ekS0 अशोकनगर थाना कोतवाली मुरादाबाद Moradabad under Section 7/16 of Prevention of Food Adulteration Act, 1954 and authorise Sri बी0एल0 अवस्थी खा0नि0 न0पा0 मुरादाबाद to launch and conduct the case in the Court."

4. English part is printed and Hindi part has been filled in by concerned person.

5. It is not disputed that CMO is a competent authority to grant sanction under Section 20 of Act, 1954 having been authorized by U.P. Government, vide Notification dated 18.09.1976, published in U.P. Gazette dated 13.11.1976. Submission is that mention of words "after perusal of all papers and records applying my own mind" are printed in sanction order and does not show actual application of mind by Sanctioning Authority.

6. However, I find no force in the submission. Where a very large number of sanction orders are required to be issued by CMO under the provisions of Act, 1954, for administrative convenience, some part of such orders have been got printed for expeditious disposal of matter unless it is shown that words contained in the order have actually not been performed or acted upon, it cannot be said that Sanctioning Authority has not applied his mind.

7. The issue as to in what manner any irregularity in the order of sanction would affect an otherwise valid order of trial has been considered time and again. In **State of Maharashtra and Others Vs. Ishwar Piraji Kalpatri and Others 1996 (1) SCC 542**, Court said that order of sanction is an administrative act. It is sufficient that if Sanctioning Authority has stated that prima-facie case is made out and it is in the interest of justice that accused persons

should be prosecuted and they shows application of mind on his part and also that he has examined the material placed before him. Court also said that while according sanction, Sanctioning Authority had personally scrutinized file and had arrived at required satisfaction.

8. In **State of Orissa Vs. Mrutunjaya Panda 1998 (2) SCC 414**, where accused was convicted for offence under Section 161 IPC and Section 5(1)(d) and 5(2) of Prevention of Corruption Act, 1947. High Court set aside conviction for want of a valid sanction. Supreme Court reverse order by referring to Section 465 Cr.P.C. and said:

"any error or irregularity in any sanction for the prosecution shall not be a ground for reversing an order of conviction by the Appellate Court unless in the opinion of that Court a failure of justice has in fact been occasioned thereby. "

9. Again, in **State of Madhya Pradesh Vs. Harishankar Bhagwan Pd. Tripathi 2010 (8) SCC 655**, the argument was raised that proper sanction was not obtained to prosecute accused persons in a trap case. Supreme Court said that Sanctioning Authority is not required to indicate that he has personally scrutinized the file and arrived at satisfaction for granting sanction and order granting sanction did not suffer from any infirmity to acquit accused persons. Even otherwise, once it is evident that material was placed before Sanctioning Authority and Competent Authority has granted sanction, any error or irregularity in sanction will not be a ground to reverse and order of conviction by Appellate order unless it is shown that three is failure of justice. For this purpose, Section 465 Cr.P.C. may be resorted to which reads as under:-

"465. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

10. Again, in **State of Bihar and Others Vs. Rajmangal Ram and Others 2014 (11) SCC 388,** conviction under the provision of Prevention of Corruption Act, 1947 was quashed by High Court on the ground of want of valid sanction. Supreme Court taking a different view, said:

"In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, it is difficult to see how at the intermediary stage a criminal prosecution

can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. "

11. Court relied on an earlier decision in **State by Police Inspector Vs. T. Venkatesh Murthy (2004) 7 SCC 763** wherein, para-14, Court said:

"14. .....Merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice. "

12. The above view has been reiterated by a three Judges' Bench of Supreme Court in **State of Madhya Pradesh Vs. Virender Kumar Tripathi (2009) 15 SCC 533.**

13. Similar view has been reiterated by a Full Bench of this Court also in **Neera Yadav Vs. C.B.I. (Bharat Singh) 2006 (ILR)1 All 490** and in para-117, Court referred to the judgement of Supreme Court in **Central Bureau of Investigation v. V.K. Sehgal and Another 1999 (8) SCC 501.** Court held that purpose and object of sanction is to prevent a frivolous or vindictive prosecution and once prosecution has concluded in conviction, it cannot be said that prosecution was frivolous or vindictive. Court quoted following extract of judgement in **V.K. Sehgal and another (supra)** as under:

"If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting that public servant, *because the very purpose of providing such a filtering check is to safeguard public servants from frivolous or mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties. But once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a sur-plusage. This could be the reason for providing a bridle upon the appellate and revisional forums as envisaged in Section 465 of the Code of Criminal Procedure."* (Emphasis added)

14. Recently, above view has also been taken by a Division Bench of this Court in **Mohd. Waris and Others Vs. State 2019 (3) Crimes 476 (All) wherein in paras- 37 and 38,** Court said as under:-

"37. A perusal of Section 465 Cr.P.C. shows that it runs into two parts; (i) "on any error, omission or irregularity", and three words have been used and it is said that the same will not justify setting aside of conviction in appeal or revision etc. but with reference to "sanction" only two words "error or irregularity" have been used and the word "omission" has not been mentioned. Meaning thereby, in the cases where sanction is required, if there is an error or irregularity in the "sanction", then conviction or finding will not be reversed in appeal or revision. It contemplates that sanction is there but there is some error or irregularity in granting sanction. If there is a complete "omission" of sanction, then in my view, Section 465 Cr.P.C. will not come into picture and will not help prosecution. It, therefore, leads to irresistible inference that if there is no sanction, whatsoever, by competent authority, it will be a serious flaw and an illegality would vitiate the entire proceedings.

38. In the cases, where sanction order has been passed but there exists some error or irregularity therein, then if such an objection raised for the first time in appeal or revision that would not vitiate conviction of an accused and Court will not interfere with such conviction and sentence on this account."

15. In this backdrop, when no illegality or irregularity could be pointed out in trial and further that sanction was granted by Competent Authority, I do not find that any case has been made out to show failure of justice so as to warrant interference in the Revision, only on the ground of alleged irregularity in the order of sanction. However, I have also rejected contention that there was any irregularity in the order of sanction.

16. No other point has been argued.

17. Revision lacks merit and is accordingly dismissed.

18. Certify the judgment to the Court below immediately.

(2020)06ILR A11
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 2220 of 2019

Hariraj ...Revisionist
Versus
State of U.P. ...Respondent

Counsel for the Revisionist:
Sri Sri Sunil Kumar Chaudhary, Sri Avinash Mani Tripathi

Counsel for the Respondent:
A.G.A.

A. Facts said in-Examination -in-chief-not controverted or cross-examined by other side-unrebutted examination in chief be taken in toto.

Criminal Revision dismissed. (E-9)

Held, The factum of death, owing to above accident, was said by PW-1 and PW-2, but it was not crossexamined by learned counsel for the defence. Hence, it was unrebutted and uncontroverted sentence of both and the same is to be taken with intact evidence. On the basis of those witnesses as well as formal exhibits, proved by Investigating Officer as well as informant, the judgment of conviction and sentence was passed. It was well in accordance with law and facts on record. There was neither any illegality or irregularity or any perversity in the impugned judgment. (Para 6)

List of cases cited:-

1. State of Rajasthan vs Fatehkaran Mehdu, AIR 2017 SC 796

2. Amit Kapoor vs Ramesh Chander & Anr, (2012) 9 SCC 460

3.Kunwar Singh Vs. State of U.P. 1993 (3) AWC 1305 Alld.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This revision under Section 397 read with Section 401 of Code of Criminal Procedure, has been filed by convict-revisionist Hariraj, against State of U.P., with a prayer for setting aside impugned judgment of conviction and sentence made, therein, by trial Court of Additional Chief Judicial Magistrate, Court No. 3, Moradabad, passed in criminal Case No. 2806 of 2014, related with Case Crime No. 202 of 2012, under Sections 279 and 304-A

I.P.C., P.S. Majhola, District Moradabad, along with judgment of Appellate Court of Sessions Judge, Moradabad, passed in Criminal Appeal No. 76 of 2018 (Hariraj Vs. State of U.P.).

2. Learned counsel for the revisionist argued that both the courts below failed to appreciate facts and law placed before it. Thereby, passed impugned judgment, wherein, conviction was awarded and sentence was passed. It was on the basis of statements recorded under Section 313 of Cr.P.C., before trial Court. But, no such statement was made by revisionist, whereas it was written under mistaken facts. The witnesses examined as eye witnesses i.e. PW-1 and PW-2, were of same department of Homegaurd, of which deceased was. They were interested witnesses. Investigating Officer did investigation under influence of department concerned. He did not recorded statements of nearby persons. The arrest was said to be made from his home that too, after 21 days of occurrence. Whereas, the statements recorded thereafter it, and PW-1 has specifically said that driver of the truck concerned ran from spot, after leaving truck there. It was all a concoction and on the basis of this, conviction and sentence was awarded. It was appealed before learned Sessions Judge, Moradabad, where specific arguments of these facts were made, but above Court also failed to appreciate facts and law and thereby, dismissed the appeal. Hence, this revision with above prayer.

3. Learned AGA has vehemently opposed with this contention that trial Court recorded statements of prosecution witnesses, wherein, PW-1 and PW-2, were two eye witnesses of spot. They have categorically said about the occurrence and rash and negligent act of revisionist, whereby, this accident occurred, resulting, injury to deceased, who subsequently succumbed to above injuries. The judgment of conviction and sentences therein, was not on the mere basis of statement recorded under Section 313 of Cr.P.C. Rather, it was upon the appreciation of entire evidence, laid before trial Court and it was well in accordance with law and evidence, on record. Appellate Court has appreciated the arguments raised by learned counsel for appellant and has passed impugned order, whereby, criminal appeal has been dismissed. In this revision, the course open to this revisional Court is limited one. It can never be second appellate court for appreciation of facts, which were confirmed by two subordinate courts. Hence, there is no illegality or irregularity in impugned judgments. This revision be dismissed.

4. Having heard learned counsels for both sides and gone through material placed on record, it is apparent that Section 397 of Code of Criminal Procedure, provided a limited jurisdiction to Court of Session Judge as well as High Court, for summoning and examining any record of any proceeding pending before inferior criminal court, situated within its legal jurisdiction, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceeding of such inferior Court. Record may be summoned, for perusal of same i.e. scope of the provision is to set right of patent defect or an error of jurisdiction, or law or the perversity, which crept in the proceeding, under this exercise of Revisional jurisdiction, as has been propounded by Apex Court in **State Of Rajasthan vs Fatehkaran Mehdu, AIR 2017 SC 796**. It has further been held by

Apex Court in **Amit Kapoor vs Ramesh Chander & Anr, (2012) 9 SCC 460**, that the revisional court is empowered to call for and examine the records of any inferior Court, for the purpose of satisfying itself, as to the illegality and irregularity of any proceeding or order, made in a case. Object of this provision is to set right of patent defect or error of jurisdiction or of law. Meaning thereby, under jurisdiction of this jurisdiction, this Court is not to set as a second appellate Court for analyzing the facts involved therein. Rather, jurisdictional error or legal error or patent error, regarding jurisdiction or law, which has resulted perversity, is to be seen and the same is to set right. Under above pretext of law, the fact of case in hand is to be scrutinized.

5. Case Crime No. 202 of 2012, was got lodged at P.S. Majhola, District Moradabad, for offences punishable under Sections 279 and 304-A I.P.C., upon the report of Shahane Alam, Company Commander Homegaurd, on 30.11.2012, with this contention that Mangu Khan, a homeguard, was on his way upon a motorcycle and when he reached in front of Moradabad Development Authority, a truck Registration No. UP 21 N/9471, being driven by, its driver rashly and negligently, did dash with motorcycle No. UP AC/5083, of Mangu Khan, resulting grievous hurt to him. This occurrence was witnessed by witnesses Sanjeev Kumar Sharma and Irshad Hussain, Homeguard 4005 and Homegaurd 0197, respectively, who were on duty at Moradabad Development Authority Office. This information was received by informant, who got this case lodged. Injured was instantly taken by those witnesses for treatment at District Hospital, Moradabad, where he was declared dead, i.e. he succumbed to this injury. Meaning thereby, this report was against the driver, who was driving above truck Registration No. UP 21 N/9471. Investigation proceeded, wherein, truck was detained. Its technical examination etc. was got conducted. Autopsy examination of deceased was conducted. Then after, charge sheet was filed, wherein, cognizance was taken. Trial proceeded. Statements of those three witnesses, two of fact and one of informant along with Investigating Officer and constable clerk, who got this case lodged, were got recorded. After closing the evidence of prosecution, statement of accused was recorded for an explanation, if any, regarding incriminating evidence, led by prosecution witnesses. There was admission of this accident that too under accident. Then after, no evidence in defence was led and court after hearing both sides, passed impugned judgment of conviction and sentence of six months simple imprisonment under Section 279 I.P.C. and two years simple imprisonment under Section 304-A of I.P.C., with a direction of concurrent running of sentences. This judgment was challenged before Sessions Judge, Moradabad, in Criminal Appeal No. 76 of 2018. The contention of appellant was same, as has been written above in this revision and learned Appellate Judge, after hearing both sides, dismissed the above appeal, holding no illegality in appreciation of law and evidence, by trial Court and this revision has been filed. The judgment of both of the Courts contains this fact that above truck was detained and against it, compensation case was filed, wherein, name of revisionst as driver of that truck, having above registration number, was there. It was contested and then after, compensation was awarded. No point of time it was raised that present revisionist was not driver of above truck at above time, date and place of accident and it was

determined by Motor Accident Claim Tribunal, wherein, award of compensation was there. Meaning thereby, this fact that appellant-revisionist was or was not driver of above truck on above date, time and place was adjudicated priorly.

6. PW-1, in his examination-in-Chief, has categorically said that he was present, on that date and time on above spot, when this accident occurred, wherein, driver of above truck, registration UP 21 N/9471, driving the same rashly and negligently, did dash with the motorcycle of Mangu Khan, resulting him serverly hurt. He was instantly taken to district hospital, where he was declared dead. He died owing to above injuries. This fact is very well there in examination-in-Chief. Whereas, no cross questioning is on this fact that it was not a death owing to above accident. The same is the situation with P.W.-2. Investigating Officer has proved his formal investigation. But no variance is there in cross-examination. This Court in **Kunwar Singh Vs. State of U.P. 1993 (3) AWC 1305 Alld.,** has held about the effect of non cross examination of a witness, regarding the averment made in Examination-in-Chief and has held that once the fact has been said in Examination-in-Chief, but has not been controverted or cross-examined in cross-examination by other side, then the unrebutted Examination-in-Chief, will be taken in toto. The factum of death, owing to above accident, was said by PW-1 and PW-2, but it was not cross-examined by learned counsel for the defence. Hence, it was unrebutted and uncontroverted sentence of both and the same is to be taken with intact evidence. On the basis of those witnesses as well as formal exhibits, proved by Investigating Officer as well as informant, the judgment of conviction and sentence was passed. It was well in accordance with law and facts on record. There was neither any illegality or irregularity or any perversity in the impugned judgment. Accordingly, this revision merits its dismissal.

7. Hence, **dismissed** as such.

8. Record of trial Court with copy of judgment be sent back.

(2020)06ILR A14
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 3037 of 2019

Jamshed Khan ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Yogesh Kumar

Counsel for the Opposite Parties:
A.G.A., Sri Samarth Sinha, Sri Vijay Sinha

Criminal Procedure Code, 1973- Application u/s 319 -Dying declaration-accusation on husband and father-in -law-not against the prospective accused-statements of PW-1and PW-3 -is no avail-as they were not present on the spot-and statement of Pw-2 do not corroborates with autopsy report-Application u/s 319 Cr.P.C. rightly rejected.

Criminal Revision dismissed. (E-9)

Held, Evidence is to be appreciated at this stage because on the basis of evidence, recorded, before the Trial court, this application has been moved. Hence, at that juncture, evidence is to be appreciated by the Trial court and learned Trial court has appreciated evidence led before it. Neither evidence of informant nor of his wife, PW-1 and PW-3, was

of any avail because they were not present on the spot and testimony of PW-2 of this fact is that those in-laws, firstly, beaten and injured the deceased, thenafter, she has been put at ablaze in which she succumbed due to above injuries during treatment, but, in autopsy examination report, there is no anti-mortem injury, except burn injuries. Hence, contention of Muskan, PW-2, is not supported by the autopsy examination report. Therefore, on the basis of law laid down, by the Apex Court, in the case of Hardeep Singh (Supra), as above, as well as discussed by the Trial court in its impugned order, facts and law placed before it, have been rightly appreciated by the Trial court and, thereby, Application, moved, under Section 319 of Cr.P.C., has been rightly rejected. (Para 9)

List of cases Cited:-

1. Hardeep Singh vs. State of Punjab and others, reported in (2014) 3 Supreme Court Cases

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Criminal Revision, under Section 397/401 of Code of Criminal Procedure, 1973 (Hereinafter, in short, referred to as "Cr.P.C."), has been filed by the revisionist, Jamshed Khan, against the order, dated 1.6.2019, passed by the learned Additional Sessions Judge, Fast Track, court no.2, Hapur, in Sessions Trial No. 332 of 2018, State vs. Shoaib and others, arising out of Case Crime No.302 of 2018, under Sections 498-A and 304-B of Indian Penal Code, 1860 (Hereinafter, in short, referred to as "IPC"), read with 3/4 of Dowry Prohibition Act, Police Station-Dhaulana, District-Hapur.

2. Learned counsel for revisionist argued that the first information report of Case Crime No. 302 of 2018 was got lodged, at Police Station-Dhaulana, District Hapur, for offences, punishable, under Sections 498A and 304B of IPC, read with Sections 3/4 of Dowry Prohibition Act, upon a report of the revisionist, Jamshed Khan, against Shoaib, husband, Aslam, father-in-law, Smt. Nazrin, mother-in-law, Parvez, brother-in-law, Gulbej @ Kalu, brother-in-law and Smt. Gullo, sister-in-law, with this contention that informant's daughter, Mumtaz was married with Shoaib and another daughter was married with Salman, and sufficient dowry was given, but, in-laws of his daughter, Mumtaz, were not satisfied with it. Husband, Shoaib, father-in-law, Aslam, Mother-in-law, Smt. Nazrin, brothers-in-law, Parvez and Gulbej @ Kalu, and sister-in-law, Smt. Gullo, wife of Parvez, were persistently demanding an Alto Car, with Rupees Two Lakhs, in cash, as additional dowry, for which cruelty is being done with her. On 13.4.2018, at about 6.00 PM, Shoaib, his mother and father, alongwith his two brothers, named as above, and one sister-in-law, also named in the first information report, assaulted Mumtaz and they, under joint mens-rea, poured kerosene oil over her body and set her at ablaze. This was a death, owing to demand of dowry and cruelty with regard to it. Informant's other daughter, Muskan, who was present at the place of occurrence, has tried to intervene, but, she, too was extended of repeating same occurrence with her. Hence, she informed informant, who rushed at the spot, alongwith other family members and other villagers, where, he found his daughter, Mumtaz, in burn and miserable condition. He, alongwith other persons, took her to Safdarjang Hospital, at Delhi, for her treatment, but, she died at 5.00 AM of 15.6.2018. Report of the incident was submitted.

3. This contention was there, in the statement, recorded, under Section 161 of

Cr.P.C., as of informant, his daughter, Mumtaz and his wife, but, chargesheet was filed against Shoaib, husband and Aslam, father-in-law, only, and other accused persons, who have been named in the first information report, were not chargesheeted.

4. During trial, informant, as PW-1, his daughter, as PW-2 and his wife as PW-3, have reiterated same contentions in their statements, recorded before the Trial court. Hence, an application, under Section 319 of Cr.P.C., was filed with a prayer for summoning those leftover accused persons, but, it was rejected by the impugned order.

5. The ground for rejection of the application, moved, under Section 319 of Cr.P.C., was held to be of dying declaration, recorded by the deceased. Even, if this dying declaration is being accepted, offence, for demand of dowry and cruelty with regard to it, is made out and this Court, at this stage, is not to make analytic analysis of evidence on the basis of which existence of a prima facie case is to be seen and the argument regarding statement in dying declaration is to be appreciated at later stage and not at this stage. Hence, Trial court has failed to appreciate facts and law placed before it and, thereby, failed to exercise jurisdiction vested in it, and as such, this Criminal Revision, with above prayer, has been preferred, challenging impugned order.

6. Learned counsel for Opposite party no.2, on the other hand, while vehemently opposing arguments advanced by learned counsel for revisionist, has contended that it was deceased, who, in her dying declaration, has categorically narrated scene and sequence of occurrence, wherein, an altercation took placed, in between the deceased and her husband, Shoaib, regarding giving of some lower (a kind of Trouser) to Shoaib, which she asked to be made available subsequently to the husband, after his taking bath. This furiated her husband and he, with the assistance of his father, put the deceased ablaze, after pouring kerosene over her. Hence, role of causing death to the deceased was assigned specifically to the deceased's husband and father-in-law. No contention, against any other family member is there and this dying declaration is fully admissible. Summoning at the stage of 319 of Cr.P.C., never requires a prima facie case, only, rather, it requires much more than initial summoning and in present case not even a single iota of evidence is there against prospective accused persons. Deceased was instantly taken to the hospital by her husband and his cousin and neither the informant nor any other family members of informant were accompanying deceased. She was given treatment at the hospital. This report was got lodged after two days of occurrence and in between no accusation was levelled by the revisionist or any of his family members, including Muskan. This subsequent accusation is under ulterior motive. Hence, learned Trial court has rightly appreciated facts and law placed before it and, thereby, rightly passed impugned order, in accordance with law. This Criminal Revision, challenging the order passed by the learned Trial court, being devoid of merits, is liable to be dismissed.

7. Learned AGA, representing State of U.P., has also vehmently opposed this Revision.

8. First information report reveals that occurrence was of 13.6.2018, but, report was got lodged on 15.6.2018 and in this report it has been stated that Muskan was an eye witness account, but this eye witness, Muskan, has never made any complaint before this registration of this very case crime number. As per the contention of this report, neither informant nor his wife, was present at the place of occurrence. Whatever, he could perceive, it was on the basis of the information given by Muskan and Muskan has not lodged any complaint, prior to registration of this report. Her testimony is with this contention that she too was subjected to demand of dowry, but, her husband was in her favour, whereas, husband of the deceased was not favouring her.

9. Meaning thereby, accusation of demand of dowry and cruelty with regard to it was against the husband of the deceased and her father-in-law. This fact is there in the dying declaration, recorded by the Magistrate, under supervision and Medical Certificate of the Medical Officer, wherein, no such statement or accusation against prospective accused persons was there. Mere contention and guilt, written in dying declaration, is against her husband and father-in-law. General allegation of demand of dowry and cruelty with regard to it and that, too, in this delayed report, by the informant, was there. Apex Court, in the case of Hardeep Singh vs. State of Punjab and others, reported in ***(2014) 3 Supreme Court Cases,*** rendered by Constitution Bench, has elaborately discussed and laid down law, for allowing and rejecting application, moved, under Section 319 of Cr.P.C., wherein, it has been held that at the time of passing an order over an application, moved, under Section 319 of Cr.P.C., much more than initial summoning is required. Evidence is to be appreciated at this stage because on the basis of evidence, recorded, before the Trial court, this application has been moved. Hence, at that juncture, evidence is to be appreciated by the Trial court and learned Trial court has appreciated evidence led before it. Neither evidence of informant nor of his wife, PW-1 and PW-3, was of any avail because they were not present on the spot and testimony of PW-2 of this fact is that those in-laws, firstly, beaten and injured the deceased, thenafter, she has been put at ablaze in which she succumbed due to above injuries during treatment, but, in autopsy examination report, there is no anti-mortem injury, except burn injuries. Hence, contention of Muskan, PW-2, is not supported by the autopsy examination report. Therefore, on the basis of law laid down, by the Apex Court, in the case of **Hardeep Singh (Supra)**, as above, as well as discussed by the Trial court in its impugned order, facts and law placed before it, have been rightly appreciated by the Trial court and, thereby, Application, moved, under Section 319 of Cr.P.C., has been rightly rejected. There is no failure in exercise of jurisdiction vested in Trial court or over-exercise of jurisdiction, vested in it, nor there is any apparent error on the face of impugned order.

Accordingly, in view of what has been discussed, hereinabove, this Criminal Revision, being devoid of merits, deserves dismissal and it stands dismissed as such.

(2020)06ILR A18
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

First Appeal From Order No. 3409 of 2010

Smt. Maya Devi & Ors. ...Appellants
Versus
Sri Sunil Kumar & Anr. ...Respondents

Counsel for the Appellants:
Sri M.N. Siddiqui

Counsel for the Respondents:
Sri S.K. Mehrotra, Sri Archit Mehrotra, Sri Baleshwar Chaturvedi

Quantum of compensation - Notional Income - Unless any evidence is led to the contrary, it may be presumed that every family in India leads a reasonably happy and respectable life. If a person has met an accidental death and is survived by dependents, and has no record of income, it would be quite inhuman to presume that he had no income and so his family was leading a beggars life. In the absence of record of income, unless and until proved to the contrary there has to be a presumption that breadwinner of a family was earning sufficiently enough for the survival of his family (Para 10)

Average income of a person to lead a reasonably good and respected life depends upon the size of the family and place where he lives. It will all depend upon the social economic condition of the area where he lives in. Broad classification could be urban, semi urban and rural areas. (Para 12)

The basic requirement for ascertaining the minimum wage in the unskilled sector is two meals a day and medical expenses. (Para 19)

The dependents being the wife, two minor sons, a minor daughters and the mother therefore, 1/5 deduction towards personal expenses will be valid. Multiplier of 16 would be applicable for the decease having died at the age of 33 years (Para 29, 31)

First Appeal from Order Allowed. (E-10)

List of cases cited:-

1. Laxmi Devi Vs. Mohammad Tabbar and anr. 2008 (12) SCC 165 *(followed)*

2. Chameli Devi & ors Vs. Jivrail Mian & ors. Civil Appeal No. 7004 of 2019

3. Union for Democratic Rights Vs. Union of India AIR 1982 (SC) 1473

4. Sarla Verma & ors Vs. Delhi Transport Corp & anr (2009) 6 SCC 121 *(followed)*

5. Santosh Devi Vs. National Insurance Company Limited (2012) 6 SCC 421

6. National Insurance Company Limited Vs Pranay Sethi & others (2017) 16 SCC 680

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

1. Heard Sri M.N. Siddiqui, learned counsel for the appellants, Sri Archit Mehrotra, Advocate holding brief of Sri S.K. Mehrotra, learned counsel for opposite party no. 2 and perused the record.

2. This first appeal from order is directed against the award dated 19th August, 2010 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No. 2, Kanpur Nagar allowing the compensation of the petitioners-claimant raised vide claim petition no. 338 of 2008.

3. It has been argued on behalf of the appellants that on the point of determination of compensation, the Tribunal has not correctly appreciated the legal authorities on contemporary law

governing the calculation of compensation in cases of motor accident claims.

4. Briefly stated facts of the case are that the husband of appellant no. 1-late Sarju Lal, who is survived by as many as seven dependents (widow, mother and five minor children) suffered the fatal accident on 6th of February, 2008 while he was hit by a *tempo* in the morning hours at around 9:30 a.m. Sarju Lal was immediately taken to the hospital where he succumbed to the injuries on 12th February, 2008. The claim petition was preferred and as many as four issues were framed. Regarding other three issues, there is no issue between the parties as the Insurance Company has not come up to file any appeal against the award. Regarding issue no. 4, the grievance of the appellants is that the Tribunal has not correctly appreciated the income of the appellants and has wrongly fixed Rs. 6,000/- as an average income. He has placed reliance upon several authorities in this regard particularly (2015) 3 SCC 590, Smt. Neeta w/o Kallappa Kadolkar & Ors. vs. The Div. Manager, MSRTC, Kolhapr.

5. It has been further argued that the deduction of personal expenses of the appellants has also been wrongly calculated as 1/3 whereas it should have been 1/5 as there were five minor children and they can be taken as 2 and 1/2 and the wife and mother of the decease being major. It has been further argued that the prospective income has also not been assessed and no compensation has been awarded to that count and 6% of the interest is also not sufficient enough as has been ordered by the Tribunal.

6. *Per contra*, counsel appearing for the Insurance Company has justified the order impugned and submits that in the facts of the case, the average income of the deceased was correctly assessed. He submits that no evidence has been led by the claimant in respect of the income of the deceased so as to come to a definite conclusion on the question of future prospective income. It has been argued by learned counsel appearing for the Insurance Company that the legal position has come to be changed only later on and would not be applied retrospectively on the accident is of the year 2008. On the question of interest, learned counsel appearing for Insurance Company submits that the insurance has been genuinely assigned as 6%.

7. Having heard learned counsel for the parties and having perused the records, we find that on the issue no. 4, the Court should have taken pragmatic view in the light of the fact that there were five minor children in the family.

8. Coming to the question of income of the deceased, who was a self employed person and was doing business of purchase and sale of buffalo, the tribunal has applied the rule of Rs. 100/- per day as an income as was held in the case of **Laxmi Devi vs. Mohammad Tabbar and anothers, 2008 (12) SCC 165**. The Court in the case of Laxmi Devi vide paragraph-4 upheld the order of the High Court where the notional income of the deceased was assessed as Rs. 100/- per day being an unskilled labourer on the ground that it was held by the high court to be a labour charge in those days and this is how the monthly income was assessed to be Rs. 3,000/- and yearly income as Rs. 36,000/-.

9. However, later on in the case of **Chameli Devi & others vs. Jivrail Mian & others** decided by the Apex Court on 4th September, 2019 in Civil Appeal No. 7004 of 2019, where the deceased was a carpenter the notional income was assess as Rs. 200/- per day. In the case of case Chameli Devi it is held

that *keeping in view the fact that the accident took place in 2001 and the deceased was a carpenter, it would not be unjustified to assess his income at Rs. 200/- per day. It is true that carpenter may not get work every day, hence, we assess the income at Rs. 5,000/-.*

10. One, who meets a fatal accident while on board a vehicle becomes entitled to a third party claim. It is a statutory claim for compensation to those who have suffered the loss of their bread winner. In such a situation there arises question of quantum of compensation to be paid. All the factors that contribute to the quantum of compensation are basically borne on income of the deceased. While a professional and employed person may give details of earning but those who are self employed may not be having this kind of statistics in black and white. In India still people do not prefer banking system and both in urban, semi urban and rural areas life goes on with daily cash transactions. Earning in cash, expenditure met and, if money, in case saved is kept for the other day and this is how saved money keeps adding everyday to meet sudden requirement. Ladies are often found keeping money in cash. In recent past when government demonetized currency note of Rs. 1000 and also of Rs. 500, we have seen how even in rural and semi urban areas people lined up before the bank to exchange their currency notes. So all this leads to one conclusion that in majority, family is survived on daily earning. Now, if a deceased did not have the record of his earning, it does not mean that he had no earning. A deceased survived by six members in a family will lead to inevitable presumption that he being the sole bread winner, was earning sufficiently for the survival of his dependents in the family. There is always a presumption, a valid enough, that one leads a reasonably respected life unless of course, he has criminal antecedents in cases of theft, snatching or dacoity etc. Every citizen enjoys a self esteem and so presumption has to be that he lives a respectable life though such a presumption is rebuttable. So unless any evidence is led to the contrary, it may be presumed that every family in India leads a reasonably happy and respectable life. If a person has met an accidental death and is survived by dependents, and has no record of income, it would be quite inhuman to presume that he had no income and so his family was leading a beggars life. It is a slur upon fellow citizen and no civilized society would approve it. So in our ultimate conclusion that we arrive at, is that even in the absence of record of income, unless and until proved to the contrary there has to be a presumption that breadwinner of a family was earning sufficiently enough for the survival of his family.

11. A family has lost its bread winner and the resultant trauma it faces cannot be visualized by others. It may have catastrophic impact on future prospects of minor children. They may not get proper education, medical care in the absence of adequate financial resources and they may suffer from malnutrition more especially in cases where bread winner was self employed. Thus a child, who could have become a well established person of good repute after attaining good education, may not attain even status of a person, who could manage even two meals a day and worse is a case when a self employed is survived by five minor children, as the case in hand is.

12. Now the question would be what should be an average income of a person to lead a reasonably good and respected life. In our considered opinion it should depend upon the size of the family and place where

he lives. It will all depend upon the social economic condition of the area where he lives in. Broad classification could be urban, semi urban and rural areas.

13. In India, in present time, both in rural and urban areas more or less basic needs to sustain life are same. Two meals a day means not less that Rs. 50/- for a person to lead a reasonably good life looking to the various factors that are taken into consideration to calculate per capita income in the country. Children we keep at par with adult on the ground that they need more nutritious food because they are often prone to various health problems due to malnutrition, and the medical expenses would go beyond imagination and in case of absence of enough financial source they lead to a crippled life.

14. Apart from daily bread and butter a person needs medical expenses and at least minimum Rs. 50 per head for two young couple a month and at least Rs. 100/- for aged couple. Children need more medical care and so each children may require at least Rs. 100/- per month.

15. So a family of two persons (adult) would require Rs. 200/- daily for two meals and Rs. 100/- at least towards medical treatment. It leads to an average monthly Rs. 6000/- + 100/-= Rs. 6,100/- where family is two adult and two children it would come to Rs. 6,300/-.

16. The above calculation is based upon average expenses incurred reasonably upon every family including adult/major and minor equally and medical expenses may very. In order to make it reasonable we keep it Rs. 200/- per family of four and Rs. 500/- per family of four and it will increase Rs. 50/- on an average per person with every increase of member in a family.

17. This above calculation is based on our assessment qua the daily expenditure that a human being incurs for its sustenance but one should not loose sight of a fact that in India there is still not enough education in semi urban and rural areas regarding population control as emotions still prevail over logic and every family by and large consists of not only aged parents but 3-4 children as dependents. In such a situation, therefore, if every increase of number in the family it results in increase of assessment of income, it could go beyond the prescribed minimum wage as it would be dependent upon the family size. A person of whose, who has not left behind any statistics of his income, cannot be presumed to be earning more than minimum wage and, therefore, it is needed to put a ceiling upon the income at par with a minimum wage while making assessment for the purposes of computation of compensation. The minimum wage has been notified by the Central Government from time to time. If a person's employment is not recorded and he is doing work of a labour, it would be more appropriate to consider the notification issued from time to time. The minimum wage is determined taking into account various considerations and the five important considerations (vide report of Expert Committee, Ministry of Labour and Employment, Government of India, January, 2019) are:-

"a) the standard working class family includes a wife and two children apart from the earning worker, an equivalent of three adult consumption units;

b) a net intake of 2,700 calorie per day per consumption unit, as recommended in 1948 by Dr. Wallace Aykroyd, first director of the Department of Nutrition at the United Nations Food and Agricultural Organization (FAO);

c) clothing requirements of 72 yeards (6.5 metres) per year per family;

d) a minimum housing rent charged by the government for low-income groups; and

e) fuel, lighting and other miscellaneous items of expenditure to constitute 20 per cent of the total minimum wage."

18. The Apex Court in a number of cases and more importantly in a celebrated judgment in the case of Peoples **Union for Democratic Rights vs. Union of India, AIR 1982 (SC) 1473** had observed that no industry has a right to exist unless it is able to pay its workmen at least a bare minimum wage and which are determined by applying principle of subsistence minimum enough to ensure sustenance of workers. It is in the light of this philosophy that concept of minimum wage was held to be a worker's legal right. The 7th pay commission had accordingly expressed its opinion that the need based norms would be calculated on the basis of the cost of food, clothing and detergent products using prices from labour bureau Shimla and raising presumption that the government does not have any unskilled staff provided for additional premium of 25% to count for skilled factor. All this shows that only anxiety that a human life not only deserves respected living but is presumed to be having a respected living. So in our considered opinion even in the absence of any income details of a person, who has met a fatal accident and is survived by dependents, the Court should follow the rule of minimum wage. The worker could be skilled or unskilled, the area could be industrial or non industrial, applying the law of averages the minimum wage standard should be made a standard for computing notionally the average monthly income of the deceased.

19. The Ministry of Labour and Employment has applied certain methodology for fixing notional minimum wage and the different minimum wages have been notified for different sectors. Seven sectors have been defined like agriculture (unskilled) with a minimum INR 360/- minerals and mines (unskilled) with INR 453/-, construction, maintenance and laydown (unskilled) INR 503/-, sweeping and cleaning with INR 503, watch and ward (i) without arms 656/- (ii) with arms 732/- and loading and unloading sector INR 503/- and stone mine sector with different minimum wages between INR 406/- and 326/- in cases of excavation and removal and between INR 2494/- and 1027/- for stone breaking or stone crushing. Those, who are working in well organized sectors, their muster role is prepared and the names are recorded but in agricultural and sweeping and cleaning sector, there would be large number of cases where there is no recorded entry of the workers and the labourers while on field or off the field and in such circumstances, therefore, it would be difficult to get the exact statistics of the earning. Law of averaging is well proved and widely acclaimed mathematical technique to reach out to a kind of reasonable and workable statistically arrived an analytical assessment and, therefore, applying the law, we calculate the average minimum wage prescribed for agricultural unskilled and sweeping and cleaning sector which is 360 and 504 respectively and that comes to

431.5 and rounding of last denomination we make it 432. Since, it could be the case of organized sector one may not get work every day and mostly it happens that out of 30 days one gets work between 20-25 days on an average so we take it that a person, who is self-employed gets work and pay at par with a minimum wages for 20 days. The average, therefore comes to 432 x 20=INR 8640/- rounding off the same would come to INR 8600 which according to us, should be the minimum average income of an individual in present time. The State Government in Uttar Pradesh has notified on December 17, 2018 the minimum wage in the unskilled sector to be around Rs. 200/-per day which according to us by any standard is not acceptable, if a family consists of more than four persons and there is only one breadwinner in the family. We have already discussed above in detail about the basic requirements of two meals a day and in addition thereto the medical expenses. We have not discussed education and other important aspects where the expenditure is incurred. Since we are more concern for minimum requirements for survival, we fail to understand how a family of four can survive at Rs. 200/- per day in modern times.

20. In our view in a dynamic society, truly characterized with good governance and responsive and value based administration, the society warrants that such assessments of economic prosperity or otherwise of any household be credible, specially from the point of view of suitability of compensation measures. And, therefore, dearness must be factored in when such compensatory measures are undertaken. Relying routinely upon the older provisions and norms may not beat the misery of the victim and the bereaved ones.

21. In the case of Laxmi Devi, the victim Rajendra Singh had died on 12.4.2004 and the high court fixed Rs. 100/- as per day income which was uphold by the supreme court whereas in the case of Sarla Verma (2009) 6 SCC 121 the issue was not the average monthly income. In this case the incident had taken place in the year 2008. The Apex Court in the case of Pranay Sethi has referred to Santosh Devi vs. National Insurance Company Limited (2012) 6 SCC 421.

22. In Pranay Sethi, the Apex Court discussed the future prospects of actual salary to be added with different percentages at different age slab. However what should be the actual salary, was left to be dependent upon various factors. As we have discussed above, the various factors in determining the minimum wage and have raised presumption that the deceased was living a reasonably good life for the sustenance on economic front to meet the basic requirements and at least two meals a day for each of the member of the family. We consider it appropriate to presume that a person must be having daily income at par with minimum wage of Rs. 432/- in present time but we may further observe that a family of four may survive upon a daily earning of Rs. 432/- but if it consists of more members, one may have many more sources to earn enough for sustenance of family. So we are of the considered opinion that in present time average notional income per day for a family of four should be 432/- and 10% should be increased with every increase of member in the family as dependent.

23. However, since in the case in hand accident is of the year 2008, considering the number of dependents, who survived upon the sole breadwinner, the deceased, we take Rs. 200/-as his per day income notionally and if he earned for 25 days only, his monthly income must have been Rs. 5,000/-

24. Now coming to the other aspect of the matter regarding deduction on account of personal expenses, future prospects, loss of estate, loss of consortium and other conventional and traditional income, the law is now come to be crystallized in the judgment of the constitution bench in the case of National Insurance Company Limited. vs. Pranay Sethi and others (2017) 16 SCC 680. The constitution bench vide paragraph-10 has held thus:-

"10. Now coming to the aspect of future prospects and claim of compensation in that head for those who are self employed. This issue is no more res integra. The Apex Court in Pranay Sethi (supra) vide paras 56 and 57 has held thus:

"56. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. ***The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time.*** *Though it may seem appropriate that there cannot be certainty*

in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. ***Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."***

(emphasis added)

25. For loss of consortium, as he was of quite young age and survived by his wife, minor sons and daughter at a very young age and towards love and affection also, some considerable amount ought to have been awarded. In Pranay Sethi (supra) the Constitution Bench vide para 52 held thus:

"52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. ***There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect.*** *Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the Tribunals and courts are likely to be unguided.* ***Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle.*** *But the revisit should not be fact-centric or quantum-centric.* ***We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years.*** *We are disposed to hold so because that will bring in consistency in respect of those heads. (emphasis added)"*

26. Ultimately, the Court vide para 59 concluded thus:

"59. In view of the aforesaid analysis, we proceed to record our conclusions:-

59.1. The two-Judge Bench in Santosh Devi v. National Insurance Co. Ltd. (2012) 6 SCC 421 should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2. As Rajesh v. Rajbir Singh (2013) 9 SCC 54 has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh (supra) is not a binding precedent.

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

59.5. For determination of the multiplicand, the deduction for personal and living expenses, the Tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

27. The above legal position has not been disputed and, therefore, the compensation is to be awarded after its computation in terms of the judgment in the case of Sarla Verma (Smt.) & ors. vs. Delhi Transport Corporation & Anr. and so far as the income aspect is concerned, we are of the considered view that the judgments in the cases of Laxmi Devi & others v. Mohammad Tabbar & Another (2008) 12 SCC 165 and Sarla Verma & Ors. v. Delhi Tranpsort Corporation & Anr. (2009) 6 SCC 121 have come to be upheld and subsequently noticed in the Constitution Bench judgment *(supra)*, hence need not be reiterated.

28. Considering the age of the deceased to be 33 years, we are of the opinion that 40% income should be added towards the future prospects. On the point of deduction from income towards personal

expenses also the law is almost settled by the Constitution Bench. Vide para 59.5, the Bench has approved paras 30 to 32 of the judgment in Sarla Verma (supra). However, for the purpose of the case in hand Para-30 of the judgment is relevant and that runs as under:-

"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra4, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this (2003) 3 SLR (R) 601 Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."

29. For the purposes of case in hand, para 30 is relevant. The dependents are the wife, two minor sons, a minor daughters, and mother and therefore, 1/5th deduction towards personal expenses will be valid.

30. On the question of multiplier also we find substance in the argument of learned counsel for the appellants that multiplier of 17 should have been applied. In Pranay Shetty's case the Constitution Bench of the Apex Court concerned with the view taken in Rajesh Kumar that has approved the table given in Sarla Verma. Speaking for the Bench Chief Justice Mishra held that *"the multiplier has already been fixed in Sarla Verma which has been approved in eshma Kumari with which we concur."* In Sarla Verma (supra) vide paragraph 42 the Court has held thus:

"42. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 of 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 years to 70 years."

31. In view of the above principles laid down in Sarla Verma affirmed in Pranay Sethi, in the present case multiplier of 16 would be applicable and so we do would be applicable for the deceased having died at the age of 33 years and so we do apply.

32. Now coming to conventional heads the Constitution Bench while providing for Rs. 40,000/- for loss of consortium, Rs. 15,00/- for loss of estate and Rs. 15,000/- towards funeral expenses, the Bench recommended 10% hike at every three years. Thus, the Apex Court applied the above principle and fixed amount in different conventional heads to bring about consistency and to avoid any variation in the orders passed by the tribunals or courts.

33. Accordingly, we direct a total compensation admissible for the claimant be given to them is as under:-

Notional Income	5,000/- p.m.	Rs. 60,000/- p.a.
Future Prospects	40% of Rs. 60000/-	Rs. 24,000/-
Total Income		Rs. 84,000/-
Deduction towards personal expenses	1/5th of total income	Rs. 16,800/-
Dependency	84,000-16,800	Rs. 67,200/-
Multiplier		16
Compensation	67,200/- x 16	Rs. 10,75,200/-
Loss of Consortium		Rs. 40,000/-
Funeral Expenses		Rs. 15,000/-
Loss of Estate		Rs. 15,000/-
Total Compensation		Rs. 11,45,200/-

34. Thus, the compensation awarded by the Court below is enhanced from 3,45,000/- to Rs. 11,45,200/- with simple interest @ of 7% per annum from the date of presentation of the application.

35. In view of the above, the appeal stands allowed. The compensation awarded to the claimants/appellants under the order of the Tribunal dated 19.8.2010 is accordingly enhanced and award stands modified to the extent indicated herein above.

(2020)06ILR A28
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2020

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE SHAMIM AHMED, J.

First Appeal No. 199 of 2017

Prabhat Singh ...Appellant
Versus
Smt. Sweta Yadav ...Respondent

Counsel for the Appellant:
Sri Sandeep Saxena, Sri Ajay Kumar Rai, Sri Dileep Chandra Mishra, Sri Samarth Krishna

Counsel for the Respondent:
Sri Anil Kumar, Sri Arvind Srivastava, Sri Kandarp Srivastava, Sri Kaustubh Srivastava

A. Consent given for divorce-Respondent wife has withdrawn consent for mutual divorce-before passing of decree- mutual consent-can be withdrawn by one of the parties -before a Court grants decree of divorce-when consent of one party is withdrawn-Court cannot grant decree of divorce by mutual consent-impugned order legal.

First Appeal dismissed. (E-9)

List of cases cited:-

1. Smt. Sureshta Devi vs. Om Prakash reported in 1991 2 SCC 25

2. Smruti Pahariya v. Sanjay Pahariya, 2009 13 SCC 338

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the appellant and learned counsel for the sole respondent.

2. This first appeal has been filed by the appellant Prabhat Singh against the judgement and order dated 15.03.2017 passed by Principal Judge, Family Court, Ghaziabad in Petition No.392 of 2017 (Smt. Shweta Yadav Vs. Prabhat Singh), under Section 13-B of Hindu Marriage Act, 1955 (hereinafter referred to as the "Act"), by which the court below has directed the appellant to return the custody of minor child and referred the petition under Section 13-B of the Act to the mediation center on the ground that the respondent-Smt. Shweta Yadav has withdrawn her consent for divorce by mutual consent.

3. It is argued by the learned counsel for the appellant that the marriage of the appellant was solemnized with the respondent-Smt. Shweta Yadav on 05.12.2011 and out of the aforesaid wedlock a daughter was born on 21.07.2014 and she has separated from the appellant on 21.06.2015 and living separately.

4. Learned counsel for the appellant further argued that the appellant found it impossible to live without his daughter, hence he pleaded for return of his wife (respondent) but she filed a divorce petition bearing No.1122 of 2015, under Section 13 of the Act in Family Court, Ghaziabad, the respondent never allowed the appellant to meet his daughter which made his life miserable and pathetic.

5. It was further argued by the learned counsel for the appellant that the respondent-Smt. Shweta Yadav agreed to give the custody of the minor child to the appellant on the ground that the appellant shall agree for filing a joint petition under Section 13-B of the Act and return the jewelry as demanded by respondent-Smt. Shweta Yadav, the appellant fell in the trap of the respondent-Smt. Shweta Yadav out of the love and affection of his daughter and agreed to file a joint divorce petition under Section 13-B of the Act in the Family Court, Ghaziabad. The divorce petition was filed on 02.03.2017 and numbered as 392 of 2017. The statement of the parties were also recorded at the time of first motion of the divorce petition and the custody of the minor daughter was handed over to the appellant on the same day i.e. 02.03.2017.

6. Learned counsel for the appellant submits that the respondent-Smt. Shweta Yadav had moved an application dated 06.03.2017 in the divorce petition filed under Section 13-B of the Act along with an affidavit alleging therein that she cannot meet her minor daughter, hence she wants the custody of the minor daughter and she also mentioned that she is withdrawing her consent.

7. Learned counsel for the appellant further submits that the action of the respondent-Smt. Shweta Yadav in withdrawing her consent without any valid reason once she has given the consent for divorce by mutual consent was totally against the law, but the Principal Judge, Family Court, Ghaziabad without passing the decree of divorce vide order dated 15.03.2017 directed the appellant to return the custody of minor daughter within 24 hours and refer the Case no.392 of 2017, under Section 13-B of the Act to the mediation center, therefore, the order dated 15.03.2017 appears to be wrong and against the provisions of Section 13-B of the Act, as such is liable to be quashed.

8. Per contra, learned counsel for the sole respondent by placing reliance upon a judgement rendered by the Apex Court in ***Smt. Sureshta Devi vs. Om Prakash reported in 1991 2 SCC 25*** submitted that consent can be withdrawn by one of the parties any time before the Court passes a decree of divorce by mutual consent.

9. We have heard learned counsel for the parties.

10. Since the facts of this case are not in dispute, with the consent of the learned counsel for the parties, we are deciding this appeal finally at the admission stage itself as per the High Court Rules.

11. In order to appreciate the submissions made by learned counsel for the parties, it would be useful to extract Section 13-B of the Act.

Section 13B in The Hindu Marriage Act, 1955

13-B. Divorce by mutual consent

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]

12. Even the most superficial reading of sub-section (1) Section 13-B of the Act indicates that subject to the provisions of the Act, a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

13. Sub-section (2) of Section 13-B of the Act further stipulates that on the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than 18 months after the said date and if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

14. There is nothing in Section 13-B of the Act which may indicate that the consent once given by either of the parties to a petition for divorce by mutual consent, cannot be withdrawn before a decree of divorce by mutual consent is passed.

15. Section 13-B of the Act was examined by the Apex Court in the case of **Smt. Sureshta Devi (supra)**. Paragraph nos. 9, 10 and 13 of the aforesaid judgement which are relevant for our purpose are being reproduced hereinbelow:-

"9. The `living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression `living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What

seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they `have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce."

13. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties .... if the petition is not withdrawn in the meantime, the Court shall pass a decree of divorce What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bonafides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

16. A Bench of three learned Judges of the Hon'ble Apex Court in the case of **Smruti Pahariya v. Sanjay Pahariya, reported in 2009 13 SCC 338** while approving the ratio laid down in the case of **Smt. Sureshta Devi (supra)**, took the following view :-

"40. In the Constitution Bench, decision of this Court in Rupa Ashok Hurra (supra), this Court did not express any view contrary to the views of this Court in Sureshta Devi (supra). We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Section 13-B (1) and 13-B (2), there is no scope of doubting the views taken in Shreshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

41. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).

42. We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13-B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

43. In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent.

17. We have gone through the order passed by the Principal Judge, Family Court, Ghaziabad and the case law referred above and after giving due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2)contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

18. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off period is a safeguard against a hasty decision if there was otherwise possibility of differences being reconciled. The object is not to perpetuate a purposeless marriage or to prolong the agony of the parties when there is no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the

Court should not be powerless in enabling the parties to have a better option.

19. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision.

20. The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'

21. Thus, in view of the ratio laid down in the case of ***Smt. Sureshta Devi (supra)***, we do not find that the Court below committed any illegality or legal infirmity in holding that consent given for divorce by mutual consent can be withdrawn by one of the parties before a Court grants a decree of divorce by mutual consent and when the consent by one of the parties is withdrawn, the Court cannot pass a decree of divorce by mutual consent. Since in this case the respondent has withdrawn his consent before the passing of a decree of divorce by mutual consent, we do not find that the Court below committed any error in passing the order dated 15.03.2017 in Case No.392 of 2017 (Smt. Shweta Yadav Vs. Prabhat Singh).

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

(2020)06ILR A33
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Income Tax Appeal No. 17 of 2007

M/s Kesharwani Sheetalaya ...Appellant
Versus
Commissioner of Income Tax, Allahabad ...Respondent

Counsel for the Appellant:
Sri R.R. Agarwal, Sri Umesh Chandra Kesarwani, Sri Krishna Agarwal, Sri Pawan Shree Agarwal, Sri Nikhil Agarwal, Sri Suyash Agarwal

Counsel for the Respondent:
S.S.C.I.T., Sri Krishna Agarawal, Sri A.N. Mahajan, Sri B.J. Agarwal, Sri Manu Ghildyal

Tax Law - Unexplained Cash Credits - Income Tax Act, 1961: Section 68, 143(2)/142(1), 143(3) - where the sum is credited in the book of accounts of a firm from a partner, the assessee have to prove the genuineness of the transaction and identity and credit worthiness of the creditor. Once the assessee proves all the three things its onus is discharged. The assessee only needs to prove the source of credit entries and he is not required to prove the source of source of the creditors' credit. (Para 30)

The requirement under Section 68 is that the assessing officer must be satisfied that the explanation offered by the assessee is genuine, but it is also provided that in the absence of a satisfactory explanation, the unexplained cash credit "may" be charged to income tax - therefore, the unsatisfactoriness of the explanation would not automatically result in deeming the amount credited in the books as income of the assessee. (Para 15)

Applicant (partners in the firm) have shown the agricultural income in their personal returns of the past years which had been accepted by the department as such. The partners are all identifiable and separately assessed to tax. The source of investment having been explained, in the event the Assessing Officer was not satisfied the addition could have been considered in the hands of the partners and not in the hands of the firm. The burden of proving the source of the credits having been sufficiently explained the addition could not have been made in the hands of the firm in the facts of the present case. (para 32)

Writ Petition Allowed. (E-10)

List of cases cited:-

1. Commissioner of Income Tax, Lucknow Vs. Kanpur Brothers (1979) 118 ITR 741 (All) *(distinguished)*

2. Deputy Commissioner of Income Tax Vs. Rohini Builders [2002] 256 ITR 360 (Guj)

3. Commissioner of Income Tax Vs. Smt. P.K. Noorjahan [1999] 237 ITR 570 (SC)

4. Commissioner of Income Tax Vs. Taj Borewells [2007] 291 ITR 232 (Mad)

5. Commissioner of Income Tax Vs. Pragati Cooperative Bank Limited [2005] 278 ITR 170 (Guj)

6. Commissioner of Income Tax Vs. Mohanakala [2007] 291 ITR 278 (SC)

7. Principal Commissioner of Income Tax (Central)-I Vs. NRA Iron and Steel Private Limited [2019] 412 ITR 161 (SC)

8. Commissioner of Income Tax, Allahabad Vs. Jaiswal Motor Finance [1983] 141 ITR 706 (All)

9. India Rice Mills Vs. Commissioner of Income Tax [1996] 218 ITR 508 (All)

10. Commissioner of Income Tax Vs. Metachem Industries [2000] 245 ITR 160 (MP)

11. Commissioner of Income Tax VS. Burma Electro Corporation [2001] 252 ITR 344 (P&H)

12. Abhyudaya Pharmaceuticals Vs. Commissioner of Income Tax [2013] 350 ITR 358 (All)

13. Commissioner of Income Tax Vs. Kishorilal Santoshilal [1995] 216 ITR 9 (Raj) *(followed)*

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

1. The present appeal has been filed under Section 260-A of the Income Tax Act, 1961 (in short 'the Act') against the order of the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad (for short 'the I.T.A.T.') dated 30.10.2006, for the assessment year 1999-2000, whereby the Tribunal partly allowed the appeal filed by the Revenue.

2. The instant appeal was admitted on the questions of law, as mentioned in the memo of appeal, which are as follows:-

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in upholding the order of the assessing officer of making addition U/s 68 of the Income Tax Act at Rs.4,00,000/- in the hand of the firm?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal

was correct in holding that the assessee was not able to prove the source of income of partners who have made the deposit with the firm in their capital account therefore addition u/s 68 is justified?"

3. The records of the case before us indicate that the assessee has described itself as a partnership firm having sixteen partners engaged in the business of cold storage. For the assessment year 1999-2000, the assessee filed a return of income on 01.11.1999 declaring an income of Rs.36,92,056/-. The case was selected for scrutiny and notices under Section 143(2)/142(1) of the Act were issued. The assessment was thereafter made under Section 143(3) and in terms of an order dated 26.03.2002 the Assessing Officer noted the following credits in the names of the partners:-

Sr. No.	Name	Amount/ Date	Nature	Evidence
1	Vishwanat Prasad Kesharwani (HUF)	50,000/- 01-03-99	Agricultural Income	Photo copy of hand record
2	Bhairo Nath (HUF)	50,000/- 01-03-99	---do---	---do---
3	Prabhu Nath (HUF)	50,000/- 01-03-99	---do---	---do---
4	Raj Kumar	50,000/- 01-03-99	---do---	---do---
5	Subhash Chandra	50,000/- 01-03-99	---do---	---do---
6	Satish Chandra	50,000/- 01-03-99	---do---	---do---
7	Harish Chandra Kesharwani	50,000/- 01-03-99	---do---	---do---

4. The Assessing Officer held the credits as unproved and made an addition of Rs.4,00,000/- under Section 68 of the Act relying upon a decision of this Court in **Commissioner of Income Tax, Lucknow v Kapur Borthers1**, which was a case where the assessee had entered deposits in the books of firm in the names of partners and upon the explanations for deposits being rejected the same were treated as income of the firm and not of the individual partners.

5. An appeal was filed by the assessee against the aforesaid order dated 26.03.2002 before the Commissioner of Income Tax (Appeals), Allahabad, which was partly allowed and the addition made by the Assessing Officer under Section 68 of the Act with regard to the cash credits in the names of the partners in their capital accounts was deleted.

6. The deletion of the cash credits was made on the ground that the partners had shown agricultural income in their returns. It was taken note of that the partners were identifiable and separately assessed to tax and the firm had explained the source of investment as agricultural income of the partners, therefore, if at all additions were to be made, then the same had to be made in the hands of the partners and not in the hands of the firm.

7. Aggrieved against the aforesaid order, the Revenue filed an appeal before the Income Tax Appellate Tribunal, Allahabad being I.T.A. No.344/(Alld) of 2004 to which the assessee filed cross-objections, being C.O. No.16(Alld) of 2006. The I.T.A.T. by the order impugned dated 30.10.2006 partly allowed the appeal filed by the Revenue and dismissed the cross-objections filed by the assessee. The Tribunal held that credits in the names of partners as agricultural income were not proved within the meaning of Section 68 and therefore the order of the Assessing

Officer treating the same to be as the firm's deemed income, was restored and the order passed by the I.T.A.T., in that regard, was set aside.

8. We have heard counsel for the parties and perused the records.

9. The principal ground sought to be canvassed by the appellant assessee is that the partners having shown the agricultural income in their personal returns of the previous years, which had been accepted by the Revenue as such without any addition, and out of the said agricultural income the partners having made the deposits with the firm in their capital accounts, the appellant assessee had satisfied the conditions provided under Section 68 of the Act with regard to the identity and capacity of the depositors as well as genuineness of the transactions. It is submitted that the only point which was required to be considered on the question of making addition under Section 68 of the Act in the hands of the firm was the nature and source of the transaction and the appellant assessee was not required to prove the source of the source.

10. It has been further contended that the genuineness of the transactions having been proved and the firm having duly explained the deposit, the impugned order passed by the Tribunal was not justifiable, and deserves to be set aside.

11. *Per contra*, the learned counsel appearing for the Revenue has supported the order passed by the Tribunal by submitting that the credits having been found in the hands of the firm the onus was on the firm to prove the creditworthiness of the partners as well as genuineness of the transaction and no evidence having been given with regard to agricultural operations of the partners, the transactions in the books of the firm were rightly held to be not genuine and proved within the meaning of Section 68 and there was no infirmity in the order passed by the Tribunal restoring the order of the Assessing Officer and setting aside the order passed by the C.I.T.(A). Reliance has been placed upon the decision in the case of **Kapur Brothers** (supra) to contend that the cash credits which are unexplained are to be added in the hands of the firm.

12. In order to answer the questions of law upon which the present appeal has been admitted it would be necessary to advert to the provisions contained under Section 68 of the Act. For ease of reference, Section 68 of the Act, as it stood prior to the Finance Act, 2012, is being extracted below:-

"68. Cash credits--Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the Assessee of that previous year."

13. As per Section 68, where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source of the same or the explanation offered by the assessee is not satisfactory, in the opinion of the Assessing Officer, the sum so credited may be charged to income tax as the income of the assessee of that previous year.

14. The conditions for the applicability of Section 68 would therefore be as follows--

(i) the existence of books of accounts made by the assessee itself;

(ii) a credit entry in the books of account; and

(iii) the absence of a satisfactory explanation by the assessee about the nature and source of the amount credited.

15. The requirement under the Section is that the assessee is to submit an explanation about the nature and source of the sum which has been credited. The explanation furnished by the assessee is to be satisfactory and the creditworthiness or financial strength of the creditor is to be proved by showing that it had sufficient balance in its accounts to explain the source and the credits in the books of accounts of the assessee. The assessee would be required to explain the source of credit in the books of accounts but not the source of the source i.e. source of the creditor. It is seen that although the requirement under Section 68 is that the Assessing Officer must be satisfied that the explanation offered by the assessee is genuine, but it is also provided that in the absence of a satisfactory explanation, the unexplained cash credit "may" be charged to income tax - therefore, the unsatisfactoriness of the explanation would not automatically result in deeming the amount credited in the books as income of the assessee.

16. A similar view was taken in the case of **Deputy Commissioner of Income Tax v Rohini Builders2,** wherein referring to the judgment of the Supreme Court in the case of **Commissioner of Income Tax v Smt. P.K. Noorjahan3,** rendered in the context of Section 69 of the Act, it was held as follows:-

"The phraseology of section 68 is clear. The Legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of that previous year. In this case the legislative mandate is not in terms of the words "shall be charged to income-tax as the income of the assessee of that previous year". The Supreme Court while interpreting similar phraseology used in section 69 has held that in creating the legal fiction the phraseology employs the word "may" and not "shall". Thus the unsatisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as the income of the assessee as held by the Supreme Court in the case of *CIT v. Smt. P.K. Noorjahan [1999] 237 ITR 570."*

17. The question of addition under Section 68 in a case of capital introduced by the partners was considered in **Commissioner of Income Tax v Taj Borewells4**, and taking note of the fact that Section 68 is a charging section and also a deeming provision it was held that once the firm had offered explanation and established that the capital was contributed by the partners, the same could not be assessable in the hands of the firm. The relevant observations made in the judgment are as follows:-

"7. Section 68 is a charging section and it is also a deeming provision. Unless the following circumstances exist, the Revenue cannot rely on section 68 of the Act.

(a) Credit in the books of an assessee maintained for the year.

(b) the assessee offers no explanation or if the assessee offers explanation the Assessing Officer is of the opinion that the same is not satisfactory, the sum so credited is chargeable to tax as "income from other sources".

x x x x x

13. ...Once the firm had offered an explanation and established that the capital was contributed by the partners, the same could not be assessable in the hands of the firm. Unless there are contradictions and inconsistencies in the statement of the partners, the credit cannot be treated as unexplained and cannot be added under section 68 of the Act in the hands of the assessee-firm..."

18. The issue relating to addition under Section 68 also came up in **Commissioner of Income Tax v Pragati Co-operative Bank Limited5,** and taking note of the language of Section 68 it was held that the word "may" indicates that the intention of the legislature is to confer a discretion on the Assessing Officer in the matter of treating the source of investment or credit which had not been satisfactorily explained as income of an assessee, but it is not obligatory to treat such source as income in every case where the explanation offered was found to be not satisfactory. It was held thus:-

"14. Section 68 of the Act requires that there has to be a credit in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit; or the explanation offered by the assessee is not, in the opinion of the assessing authority, satisfactory, then the sum so credited may be charged to tax as income of the assessee of that previous year. The apex court in the case of *CIT v. Smt. P.K. Noorjahan [1999] 237 ITR 570* has laid down that the word "may" indicated the intention of the Legislature that a discretion was conferred on the Assessing Officer in the matter of treating the source of investment/credit which had not been satisfactorily explained as income of an assessee, but it was not obligatory to treat such source as income in every case where the explanation offered was found to be not satisfactory."

19. The nature and scope of Section 68 of the Act fell for consideration before the Supreme Court in **Commissioner of Income Tax v P. Mohanakala6**, and it was held as follows:-

"16. The question is what is the true nature and scope of section 68 of the Act? When and in what circumstances section 68 of the Act come into play? A bare reading of section 68 suggests that there has to be credit of amounts in the books maintained by an assessees; such credit has to be of a sum during the previous year; and the assessees offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessees in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessees of that previous year. The expression "the assessees offer no explanation" means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other

attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

20. The aforementioned principle of law has been reiterated and followed in a recent judgment in **Principal Commissioner of Income Tax (Central)-I v NRA Iron and Steel Private Limited7.**

21. The judgment in the case of **Kapur Brothers,** which forms the basis of the order passed by the Assessing Officer and also that of the Tribunal, and upon which strong reliance has been placed by the Revenue, was a case where the entries had been made in the books of account of the assessee firm about three weeks prior to the end of the accounting period and the different explanations furnished by the assessee at different stages of the proceedings were disbelieved for the reason that the assesee had failed to establish that the partners had actually deposited the money and that the entries were not fictitious, and it was in view of the said facts that the court proceeded to answer the question referred to it by holding that the cash credit entries standing in the names of the partners in the account books of the firm could validly be treated as income of the firm from the undisclosed sources. The operative portion of the judgment in the case of **Kapur Brothers** is being extracted below:-

"In that case, the entries were alleged to have been made a week before the end of the accounting period. In the present case, the entries were made about three weeks prior to the end of the accounting period. Identical amounts were entered as deposited in the name of each partner. Different explanations were given by the assessee at different stages of the proceedings. They were disbelieved. In this view of the matter, the Tribunal was not justified in treating the amount as the income of the individual partner in view of the finding that the assessee had failed to establish that the partners have actually deposited the money and that the entries were not fictitious.

Accordingly, we answer the question referred to us by holding that the cash credit entries standing in the names of the partners in the account books of the firm could validly be treated as the income of the firm from undisclosed sources. As no one appeared on behalf of the assessee, there will be no order as to costs."

22. The question as to whether in a case where there are cash credit entries in the books of the assessee firm in which accounts of individual partners exist and it is found as a fact that the cash was received by the firm from its partners then in the absence of any material to indicate that there were profits of the firm, the sum so credited could be assessed in the hands of the firm was considered in the decision in **Commissioner of Income Tax, Allahabad v Jaiswal Motor Finance8,** and it was stated thus:-

"...It appears to be well settled that if there are cash credit entries in the books of the firm in which the accounts of the individual partners exist and it is found as a fact that cash was received by the firm from its partners then in the absence of any material to indicate that they were profits of the firm, could not be assessed in the hands of the firm. We are, therefore, of the opinion that the Tribunal did not commit any error of law and rightly held that the

deposits shown in its accounts were satisfactorily explained."

23. The questions with regard to burden of proof in respect of an addition under Section 68 came up for consideration in **India Rice Mills v Commissioner of Income Tax9,** and it was held that where capital contributions are made by the partners prior to the commencement of the business by the assessee firm, it is for the partners to explain the source of such capital contribution and if they failed to discharge such onus then such capital contributions, although entered in the books of accounts of the assessee firm, cannot be regarded as income of the assessee firm but the same were to be added in hands of the partners. Distinguishing the judgment in the case of **Kapur Brothers,** it was held as follows:-

"Reliance on *Kapur Brothers' case [1979] 118 ITR 741 (All)* is misplaced, inasmuch as in that case deposits were entered in the books of the firm when it was already carrying on its business. The firm was called upon to explain the source of the deposits. The explanation of the firm was that the deposits represented the sale proceeds of certain assets belonging to the partners. When no evidence was adduced to substantiate that explanation, the assessing authority added the amount as income of the partnership-firm. These facts are materially different from the fact of the Infant case. Most striking feature of the case on hand is that all the deposits came to be made during the accounting year in the books of he assessee-firm before it started its business. Therefore, the onus was on the partners to explain the source in the case on hand and if they failed, the amount could have been added in their hands only and not in the hands of the assessee-firm."

24. The question as to whether in a case where there was credit in the capital account of partners in books of the firm, addition thereof could be made in the hands of the firm or the same had to be considered in the hands of the partners, came up in a reference under Section 256(1) of the Act in **Commissioner of Income Tax v Metachem Industries10,** and it was held that according to Section 68 the burden was on the assessee to satisfactorily explain the credit entry in the books of account of the previous year and in a case where satisfactory explanation had been given by establishing that the amount had been invested by a particular person, be he a partner or any individual then the burden of the assessee firm is discharged and the credit entry could not be treated to be income of the firm for the purposes of income tax. The relevant observations made in the judgment are as follows:-

"...Section 68 of the Act of 1961 says that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. Therefore, according to section 68, the first burden is on the assessee to satisfactorily explain the credit entry in the books of account of the previous year. If the explanation given by the assessee is satisfactory, then that entry will not be charged with the income of the previous year of the assessee. In case the explanation offered by the assessee is not satisfactory or the source offered by the assessee-firm is not satisfactory, then in that case, the

amount should be taken to be the income of the assessee. In the present case, the Assessing Officer did not feel satisfied with the explanation given by the assessee and accordingly assessed all the three credit entries to the account of the assessee as the income.

...Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee-firm is over. The assessee-firm cannot ask that person who makes investment whether the money invested is properly taxed or not. The assessee is only to explain that this investment has been made by the particular individual and it is the responsibility of that individual to account for the investment made by him. If that person owns that entry, then the burden of the assessee-firm is discharged. It is open to the Assessing Officer to undertake further investigation with regard to that individual who has deposited this amount.

So far as the responsibility of the assessee is concerned, it is satisfactorily discharged. Whether that person is an income-tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income-tax. It is open to the Assessing Officer to take appropriate action under section 69 of the Act, against the person who has not been able to explain the investment..."

25. A similar question was considered in **Commissioner of Income Tax v Burma Electro Corporation11** wherein the deletion of the addition made by the Tribunal, on the ground that though there was no evidence on record to show availability of funds with partners at the time of investment with the assessee firm the concerned partners having admitted to have made those investments and there being no material to indicate that those investments were profits of the assessee firm, the sum so credited could not be assessed as income of the firm in terms of Section 68 but could be assessed in the hands of the individual partners, was upheld.

26. We may also refer to the decision in the case of **Abhyudaya Pharmaceuticals v Commissioner of Income Tax12,** wherein the earlier decision in the case of Jaiswal Motor Finance was followed on the point that if there are cash credit entries in the books of the assessee firm in which accounts of an individual partner exists, and it is found as a fact that the cash was received by the firm from its partners then in the absence of any material to indicate that the same were profits of the firm, it could not be assessed in the hands of the firm. The judgment in the case of **Kapur Brothers** was also considered and distinguished on facts. The relevant observations made in the judgment are as follows:-

"13. So far as the second limb of the argument that at whose hands the addition should be made is concerned, it is apt to have a look to section 68 of the Income-tax Act. Heading of the said section is "Cash Credits" and it reads that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer,

satisfactory, the sum so credited may be charged to income-tax as income of the assessee of that previous year.

14. It may be noted that section 68 of the Income-tax Act, 1961 is a new provision in the sense that there was no such provision under the old Act, i.e., the Indian Income-tax Act, 1922. Even then the underlying principle of section 68 was given judicial recognition by courts. In other words, the principle has been developed on the basis of judicial decisions which has been given statutory recognition by section 68.

15. *CIT v. Jaiswal Motor Finance [1983] 141 ITR 706 (All)* is a Division Bench authority of this court wherein it has been laid down that if there are cash credit entries in the books of the assessee-firm in which accounts of an individual partner exists, and it is found as a fact that the cash was received by the firm from its partners then in the absence of any material to indicate that they were profits of the firm, it could not be assessed in the hands of the firm. The learned counsel for the appellant submits that the aforesaid decision applies with full force to the facts of the case on hand. Noticeably, this was also a case where it was the first year of assessment of the firm. The observations made therein if read in the context of the facts of the present case, the submission of the appellant's counsel is well founded. The relevant extract is reproduced below (page 707):-

"It appears to be well settled that if there are cash credit entries in the books of the firm in which the accounts of the individual partners exist and, it is found as a fact that cash was received by the firm from its partners then in the absence of any material to indicate that they were profits of the firm, it could not be assessed in the hands of the firm. We are, therefore, of the opinion that the Tribunal did not commit any error of law and rightly held that the deposits shown in its accounts were satisfactorily explained."

16. At this stage, the learned standing counsel for the Department places reliance upon another Division Bench decision of this Court in the case of *Kapur Brothers [1979] 118 ITR 741 (All)*. It is apt to examine the facts of the case of *Kapur Brothers (supra)*. The Assessing Officer found a deposit of certain amount while making assessment of M/s. Kapoor Brothers. The amount was deposited in the name of its partners. The deposits were entered as on October 20, 1966. The accounting period for the assessment year 1967-68 ended on November 11, 1968. The explanation offered by the assessee was not found satisfactory. In this factual background, it was noticed that the entries were made about three weeks prior to the end of the accounting period. In this factual background the High Court held that cash credit entries standing in the name of partners in the account books of the Firm would validly be treated as income of Firm from undisclosed source.

17. On a first flash, it appears that the ratio of the aforesaid decisions given in the case of *Kapur Brothers [1979] 118 ITR 741 (All)* and *Jaiswal Motor Finance [1983] 141 ITR 706 (All)* is conflicting, but on a meaningful reading thereof, would show that they were rendered in different factual matrix. The ratio laid down in the case of *Kapur Brothers [1979] 118 ITR 741 (All)* will be applicable in a case where a partner brings capital amount at the formation of the firm itself, before the commencement of business by the firm. It would not be applicable in a case where the deposit is reflected in the account books of the firm during the currency of the business of the firm. The underlying idea in the case of *Kapur Brothers [1979] 118 ITR 741 (All)* is that when the assessee-firm has no business, it cannot possibly have any income. Therefore, in such a case the question of presumption of income of

the assessee-firm would not arise generally. But it is not appropriate when the assessee-firm is earning income from its business and in that situation the assessee-firm has to explain the cash credit standing in its account. If the above line of distinction is kept in mind, we find that both the decisions are standing on a different factual background.

18. It is interesting to note that the aforesaid two decisions one given in the case of *Jaiswal Motor Finance [1983] 141 ITR 706 (All)* and another in the case of ***Kapur Brothers*** *[1979] 118 ITR 741 (All)* were again up for consideration before a Division Bench of this court in the case of *India Rice Mill v. CIT (1996) 218 ITR 508*. The relevant extract is reproduced below (page 510 of 218 ITR):

"However, the Tribunal relying on CIT v. *Kapur Brothers [1979] 118 ITR 741 (All)*, held that since the amount was credited in the books of the assessee-firm, it is for the assessee to explain the source of the deposits and as the assessee-firm failed to discharge that onus, the deposits were rightly taken to be the income of the assessee-firm from undisclosed sources by the assessing authority..."

Reliance on *Kapur Brothers' case [1979] 118 ITR 741 (All)* is misplaced, inasmuch as in that case deposits were entered in the books of the firm when it was already carrying on its business. The firm was called upon to explain the source of the deposits. The explanation of the firm was that the deposits represented the sale proceeds of certain assets belonging to the partners. When no evidence was adduced to substantiate that explanation, the assessing authority added the amount as income of the partnership-firm. These facts are materially different from the fact of the instant case. Most striking feature of the case on hand is that all the deposits came to be made during the accounting year in the books of the assessee-firm before it started its business. Therefore, the onus was on the partners to explain the source in the case on hand and if they failed, the amount could have been added in their hands only and not in the hands of the assessee-firm."

19. On the facts and circumstances of this case, we are of the considered opinion that the authorities below have committed error as they have failed to take into account that this was the first year of the business of the assessee firm. The partnership firm was formed on July 5, 1990 and on July 7, 1990, Master Shishir Garg deposited Rs.1,90,000 and Rs.72,000 as capital money with the Firm through bank clearance of two bank drafts. The accounting period being financial year, i.e., ending on March 31, 1991, the Firm could not have any income at the time of its formation. The identity of the depositor, i.e., Master Shishir Garg was not in issue at any point of time before the income-tax authorities. They treated the said deposit by Master Shishir Garg. This being so, if for one reason or the other, they were not satisfied with the financial capability of Master Shishir Garg, the amounts could have been added at the hands of Master Shishir Garg and not at the hands of firm.

20. The decision relied upon by the learned counsel for the Department is clearly distinguishable on facts as it was not in respect of first year of the business and has no application whatsoever. The argument put by him that the income was liable to be added in the hands of firm as Master Shishir Garg being minor could not be prosecuted, has no substance.

21. It may be noted that the decision given in the case of *Jaiswal Motor* (supra) is being constantly followed by this court in the subsequent decisions. Reference can be made to *Surendra Mohan Seth v. CIT [1996] 221 ITR 239 (All).*

22. The Rajasthan High Court in *CIT Vs. Kewal Krishna and Partners [2009] 18 DTR 121 (Raj)* has also taken similar view."

27. Section 68 requires the Assessing Officer to satisfy itself of the source of the credit and if during the course of enquiry undertaken, the entries are found to be not genuine then the sum represented by such credit entry is to be added as income of the assessee. The satisfaction of the Assessing Officer thus forms the basis for invocation of the provisions of Section 68. The satisfaction in this regard, however, must not be illusory or imaginary but is required to be based on the facts and the evidence and on the basis of a proper enquiry of the material before the Assessing Officer. The enquiry envisaged under the provision is to be reasonable and just.

28. Under Section 68, the onus is on the assessee to offer explanation where any sum is found credited in the books of account and where the assessee fails to prove to the satisfaction of the Assessing Officer, the source and nature of the amount of cash credits an inference may be drawn that the credit entries represent income taxable in the hands of the assessee. This does not however absolve the responsibility of the Assessing Officer to prove that the cash credits constitute the income of the assessee. The onus on the assessee has to be understood with reference to the facts of each case and if the *prima facie* inference on the basis of facts is that the assessee's explanation is probable, the onus shifts to the Revenue. It has been consistently held that once the assessee has proved the identity of its creditors, the genuineness of the transactions and the creditworthiness of the creditors vis-a-vis the transactions which it had with the creditors, the burden stands discharged and the burden then shifts to the Revenue to show that the amount in question actually belong to, or was owned by the assessee himself.

29. The question as to whether in a case where money has come from a partner, addition, if any, has to be made in the hands of the partner or of the firm came up for consideration upon the reference under Section 256(1) of the Act in the case of **Commissioner of Income Tax v Kishorilal Santoshilal13**, and referring to the language used under Section 68 and various authorities on the point it was held that in this regard the following points are required to be noted:-

"On the basis of the language used under section 68 and the various decisions of different High Courts and the apex court, the only conclusion which could be arrived at is :

(i) that there is no distinction between the cash credit entry existing in the books of the firm whether it is of a partner or of a third party,

(ii) that the burden to prove the identity, capacity and genuineness has to be on the assessee,

(iii) if the cash credit is not satisfactorily explained the Income-tax Officer is justified to treat it as income from "undisclosed sources",

(iv) the firm has to establish that the amount was actually given by the lender,

(v) the genuineness and regularity in the maintenance of the account has to be taken into consideration by the taxing authorities,

(vi) if the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by section 68 can be invoked."

30. It is therefore seen that in a case where a sum is credited in the books of account of a firm from a partner, the

assessee firm could discharge its onus by proving three things: (i) identity of the creditor; (ii) creditworthiness of the creditor; and (iii) genuineness of transaction in question. Once the assessee proves all the three things its onus is discharged. It has also been consistently held that the assessee only needs to prove the source of credit entries and he is not required to prove the source of the source or the creditors' credit.

31. In a case where the integrity of the creditors is established and the entries are shown to be not fictitious, the burden would shift on the Revenue.

32. In the case at hand, the partners have shown the agricultural income in their personal returns of the past years which had been accepted by the department as such. The partners are all identifiable and separately assessed to tax. The source of investment having been explained, in the event the Assessing Officer was not satisfied the addition could have been considered in the hands of the partners and not in the hands of the firm. The burden of proving the source of the credits having been sufficiently explained the addition could not have been made in the hands of the firm in the facts of the present case.

33. In view of the aforementioned facts and circumstances the questions of law are answered in favour of the assessee and against the Revenue.

34. The appeal stands, accordingly, allowed.

(2020)06ILR A45
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

S.C.C. Revision No. 23 of 2020

Smt. Anju Srivastav ...Revisionist
Versus
Sri Saurabh Birla & Anr. ...Respondents

Counsel for the Revisionist:
Sri Virendra Singh

Counsel for the Respondents:
Sri Utkarsh Birla

A. Civil Law - Code of Civil Procedure,1908-Section 115 - The Provincial Small Cause Courts Act,1887-Section 25 - The Transfer of Property Act, 1882 –Section 106-ejectment and arrears of rent-notice served upon the applicant but failed to comply with the same-once the notice terminating the tenancy meets the requirement of section 106 of Act,1882 and where the suit property is out of the purview of U.P. Act No. 13 of 1972, the issue of default in payment of rent is immaterial-the applicant used the property without paying rent- the trial court rightly awarded the damages at the rate of Rs. 12,000/-per month higher than the rent of the suit property from the date of institution of suit till the delivery of possession.(Para 4 to 26)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Smt. Sunita Gupta Vs Prabhat Chandra Tandon (2010) 2 ARC 236,

2. Smt. Prakash Rani @ Prakashwati Vs VIth A.D.J., Bulandshahr & ors. (2006) 2 ARC 296

3. Waqf Allal Aulad/Waqf Alkhair Allahtala, Dr. Ziaul Haq Vs Ist A.D.J., Bijnor & anr. (2008) 3 ARC 428

(Delivered by Hon'ble Saral Srivastava, J.)

1. It is informed by Sri Atul Dayal, learned Senior Counsel for the respondents

that respondent no.2 has expired on 02.02.2020, however, he submits that respondent no.1 is the son and legal heir of Nitish Kumar Birla, respondent no.2 and he is already impleaded in present revision as respondent no.1, therefore, no substitution of respondent no.2 is required and the Court may proceed with the matter. In view of the statement of Sri Atul Dayal, learned Senior Counsel, the Court proceeds to hear the present revision with the consent of counsel of both the parties.

Order on SCC Revision

1. Heard learned counsel for the revision-applicant and Sri Atul Dayal assisted by Sri Ayush Khanna ,advocate.

2. The respondents/plaintiff instituted SCC Suit No.8 of 2018 (Sri Saurabh Birlaand & Others Vs. Smt. Anju Srivastava) contending inter alia that respondent no.1 (Saurabh Birla) is the owner of Flat No.32B/T, Third Floor, Dhakre Enclave Dhaulpur House, M.G. Road, Agra. The respondent no.2 (Nitish Kumar Birla) was managing the aforesaid flat on behalf of respondent no.1 as caretaker. The respondent no.2 let out half portion of the above flat towards norther side (hereinafter referred to as 'suit property') to the revision-applicant (hereinafter referred as 'applicant') at Rs.6500/- per month for 11 months commencing from 01.07.2014 to 31.05.2015. The tenancy was, thereafter, extended for a further period of 11 months commencing from 01.06.2015 to 31.04.2016 at the agreed rent of Rs.7200/- per month between the parties. After 31.04.2016, the tenancy was allowed to continue further w.e.f. 01.05.2016 to 31.03.2017 at the agreed rent of Rs.8000/- per month. The applicant was also liable to pay other taxes, electricity charges and society charges. The applicant had paid rent at Rs.8000/- per month upto May, 2016. However, the rent from 01.06.2016 onwards was not paid by the applicant.

3. The respondents asked the applicant to pay arrears of rent and taxes, but she on one pretext or the other avoided the payment of rent. However, the applicant made payment of Rs.35,000/- through cheque in March, 2017. Thus, rent of Rs.1,01,000/- from 01.06.2016 upto 31.10.2017 was due after adjustment of Rs.35,000/- paid by the applicant in March, 2017 besides the taxes and other charges on the suit property.

4. The respondents in the aforesaid circumstances served a notice dated 27.11.2017 through Sri Navin Kumar Gupta, Advocate by speed post/A.D. to the applicant terminating the tenancy of the applicant. The respondent by the said notice asked the applicant to vacate the suit property and pay entire arrears of rent and taxes till the delivery of actual physical possession of the suit property to the respondents. The aforesaid notice was duly served upon the applicant, but she failed to comply with the same. As the rent of the suit property was above Rs.2,000/-, therefore, according to the respondents, the suit property was exempted from U.P. Act No.13 of 1972. In the aforesaid backdrop, respondents prayed for a decree of ejectment and recovery of arrears of rent and mesne profits together with 18% interest.

5. The record of the case reveals that the suit was instituted on 30.01.2018 and notice was issued to the applicant. She filed vakalatnama on 08.03.2018 and obtained copy of plaint on 16.04.2018. Thereafter,

she did not appear on the date fixed in the suit on 20.04.2018, 04.05.2018, 11.05.2018, 18.05.2018, 23.07.2018 and 06.08.2018 nor filed the written statement.

6. The Judge Small Causes Court No.1, Agra, (hereinafter referred to as 'trial court') on 06.08.2018 granted last opportunity to the applicant to file written statement, despite that the applicant continued to remain absent on 29.08.2018 and 11.09.2018 which were the date fixed in the aforesaid suit. The trial court passed an order on 11.09.2018 to proceed exparte in the suit. The applicant, thereafter, did not appear before the trail court on the date fixed in the suit on 25.09.2018, 16.10.2018, 19.11.2018, 10.12.2018, 19.12.2018, 16.01.2019 and 20.02.2019.

7. The applicant filed an application 19Ga on 26.02.2019 praying for setting aside the order dated 11.09.2018 by which trial court directed the suit to proceed exparte. After filing application 19Ga, the applicant again did not appear on 20.04.2019, 08.05.2019 and 03.07.2019 before the trial court. As the applicant did not appear on several dates fixed in the suit after the filing of application 19Ga, therefore, the trial court by order dated 03.07.2019 dismissed the application 19Ga.

8. The Revision-applicant, thereafter, filed an application 22Ga for setting aside the order dated 03.07.2019 which was rejected by the trial court by order dated 02.09.2019 with liberty to the applicant to remain present on the date fixed in the suit and to cross examine the plaintiff's witnesses and also to argue the matter.

9. It appears that the applicant after about one month and 19 days from the date of order dated 02.09.2019 appeared before the court below and filed an application on 21.10.2019 for adjournment of the suit on the ground that she had filed a revision against the order dated 02.09.2019 rejecting application 22Ga and order dated 03.07.2019 rejecting application 19Ga.

10. On the application of the applicant, the suit was adjourned to 31.10.2019 for exparte hearing. The applicant did not appear before the court below to argue the matter nor filed any application to bring on record that she has preferred revision before the High Court against the order dated 03.07.2019 and 02.09.2019. The court below, accordingly, proceeded ex-parte and decreed the Suit on 05.11.2019. The judgment and decree dated 05.11.2019 is impugned in the present revision.

11. Challenging the ex-parte judgement and order dated 05.11.2019, the only contention advanced by learned counsel for the applicant is that the applicant has paid the agreed rent at the rate of Rs.6500/- per month, hence, there was no default in payment of rent. He further submits that there was no agreement between the parties for enhancement of rent periodically, therefore, the basis of the notice terminating the tenancy given by respondents that the rent of the suit property was Rs.8,000/- per month with effect from 01.05.2016 and the applicant had defaulted in payment of rent is wrong and incorrect. Thus, the submission is that the trial court has erred in decreeing the suit.

12. Per contra, learned counsel for the respondents submits that it is not in dispute that provision of U.P. Act No.13 of 1972 is not applicable over the suit property and the notice under Section 106 of the Transfer of Property Act, 1882 was served upon the applicant, perusal of which clearly elucidates the intention of the lessor/owner of the suit property to terminate the tenancy, therefore, the tenant is liable for

eviction even if there is no default in payment of rent. Thus, the submission is that once the notice terminating the tenancy meets the requirement of Section 106 of Act, 1882, the issue of default in payment of rent is not materiel. Accordingly, he submits that the trail court has not committed any illegality or jurisdiction error in decreeing the suit. In support of the aforesaid submissions, he has placed reliance upon the judgements of this Court in the case of ***Sunita Gupta (Smt.) Vs. Prabhat Chandra Tandon 2010 (2) ARC 236, (Smt.) Prakash Rani @ Prakashwati Vs. VIth Additional District Judge, Bulandshahr and Others 2006 (2) ARC 296 & Waqf Allal Aulad/Waqf Alkhair Allahtala, Dr. Ziaul Haq Vs. Ist ADJ, Bijnor and Another 2008 (3) ARC 428.***

13. He further submits that the respondents have proved their case by leading cogent evidence that the notice terminating the tenancy was valid and in the absence of any evidence filed by the applicant rebutting the evidence of the respondent, the trial court has not committed any illegality or jurisdictional error in decreeing the suit. He further submits that the finding of the trial court that the respondents have proved their case is based upon proper evidence on record, and thus, being a finding of fact is not liable to be interfered with by this Court in exercise of its revision jurisdiction.

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

15. In the present case, the respondents/landlord had given a notice dated 27.11.2017 through their counsel Sri Navin Kumar Gupta by speed post/A.D. which was duly served upon the applicant. The notice as well as service of notice upon the applicant was duly proved by respondents/landlord by filing affidavit of respondent no.2, Nitish Kumar Birla. The applicant has not denied the service of notice terminating the tenancy. It would be apposite to refer few paragraphs of the notice dated 27.11.2017 which clearly shows the intention of the respondents/landlord to terminate the tenancy of the applicant:-

"...

7. That you have paid rent @ 8,000/- per month only for the month of May, 2016. Rent became due from you in respect of the property in question for the period 01.06.2016 onwards. My client Shri Nisheeth Kumar Birla repeatedly asked you to clear the arrears of rent and also to pay the taxes as claimed above but you dilly-dallied the matter and paid Rs.35,000/- only through Cheque in March 2017.

8. That for the period 1.6.2016 upto 30.6.2017 Rs.1,04,4000/- became due against you towards arrears of rent besides taxes. After adjusting Rs.35,000/- paid by you in March 2017, Rs.69,000/- towards arrears of rent besides taxes still remain due against you in respect of the property in question which you have not paid despite repeated reminders of my client Shri Nisheeth Kumar Birla. Rent and taxes from 01.07.2017 till date have also became due against you.

9. That you are also not paying electricity dues in respect of the electric connection which is in your use and electricity dues for several months have accumulated against you.

10. That in the above circumstances my client does not want to continue your tenancy in respect of

the property in question and the same is hereby terminated. Property in question is exempt from U.P. Act 13, 1972.

11. That at present the property in question can easily be let out at the rent of Rs.12,000/- per month.

12. That earlier my client sent a similar notice dt. 5.7.2017 to you but you managed to return the same in collusion with the postman.

I, therefore, call upon you to vacate the property in question, delivering its actual vacant possession to my client Shri Nisheeth Kumar Birla just after the expiry of 30 days from the service of this notice upon you clearing within the aforesaid period the entire arrears of rent & taxes as claimed above. In case of non-compliance of this notice, my clients shall be constrained to file a suit against you for your ejectment from the property in question and for recovering from you the entire arrears of rent & taxes together with interest thereon @ 18% per annum. In case such suit is filed, you shall also be liable to pay mesne profits @ Rs.12,000/- per month and you shall also be saddled with all the costs & consequences of such suit."

16. It is admitted on record that rent of the suit property is more than Rs.2,000/- and, therefore, provisions of U.P. Act No.13 of 1972 are not applicable.

17. This Court in the cases relied upon by the learned counsel for the respondents has held that where the suit property is out of the purview of U.P. Act No.13 of 1972 and a valid notice showing the intention of the landlord to terminate the tenancy has been served upon the tenant, the issue of default in payment of rent is immaterial and the tenant is liable for eviction. Paragraphs 5 & 6 of the judgement of Sunita Gupta (Smt.) (supra) are extracted hereinbelow:-

"5. Heard the learned counsel for the parties and perused record. It is not in dispute that there is a relationship of landlord and tenant between the parties and the monthly rate of rent in respect of the disputed shop is Rs.2500/-. This being so, the provisions of the U.P. Act No.13 of 1972 are not applicable. The learned counsel for the applicant could not point out any legal infirmity in the notice given under Section 106 of the Transfer of Property Act.

6. The learned counsel for the applicant could submit only this much that the property in dispute was sublet due to financial crisis and now, the sub tenant has been removed from the property in dispute. Be that as it may, in view of the fact that the provisions of the U.P. Act No.13 of 1972 are not applicable and there is no illegality in the notice terminating the tenancy, I do not find any good ground to interfere in the revision. No other point was pressed. The revision lacks merit and it is dismissed summarily".

18. This Court in the case of ***(Smt.) Prakash Rani @ Prakashwati (supra)*** held that if provisions of U.P. Act No.13 of 1972 is not applicable over the suit property, then even if there is no default in payment of rent , the suit for eviction is liable to be decreed provided a valid notice terminating the tenancy has been served upon the tenant. Paragraph 5 of the judgement is extracted hereinbelow:-

"5. However, as far as the judgment of the Revisional Court in tenant's revision (S.C.C. Revision No. 19 of 1990) is concerned, I find that the said judgment is clearly erroneous in law. The Revisional Court in Para 10 of its

judgment clearly held that there was absolutely no dispute that provisions of U.P. Act No. 13 of 1972 were not applicable on the building in dispute. However, the Revisional Court has held that as at the time of giving notice tenant was not defaulter, hence his tenancy could not be terminated. This view is clearly erroneous in law. If U.P. Act No. 13 of 1972 is not applicable, then suit for eviction is liable to be decreed after termination of tenancy, without there being any default in payment of rent or any other ground. For termination of tenancy it is not at all necessary that the tenant must be defaulter. Month to month tenancy is terminable by one month's notice under section 106 of the Transfer of Property Act. It has not been found by the Revisional Court that there was any agreement in between the parties against termination of tenancy by one month's notice."

19. Paragraph 6 of the judgement in the case of ***Waqf Allal Aulad/Waqf Alkhair Allahtala, Dr. Ziaul Haq (supra)*** is also relevant in the context of the present case, and thus, is extracted hereinbelow:-

"6. If Rent Control Act does not apply, then tenant is liable to eviction simply after termination of tenancy. Default or no default is wholly immaterial. Revisional court itself held that building in dispute belonged to Waqf-allal-aulad and was beyond the purview of U.P. Act No.13 of 1972. Thereafter, there was absolutely no sense in holding that the notice of termination of tenancy was invalid on the ground that tenant was not defaulter when notice was given. The view taken by the lower revisional court is quite strange and utterly untenable. Even if Rent Control Act applies and in the notice wrong period of default and wrong rate of rent is mentioned, still notice does not become invalid vide Full Bench authority of Gokaran Singh Vs. Ist Additional District and Sessions Judge, Hardoi and others, 2000 (1) ARC 653."

20. In the present case, learned counsel for the applicant has failed to point out any illegality in the notice dated 27.11.2017 terminating the tenancy. A perusal of the notice dated 27.11.2017 makes it amply clear that there was clear intendment of the respondents/ landlord to terminate the tenancy of the applicant. In this view of the fact and in the light of the ratio laid down by this Court in aforesaid judgements, this Court finds that the trial court has not committed any jurisdictional error in decreeing the suit.

21. The contention of the counsel for the applicant that there was no rent due is also belied from the averments made in paragraph 15 of the affidavit of the applicant in the present revision wherein she has stated that the rent is due from April, 2007 onwards. Paragraph 15 of the affidavit is extracted hereinbelow:-

"15. That, the rent from April, 2017 to onwards at the rate of Rs.6500/- per month is only due."

22. Further, it is the case of the respondent that the suit property was let out for eleven months commencing from 01.07.2014 to 31.05.2015. The tenancy was ,thereafter, extended for a further period of 11 months commencing from 01.06.2015 to 31.04.2016 at the agreed rent of Rs.7200/- per month between the parties. After 31.04.2016, the tenancy was allowed to continue further w.e.f. 01.05.2016 to 31.03.2017 at the agreed rent of Rs.8000/- per month. The fact that the rent has been periodically enhanced and the rent of the suit property was Rs.8,000/- from 01.05.2016 was proved by the respondent by filing the affidavit of Nishit Kumar Birla. The applicant did not rebut the affidavit of Nitish Kumar Birla nor cross examined him despite permitted by the

trail court to cross examine the witnesses, hence, this court finds that the trail court has not committed any illegality in awarding Rs.1,25,000/- towards arrear of rent treating the rent of the suit property to be Rs.8,000/- per month from 01.05.2016.

23. It is also worth to notice that the applicant had adopted all dilatory tactics to delay the disposal of the suit inasmuch as she did not appear on the several dates fixed by the trial court in the suit nor she did chose to file application 19Ga in her absence. The applicant, thereafter, filed application 22Ga on 14.08.2019 to recall the order dated 03.07.2019 which was dismissed by the trial court granting liberty to the applicant to participate in the hearing of the case, yet the applicant sought adjournment of the case on 31.10.2019 on the false ground that she had filed revision against the order dated 02.09.2019 before the High Court, whereas the revision was filed on 19.12.2019 with delay condonation application. From the aforesaid fact, it is manifest that the conduct of the applicant in contesting the suit was mischievous which disentitles her for any relief from this Court in exercise of its revision jurisdiction.

25. The applicant has used the suit property without paying rent, therefore, the trial court has not committed any jurisdictional error in awarding damages at the rate of Rs.12,000/- per month higher than the rent of the suit property from the date of institution of the suit till the delivery of possession of the suit property to the respondent. In this regard, it would be apt to refer paragraphs 10 and 11 of the judgement of this Court in the case of ***Food Corporation of India and Another Vs. M/s Durga Shakti Enterprises 1996 (1) ARC 153*** which are being extracted hereinbelow:-

written statement despite several opportunities granted by the trial court.

24. The insincere approach of the applicant in contesting the suit is also evident from the fact that the applicant filed an application 19Ga under Order 9 Rule 7 of C.P.C. to recall the order of the trail court to proceed ex-parte, but she did not appear on several dates to argue the said application which led the trial court to pass the order dated 03.07.2019 dismissing the

"10. The last contention has been that the mesne profits at the rate of Rs.35,000 per month could not be granted by the Court below. It was contended that mesne profits exceeding the agreed rate of rent cannot be granted. In support of this contention the case of Mahesh Lalwani v. Sardar Uttam Singh, 1989 LCD 1, was referred. In this case it was held that the damages for occupation of premises under tenancy should be equal to such amount which the plaintiff was realising as rent of the premises from the defendant. No excess amount could be awarded by way of penalty, even though the premises is not governed by the Rent Control Act. However, from the side of the opposite party, the decision of the Hon'ble Supreme Court reported in AIR 1977 SC 2270, Shyam Charan v. Sheoji Bhai, was cited and it was argued that in view of this decision damages can be awarded at enhanced rate. In view of this decision of the Hon'ble Supreme Court, Single Judge decision of this Court cannot be followed by another Single Judge of the same Court. It is, therefore, clear from the pronouncement of the Hon'ble Supreme Court that the damages can be awarded at the enhanced rate.

11. In this case mesne profits were claimed at the rate of Rs.6000 per

month as against the agreed rate of Rs.1600. The Hon'ble Supreme Court confirmed the award of mesne profits at the rate of Rs.4000 per month."

26. For the reasons given above, this Court finds that trial court has not committed any illegality or jurisdictional error in decreeing the suit. Consequently, the revision lacks merit and is, accordingly, ***dismissed*** with no order as to cost.

(2020)06ILR A52
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

S.C.C. Revision No. 33 of 2020

Smt. Ranjana Mishra ...Revisionist
Versus
Kamal Kumar & Ors. ...Respondents

Counsel for the Revisionist:
Sri Sri Rishikesh Tripathi

Counsel for the Respondents:

A. Civil Law - Code of Civil Procedure,1908- Section 115-Order XV Rule 5- suit for decree of eviction and arrears of rent-Strike off defence of tenant on failure to deposit the admitted rent-the issue as to whether the tenant was in use or not in the building in question is the subject-matter of evidence-the said submission is not sustainable-the requirement of Order XV Rule 5 is mandatory requirement-thus court below committed no illegality in allowing the application-(Para 3 to 14)

B. The Order XV Rule 5 of CPC provides that in any suit by a lessor for the eviction of a lessee after determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant/lessee shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine percent per annum.(Para 12, 13)

C. The purpose of enacting the provision of Order XV Rule 5 was not to give lever to the landlord to get the tenant punished for insignificant lapses, but to ensure that the dues of the landlord are properly secured and he can get his rent regularly even though the litigation may continue.

Landlord filed a suit against the applicant/revisionist on the ground that the applicant has not paid rent. Notice was given for terminating the tenancy. The applicant denied the same and stated that the applicant is not in use and occupation of the residential building as the landlord has put a lock on the staircase of the building.(Para 3, 4, 5)

The revision is dismissed. (E-6)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard learned counsel for the revision-applicant.

2. By means of present revision, the revision-applicant has assailed the order dated 03.01.2019 passed by III Additional District Judge/Special Judge (D.A.A.), Agra in SCC Case No.66 of 2015 (Kamal Kumar and others Vs. Smt. Ranjana Mishra) whereby the application of the respondents-landlord under Order XV Rule 5 CPC has been allowed and the defence of the revision-applicant has been struck off.

3. The respondents-landlord has filed SCC Case No.66 of 2015 (Kamal Kumar and others Vs. Smt. Ranjana Mishra) against the revision-applicant for eviction and arrears of rent on the ground that the revision-applicant is a tenant of a residential building at the rate of Rs.2200/- per month. The revision-applicant has not paid rent from 01.01.2010 and has

committed default in payment of rent. It is further stated that notice terminating the tenancy was given on 20.08.2015 which was replied by the revision-applicant on 17.09.2015. The suit has been instituted on 29.09.2015 for decree of eviction and arrears of rent.

4. In the aforesaid suit, written statement has been filed by the revision-applicant denying the averments of the plaint. It was stated that the revision-applicant has not defaulted in payment of rent.

5. It appears that subsequent to filing of the written statement, the revision-applicant filed amendment application on 05.12.2017 to incorporate the fact that the revision-applicant is not in use and occupation of the residential building as the respondents-landlord has put a lock on the staircase of the building due to which the revision-applicant is not able to use and occupy the building. The said amendment application was allowed by the trial court.

6. The respondents-landlord filed application under Order XV Rule 5 CPC on 26.10.2017 praying that the defence of revision-applicant be struck off as she has not complied with the mandatory requirement of Order XV Rule 5 CPC in not depositing the admitted amount due with interest.

7. The aforesaid application was contested by the revision-applicant contending inter-alia that since she is not in use and occupation of the aforesaid building, therefore, she is not liable to deposit any amount as contemplated under Order XV Rule 5 CPC.

8. The trial court by order dated 03.01.2019 allowed the application by recording a finding that the issue as to whether the revision-applicant is in use and occupation of the building in question is the subject matter of evidence which can be adjudicated on the basis of evidence led by the parties and thus, the revision-applicant is required to comply with the requirement of Order XV Rule 5 CPC and as the revision-applicant has not complied with the same, her defence is liable to be struck off.

9. Challenging the aforesaid order, learned counsel for the revision-applicant has contended that the court below has committed jurisdictional error in allowing the application inasmuch as it is specific case of the revision-applicant that she is not in use and occupation of the property in question, therefore, the requirement of deposit of admitted amount due with interest contemplated in Order XV Rule 5 CPC is not attracted in the present case.

10. He submits that a bare reading of Order XV Rule 5 of CPC shows that admitted due amount as contemplated under Order XV Rule 5 CPC is to be deposited by the lessee only when he is in use and occupation of the property in question. Thus, the submission is that as the revision-applicant was not in use and occupation of building in question, therefore, he is not liable to comply with the requirement of Order XV Rule 5 of CPC. He further submits that the revision-applicant has also laid set-off claim against the respondents in written statement as contemplated under Order VIII (1) of CPC, and the amount claimed by the revision-applicant is more than the admitted rent and thus, for the said reason also revision-applicant is not liable to comply with the requirement of Order XV Rule 5 of CPC.

11. I have considered the submissions of learned counsel for the revision-applicant and perused the record.

12. The Order XV Rule 5 of CPC provides that in any suit by a lessor for the

eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant/lessee shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum.

13. *Explanation*-1 defines the expression 'first hearing' which means that the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned is the date of first hearing.

14. In the instant case, according to the revision-applicant, she is not liable to comply with the requirement of Order XV Rule 5 of CPC as she is not in use and occupation of the premises. The said submission is not sustainable for the reason that the issue as to whether the revision-applicant is in use and occupation of the property can be decided only upon the evidence of the parties and not on the basis of ex-parte version of revision-applicant that she is not in use and occupation of the property in question. The requirement of Order XV Rule 5 of CPC to deposit entire admitted amount due alongwith interest is statutory requirement which the revision-applicant has to comply with as Order XV Rule 5 of CPC does not contemplate or envisage any situation that in case tenant is not in occupation and use of the property in question or has laid set-off claims against the lessor, the requirement of deposit of admitted amount due alongwith interest as provided in Order XV Rule 5 of CPC is not to be complied with.

15. In view of the aforesaid fact, this Court is of the opinion that the court below has not committed any illegality or jurisdictional error in allowing the application under Order XV Ruel 5 of CPC of respondents-landlord. Consequently, the revision lacks merit and is ***dismissed.***

15. In view of the aforesaid fact, this Court is of the opinion that the court below has not committed any illegality or jurisdictional error in allowing the application under Order XV Rule 5 of CPC of respondents-landlord. Consequently, the revision lacks merit and is ***dismissed.***

(2020)06ILR A54
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.06.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

S.C.C. Revision No. 142 of 2014

Hari Om Gupta & Anr. ...Revisionists
Versus
Smt. Jyoti Bhatia ...Respondent

Counsel for the Revisionists:
Sri Kiran Kumar Arora

Counsel for the Respondent:
Sri Pradeep Saxena, Sri Ram Pratap Yadav

A. Civil Law - Code of Civil Procedure, 1908- Section 115 - The Provincial Small Causes Courts Act,1887-Section-25 & Indian Evidence Act, 1872-Section 65- eviction and arrears of rent-applicants were carrying on business on the suit property, property was let out to applicants on a monthly rent of Rs. 25,000/-per month for two years-applicants were to vacate the suit property after the expiry of the term of the tenancy-notice was served for termination and claimed of rent and mesne profit-applicants produced photocopy of agreement to sell-applicants failed to reply why they did not produce original agreement to sell-they only stated that they possessed the original-ingredients of Section 65(c) of the Act, 1872 are

lacking-photocopy of the agreement to sell is not admissible in evidence-payment of Rs. 13 Lac as sale consideration could not be proved-no independent evidence on record to support the testimony of applicants for payment-to recover the alleged amount, applicant can sought the other alternate remedy available to them in law.(Para 3 to 44)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. M/s India Umbrella Manufacturing Co. & ors. Vs Bhagvandei Agrawal thru Legal Representatives & ors. AIR (2004) SC 1321

2. Dharamaji @ Baban Bajirao Shinde Vs Jagannath Shankar Jadhav (1994) AIR (Bombay) 254

3. Bobba Suramma Vs Peddireddi Chandramma (1959) AIR AP 568

4. Ekadashi Vs Ganga (1981) AIR All 373

5. Vasanthi Vs Venugupal (Dead) Thru Legal Representatives (2017) 4 SCC 723

6. Benga Behera & anr. Vs Braja Kishore Nanda & ors. (2007) 9 SCC 728

7. J. Yashoda Vs K. Shobha Rani (2007) 5 SCC 730

8. Saudul Azeez Vs D.J., Gorakhpur & ors. (1999) 4 AWC 3213

9. K.B. Saha & Sons Pvt. Ltd. Vs Development Consultant Ltd. (2008) 8 SCC 564

10. Ratan Lal & ors. Vs Hari Shanker & ors. (1980) AIR All 180

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Kiran Kumar Arora, learned counsel for the revisionists and Sri Ram Pratap Yadav, learned counsel for the respondent.

2. The revision-applicant nos.1 & 2 have assailed the judgement and decree dated 06.02.2014 passed by Additional District Judge, Court No.1, Bareilly in SCC Suit No.7 of 2011 whereby the trial court has decreed the suit of the respondent.

3. The brief facts of the case are that respondent (plaintiff) instituted SCC Suit No.7 of 2011 contending inter alia that she is the owner of a shop and godown constructed over an area of 72.5 square meters situated in Shyamganj, Rile Godown, Bareilly (hereinafter referred to as 'suit property') described at the foot of the plaint. She has let out the suit property to revision-applicant nos.1 & 2 (hereinafter referred to as 'applicants') on a monthly rent of Rs.25,000/- per month including taxes. The applicants have been carrying on business on the suit property in the name and style of M/s Saraswati Sales. The suit property was let out to applicants on 25.11.2008 for two years on the condition that entire rent of the suit property would be paid in advance by the applicants. The period of tenancy expired on 24.11.2010. The applicants were to vacate the suit property on 25.11.2010 after the expiry of the term of the tenancy. It is further averred that the applicants have not paid rent after 24.11.2010 nor they have vacated the suit property. Consequently, the respondent sent a notice by registered post terminating the tenancy which was duly served and delivered on applicants on 24.01.2011. By the said notice, respondent also claimed arrears of rent and mesne profit to the tune of Rs.37,500/- for the period from 25.02.2011 to 07.04.2011.

4. In the aforesaid factual backdrop, the respondent prayed for a decree of eviction, arrears of rent amounting to

Rs.1,12,500/- and future mesne profit @ Rs.25,000/- per month.

5. In the written statement filed by the applicants, they averred that the respondent is the co-owner of the suit property since the suit property was purchased by the respondent alongwith Radheshyam Bhatiya and Smt. Prakashi Devi from Smt. Sadhna Devi by registered sale deed dated 05.05.2004. The applicants denied the rent of the suit property to be Rs.25,000/- per month. According to the applicants, rent of the suit property was Rs.2500/- and no rent was due on the date of institution of the suit. It was also pleaded that an agreement to sell was entered into on 25.11.2008 in respect of the suit property with the concurrence of the three co-owners of the suit property and applicants paid Rs.1 lac through cheque as advance. It was also averred that a sum of Rs.13 lac has been paid to the respondent up till 20.10.2010. The applicants are ready and willing to pay the balance sale consideration and purchase the suit property. The owners of the suit property became dishonest and refused to execute the sale deed according to the agreement to sell dated 15.12.2008.

6. The trial court based on the pleadings of the parties framed five issues. The learned counsel for the applicants has assailed the finding of the trial court on issue nos.1, 2 & 3, which reads as under:-

"1. क्या ज्योति भाटिया विवादित संपत्ति की सह भवन स्वामिनी है और वह प्रतिवादीगण की धारा 106 संपत्ति अन्तरण अधिनियम के अंतर्गत किरायेदारी समाप्त कर सकती है?

2. क्या प्रतिवादीगण विवादित संपत्ति में अंकन 25000/- प्रतिमाह के किरायेदार थे?

3. क्या प्रतिवादीगण ने किराया अदा करने में कोई व्यतिक्रम किया है?"

7. On issue no.1, the trial court by placing reliance upon the judgement of Apex Court in the case of ***M/s India Umbrella Manufacturing Co. & Others Vs. Bhagvandei Agrawal through Legal Representatives & Others AIR 2004 SC 1321*** held that the respondent is co-owner and suit is maintainable at the behest of the respondent. The trial court further held that since the photocopy of the agreement to sell was filed and the original was not filed, therefore, it is not admissible in evidence. It also noticed the statement of DW-1 Hari Om Gupta, (applicant no.1) wherein he admitted that the original agreement to sell is in his possession but he did not give any reason for not filing the original copy of the agreement to sell. Consequently, the trial court disbelieved the execution of the agreement to sell.

8. Issue nos.2 & 3 were jointly decided by the trial court and after appreciating the evidence on record, it found the rent of the suit property was Rs.25,000/- per month.

9. Challenging the aforesaid findings learned counsel for the applicants has contended that though applicants were initially inducted as the tenant, after the execution of the agreement to sell dated 15.12.2008, the applicants continued in the possession of the suit property in furtherance of the agreement to sell. Accordingly, he submits that since the preconditions of Section 53A of Transfer of Property Act, 1882 (hereinafter referred to as 'T.P. Act') are satisfied, therefore, applicants are entitled to the protection of Section 53A of T.P. Act. In support of his

aforesaid contention, he has placed reliance upon following judgements:-

(i). Dharamaji alias Baban Bajirao Shinde Vs. Jagannath Shankar Jadhav 1994 AIR (Bombay) 254;

(ii). Bobba Suramma Vs. Peddireddi Chandramma 1959 AIR (AP) 568;

(iii). Ekadashi Vs. Ganga 1981 AIR (All) 373.

10. His further submission is that even if applicants did not file the suit for the enforcement of agreement to sell, the relationship of landlord and tenant extinguished on the execution of the agreement to sell, hence, the suit is not maintainable because of Section 15 read with Entry 4 of Second Schedule of Provincial of Small Causes Courts Act, 1887 (hereinafter referred to as 'Act, 1887').

11. He further contends that trial court has erred in disbelieving the agreement to sell on the ground that the photocopy of the same was filed since according to applicants, photocopy of the agreement to sell is secondary evidence, therefore, in the absence of original agreement to sell, the trial court ought to have accepted the photocopy of the agreement to sell. He further contends that agreement to sell, though not registered, can be read in evidence for collateral purposes because of the proviso to Section 49 of The Registration Act, 1908 (hereinafter referred to as 'Act, 1908').

12. It is further urged by learned counsel for the applicants that finding of the trial court in respect of rent of the suit property to be Rs.25,000/- per month is illegal and against the record since the amount of Rs.6 lakhs paid through cheques on various dates was towards the advance in respect of the purchase of the suit property, besides Rs.7 lakhs paid in cash towards advance for the purchase of the property, therefore, finding of the trial court that Rs.6 lakhs paid through cheques for the payment of rent of two years @ Rs.25,000/- per month is erroneous and not sustainable in law.

13. Per contra, learned counsel for the respondent contends that the applicants have failed to establish that agreement to sell fulfils all the prerequisites of Section 53A of T.P. Act, therefore, the applicants are not entitled to the protection of Section 53A of T.P. Act. In support of his contention, he has placed reliance upon the judgement of Apex Court in the case of ***Vasanthi Vs. Venugupal (Dead) Through Legal Representatives 2017 (4) SCC 723.***

14. He further contends that as per the statement of DW-1 Hari Om Gupta (applicant no.1), the original agreement to sell is in his possession and he did not give any reason for not producing the same, therefore, the conditions envisaged in Section 65 of the Indian Evidence Act, 1872 (hereinafter referred as 'Act,1872') to lead secondary evidence to prove a document do not exist in the instant case, therefore, the trial court has rightly held that photocopy of original agreement to sell is not admissible in evidence. He further contends that the photocopy of the agreement to sell is not secondary evidence, for this reason also, it cannot be read in evidence. In support of his aforesaid submission, he has placed reliance upon the judgement of Apex Court in the case of ***Benga Behera and Another Vs. Braja Kishore Nanda and Others (2007) 9 SCC 728.***

15. He further urges that if a document is inadmissible in evidence, it cannot be read in evidence even for collateral purposes.

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

17. To appreciate the argument of learned counsel for the applicants that they are entitled to protection under Section 53-A of the T.P. Act, it would be useful to refer Section 53-A of the T.P. Act which reads as under:-

*"53A. **Part performance.**--Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

18. The apex court in the case of **Vasanthi (supra)** laid down three prerequisites to exist to claim the benefit of Section 53A of T.P.Act. Paragraphs 18 & 25 of the said judgement are being extracted herein below:-

"18. As would be patent from the above quotes, the protection of a prospective purchaser/transferee of his possession of the property involved, is available subject to the following prerequisites:

(a) There is a contract in writing by the transferor for transfer for consideration of any immovable property signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(b) The transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract;

(c) The transferee has done some act in furtherance of the contract and has performed or is willing to perform his part of the contract.

25. This Court in Shrimant Shamrao Suryavanshi and another vs. Pralhad Bhairoba Suryavanshi by Lrs. and others (2002) 3 SCC 676, while tracing the incorporation of Section 53A in the TP Act, vide Act of 1929, acting on the recommendations of the Special Committee on the issue, had ruled that mere expiration of the period of limitation for bringing a suit for specific performance would not debar a person in possession of an immovable property by way of part performance from setting up a plea, as contemplated therein in defence to protect his possession of the property involved. It

was however underlined that if the conditions precedent, as enumerated, in Section 53A of the Act, are complied with, the law of limitation would not come in the way of the said person to avail the benefit of the protection to his possession as extended thereby even though a suit for specific performance of a contract by him had gone barred by limitation. Explicitly therefore, though mere expiry of the period of limitation for a suit for specific performance may not be a bar for a person in possession of an immovable property in part performance of a contract for transfer thereof for consideration to assert the shield of Section 53A of T.P. Act, it is nevertheless imperative that to avail the benefit of such protection, all the essential pre-requisites therefor would have to be obligatorily complied with.

19. The Court, now, proceeds to analyze whether the preconditions to claim the benefit of Section 53A of T. P. Act exists in the present case to entitle the applicants for protection of Section 53A of T. P. Act.

20. According to applicants, an agreement to sell was executed between the applicants and respondent on 25.11.2008 in respect of the suit property for the purchase of it for a sale consideration of Rs.23 Lacs, and that the terms and conditions of the agreement to sell are explicit and distinct from which the terms necessary to constitute a transfer can be ascertained.

21. The applicants had filed photocopy of the agreement to sell based on which he asserts to seek the protection of Section 53A of T.P.Act. Before proceeding to peruse the terms and conditions of the contract to find out whether it contains the necessary terms to constitute a transfer, the first question to be considered is whether the trial court was justified in disbelieving the photocopy of the agreement to sell as the essential conditions to attract 65 of Act,1872 were lacking. At this stage, it would be apt to refer paragraph 9 of the affidavit of applicant no.1 wherein he has stated about the filing of the photocopy of the agreement to sell dated 15.12.2008. Paragraph 9 of the affidavit is reproduced hereinbelow:-

"9. यह कि विवादित दुकान मय कोठरी को बेचने का इरादा तीनों सहस्वामियों श्रीमती ज्योति भाटिया, राधेश्याम भाटिया व श्रीमती प्रकाशी देवी का हुआ इस पर शपथकर्ता की पत्नी ने इस दुकान मय कोठरी को खरीदने की इच्छा जाहिर की. इस बात पर तीनों सह स्वामियों व श्रीमती सुशीला गुप्ता (पत्नी शपथकर्ता) के बीच एक इकरारनामा मुहायदावय दिनांकित 15.12.2008 निष्पादित हुआ जिस पर श्रीमती ज्योति भाटिया, राधेश्याम भाटिया, श्रीमती प्रकाशी देवी व श्रीमती सुशीला गुप्ता ने अपने हस्ताक्षर शपथकर्ता के समक्ष किये और शपथकर्ता ने भी बतौर गवाह अपने दस्तखत किये फिर इस इकरारनामा मुआहायदावय को नोटरी पब्लिक श्री अनूप कुमार कोहरवाल एडवोकेट के द्वारा सत्यापित कराया गया. इस इकरारनामा मुहायदावय दिनांकित 15.12.2008 की सत्य फोटोस्टेट कॉपी नोटरी द्वारा सत्यापित इस शपथ पत्र के द्वारा संलग्नक-1 के रूप में दाखिल की जा रही है पत्रावली पर भी इस इकरारनामा मुहायदावय की सत्य फोटोकॉपी पेपर न. 27/ग है. इस इकरारनामा मुहायदावय के सम्बन्ध में शपथकर्ता व उसकी पत्नी सक्षम न्यायालय बरेली में विधि अनुसार कार्यवाही करेंगे."

22. The applicant no.1 in his cross-examination has categorically stated that he has the original agreement to sell, but he

has not filed the same and he cannot explain the reason for not filing the original copy of the agreement to sell. The relevant extract of the cross-examination of application no.1 is reproduced hereinbelow:-

"...मैंने मूल मुहायदा वय दाखिल नहीं किया है. मैं मूल मुहायदा वय दाखिल न करने का कारण नहीं बता सकता. मूल एग्रीमेंट मेरे पास है..."

23. It is pertinent, at this point, to refer a few provisions of the Indian Evidence Act, 1872. Section 61 of the Act, 1872 deals with proof of contents of documents, which states that the contents of a document may be proved either by primary or by secondary evidence.

24. Section 62 defines primary evidence. Primary evidence means the document itself produced for the inspection of the Court.

25. Section 63 provides for secondary evidence which reads as under:-

"63. Secondary evidence.--Secondary evidence means and includes--

(1) Certified copies given under the provisions hereinafter contained1;1;"

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it."

26. Section 65 deals with the eventualities in which secondary evidence relating to a document may be given. Section 65 is quoted hereinbelow:-

"65. Cases in which secondary evidence relating to documents may be given.--Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:--

(a) When the original is shown or appears to be in the possession or power-- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1 [India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

27. It is trite law that a party must first adduce primary evidence to prove a document and only in eventualities elucidated in Section 65 (a) to (g), secondary evidence can be adduced to prove the existence, conditions or contents of a document.

28. The statement of applicant no.1 is crystal clear on the point that the original agreement to sell is in his possession. At this point, it would be relevant to refer the judgement of the Apex Court in the case of ***Benga Behera and Another (supra)*** wherein respondent in SLP applied for grant of Letters of Administration based on Will allegedly executed in his favour by one Sarajumani Dasi on or about 15.01.1982, the Apex Court held that a document on which the title rest is required to be proved by primary evidence, and if the original document is lost or destroyed, secondary evidence may be given under Section 65 (c) of the Act, 1872 and loss of original document is required to be proved for the admissibility of secondary evidence. Paragraph 31 & 32 of the judgement are being extracted herein below:-

"31. A document upon which a title is based is required to be proved by primary evidence, and secondary evidence may be given under Section 65(c) of the Evidence Act. The said clause of Section 65 provides as under:

"65. (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

Loss of the original, therefore, was required to be proved.

32. In a case of this nature, it was obligatory on the part of the first respondent to establish the loss of the original Will, beyond all reasonable doubt. His testimony in that behalf remained uncorroborated."

29. In the instant case, the case of the applicants can fall in Section 65 (c) of the Act, 1872. It is clear from the reading of Section 65(c) that secondary evidence of a document is admissible only when the party desirous of proving a document by Secondary evidence proves by cogent evidence that the original document is lost or destroyed or is not in his possession and that he made best effort to procure the production of it but failed. Thus, the party has to account for the non-production of the said document in one of the ways indicated in the said section. This necessarily implies that the party, who wants to give secondary evidence, has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced.

30. Another question which crops up in the light of the submission of the respondent whether photocopy of a document is Secondary evidence, in this regard, it would be relevant to refer to the judgement of the Apex Court in the case of ***J.Yashoda Vs. K. Shobha Rani (2007) 5 SCC 730*** wherein it has been held that

photocopy cannot be admitted as secondary evidence. Paragraphs 7 & 9 of the judgement are being extracted herein below:-

"7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In Ashok Dulichand v. Madahavlal Dube and Another [1975(4) SCC 664], it was inter alia held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who

was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

31. In the case of ***Saudul Azeez Vs. District Judge, Gorakhpur and Others 1999 (4) AWC 3213,*** this Court has held that a photocopy of a document cannot be admitted in evidence. Paragraphs 9 to 12 are being extracted herein below:-

"9. In the present case, there is nothing to indicate that the alleged photocopy was prepared from the original or that it was not prepared from a copy of the original, or that it was compared with (he original if prepared from a copy compared with the original. In the absence of any material, it cannot be treated to be a secondary evidence. It is only orally being claimed to be a photocopy without claiming that what was photographed was the original or that it was compared with the original. Admittedly, it is not a certified copy.

10. Now secondary evidence is permitted only in certain circumstances. It cannot come in automatically as in the case of primary evidence. In order to allow secondary evidence, certain tests as provided in Section 65 and procedure as provided in Section 66 of the Evidence Act are to be satisfied and complied with, as the case may be. Inasmuch as Section 64 of the said Act prescribes that documents must be proved by primary evidence. Exception to this rule is permitted only in cases as provided in Section 65 read with Section 66 of the said Act.

11. Section 65 of the Act permits secondary evidence (a) when the original is shown or appears to be in the possession or power of (i) the person against whom the document is sought to be proved, or (ii) any person out of reach of, or not subject to. the process of the Court, or (iii) any person legally bound to produce it. and when after the notice mentioned -in Section 66 such persons mentioned in (i), (ii), (iii) does not produce it ; (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ; (c) when the original has been destroyed or lost, or when the parly offering is unable to produce it in reasonable time for reason not arising from his own default or neglect; (d) when the original is such that it is not easily movable; (e) when the original is a public document Within the meaning of Section 74 ; (f) when the original is a document of which certified copy is permitted to be given in evidence either by Evidence Act or by any other law in force in India: (g) when the original consists of numerous accounts or other documents which cannot be conveniently examined by the Court, and the fact to be proved is the general result of the whole collection.

12. The present case does not fit in clause (d). (e), (f) and (g). It. however, could come within clause (a), (b) and (c). But as observed earlier. In the facts and circumstances of the case, it does neither fit in clause (a) nor (b) nor (c). The applicant has not made out any case which could come within the scope and ambit of either of the clauses (a), (b) and (c) of Section 65 of the Act. Therefore, the photocopy cannot

be relied upon even as a secondary evidence."

32. In the present case, no factual foundation has been laid by the applicants for giving secondary evidence to prove the agreement to sell and the applicant no.1 admits in his cross-examination that he is in possession of the original agreement to sell. Further, there is no averment either in the written statement or in the affidavits of the applicants that the photocopy of the agreement to sell was prepared from the original or compared with the original. Therefore, from the above facts and law laid down in the above-referred cases that photocopy of a document is not the secondary evidence, it is manifest that necessary ingredients of Section 65 (c) of the Act, 1872 are lacking in the present case. Therefore, the view of the trial court that photocopy of the agreement to sell is not admissible in evidence is not erroneous and the agreement to sell cannot be proved by leading Secondary evidence.

33. The judgement relied upon by the counsel for the applicants of this Court in the case of ***Ekadashi (supra)*** is distinguishable on the fact since in the said case the benefit of Section 53-A of T.P. Act was extended to the defendant, who had preferred the second appeal before this Court, on the ground that all the preconditions for claiming the benefit of 53-A were present.

34. The other judgement relied upon by the counsel for the applicants ***Bobba Suramma (supra)*** also reiterates the law that to avail the benefit of Section 53A of T.P. Act, essential prerequisites of Section 53A must be present and established. In this case, the plea of the appellant seeking protection of Section 53A of T.P. Act was rejected by Andhra Pradesh High Court by affirming the judgement of the trial court and appeal court decreeing the suit of plaintiff-respondent for possession against the defendant-appellant, who claimed the possession of the suit property under an agreement to sell. Thus, the said judgement is also of no help to the applicants.

35. The judgement of ***Dharmaji Alias Baban Bajirao Shinde (supra)*** has also been rendered in a different factual context. The Bombay High Court also reiterated that if the preconditions of Section 53A of T.P. Act are complied with, the transferee cannot be denied the protection of Section 53A of T.P. Act on the pretext that document is unregistered. However, it dismissed the appeal since as per the admission of plaintiff-appellant, he was not in the possession of the suit property. So this judgement also does not come in aid to the applicants.

36. Since the photocopy of the agreement to sell cannot be accepted to prove its execution, therefore, the precondition to avail the benefit of Section 53A of T.P.Act that there should be a contract in writing by the transferor (respondent in the instant case) in respect of the suit property for consideration from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty is lacking in the present case. Accordingly, it is held that the applicants are not entitled to the protection of Section 53A of the T. P. Act and the suit for eviction of the respondent is maintainable and not barred by Section 15 read with Entry 4 of the Second Schedule of Act, 1887.

37. To appreciate the argument of counsel for the applicants that unregistered agreement to sell can be

relied on for collateral purposes, it would be necessary to consider ambit of the word 'collateral purposes/collateral transaction' referred in the proviso to Section 49 of the Act 1908. Section 49 of the Act 1908 is reproduced hereinbelow:-

"49. Effect of non-registration of documents required to be registered.--No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) 55, 56 [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]

State Amendment Uttar Pradesh:

In section 49,--

(i) in the first paragraph, after the words "or by any provision of the Transfer of Property Act, 1882" insert the words "or of any other law for the time being in force",

(ii) substitute clause (b) as under: "(b) confer any power or create any right or relationship, or",

(iii) in clause (c), after the words "such power", insert the words "or creating such right or relationship",

(iv) in the proviso, omit the words "as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or". [Vide Uttar Pradesh Act 57 of 1976, sec. 34 (w.e.f. 1-1-1977)]."

38. In this regard, it would be apt to refer to the judgement of the Apex Court in the case of ***K.B. Saha and Sons Private Limited Vs. Development Consultant Limited (2008) 8 SCC 564*** wherein Apex Court in paragraph 34 of the judgement has laid down when an unregistered document can be read in evidence for collateral purposes. Paragraph 34 of the said judgement is being extracted hereinbelow:-

"34. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that :-

1. A document required to be registered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

39. It would be also relevant to refer paragraph 4 of the judgement of this Court in the case of ***Ratan Lal and Others Vs. Hari Shanker and Others AIR 1980 (All) 180*** which is being extracted hereinbelow:-

"4. The second contention was that the partition deed, even if it was not registered, could certainly be looked into for a collateral purpose. This proposition is correct that if a document is compulsorily registerable and has not been registered, it will be admissible in evidence only for a collateral purpose, but the collateral purpose has a limited scope and meaning. It cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished a right to immovable property. If these could not be established by the collateral purpose, then in that event how could the document be used for showing that the property was partitioned or that particular properties were given to the various parties in the partition. If the document was unregistered, then it could not be used for showing that is created, declared, assigned, limited or extinguished a right to immovable property. The term 'collateral purpose' would not permit the party to establish any of these acts from the deed. In my opinion, the contention that it would be used for collateral purpose does not advance the case of the plaintiffs at all. It still falls short in proving that there was a partition between the parties."

40. It is evident from the law laid down in the aforesaid two cases that an unregistered document may be admitted as evidence for the collateral purpose; the collateral purpose has limited scope and does not mean that the unregistered document can be used to create, declare, assign, limit or extinguish a right in the immoveable property. Thus, it can safely be culled out that an unregistered agreement to sell cannot be read in evidence to prove its execution nor its terms can be read in evidence to ascertain that it incorporates all the terms necessary to constitute a transfer to create a right in immovable property and extend the benefit of 53A of the T.P. Act to the applicants. Thus, the applicants are not entitled to the benefit of Proviso to Section 49 of the Act, 1908.

41. Further, as it is held that the photocopy of the agreement to sell is not the secondary evidence and is inadmissible in evidence, therefore, in the instant case it cannot be read in evidence even for collateral purpose.

42. Now, coming to the contention of learned counsel for the applicants that the trial court has erred in holding the rent to be Rs.25,000/- per month. The trial court after appreciating the statement of Dw2 Smt. Sushila Devi, Dw3 Pradeep Arya and other evidence on record held that Rs.6 lac paid by the applicants through cheque on different dates was towards rent for two years. The trial court has given elaborate reasons for recording the aforesaid finding. This Court finds that the aforesaid finding is based on the appreciation of evidence on record and no perversity could be pointed out by the counsel for the applicant, hence, the aforesaid finding being the finding of fact is not liable to be upset by this court in the exercise of its revision power under Section 25 of the Act,1887.

43. Lastly, It is urged by counsel for the applicants that applicants had paid Rs.13 lacs out of which Rs.7 lac was paid in cash and trial court has not returned any finding as to the payment of Rs.7 lac in cash, therefore, the order of the trial court is not

sustainable. It is worth to notice paragraph no. 24 & 25 of the written statement wherein they have stated about payment of Rs.13 lakhs as an advance towards sale consideration in compliance of agreement to sell but no details as to how Rs.13 lakhs has been paid have been given in the written statement. The applicants in their evidence for the first time disclosed that out of Rs.13 lakhs paid in advance, Rs.6 lakhs has been paid through cheques on various dates and Rs.7 lakhs in cash and there is no independent evidence on record to support the testimony of applicants for payment of Rs.7 Lakhs in cash. Therefore, this court does not find any merit in the aforesaid submission of the counsel for the applicant. However, if the applicants desire to recover the amount alleged to have been paid by them, they may, if so advised, take recourse to the remedy available to them in law.

44. Thus, for the reasons given above, the revision lacks merit and is accordingly, ***dismissed***. There shall be no order as to costs.

(2020)06ILR A67
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

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

Application U/S 482 No. 491 of 2020

Sumit ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mohd. Rashid Siddiqui, Sri Abhinav Gaur, Sri Anoop Trivedi

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

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 & Indian Penal Code, 1862-Sections 147, 148, 149, 302 & SC/ST Act, 1989-Section 3(2)(V)- challenge to-order passed by special judge, SC/ST Act-offences u/s 302 can never be tried by the Special Court established u/s 14 of the

SC/ST Act while all other special Acts categorically make provision for those cases under such Special Act, can jointly be tried along with other offences under Other Acts- a proviso has been added by way of new amendment in section 14 of the SC/ST Act w.e.f. 26.01.2016 that special court established under this Act shall have power to directly take cognizance without taking recourse to section 193 Crpc for the commitment of the case because that would result in delay-merely because commitment was not made, all the proceedings would not vitiate the trial on the ground alone as it is necessary to show that by non-compliance, failure of justice had occurred or any deep prejudice was caused to the accused-principle of prejudice or failure of justice be taken into consideration-special court u/s 14 of the SC/ST Act is also conferred with the power of Session judge-the intention of the legislature is to ensure that even if the offence is found to have been committed under IPC as well as under SC/ST Act, the same should be tried by one court i.e. Special Court which has been conferred power to minimize the delay in disposal of the case-cognizance taken by trial court does not suffer from any infirmity. (Para 6, 8,11 ,13)

B. It is the duty of the court to see that victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice. The legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intention of the legislature to sub serve the substantive objects of the criminal trial.(Para 10)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Rati Ram & ors. Vs. St. Of M.P. (2012) 4 SCC 516

2. Moly Vs St. Of Kerala, (2004) 4 SCC 584

3. Vidya dharan Vs St. Of Kerala (2004) 1 SCC 215

4. Bhooraji Vs St. Of M.P. (2001) 7 SCC 679

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

1. Heard Sri Anoop Trivedi learned Senior Advocate assisted by Sri Abhinav Gaur, learned counsel for the applicant, Sri B.A. Khan, learned A.G.A. appearing for the State and perused the record.

2. This application under Section 482 Cr.P.C has been moved with a prayer to quash the orders dated 05.09.2017 and 17.08.2019 passed by the Special Sessions Judge, SC/ST Act, Meerut in S.S.T. No. 5031 of 2016 (State vs. Sanjay and others) arising out of Case Crime No. 192 of 2016 under sections 147, 148, 149, 302 IPC and 3 (2) (V) of SC/ST Act as well as charge-sheets dated 02.10.2016 and 30.11.2016 and also a prayer is made to stay the proceedings in this case till the disposal of this application.

3. In order to understand and appreciate the argument of the learned counsel for the applicant, it would be appropriate to give in brief the facts of this case as they emerged from the FIR.

4. The opposite party no. 2 Mitan Kumar has lodged an FIR dated 13.7.2016 stating therein that about 1 ½ months ago a quarrel had happened between him and co-villagers accused-applicant Sumit and co-accused Sujeet and because of that the accused-applicant and other co-accused were having enmity towards elder brother of the applicant Chetan. On 13.7.2016 when his elder brother Chetan was returning home with his mother Savitri Devi and when all of them reached near the sugarcane field of Vedpal, one motorcycle came from behind, on which the accused-applicant along with co-accused Sujeet, Sumit and Sanjai came there, while another accused Ashok who was already hiding in the sugarcane field also came out on the road and started saying *"Aaj Is Chamte ke Bhure Ko Dekh Lo'* and they all gheraoved his elder brother Chetan and opened fire upon him and when his mother came to save him, these people also pointed out their weapon towards her and told her to remain quiet otherwise she would also be shot dead. His brother after receiving injuries of bullet, fell down and died on the spot while all the five accused including the applicant fled from there threatening that whoever would incur their enmity would have to face the same consequence. The informant did not chase them because of fear and after the accused fled from there, on the alarm being raised by the informant and also hearing the sound of gun fire, no one came because of fear.

5. On the basis of the written report, a case was registered as Case Crime No. 192 of 2016 under sections 147, 148, 149, 302 IPC and section 3 (2) (v) of SC/ST Act against the accused-applicant and four other accused named in the FIR. After investigation, charge-sheet against the accused-applicant has been filed on 2.10.2016 under the above-mentioned sections and on the basis of evidence on record against the accused-applicant, charges under the above-mentioned sections were framed on 5.9.2017.

6. An application 93-Kha was moved thereafter from the side of the applicant and two other co-accused namely, Ashok and Sanjay stating therein that cognizance of

the offence under sections 302, 147, 148, 149 IPC has been taken directly by the court below by-passing the provision of section 193 Cr.P.C. Cognizance of the offence under SC/ST Act is taken under proviso to section 14 (1) of the said Act. The proviso to Section 14 (1) of the SC/ST Act provides that "the courts so established or specified, shall have power to directly take cognizance of offences under this Act". Further it is mentioned that section 6 of this Act provides that "Subject to the other provisions of this Act, the provisions of section 34, Chapter III, Chapter IV, Chapter V-A section 149, and Chapter XXIII of IPC, shall, so far as may be, apply for the purposes of this Act as they apply for the purpose of IPC. Further, It is mentioned that section 6 of the Act, makes it clear that other offences either in IPC or any other Act never have their application under this Act. Further it is mentioned that SC/ST Act nowhere provides that all other cases which can be jointly charged with, under the Code of Criminal Procedure, be charged at the same trial, and as such offences under section 302 IPC can never be tried by the Special Court established under section 14 of the SC/ST Act. Further it is mentioned that all other special Acts categorically make provision for those cases under such special Act, can jointly be tried along with other offences under other Acts, which can be jointly tried under Cr.P.C. Further, it is mentioned that the Special Act under Prevention of Corruption Act specifically provides section 4(3) "that a Special Judge under Prevention of Corruption Act, may also try an offence other than an offence specified in section 3 with which the accused may under Cr.P.C. be charged at the same trial. Similarly, the U.P. Gangster Act also provides under section 8 of the Act, the procedure for joint trial of cases under section 2/3 of U.P. Gangster Act along with offences under IPC or other Act, but no such provision exists under SC/ST Act 1988. Further it is mentioned that section 3(2)(v) of SC/ST Act clearly provides punishments for those offences under IPC punishable with imprisonment for a term of 10 years or more against a person or property of any member belonging to Scheduled Castes and Scheduled Tribes. As such it is clear that offences under section 302 IPC can never be tried by Special Court established under SC/ST Act. It is further pointed out that one of the accused in the present case namely, Prakash belongs to Scheduled Caste. Further, it is mentioned that the offence under section 3(2)(v) of SC/ST Act in the present case, could be tried along with sections 147, 148, 149 IPC but it cannot jointly be tried along with section 302 IPC. Further, it is mentioned that the cognizance of offence under section 302/147/149 IPC could not be taken under section 14 of the SC/ST Act and provisions of sections 207 to 209 and section 193 Cr.P.C. should have been followed. Further it is mentioned that it is expedient in the interest of justice that the charges under section 302/147/148/149 IPC be dropped against the applicant and prosecution should be directed to file a report under section 173 (8) Cr.P.C. before the Court having jurisdiction.

7. Upon consideration of this application, the trial court has passed the impugned order which shows that in the present case entire evidence of prosecution has been recorded and the case is at the stage of recording the statement of accused under section 313 Cr.P.C. and further the case has to be decided expeditiously as per direction of High Court. Further, it is mentioned that in the present matter after taking cognizance against the accused applicant Sumit, charge was framed on 05.09.2017, although against other accused,

charges were framed on separate date after having taken into consideration the prosecution documents. The said order has not been challenged at any stage by the accused till the conclusion of the prosecution evidence. Therefore, the objections which have been raised at this stage, they would be disposed of, in the interest of justice, at the time of final delivery of judgment and hence there was no justifiable reason to pass order on the said application at this stage and the direction is given that the accused shall appear on 21.8.2019 for getting his statement recorded under section 313 Cr.P.C. for which he should appear in person.

8. The submission which has been advanced by the learned counsel for the applicant is that the trial court could not have taken cognizance under section 302 IPC because the same would require committal of the case by the court of Magistrate to the Court of Sessions as has been provided under section 193 Cr.P.C. which provide that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code of Criminal Procedure. Although he did admit that w. e. f. 26.1.2016, by way of new amendment in section 14 of the SC/ST Act, a proviso has been added which shows that special court established under this Act shall have power to directly take cognizance of offence under this Act. However, he has relied upon a judgment of Hon'ble Apex Court decided on 17.2.2012 i.e. **Rati Ram and others vs. State of Madhya Pradesh, Criminal Appeal No. 223 of 2008 along with connected appeal [(2012) 4 SCC 516],** which is of earlier date i.e. prior to the amendment in the said Act. In this judgment, the matter was referred to Larger Bench in order to deal with the contradictory views as regards the effect and impact of not committing an accused in terms of section 193 Cr.P.C. in cases where charge sheet is filed under section 3 (1) (x) of SC/ST Act and cognizance is directly taken by the Special Judge under the Act. **In Moly vs. State of Kerala, (2004) 4 SCC 584, Vidya dharan vs. State of Kerala, (2004) 1 SCC 215,** on the one hand wherein it has been held that the conviction by Special Court is not sustainable if Investigating Officer has suo motu entertained and taken cognizance of the complaint directly without the case being committed to it, and therefore there should be retrial or total setting aside of the conviction as the case may be, and on the other hand, in **State of M.P. Vs. Bhooraji, (2001) 7 SCC 679,** wherein taking aid under section 465 (1) of the code, it has been opined that when a trial has been conducted by the Court of competent jurisdiction and a conviction has been recorded on proper appreciation of evidence, the same cannot be erased or effaced merely on the ground that there had been no committal proceedings and cognizance was taken by the Special Court, inasmuch as the same does not give rise to failure of justice.

9. It is further mentioned in this judgment that the facts were that the appellants were charge-sheeted under section 3 (1) (x) of the Act but eventually the charges were framed under sections 147, 148 and 302 read with section 149 of IPC. The trial court vide judgment and order dated 31.8.1996 convicted all the accused persons barring Mohan for offences under section 302 read with 149 IPC and sentenced them to imprisonment for life with a fine of Rs.one thousand and in default of payment of fine, to suffer further R.I. for three months and sentenced

to one month's R.I. under section 147 IPC. The accused Mohan was convicted for the offences under section 148 and 302 IPC and was sentenced to undergo one month's R.I. on the first score and to further life imprisonment and to pay a fine of Rs.one thousand , in default of payment of fine, to suffer further R.I. for three months on the second count.

10. Being dissatisfied with the judgment of conviction and the order of sentence, the appellant along with others preferred Criminal Appeal No. 1568 of 1996 before the High Court of Judicature of Madhya Pradesh at Jabalpur. Apart from raising various contentions on merits, it was pressed that the entire trial was vitiated as it had commenced and concluded without committal of the case to the Court of Sessions as provided under section 193 of the Code. In this judgment very deep comparison is made of the committal procedure as provided under unamended Cr.P.C. as well as the procedure which has been laid in the amended Cr.P.C and it would be relevant to record here-in-below the relevant paragraphs from the judgment in order to understand the reasoning given by Hon'ble Apex Court as to why it found that in the present case there occurred no failure of justice and did not hold the proceedings vitiated only on account of non-committal of proceedings under section 193 Cr.P.C. Paragraph nos. 51 to 68 of the judgment are quoted as under:

"51. Section 209 of the Code deals with the commitment of case to the Court of Session when an offence is triable exclusively by it. The said provision reads as follows:

***"209.Commitment of case to Court of Session when offence is triable exclusively by it.**--When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall--*

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

52. Prior to coming into force of the present Code, Section 207 of the Code of Criminal Procedure, 1898 dealt with committal proceedings. By the Criminal Law Amendment Act, 1955, Section 207 of the principal Act was substituted by Sections 207 and 207-A. To appreciate the inherent aspects and the conceptual differences in the previous provisions and the present one, it is imperative to reproduce Sections 207 and 207-A of the old Code. They read as under:

"207.Procedure in inquiries preparatory to commitment.--In every inquiry before a Magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such court, the Magistrate shall--

(a) In any proceeding instituted on a police report, follow the procedure specified in Section 207-A; and

(b) In any other proceeding, follow the procedure specified in the other provisions of this Chapter.

207-A.Procedure to be adopted in proceedings instituted on police report.--*(1) When, in any proceeding instituted on a police report, the Magistrate receives the report forwarded under Section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date not later than fourteen days from the date of the receipt of the report, unless the Magistrate, for reasons to be recorded, fixes any later date.*

(2) If, at any time before such date, the officer conducting the prosecution applies to the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished.

(4) The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(8) As soon as such charge has been framed, it shall be read and explained to the accused and a copy thereof shall be given to him free of cost.

(9) The accused shall be required at once to give in, orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence on his trial:

Provided that the Magistrate may, in his discretion, allow the accused to give in his list or any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this sub-section shall be deemed to preclude the accused from giving, at any time before his trial, to the clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial.

(10) When the accused, on being required to give in a list under sub-section

(9), has declined to do so, or when he has given in such list, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session, as the case may be, and shall also record briefly the reasons for such commitment.

(11) When the accused has given in any list of witnesses under sub-section (9) and has been committed for trial, the Magistrate shall summon the witnesses included in the list to appear before the court to which the accused has been committed:

Provided that where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the clerk of the State and such witnesses may be summoned accordingly:

Provided also that if the Magistrate thinks that any witness is included in the list for the purpose of vexation of delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

(12) Witnesses for the prosecution, whose attendance before the Court of Session or the High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon by the Court of Session or the High Court to give evidence.

(13) If any witness refuses to attend before the Court of Session or the High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or the High Court is required, when the Magistrate shall send him in custody to the Court of Session or the High Court as the case may be.

(14) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the State Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge; and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or where the commitment is made to the High Court, to the clerk of the State or other officer appointed in this behalf by the High Court.

(15) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

(16) Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant to custody."

53. On a bare perusal of the abovequoted provisions, it is plain as day that an exhaustive procedure was enumerated prior to commitment of the case to the Court of Session. As is evincible, earlier if a case was instituted on a police report, the Magistrate was required to hold enquiry, record satisfaction about various aspects, take evidence as regards the actual commission of the offence alleged and further was vested with the discretion to record evidence of one or more witnesses. Quite apart from the above, the accused was at liberty to cross-examine the witnesses and

it was incumbent on the Magistrate to consider the documents and, if necessary, examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him by the prosecution and afford the accused an opportunity of being heard and if there was no ground for committing the accused person for trial, record reasons and discharge him.

54. Thus, the accused enjoyed a substantial right prior to commitment of the case. It was indeed a vital stage. But, in the committal proceedings in praesenti, the Magistrate is only required to see whether the offence is exclusively triable by the Court of Session. Mr Fakhruddin, learned Senior Counsel, would submit that the use of the words "it appears to the Magistrate" are of immense signification and the Magistrate has the discretion to form an opinion about the case and not to accept the police report.

55. To appreciate the said submission, it is apposite to refer to Section 207 of the 1973 Code which lays down for furnishing of certain documents to the accused free of cost. Section 209(a) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the Magistrate is only to verify the nature of the offence. It is also worth noting that thereafter, a mandate is cast that he "shall commit".

56. Evidently, there is a sea of difference in the proceeding for commitment to the Court of Session under the old Code and under the existing Code. There is nothing in Section 209 of the Code to even remotely suggest that any of the protections as provided under the old Code has been telescoped to the existing one.

57. It is worth noting that under the Code of Criminal Procedure, 1898, a full-fledged Magisterial enquiry was postulated in the committal proceeding and the prosecution was then required to examine all the witnesses at this stage itself. In 1955, Parliament by Act 26 of 1955 curtailed the said procedure and brought in Section 207-A to the old Code. Later on, the Law Commission of India in its 41st Report, recommended thus:

*"**18.19.Abolition of committal proceedings recommended.**--After a careful consideration we are of the unanimous opinion that committal proceedings are largely a waste of time and effort and do not contribute appreciably to the efficiency of the trial before the Court of Session. While they are obviously time-consuming, they do not serve any essential purpose. There can be no doubt or dispute as to the desirability of every trial, and more particularly of the trial for a grave offence, beginning as soon as practicable after the completion of investigation. Committal proceedings which only serve to delay this step, do not advance the cause of justice. The primary object of protecting the innocent accused from the ordeal of a sessions trial has not been achieved in practice; and the other main object of apprising the accused in sufficient detail of the case he has to meet at the trial could be achieved by other methods without going through a very partial and ineffective trial rehearsal before a Magistrate. We recommend that committal proceedings should be abolished."*

We have reproduced the same to accentuate the change that has taken place in the existing Code. True it is, the committal proceedings have not been

totally abolished but in the present incarnation, it has really been metamorphosed and the role of the Magistrate has been absolutely constricted.

58. In our considered opinion, because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance with the same and raising of any objection in that regard after conviction attracts the applicability of the principle of "failure of justice" and the convict appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well-nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial.

59. At this juncture, we would like to refer to two other concepts, namely, speedy trial and treatment of a victim in criminal jurisprudence based on the constitutional paradigm and principle. The entitlement of the accused to speedy trial has been repeatedly emphasised by this Court. It has been recognized as an inherent and implicit aspect in the spectrum of Article 21 of the Constitution. The whole purpose of speedy trial is intended to avoid oppression and prevent delay. It is a sacrosanct obligation of all concerned with the justice dispensation system to see that the administration of criminal justice becomes effective, vibrant and meaningful. The concept of speedy trial cannot be allowed to remain a mere formality [see Hussainara Khatoon (1) v. State of Bihar [(1980) 1 SCC 81 : 1980 SCC (Cri) 23] ,Moti Lal Saraf v. State of J&K [(2006) 10 SCC 560 : (2007) 1 SCC (Cri) 180 : AIR 2007 SC 56] and Raj Deo Sharma v. State of Bihar [(1998) 7 SCC 507 : 1998 SCC (Cri) 1692 : AIR 1998 SC 3281]].

60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in Mangal Singh v. Kishan Singh[(2009) 17 SCC 303 : (2011) 1 SCC (Cri) 1019 : AIR 2009 SC 1535] wherein it has been observed thus: (SCC p. 307, para 14)

"14. ... Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence."

(emphasis supplied)

61. It is worth noting that the Constitution Bench in Iqbal Singh Marwah v. Meenakshi Marwah[(2005) 4 SCC 370 : 2005 SCC (Cri) 1101 : AIR 2005 SC 2119] (SCC p. 387, para 24) though in a different context, had also observed that delay in the prosecution of a guilty person comes to his

advantage as witnesses become reluctant to give evidence and the evidence gets lost.

62. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused (quaere a victim). Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

63. In the case at hand, as is perceivable, no objection was raised at the time of framing of charge or any other relevant time but only propounded after conviction. Under these circumstances, the right of the collective as well as the right of the victim springs to the forefront and then it becomes obligatory on the part of the accused to satisfy the court that there has been failure of justice or prejudice has been caused to him. Unless the same is established, setting aside of conviction as a natural corollary or direction for retrial as the third step of the syllogism solely on the said foundation would be an anathema to justice.

64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice.

65. We may state without any fear of contradiction that if the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial.

66. Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance with Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in Bhooraji [(2001) 7

SCC 679 : 2001 SCC (Cri) 1373 : AIR 2001 SC 3372] lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused.

67. The decisions rendered in Moly [(2004) 4 SCC 584 : 2004 SCC (Cri) 1348 : AIR 2004 SC 1890] and Vidyadharan [(2004) 1 SCC 215 : 2004 SCC (Cri) 260] have not noted the decision in Bhooraji [(2001) 7 SCC 679 : 2001 SCC (Cri) 1373 : AIR 2001 SC 3372] , a binding precedent, and hence they are per incuriam and further, the law laid down therein, whereby the conviction is set aside or the matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law and, accordingly, they are hereby, to that extent, overruled.

68. The appeals be placed before the appropriate Bench for hearing on merits."

11. It is apparent from the above judgment that the principle of failure of justice has been stuck in the above mentioned case by Hon'ble Supreme Court and it has also held that the procedure of commitment of case in amended Cr.P.C. has been made of very superficial nature as the Magistrate committing the case, does not enjoy any power to make deeper analysis of the evidence which he was supposed to collect under unamended Cr.P.C. and now he has simply to commit the case irrespective of what were the facts and evidence on record. Therefore, no deeper scrutiny is required to be made of the evidence gathered by the Investigating Officer under the provision of 193 Cr.P.C. nor does he have any discretion to commit the case to the Court of Sessions as he is bound to commit the case. Therefore, it is held that merely because in this case commitment was not made, all the proceedings would not vitiate the trial on that ground alone as it was necessary to show that by non-compliance, failure of justice had occurred or any deep prejudice was caused to the accused, though I am of the view that this judgment would not apply in the present case because this judgment belongs to a period prior to amendment in section 14 of SC/ST Act which provides for the power to the Special Court to directly take cognizance. But even if, what has been mentioned in this ruling as I have discussed above, i.e principle of prejudice or failure of justice be taken into consideration, in the light of the facts of present case I find that the entire evidence has already been collected in this case and it is thereafter that the accused has resorted to this objection that the case was not committed to the Special Court, hence it did not have power to try this case, I do not see any prejudice to have been caused to the accused nor do I see that failure of justice would occur in this case because the Special Court created under section 14 of the SC/ST Act is also conferred with the power of Sessions Judge. In the present case, the offence under section 3(2) (V) of the SC/ST Act is alleged to have been committed along with offence under section 302 IPC, therefore, it would result in failure of justice if a separate Sessions Court be asked to decide the offence under section 302 IPC while the Special Court be allowed to hold trial for offence under section 3 (2) (V) of SC/ST Act. That would seem to be anomalous situation.

12. In order to gather the objective of the amendment in the SC/ST Act, it would be pertinent to take into consideration the Annual Report of the Government of India under section 21 (4) of the SC/ST Act for the year 2016, which speaks that ---

"1.1 THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 AND THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) RULES, 1995.

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (No.33 of 1989) (hereinafter referred as ' PoA ' Act) came into force with effect from 30.01.1990. This legislation aims at preventing commission of offences by persons other than Scheduled Castes and Scheduled Tribes against members of Scheduled Castes (SCs) and Scheduled Tribes (STs) to provide for Special Courts for trial of such offences and for relief and rehabilitation of the victims of such offences. The PoA Act extends to whole of India except the State of Jammu and Kashmir. With an objective to deliver members of SCs and STs, a greater justice, the PoA Act has been amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (No.1 of 2016), notified in the Gazette of India Extraordinary on 01.01.2016 and enforced with effect from 26.01.2016. The amendments broadly relate to rephrasing and expansion of some of earlier offences and addition of several new offences, addition of certain IPC offences attracting less than ten years of imprisonment committed against members of SCs and STs, as offences punishable under the PoA Act, establishment of Exclusive Special Courts and specification of Exclusive Special Public Prosecutors to exclusively try the offences under the PoA Act to enable expeditious disposal of cases, power of Special Courts and Exclusive Special Courts to take direct cognizance of offence and as far as possible, completion of trial of the case within two months from the date of filing of the charge sheet, addition of chapter on the ''Rights of Victims and Witnesses' and wilful negligence of a public servant in discharging duties for registration of complaints, recording statement of witnesses, conducting investigation and filing charges and any other duties specified in the Act and Rules. The PoA Act is implemented by the respective State Governments and Union Territory Administrations, which are provided admissible Central assistance under the Centrally Sponsored Scheme for effective implementation of the provisions of the Act. Main provisions of the PoA Act are as under: -

(i) Defines offences of atrocities and prescribes punishment therefor, (Section 3).

(ii) Punishment for wilful neglect of duties by non-SC/ST public servants (Section 4).

(iii) Establishing an Exclusive Special Court for one or more districts, specifying Court of Session to be a Special Court for speedy trial of offences under the Act. Powers of these Courts to take direct cognizance of offences under the Act, duty of the State Government to establish adequate number of Courts to ensure that cases under the Act are disposed of within a period of two months as far as possible (Section 14).

(iv) An appeal against judgment of Special Court or an Exclusive Special Court to the High Court (Section 14A).

(v) Appointment of Exclusive Special Public Prosecutors and Special Public Prosecutors for conducting cases in Exclusive Special Courts and Special Courts (Section 15).

(vi) Rights of Victims and Witnesses (Section 15A).

(vii) Preventive action to be taken by the law and order machinery (Section 17).

(viii) Measures to be taken by State Governments for effective implementation of the Act, including: -

a. Adequate facilities including legal aid, to the persons subjected to atrocities to enable them to avail themselves of justice;

b. Economic and social rehabilitation of victims of the atrocities;

c. Appointment of officers for initiating or exercising supervision over prosecution for contravention of the provisions of the Act; and

d. Setting up of Committees at appropriate levels to assist the Government in implementation of the Act;

e. Delineation of "Identified Areas"(commonly known as "Atrocity Prone Areas") where members of SC/ST are vulnerable to being subjected to atrocities and adoption of necessary measures to ensure their safety. {Section 21 (2)}.

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules,1995 under the PoA Act were notified on 31.03.1995, which, among other things, prescribed minimum scale of relief and rehabilitation for the affected persons. The prescribed minimum scale of relief and rehabilitation under the Rules has been amended from time to time.

Consequent upon amendments done in the PoA Act, certain amendments had been necessitated in the PoA Rules. Accordingly necessary amendments have been done in the PoA Rules by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Rules, 2016, notified in the Gazette of India on 14.04.2016, which broadly relate to provision of relief amount for 47 offences of atrocity, rationalization of the phasing of payment of relief amount to victims for various offences of atrocities, enhancement of relief amount to Rs. 85000/- to Rs. 8,25,000/-, depending upon the nature of the offences, payable of admissible relief amount within seven days, completion of investigation and filing of charge sheet in court within sixty days, to enable timely commencement of prosecution and periodic review of the Scheme for the rights and entitlements of victims and witnesses in accessing justice, by the State, District and Sub-Division Level Vigilance and Monitoring Committees in their respective meetings.

Salient provisions of the PoA Rules notified under the PoA Act are as under: -

(i) Precautionary and Preventive Measures to be taken by the State Governments regarding offences of atrocities (Rule 3).

(ii) Investigation of offences under the Act to be done by not below the rank of a DSP level Officer {Rule 7 (1)}.

(iii) Completion of investigation and filing of charge sheet in court within sixty days and report forwarded to Director General of Police or Commissioner of Police of the State {Rule 7 (2)}.

(iv) Setting up of the Scheduled Castes and the Scheduled Tribes Protection Cell at State headquarters under the charge of Director General of Police/IG Police (Rule 8).

(v) Nomination of (a) a Nodal Officer at the State level (not below the rank of a Secretary to the State Government), and (b) a Special Officer at the district level (not below the rank of an Additional District Magistrate) for districts with identified atrocity prone areas to co-ordinate the functioning of DMs, SPs and other concerned officers, at the State and

District levels, respectively. (Rule 9 and 10).

(vi) Provision of relief in cash or kind or both to victims of atrocities as per prescribed norms within seven days. (Rule 12 (4) and Schedule).

(vii) State Government/Union Territory Administration to provide necessary authorization and powers to the District Magistrate for immediate withdrawal of money from treasury so as to timely provide the relief amount to atrocity victims (Rule 12(4A).

(viii) State Level Vigilance and Monitoring Committee under the Chief Minister to meet at least twice a year (Rule 16).

(ix) District Level Vigilance and Monitoring Committees under the District Magistrate to meet at least once every quarter (Rule 17).

(x) Sub-Divisional Level Vigilance and Monitoring under the Sub-Divisional Magistrate to meet at least once every quarter (Rule 17 A)."

13. It is apparent from the said report that the main aim for introducing the amendment was to ensure expeditious disposal of offences pertaining to this Act, hence keeping in mind the said aim, the amendment has been incorporated in the said Act conferring upon Special Judge power to directly try the case and not wait for the commitment of the case to it because that would result in delay. A deeper scrutiny of entire report which is too long, would indicate that whatever data has been collected with respect to pendency and disposal of cases pertaining to SC/ST Act, also included the cases under SC/ST Act coupled with the offence falling under IPC, therefore, it appears that the intention of the legislature would have been, while passing the Act, to ensure that even if an offence is found to have been committed under IPC as well as under SC/ST Act, the same should be tried by one court only i.e. Special Court which has been conferred the power of taking cognizance directly to minimize the delay in disposal of the case, therefore, I am of the view that in the present case the cognizance which has been taken by the trial court directly under the above-mentioned sections, does not suffer from any infirmity and the objection raised by the learned counsel for the applicant is not found to have any force.

14. In view of the aforesaid, the application deserves to be dismissed and is accordingly dismissed.

(2020)06ILR A80
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 1726 of 2016

Devendra Kumar Garg ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Amit Daga

Counsel for the Opposite Parties:
A.G.A., Sri Pankaj Bharti, Sri Ajay Kumar Sharma

Civil Law - Negotiable Instruments Act, 1881 - Section 138, 141 - Offences by companies - for maintaining the prosecution under section 141 of the N.I. Act arraigning of a company as an accused is imperative – In absence of the company being arraigned as an accused a complaint is not maintainable

Notice as well as the complaint u/s 138 N.I. Act was filed against the applicant, who was Director of Firm, in his individual capacity -

Company was not arrayed as a party neither in the notice nor in the complaint – Held - for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative - since company was not arraigned as an accused (Para 8,9)

Application dismissed. (E-5)

List of case cited:-

1. Aneeta Hada Vs Godfather Travels & Tours Pvt. Ltd. (2012) 5 SCC 661

2. Himanshu Vs B.Shivamurthy & anr. (2019) 3 SCC 797

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

1. The present application under Section 482 Cr.P.C. has been filed by the applicant seeking following relief:

"quashing the order dated 17.7.2013 passed by A.C.J.M., Court No.2, Muzaffarnagar in Criminal Complaint Case No.152/9 of 2013, "Pawan Kumar Goel Vs. Devendra Kumar Garg" and order dated 05.12.2015 passed by learned Additional Sessions Judge, Court no.10, Muzaffarnagar inCriminal Revision No.290 of 2013, 'Devendra Kumar Garg Vs. Pawan Kumar Goel', as well as the entire proceedings of Criminal Complaint Case No.152/9 of 2013, 'Pawan Kumar Goel Vs. Devendra Kumar Garg' under Section 138 of N.I.Act, Police Station-Civil Lines, District-Muzaffarnagar, presently pending before the Court of learned A.C.J.M. IInd, Muzaffarnagar."

2. Heard Shri. Amit Daga, learned counsel for the applicant, Shri. Ajay Kumar Sharma, learned counsel appearing on behalf of the State O.P. No.2 is represented through his counsel Shri. Pankaj Bharti, but none appeared on his behalf even in the revised call and the judgment was reserved.

3. The facts as narrated in the application are as follows:

(i) The O.P. No.2 filed a criminal complaint against the applicant under Section 138 of the N.I. Act before the Court of learned Additional Chief Judicial Magistrate, Court No.II, Muzaffarnagar, on 28.1.2013. In the complaint it was alleged that the complainant's firm indulged in the business of Machineries and the accused/applicant was running a chemical factory in the name and style "Ravi Organics Ltd." It was further alleged that during the course of transaction, accused applicant being director of his firm issued one cheque bearing No.802275 dated 31.10.2012 of Rs.10 lakhs payable at Union Bank of India, Muzaffar Nagar. It was further alleged in the complaint that the said cheque was deposited in the complainant's bank at State Bank of Patiala Court Road, Muzaffarnagar for encashment however, the same was returned by the bankers of the accused applicant with an endorsement "Exceeds Arrangement." It was further alleged that complainant sent one registered legal demand notice to the applicant on 29.12.2012 through registered post however, when the amount was not paid, the aforesaid complaint was filed.

(ii) On the basis of the complaint as well as other materials on record, the learned Magistrate took cognizance and called the complainant to record his statement under Section 200 Cr.P.C. The complainant filed the statement by way of an affidavit. On the basis of materials available on record, the learned A.C.J.M. Court No.II, Muzaffarnagar took cognizance by order dated 17.7.2013.

(iii) The applicant being aggrieved by the summoning order dated 17.7.2013 preferred a Criminal Revision No.290 of 2013,

before the Additional Sessions Judge, Muzaffarnagar which was dismissed by the learned Sessions Court on 17.7.2013. The applicant thereafter preferred present application for quashing of the order dated 17.7.2013 as well as the order dated 05.12.2015.

(iv) Shri. Pankaj Bharti has filed his Vakalatnama on behalf of O.P. No.2 on 22.1.206 however, no counter affidavit was filed despite the matter was listed on many occasions as well as counsel was not even present when judgment was reserved on 07.2.2020.

(v) This Court passed the following order on 05.12.2016:

"Heard learned counsel for the applicant, learned counsel for the complainant as well as learned A.G.A. for the State and perused the record.

This application under Section 482 Cr.P.C. has been filed by the applicant with the prayer to quash the order dated 17.07.2013 passed by Additional Chief Judicial Magistrate, Court No. 2, Muzaffarnagar in Criminal Complaint Case No. 152/9 of 2013, and order dated 05.12.2015 passed by Additional Sessions Judge, Court No. 10, Muzaffarnagar in Criminal Revision No. 290 of 2013, under Section 138 of Negotiable Instrument Act, Police Station Civil Lines, District Muzaffarnagar.

Submission of the learned counsel for the applicant is that complaint has been filed without making party to the company though complainant case is that cheque in question had been issued by the applicant in capacity of the director of Ravi Organics Limited. At this stage learned counsel for the applicant placed reliance on the following case laws.

I. S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and another (2005)8 Supreme Court Cases 89.

II. Yogendra Kumar Khullar @ Bittoo Vs. State of U.P. and another 2012 (79) ACC 789.

III. Anita Hada Vs. Godfather Travels and Tours Private Limited (2012) 5 Supreme Court Cases 661.

Learned A.G.A. as well as learned counsel for the complainant argued that non-bailable warrant has been issued in the matter. Applicant is authorized signatory hence complaint can go on.

Having heard the learned counsel for the parties and in view of the law laid down in Anita Hada (supra), Yogendra Kumar Khullar@ Bittoo (supra) and S.M.S. Pharmaceuticals Ltd. (supra), matter requires thorough consideration.

Learned AGA has accepted notice on behalf of the opposite party no.1.

Issue notice to opposite party no. 2.

Steps be taken by Registered Post A.D. within a week.

All the opposite parties may file counter affidavit within four weeks. Rejoinder affidavit may be filed within two weeks thereafter.

List on 25.04.2016 before the appropriate Bench.

Till the next date of listing, further proceedings of the aforesaid complaint case shall remain stayed only against the applicant."

4. Shri. Amit Daga, learned counsel appearing on behalf of the applicant submitted that if any complaint under Section 138 of the N.I. Act is filed in respect of dishonour of cheque issued from the account of a Company, it is incumbent on the part of the complainant to make necessary averments in the complaint that at the time when offence was committed, the person accused was incharge and was

responsible for the conduct and business of the Company. However, in the complaint in question, the company was not made a party as an accused. He further submitted that it is settled position of law that for maintaining the prosecution under Section 141 of the N.I. Act arraigning of a company as an accused is imperative. In support of his submission he relied upon a judgment of three Judges of the Apex Court in ***Aneeta Hada Vs. Godfather Travels and Tours Private Limited (2012) 5 SCC 661***. He further relied on paragraph nos.58 and 59 of the said judgment.

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in State of Madras v. C.V. Parekh (1970) 3 SCC 491, which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal v. State of M.P. does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada v. Indian Acrylic Ltd, (2000) 1 SCC 1 is overruled with the qualifier as stated in paragraph 51. The decision in U.P. Pollution Control Board v. Modi Distillery, (1987) 3 SCC 684 has to be treated to be restricted to its own facts as has been explained by us hereinabove." (Emphasis supplied)

5. He further relied upon a recent judgment in Himanshu Vs. B.Shivamurthy & Anr,2019 (3) SCC 797, wherein in paras 12, 13 and 14 it has been held that:

"12.The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable.

The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

14. We, accordingly, are of the view that the High Court was in erorr in rejecting the petition under Section 482 of

the CrPC. We hence allow the appeal and set aside the judgment of the High Court. In consequence, the complaint, being C.R.P No. 27/2004 shall stand quashed." (Emphasis supplied)

6. He further relied upon various orders passed by a co-ordinate bench of this Court where on the basis of similar contention relief has been granted to the applicant. Details of said petitions are as follows: (i) Criminal Misc. Writ Petition No.25369 of 2013 dated 19.11.2019; (ii) Criminal Misc. Writ Petition No.24377 of 2013 dated 19.11.2019; (iii) Criminal Misc. Writ Petition No.24632 of 2013 order dated 19.11.2019; (iv) Criminal Misc. Writ Petition No.25491 of 2013 order dated 19.11.2019.

7. Shri. Ajay Kumar Sharma, learned counsel appearing on behalf of the State has not disputed the legal position as submitted by the learned counsel for the applicant.

8. From perusal of the contents of the notice and complaint, it is evident that the notice as well as the complaint was filed against the applicant in his individual capacity. Company was not arrayed as a party neither in the notice nor in the complaint. Hon'ble Apex Court in the case of ***Aneeta Hada (supra)*** has held that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative.

9. Judgment passed in ***Aneeta Hada (supra)*** is also followed in the case of ***Himanshu (supra)***, wherein the Apex Court has dismissed the complaint, since company was not arraigned as an accused. Present case is squarely covered by the judgment passed in ***Aneeta Hada (supra) and Himanshu (supra)***.

10. In view of the above discussions, this application is allowed and the order dated 17.7.2013 passed by A.C.J.M., Court No.2, Muzaffarnagar in Criminal Complaint Case No.152/9 of 2013, "Pawan Kumar Goel Vs. Devendra Kumar Garg" and order dated 05.12.2015 passed by learned Additional Sessions Judge, Court no.10, Muzaffarnagar in Criminal Revision No.290 of 2013, 'Devendra Kumar Garg Vs. Pawan Kumar Goel', as well as the entire proceedings of Criminal Complaint Case No.152/9 of 2013, 'Pawan Kumar Goel Vs. Devendra Kumar Garg' under Section 138 of N.I.Act, Police Station-Civil Lines, District-Muzaffarnagar, presently pending before the Court of learned A.C.J.M. IInd, Muzaffarnagar are hereby quashed.

(2020)06ILR A84
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 2331 of 2020

Anoop Keshari @ Anoop Chowdhary ...Applicant

Versus

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

Counsel for the Applicant:
Sri Vimlendu Tripathi

Counsel for the Opposite Parties:
A.G.A., Sri Ram Vishal Mishra

A. Criminal Law - Criminal Procedure Code (2 of 1974) - Section 145 - Section 145 - deals with dispute concerning land likely to cause breach of peace - however dispute regarding office of Management of the Society, registered under Societies Registration Act, cannot be held as a dispute regarding ownership and possession of immovable property - Executive Magistrate has no jurisdiction to decide such dispute u/s 145 CrPC

Immovable property in dispute was a Arya Samaj Temple, a property of religious

endowment - Held - it is not a property of either of the party but is a property dedicated to Almighty and open for worship by all - no question of dispute regarding ownership or possession of the property is there - dispute was only regarding office of Management of the Society – such dispute can never be held as a dispute regarding ownership and possession of immovable property - City Magistrate without jurisdiction passed order of attachment of the Temple as well School Property of Arya Samaj Temple u/s 146(1) Cr.P.C. - orders passed by the City Magistrate u/s 145(1) and 146(1) Cr.P.C. quashed (Para 7, 8, 9)

B. Criminal Law - Criminal Procedure Code (2 of 1974) - Section 145, 146 - Condition precedent for passing order by the Magistrate u/s 145 Cr.P.C. is that the Magistrate has to give proper reasons for his satisfaction for invoking jurisdiction u/s 145 Cr.P.C. - order to be passed after application of mind - Application of judicial mind - meaning - an order can be held to be passed on application of judicial mind only when it contains both sides' contentions and the documents filed by them in support of their respective claim & the reasons for taking the decision. (Para 7, 8)

Application allowed. (E-5)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application u/s 482 Cr.P.C. has been filed by applicant Anoop Keshari alias Anoop Chowdhary against State of U.P. and three others with a prayer for quashing impugned order dated 24.12.2019 passed u/s 146(1) Cr.P.C. as well as impugned order dated 28.11.2019 passed u/s 145(1) Cr.P.C. by the City Magistrate, Allahabad, in Case No. D-201902030007120 of 2019, Pratap Narain Mishra Vs. Anoop Keshari and others, P.S. Kotwali, District Allahabad, as well as entire proceeding of above mentioned case.

2. Learned counsel for applicant argued that the matter in question was not with regard to ownership and possession of any individual immovable property. Rather property in question is of Arya Samaj Temple having two colleges running with it and it is belonging of Arya Pratinidhi Sabha, U.P., Lucknow, under general superintendence of Sarvdeshik Arya Pratinidhi Sabha, New Delhi, for whole of India since mid of 19th century and everybody is having right and use to worship in above temple. There occurred no apprehension of breach of peace regarding above Arya Samaj Temple because O.P. No. 2 as well as applicant use to visit and worship in above temple. The dispute was regarding office of management and O.P. No. 2 was Secretary. In the year 2017 election of office bearers took place wherein the applicant was elected as Mantri to manage the affairs of above Arya Samaj Temple and its allied subject at Allahabad. This was duly recognized by State Unit at Lucknow. Representation was made by O.P. No. 2, but it was rejected by State Level Unit. In between two cases regarding criminal breach of trust and other mismanagement of property of Society, Arya Pratinidhi Sabha, was got lodged against O.P. No. 2 and one Pawan Jaiswal, wherein other co-accused preferred a proceeding u/s 482 Cr.P.C. before this court, which was rejected. Then after a Special Leave Petition was filed before Apex Court where the S.L.P. was rejected. Only after this failure to have some relief, manipulation was made by O.P. No. 2 under connivance with local police as well as Executive Magistrate. Thereafter a proceeding u/s 107/116 Cr.P.C. was undertaken and on this, report for proceeding u/s 145 Cr.P.C. was submitted before the City Magistrate wherein likelihood of breach of peace in

Arya Samaj Temple, Chowk, Allahabad, was reported and the Magistrate in a routine way issued notices to both sides fixing a date. Though, there was no apprehension of breach of peace nor it was an individual immovable property, requiring any interference by Executive Magistrate u/s 145 Cr.P.C. Moreso, a civil suit was also pending on behalf of O.P. No. 2 for determination of right of Secretaryship of Management Committee of Arya Samaj Temple, Chowk, Allahabad, and its allied property. But the learned Magistrate, without applying his judicial mind, passed the impugned order u/s 145(1) Cr.P.C. Both sides appeared before the City Magistrate, therein, documents with reply were filed, wherein, it was specifically mentioned that no dispute regarding ownership or possession of immovable property of Arya Samaj Temple, Chowk, Allahabad, is there, because the Temple is under ownership of Almighty and worship of deities are done by each member belonging to Arya Samaj. The dispute was regarding office of management of Temple and it is within the domain of Assistant Registrar, Societies, as Arya Samaj Temple, Chowk, Allahabad, is a registered Society registered under Societies Registration Act. In case there arises a dispute regarding Management of the Society, it is to be referred to the Sub Divisional Magistrate concerned, who will decide the same. But the learned City Magistrate without making any appreciation of facts and law; by giving any reason, passed the impugned order of attachment of the Temple as well School Property of Arya Samaj Temple, Chowk, Allahabad, under section 146(1) Cr.P.C. whereby work of receivership has been assigned to consignee (supurdagar), which was not within the jurisdiction of the City Magistrate. The dispute regarding office of Management of a Society is to be resolved either by its State Unit or by Central Unit regarding its internal management or by the Assistant Registrar, Societies, under the Societies Registration Act and in case of its failure, reference is to be made under Rule 4 of the Societies Registration Act to the Court of Sub Divisional Magistrate concerned, who will decide as per rules given in the Societies Registration Act. But the learned City Magistrate did not give any reason and without applying its judicial mind passed the impugned order of attachment u/s 146(1) Cr.P.C. and appointed a receiver. It was a mechanical order. It is apparently under abuse of process of law. Hence this application with above prayer.

3. Learned counsel for O.P. No. 2 vehemently opposed the application with contention that O.P. No. 2 is elected Secretary of Committee of Management of Arya Samaj Temple, Chowk, Allahabad, and he was rightly in the office of Management, for which, effort was made by applicant for dispossessing him. Owing to which apprehension of breach of peace was reported by the police to the Executive Magistrate. The jurisdiction u/s 145(1) Cr.P.C. was invoked by the City Magistrate, Allahabad, following the order of attachment u/s 146(1) Cr.P.C. It was well in accordance with law with no abuse of process of law. However, it is being admitted that the property is of Arya Samaj Temple, district Unit Allahabad, open for worship to everybody. The property of Arya Samaj Temple, unit Allahabad, is property of Almighty. Hence, there is no dispute regarding ownership and possession of the property. Rather the dispute is regarding office of management of the Unit. If this Court directs the City Magistrate for disposal of proceeding then O.P. No. 2 is having no objection.

4. Learned AGA has vehemently opposed the application.

5. Section 145 Cr.P.C. provides that whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute, likely to cause a breach of the peace, exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

6. Hon'ble Apex Court in ***Ram Sumer Puri Mahant vs State Of U.P. and others, (1985) 1 SCC 427*** has propounded that when a civil litigation is pending in regard to some immovable property wherein question of possession is involved, the parties in possession to approach civil court for interim order such as injunction or appointment of receiver for adequate protection of the property, during pendency of suit, then there is no jurisdiction for initiating a parallel criminal proceeding under section 145 Cr.P.C. The order made under section 145 Cr.P.C. deals only with the factum of possession of party as on a particular date. It confers no title to remain in possession of disputed property against any decision of civil court.

7. Admittedly, immovable property in dispute is a Arya Samaj Temple, Chowk, Allahabad. Meaning thereby it is a property of religious endowment. Admittedly, the Society, being a registered Society under Societies Registration Act, is having its full control by its Divisional Unit for whole of Division, State Unit of Lucknow for whole of the State of U.P. and National Unit Delhi for whole of the nation. Meaning thereby it is not a property of either of the party. It is a property dedicated to Almighty and open for worship by all. Hence no question of dispute regarding ownership or possession of the property is there. The dispute is only regarding office of Management of the Society. In the impugned order, the Magistrate, for initiating proceeding u/s 145 Cr.P.C., has written about dispute regarding ownership and possession of the property, which is apparently against facts on record. This reveals that the Magistrate, while passing the impugned order, has not applied its judicial mind. This order is with no reason. Whereas initial order is to be passed with reason, as has been mentioned in section 145 Cr.P.C. The condition precedent for passing order by the Magistrate is that the Magistrate has to give proper reasons for his satisfaction for invoking jurisdiction u/s 145 Cr.P.C. But in the impugned order there is no reason at all. On this score only the impugned order u/s 145(1) Cr.P.C. is not to be sustained.

8. Regarding second impugned order u/s 146(1) Cr.P.C., the parties appeared before the Magistrate, they filed their reply and documents in support of their contentions. What were the documents, how it was appreciated, what questions were involved, what were facts of documents, what were contentions of parties have not been mentioned in the impugned order. It itself shows that the Executive Magistrate, while passing impugned orders u/s 145(1) Cr.P.C. as well as u/s 146(1) Cr.P.C., has not followed the mandate of Legislature given under sections 145 and 146 Cr.P.C. Order of this character can never be said to be an order

after application of judicial mind. There is principle of legislative expectancy that when a dispute is there, both sides are filing their reply and documents in support of their claim then the man, who is making decision, has to mention both sides' contentions and the documents filed by them in support of their respective claim, then the reasons for taking the decision and then only the order can be held to be on application of judicial mind. Hence both the impugned orders are not to be sustained, as such they are under abuse of process of law.

9. The dispute regarding office of management of Society, registered under Societies Registration Act, can never be held as a dispute regarding ownership and possession of immovable property and for this Legislature has given Societies Registration Act with rules framed there under. Assistant Registrar has the authority to decide the dispute regarding management of office of Society. In case of its failure, reference is to be made to the Sub Divisional Magistrate of the area under Rule of the above Act for adjudication. But by these impugned orders, under challenge, the City Magistrate has decided to take over possession of the property and has appointed some receiver for making management of the above property, which was of Almighty having no dispute regarding its ownership and possession. Under garb of attachment order, receiver has been appointed, which power never vests with the Executive Magistrate, particularly when a civil suit has already been filed by O.P. No. 2. There is a chapter under Code of Civil Procedure for appointment of receiver to protect the property in dispute. Hence this application merits to be allowed.

10. The application under section 482 Cr.P.C. is allowed and both the impugned orders passed by the City Magistrate u/s 145(1) and 146(1) Cr.P.C. are hereby quashed with this specific mention that an officer of City Magistrate rank i.e. a senior Executive officer should be careful in future in making such type of decision without any reason in order.

11. The file is being remanded back to the Magistrate concerned to make decision in accordance with law, provisions of Code of Criminal Procedure along with precedents of Apex Court and this court.

(2020)06ILR A88
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.02.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

U/S 482/378/407 No. 2801 of 2012

Smt. Archana Gupta & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Arun Sinha, Riyaz Ahmad

Counsel for the Opposite Parties:
Govt. Advocate, Vinay Kumar Singh

A. Criminal Law - Indian Penal Code (45 of 1860) - Section 415- Section 420 - Offence of Cheating - distinction between mere breach of contract & the offence of cheating - for cheating - fraudulent or dishonest intention to cheat/ deceive must be shown to exist right at the time of making of promise -"mens rea" on the part of accused must be established at the

very beginning/inception of the transaction - in case of mere failure to keep up promise subsequently culpable intention to deceive cannot be presumed at the beginning when the accused made the promise (Para 11)

B. Criminal Law - Indian Penal Code (45 of 1860) – Section 405 - Section 406 - Criminal breach of trust - first requirement is 'entrustment of property' by victim to accused

There were dues payable by accused-applicants to complainant in respect whereof a cheque was issued by Accused-applicants but when it was submitted for collection the same was dishononoured - Opposite Party filed complaint - Magistrate summoned applicant u/s 406, 420 - *Held* - complaint basically refers to offence under Section 138 of Negotiable Instruments Act, 1881 - dues payable by Accused - Applicants satisfy liability as 'debt' but cannot be treated to be entrustment of property by Complainant to Accused persons and when there is no entrustment, question of dishonest misappropriation or conversion of such property to own use by such persons does not arise - ingredients of 'cheating and dishonest inducement for delivery of property' or 'entrustment of property' as required u/Ss. 420,406 not satisfied- Offence not made out - Proceedings, quashed (Para 26)

Application allowed (E-5)

List of case cited :

1.Mahadeo Prasad Vs St. of W.B. AIR (1954) SC 724

2.JaswantraiManilalAkhaney Vs St. of Bom AIR (1956) SC 575

3.G.V. Rao Vs L.H.V. Prasad & ors. (2000) 3 SCC 693

4.HridayaRanjan Prasad Verma & ors. Vs St. of Bihar & anr. (2000) 4 SCC 168

5.S.W. Palanitkar & ors Vs St. of Bihar & anr. (2002) 1 SCC 241

6.Hira Lal Hari lalBhagwati Vs CBI, New Delhi 2003(5) SCC 257

7.Devender Kumar Singla Vs Baldev Krishan Singh (2004) 2 JT 539 SC

8.I.O.C. Vs NEPC India Ltd. (2006) 6 SCC 736

9.Rajesh Bajaj Vs St. NCT of Delhi, (1999) 3 SCC 259

10.Vir Prakash Sharma Vs Anil Kumar Agarwal & anr. (2007) 7 SCC 373

11.Sh. Suneel Galgotia & anr. Vs St. of U.P. & ors. (2016) 92 ACC 40

12.R.K. Vijayasarathy & ors. Vs SudhaSeetharam & ors. (2019) 3 SCALE 563

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

1. Sri Arun Sinha, Advocate for the applicants is present. None appeared on behalf of opposite party 2 though name of Sri Vinay Kumar Singh, Advocate, is shown in cause list as counsel for opposite party. Hence I proceed to decide the application after hearing learned counsel for applicants and learned A.G.A.

2. Opposite party 2 Complainant Babu Lal Gaur filed an application under Section 156(3) Cr.P.C., which has been treated as complaint and after recording statements of complainant and witnesses under Sections 200 and 202 Cr.P.C., Magistrate has summoned applicants for trial under Sections 406, 420 IPC vide order dated 29.02.2012.

3. It is contended that perusal of complaint shows that if allegations made in the complaint are taken to be correct, yet no offence under Sections 406, 420 IPC is made out.

4. The complaint filed by complainant-opposite party 2 reads as under :

"1. यह कि प्रार्थी उपरोक्त पते का स्थाई निवासी है,जो श्रीमान जी के क्षेत्राधिकार में आता है।

2. यह कि उपरोक्त विपक्षीगण मेसर्स रिलायन्स कम्युनिकेशन्स के लिए ठेकेदारी का काम करते है। उपरोक्त विपक्षीगणों ने प्रार्थी को मेसर्स मेसर्स ए0वी0आई0 कंस्ट्रक्शन्स कम्पनी, ए–17, आस्था कुंज, साऊथ सिटी, रायबरेली रोड, थाना मोहनलालगंज, लखनऊ के लिए सब कान्ट्रैक्ट के रूप में काम करने का ऑफर दिया।

3. यह कि प्रार्थी ने उपरोक्त विपक्षीगणों का ऑफर स्वीकार कर लिया तथा दिनांक 16/03/2008 से 16/06/2008 तक के लिए प्रार्थी को भूमिगत केबिल बिछाने का काम मिला। प्रार्थी ने उपरोक्त काम में लगभग रू0 5,50,000/–(पांच लाख पचास हजार रूपया) लगाया।

4. यह कि प्रार्थी ने अपना काम समय पर पूरा कर दिया तथा अपनी रिपोर्ट विपक्षीगणों को सौंप दी। विपक्षीगण प्रार्थी के कार्य से संतुष्ट व खुश थे।

5. यह कि जब प्रार्थी ने अपने पेमेन्ट की मांग की, तो विपक्षीगणों द्वारा बताया गया कि प्रार्थी रिलायन्स कम्यूनिकेशन्स में पैसा नहीं मिला है। जब मिल जायेगा, तब अपकी पेमेन्ट कर देंगे।

6. यह कि इस तरह विपक्षीगण प्रार्थी को लगातार टहलाते रहे। प्रार्थी द्वारा रूपया मांगने पर प्रार्थी पर नाजायज दबाव बनाने लगे। प्रार्थी को बाद में यह भी ज्ञात हुआ कि विपक्षीगणों को मेसर्स रिलायन्स कम्यूनिकेशन से बकाया पेमेन्ट प्राप्त हो चुका है।

7. यह कि प्रार्थी द्वारा बार–बार अपना रूपया मांगने पर विपक्षीगणों ने प्रार्थी को चेक नं0 224449, दिनांकित 10/12/08 रूपया 1,99,000/– एच0डी0एफ0सी0 बैंक पद देय था, प्रार्थी को दिया। प्रार्थी ने जब उसे अपने एकाउंट में लगाया, तो वह चेक "इनसफिसियेन्ट फंड" लिखकर वापस आ गयी।

8. यह कि जब प्रार्थी वह चेक लेकर विपक्षीगणों के पास गया, तो विपक्षीगणों ने कहा कि आप एक दूसरा चेक ले लीजिये। प्रार्थी को जब दूसरा चेक नं0 224450 दिनांकित 11/06/09 रू0 4,50,000/– एच0डी0एफ0सी0 बैंक पर देय था, दिया गया। जब प्रार्थी ने वह चेक अपने एकाउंट में लगाया, तो वह चेक एकाउंट बंद लिखकर वापस आ गया। विपक्षीगणों ने जानबूझकर, धोखा देने की नियत से, छल कपट पूर्वक, एकाउंट क्लोज की चेक दी, जो बाउंस होकर वापस आ गयी।

9. यह कि प्रार्थी को विपक्षीगण बार–बार धोखा देते रहे तथा प्रार्थी का पैसा वापस नहीं किया। प्रार्थी को इसके बाद दो चेके नं0 752922 दिनांकित 26/06/11 रू0 4,50,000/– एस0बी0आई0, लखनऊ एवं चेक नं0 752923 दिनांकित 26/06/11 रू0 13,500/– एस0बी0आई0 लखनऊ पर का दिया गया।

10. यह कि उपरोक्त दोनों चेके भी बैंक में लगाते ही "इनसफिसियेन्ट फंड" लिखकर वापस आ गयी।

11. यह कि प्रार्थी को मालूम हुआ कि उपरोक्त विपक्षीगणों के खिलाफ थाना मोहनलालगंज में श्री प्रवीन बागड़े ने मु0अ0सं0 287/11 धारा 406/506 में प्रथम सूचना रिपोर्ट दर्ज करा रखी है, प्रार्थी जब अपनी रिपोर्ट लिखाने गया, तो थाना– मोहनलालगंज द्वारा प्रार्थी की रिपोर्ट नहीं लिखी गयी।

12. यह कि थाना–मोहनलालगंज द्वारा कोई कार्यवाही न किये जाने पर प्रार्थी द्वारा उक्त घटना के सम्बन्ध में दिनांक 26/07/2011 को प्रार्थना पत्र पंजीकृत डाक द्वारा श्रीमान् पुलिस अधीक्षक महोदय, लखनऊ को भी भेजी गयी है, जिस पर भी अभी तक कोई कार्यवाही नहीं की गयी है। प्रार्थना पत्र एवं रजिस्ट्री रसीद की छायाप्रति माननीय महोदय के समक्ष सुलभ अवलोकनार्थ हेतु ***संलग्नक संख्या 1,*** *संलग्न है।*

13. यह कि प्रार्थी के उक्त पंजीकृत प्रार्थना–पत्रों पर भी जब कोई नहीं की गयी, तब प्रार्थी द्वारा विवश होकर न्याया पाने के उद्देश्य से उपरोक्त प्रार्थना पत्र माननीय महोदय के समक्ष संस्थित कर रहा है।

14. यह कि अभियुक्तगण बहुत ही दबंग एवं पहुंच वाले व्यक्ति है। यदि अभियुक्तगणों के खिलाफ अविलम्ब कोई कार्यवाही नहीं की गयी, तो अभियुक्तगण साजिश रच करके प्रार्थी एवं उसके परिवार वालों को किसी झूठे मुकदमें में भी फंसवा सकते हैं तथा जान से भी मरवा सकते हैं।

15. यह कि उक्त घटना श्रीमान् की स्थानीय अधिकारिता वाली सीमाओं में घटित हुई है, इसलिये उक्त अपराध की जांच एवं विचारण करवाने का पूर्ण अधिकार श्रीमान् जी को प्राप्त है।

16. यह कि उपरोक्त परिस्थितियों, तथ्यों एवं कारणों को दृष्टिगत रखते हुए अन्तर्गत धारा 156(3) द0प्र0सं0 के प्राविधानों के अन्तर्गत वाद पंजीकृत किये जाने एवं विवेचना किये जाने का आदेश/निर्देश प्रभारी निरीक्षक थाना कृष्णानगर, जनपद–लखनऊ को दिया जाना न्यायहित में नितान्त आवश्यक व न्याय संगत है अन्यथा प्रार्थी न्याय पाने से वंचित रह जायेगा।

<u>प्रार्थना</u>

अतः सम्मानीय न्यायालय से याचना है कि न्यायहित में प्रार्थना पत्र में वर्णित तथ्यों, कारणों एवं लगे साक्ष्यों के आधार पर थानाध्यक्ष मोहनलालगंज को निर्देशित करें, कि वह प्रार्थी की प्रथम सूचना रिपोर्ट अंकित कर विवेचना के परिणाम से माननीय न्यायालय को सूचित किये जाने का आदेश पारित करने की कृपा करें।''

"1. That the applicant is permanent resident of aforementioned address which falls within your jurisdiction.

2. That the aforesaid opposite parties are engaged as contractor for M/s Reliance Communications. The aforesaid opposite parties had offered to work as a sub-contract for M/s A.V.I. Constructions Company, A-17, Aastha Kunj, South City, Raibareli Road, Police Station - Mohanlal Ganj, Lucknow.

3. That the applicant has accepted the offer of aforesaid opposite parties and got the work of laying underground cable from 16/03/2008 to 16/06/2008. The applicant had invested about Rs. 5,50,000/- (Rupees Five Lacs and Fifty Thousand) in the aforesaid work.

4. That the applicant completed his work in time and handed over his report to the opposite parties. The opposite parties were satisfied and happy with the work of applicant.

5. That when the applicant raised demand for payment, it had been told by the opposite parties that they had not received money form Reliance Communications and they would make pay him after receiving it.

6. That in this manner the opposite parties kept on equivocating the applicant continuously. When the applicant asked for money, the began to mount undue pressure on the applicant. Later on the applicant got to know that the opposite parties had received the left over payment from M/s Reliance Communications.

7. That when the applicant repeatedly demanded his money, the opposite parties gave Cheque No. 224449 dated 10/12/08 Rupees 1,99,000/- payable at H.D.F.C. Bank to the applicant. When the applicant deposited this cheque in his account, the same had returned with "Insufficient Fund" endorsed on it.

8. When the applicant went to the opposite parties with that cheque, the opposite parties asked him to take another cheque. The applicant had been given the other cheque bearing number 224450 dated 11/06/2009 Rupees 4,50,000/- payable at H.D.F.C. Bank. When the applicant deposited this cheque in his account, the cheque was returned with "account closed" endorsed on it. The opposite parties with an intention to commit cheating, fraudulently gave a cheque of closed account which got dishonoured and returned.

9. That the opposite parties kept on cheating the applicant repeatedly and did not return the money of applicant. Thereafter, the applicant had been given two cheques bearing No. 752922 dated 26/06/11 Rupees 4,50,000/- S.B.I. Lucknow and No. 752923 dated 26/06/11 Rupees 13,500/- S.B.I. Lucknow.

10. That as soon as both the aforesaid cheques had been deposited in the bank, it returned with "Insufficient Fund" endorsed on it.

11. That the applicant came to know that Shri Pravin Bagde had lodged the First Information Report against the aforesaid opposite parties in Case Crime No. 287/11 under Section 406/506. When the applicant went to lodge the report, the report of the applicant had not been lodged by Police Station Mohanlalganj.

12. That when Police Station Mohanlalganj had not taken any action, the applicant has sent application dated 26/07/2011 regarding the said incident through Registered Post to the Superintendent of Police, Lucknow. Still, no action has been taken on it. The photocopies of application and receipt of the Registered Post is annexed as Annexure No. 1 for your kind perusal.

13. That when no action has been taken on the said registered letters of the applicant, then being compelled and with an object to get justice, the applicant is instituting the aforesaid application before you.

14. That the accused persons are very dominating and sourceful persons. If no action is taken up promptly against the accused persons, the accused persons may conspire and even implicate the applicant or his family membersin any false case or get them even killed.

15. That the said incident has occurred within your local jurisdiction, therefore you have full authority to get conducted the investigation and trial of the said offence.

16. That having regard to the aforesaid circumstances, facts and causes, it is essential and just in the interest of justice to register the case under the provisions of Section 156 (3) Cr.P.C. and to issue the order/ direction to In-charge Inspector Police Staion Krishna Nagar, District Lucknow to conduct the investigation or else the applicant shall be deprived from getting justice.

Prayer

Therefore it is urged to the learned Court that in the interest of justice, on the basis of described facts, causes and annexed evidences, directions may be issued to Police Station Mohanlalganj to lodge the First Information Report of the applicant, and an order may please be passed to apprise the outcome of the investigation to the learned Court."

(English Translation by Court)

5. Section 420 is "cheating" which is defined in Section 415 and both these provisions read as under:

*"**415. Cheating.**- Whoever, by **deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property** to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

*Explanation.--A **dishonest concealment of facts is a deception** within the meaning of this section."*

*"**420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person,** or to make, alter or destroy the*

whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

6. In order to attract allegations of "cheating", following things must exist:

(i) The person deceived, delivered to someone or **consented that certain person shall retain property.**

(ii) Person deceived was induced by accused to do as above.

(iii) Such person acted upon such inducement and consequently was deceived by the accused.

(iv) Accused acted fraudulently or dishonestly.

(v) Accused did it intentionally.

(vi) such act or omission caused or likely to cause damage or harm to that person in body, mind, property or reputation. (Emphasis added)

7. Then in order to attract Section 420 I.P.C., essential ingredients are:

(i) cheating;

(ii) dishonest inducement to deliver property or to make or destroy any valuable security or any thing which is sealed or signed or is capable of being converted into a valuable security; and,

(iii) mens rea of accused at the time of making inducement and which act of omission.

8. In **Mahadeo Prasad Vs. State of West Bengal, AIR 1954 SC 724** it was observed that to constitute offence of cheating, intention to deceive should be in existence at the time when inducement was offered.

9. In **Jaswantrai Manilal Akhaney Vs. State of Bombay, AIR 1956 SC 575,** Court said that a guilty intention is an essential ingredient of the offence of cheating. For the offence of cheating, "mens rea" on the part of that person, must be established.

10. In **G.V. Rao Vs. L.H.V. Prasad and others, 2000(3) SCC 693,** Court said that Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property and in the second part the person should intentionally induce the complainant to do or omit to do a thing. In other words in the first part, inducement must be dishonest or fraudulent while in the second part, inducement should be intentional.

11. In **Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another, 2000(4) SCC 168** Court said that in the definition of 'cheating', there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. It was pointed out that there is a fine distinction between mere breach of contract and the offence of cheating. It depends upon the intention of accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest

intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. In order to hold a person guilty of cheating it would be obligatory to show that he had fraudulent or dishonest intention at the time of making the promise. Mere failure to keep up promise subsequently such a culpable intention right at the beginning, i.e, when he made the promise cannot be presumed.

12. In **S.W. Palanitkar and others Vs. State of Bihar and another, 2002(1) SCC 241,** while examining the ingredients of Section 415 IPC, the aforesaid authorities were followed.

13. In **Hira Lal Hari lal Bhagwati Vs. CBI, New Delhi, 2003(5) SCC 257,** Court said that to hold a person guilty of cheating under Section 415 IPC it is necessary to show that he has fraudulent or dishonest intention at the time of making promise with an intention to retain property. The Court further said:

"Section 415 of the Indian Penal Code which defines cheating, requires deception of any person (a) inducing that person to: (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property OR (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person, anybody's mind, reputation or property. In view of the aforesaid provisions, the appellants state that person may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the Section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest."

(Emphasis added)

14. In **Devender Kumar Singla Vs. Baldev Krishan Singh 2004 (2) JT 539 (SC),** it was held that making of a false representation is one of the ingredients of offence of cheating.

15. In **Indian Oil Corporation Vs. NEPC India Ltd., 2006(6) SCC 736** in similar circumstances of advancement of loan against hypothecation, the complainant relied on Illustrations (f) and (g) to Section 415, which read as under:

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

"(g). A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contact and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

16. Court said that crux of the postulate is intention of the person who induces victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. Court also referred to its earlier decisions in **Rajesh Bajaj Vs. State NCT of Delhi,**

1999(3) SCC 259 and held that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent.

17. In **Vir Prakash Sharma Vs. Anil Kumar Agarwal and another, 2007(7) SCC 373** it was held that if no act of inducement on the part of accused is alleged and no allegation is made in the complaint that there was any intention to cheat from the very inception, the requirement of Section 415 read with Section 420 IPC would not be satisfied. The Court relied on the earlier decisions in **Hridaya Ranjan Prasad Verma (supra) and Indian Oil Corporation Vs. NEPC India Ltd.(supra).**

18. The aforesaid authorities have been referred to and relied on in reference to offence under Section 420 I.P.C. by a Division Bench of this Court in which one of us (Hon'ble Sudhir Agarwal, J.) was also a member in **Sh. Suneel Galgotia and another Vs. State of U.P. and others 2016 (92) ACC 40.**

19. Looking to allegation made in complaint and in the light of exposition of law in respect of Section 420 IPC, as discussed above, I find that in the present case there is no allegation of dishonest inducement on the part of applicants. The basic ingredients of Section 420 read with 415 IPC i.e. dishonest inducement to person so deceived to deliver any property is clearly absent.

20. Once necessary ingredient is absent, offence under the said provision cannot be made out. In **R.K. Vijayasarathy and others vs. Sudha Seetharam and others 2019(3) SCALE 563,** in similar circumstances, Supreme Court, in para 18 said :

"The ***condition necessary for an act to constitute an offence under Section 415 of the Penal Code is that there was dishonest inducement by the accused.*** *The first respondent admitted that the disputed sum was transferred by the son of the appellants to her bank account on 17 February 2010. She alleges that she transferred the money belonging to the son of the appellants at his behest. No act on part of the appellants has been alleged that discloses an intention to induce the delivery of any property to the appellants by the first respondent. There is thus nothing on the face of the complaint to indicate that the appellants dishonestly induced the first respondent to deliver any property to them. Cheating is an essential ingredient to an offence under Section 420 of the Penal Code. The ingredient necessary to constitute the offence of cheating is not made out from the face of the complaint and consequently, no offence under Section 420 is made out."* (emphasis added)

21. For constituting offence under Section 420 IPC, it has to be a Cheating and dishonest inducement for delivery of property. Cheating is defined in Section 415 IPC and ingredient, I have already discussed above, are not available in the case in hand. In fact complaint basically refers to offence under Section 138 of Negotiable Instruments Act, 1881 *(hereinafter referred to as "Act, 1881")* but Complainant having failed to act in accordance with requirement of Section 138 of Act, 1881 and was not in a position to lodge a complaint under the said provision, has implicated applicants under Sections 406, 420 IPC though from

contents of complaint, ingredients of aforesaid provision are not satisfied at all. In the circumstances, proceedings against Accused-applicants under Section 420 IPC is illegal and gross abuse of process of law.

22. Similarly, Section 406 I.P.C. also I do not find is attracted in the case in hand. It talks of punishment for "criminal breach of trust" which is defined in Section 405 I.P.C. and both these provisions read as under:

"405. Criminal breach of trust.

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

***Explanation 1.**-- A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not, who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.*

***Explanation 2.**-- A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."*

"406. Punishment for criminal breach of trust.

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

23. In order to attract allegation of "criminal breach of trust", following things must exist :

i. Accused was entrusted with some property.

ii. Accused had dominion over certain property.

iii. Accused (i) misappropriated, (ii) converted to his own use, (iii) used or disposed off that property or wilfully suffered any person to dispose off that property.

iv. Accused did in violation of (i) any direction of law, (ii) any legal contract express or implied relating to carrying out the trust.

v. He did so dishonestly.

24. "Criminal breach of trust" talks of entrustment of property and dishonest

misappropriation or conversion thereof for own use or dishonest use or disposal of property in violation of any direction of law prescribing mode in which property in which such trust is to be discharged, or of Accused-applicants to Complainant in respect whereof a cheque was issued by Accused-applicants being Cheque No.224449 dated 10.12.2008 for Rs.1,99,000/- payable at HDFC Bank but when it was submitted for collection, the same was dishonoured on the ground of 'insufficient fund'. Complainant again went to Accused-applicants, who issued another Cheque No.224450 dated 11.06.2009 for Rs.4,50,000/- payable at HDFC Bank but this was returned on the ground that account has been closed. There is no averment in the complaint that thereafter any demand was made by giving any notice, as provided under Section 138 of Act, 1881 and compliance thereof was made. Instead, Complainant has filed above complaint for trial under Section 406/506 IPC but Magistrate, after recording evidence under Sections 200 and 202 Cr.P.C., has summoned applicants under Sections 406, 420 IPC.

26. Section 406 IPC deals with offence of criminal breach of trust which is defined in Section 405 IPC. The first requirement of Section 406 IPC is 'entrustment of property' by victim to Accused but there is no such entrustment. As per complaint, dues payable by Accused-Applicants according to averments made by Complainant satisfy liability as 'debt' but cannot be treated to be entrustment of property by Complainant to Accused persons and when there is no entrustment, question of dishonest misappropriation or conversion of such property to own use by such persons does not arise. Even Explanation 1 and 2 of any legal contract by a person who has contravened the said provision.

25. Complaint in the present case shows that there was dues payable by Section 405 IPC are not attracted in the case in hand since there is no deduction of wages by employer for deposit in concern fund under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and Employees' State Insurance Act, 1948. Therefore, Section 406 is not at all attracted.

27. In view of discussions made hereinabove and considering the allegations contained in the complaint in the case in hand, in the light of above authorities, proceedings are liable to be quashed.

28. The application is allowed. Criminal proceedings in Complaint Case No. 2688 of 2011, Babu Lal Gaur vs. Smt. Archana Gupta and others, under Sections 406 and 420 IPC, pending in the Court of Special Chief Judicial Magistrate (Custom), Lucknow are hereby quashed.

(2020)06ILR A97
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Application U/S 482 No. 3032 of 2020

Yashpal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Suresh Kumar Verma

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

Criminal Law - Criminal Procedure Code (2 of 1974) - Section 482 - Indian Penal Code (45 of 1860) - Section 308, 323, 504 - Allegation that accused abused victim & when he objected to abuse, all accused persons started beating him with lathi and danda causing serious head injury - Medical report showed fracture of temporal parietal bone and injury was found grievous in nature - *Held* - truthfulness of allegation cannot be considered in the proceeding under Section 482 Cr.P.C. before High Court and trial must go on (Para 15)

Application dismissed (E-5)

List of case cited :

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

2.Iridium India Telecom Ltd. Vs Motorola Incorporated & ors. (2011) 1 SCC 74

3.Anil Arya Vs St. of U.P. & ors. Crl. Rev. No. 1216 of 2005 dt 09.09.2016

4.Md. Allauddin Khan Vs St. of Bihar & ors., (2019) 6 SCC 107

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

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Suresh Kumar Verma, learned counsel for applicant, learned AGA for State and perused the material available on record.

2. Applicants Yashpal. Vikas and Subhash have filed an application under Section 482 Cr.P.C., with the following prayer :-

"to quash the entire proceeding as well as charge sheet dated 10.08.2018 and cognizance order dated 23.07.2019 filed in Criminal Case No.207/9 of 2019 (State Vs. Subhash Chandra and others) arising out of Case Crime No.211 of 2018 under Section 308, 323, 504 I.P.C., Police Station- Rajpura, District- Bheem Nagar, pending in the court of Civil Judge (Senior Division)/ Additional Chief Judicial Magistrate Chandausi."

3. Learned counsel for the applicants submits that the applicants are innocent and they have committed no offence. No case is made out under Section 308 I.P.C.. Investigating Officer did not collected proper evidence. This is a counter blast case. Victim has not been medically examined by the panel of the Doctors. As per injury report of injured Rahul, all the injuries found on his person hard and blunt object and simple in nature. He showed some document and statement in support of his contentions.

4. Learned A.G.A. opposed the prayer of application and submitted that as per supplementary report of victim Fracture temporal parietal bone and injury was found grevious in nature. It is further submitted by learned A.G.A. that applicants have committed crime. Investigating Officer rightly collected the evidence and finding sufficient evidence against accused submitted the charge-sheet. There is no illegality or irregularities in submitting the charge-sheet.

5. Brief facts of the case which need to be noted for disposal of present case are:-

On 12.06.2018 at about 08.30 P.M. accused Yaspal, Vikash and Subhash started abusing him. When he objected to abuse, all accused persons started beating

him with *lathi* and *danda* causing serious head injury. Incident was witness by Nauvatram and Kaushal who saved him. Accused persons ran away extending thread to kill him. On the basis of medical report of victim, case was converted into the aforesaid section. Matter was investigated and Investigating Officer who collected the evidence and found sufficient evidence and submitted charge-sheet against the accused applicant which is under challenge in the present application.

6. As per injury report of injured Rahul three injuries were found on his person out of them one Traumatic swelling on the left side of skull injury was kept under observation and two others contusions.

7. I have considered the rival submissions made by the parties and perused the records.

8. Before I enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 Cr.P.C. vested in the High Court. Section 482 Cr.P.C. saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

9. It is settled that the power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice.

10. Time and again, Apex Court and various High Courts, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not pre-empt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. (See : **State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.**

11. In **Anil Arya v. State of U.P. and Others, Criminal Revision No. 1216 of 2005, decided on 09.09.2016**, this Court held as under :-

"Whether evidence is correct or not or credible enough or not to sustain conviction and punishment is a matter which would be seen after revisionist put in appearance, lead evidence and thereafter Trial Court examine the entire evidence and record its finding thereon, but at the stage of summoning of revisionist on the basis of aforesaid statement in Trial under Section 319 Cr.P.C., the probable defence of accused summoned under Section 319 Cr.P.C. cannot be examined for the first time in a revisional jurisdiction by this Court."

12. In **Md. Allauddin Khan Vs. The State of Bihar and others, (2019) 6 SCC**

107, Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under :-

"12. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have *committed the offences punishable under Sections 323, 379 read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

13. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

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

13. In **State of Haryana and others v. Bhajan Lal and others, 1992 Supp (1) SCC 335,** Court has elaborately considered the scope and ambit of Section 482 Cr.P.C. Although in the above case Court was considering the power of the High Court to quash the entire criminal proceeding including the FIR, the case arose out of an FIR registered under Section 161, 165 IPC and Section 5(2) of the Prevention of Corruption Act, 1947. Court elaborately considered the scope of Section 482 Cr.P.C./ Article 226 of the Constitution of India in the context of quashing the proceedings in criminal investigation. After noticing various earlier pronouncements of Court, Court enumerated certain Categories of cases by way of illustration where power under Section 482 Cr.P.C. can be exercised to prevent abuse of the process of the Court or secure ends of justice. Paragraph 102 which enumerates 7 categories of cases where power can be exercised under Section 482 Cr.P.C. are extracted as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do

not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do

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

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

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

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

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

14. From the perusal of allegations made in the F.I.R. and evidence collected by I.O. during investigation, it is not a case of grave injustice. *not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.* Learned counsel for applicants could not show any irregularity and illegality to investigation.

15. The allegation levelled against them can be adjudicated only after the evidence and truthfulness of allegation cannot be considered in the proceeding under Section 482 Cr.P.C. before this Court and trial must go on.

16. Considering facts and circumstances of the case, allegation made in F.I.R., injury report of victim and legal preposition discussed herein before, application under Section 482 Cr.P.C. fails and is accordingly **dismissed.**

(2020)06ILR A101
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 4383 of 2020

Geetanjali ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Shailendra Kumar Yadav, Mahesh Prasad Yadav

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

Criminal Law - Criminal Procedure Code (2 of 1974) - Section 203, 204 - Conditions for issuing process - Dismissal of complaint before issuing process - *Held* - Magistrate must apply his mind to a complaint & see whether

complaint contain materials making out prima facie case to proceed - words "sufficient ground for proceeding" - suggest that ground should be made out in the complaint for proceeding against the opposite party/respondent - where allegations in the complaint or the chargesheet do not constitute an offence against a person, the complaint is liable to be dismissed (Para 11) Applicant husband died due to improper medical treatment - moved application u/s 156 (3) Cr.P.C. - same treated as a complaint case - Magistrate rejected the complaint - Criminal Revision also dismissed- *Held* - complaint case, filed after more than one month and twenty days from the date of death - in the application filed u/s 156 (3) Cr.P.C. there is no averment that initially the applicant tried to lodge F.I.R. before filing the application under Section 156 (3) Cr.P.C- which makes the case doubtful - in enquiry report submitted by the Police & report of the medical board it was mentioned that husband of the applicant had expired due to septicemia, Acute Respiratory Distress Syndrome, Fever Multi Organ Failure – courts below have not committed error in rejecting application. (Para 13)

Application dismissed (E-5)

List of case cited :

1.Mahboob & ors. Vs St. of U.P. & anr. (2017) 2 JIC, 320, All LB

2.Smt. Shiv Kumar & ors. Vs St. of U.P. & anr. (2017) 2 JIC, 589, All LB

3.HariramVerma & 4 ors. Vs St. of U.P. & anr. (2017) 99 ALL CC 104

4.Jacob Mathew Vs St. of Punj. & ors. Crl. Appeal No. 144-145/2004, decided on 5th August, 2005

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Shailendra Kumar Yadav and Mr. Mahesh Prasad Yadav, learned counsel for the applicant and Mr. Prashant Kumar, learned A.G.A. for the State assisted by Mr. P.K. Shahi, learned special counsel for the State.

2. The present application under Section 482 Cr.P.C. has been filed to quash the judgment and order dated 15th March, 2018 passed by the Chief Judicial Magistrate, Allahabad in Complaint Case No. 1521 of 2015 (Geetanjali Vs. Dr. R.P. Shukla & Others), whereby the complaint made by the applicant through an application under Section 156 (3) Cr.P.C. has been rejected. The applicant has also challenged the judgment and order dated 1st October, 2019 passed by the Additional Sessions Judge, Court No.21, Allahabad in Criminal Revision No. 120 of 2018 (Geetanjali Vs. Dr. R.P. Shukla & Others) whereby the revision filed by the applicant has been dismissed and the judgment and order passed by the concerned Magistrate dated 15th March, 2018 has been affirmed.

3. Learned counsel for the applicant submits that the case of applicant is that the husband of applicant, namely, Shyamendra Kaushal became suddenly ill on 27th July, 2015, the applicant and her father-in-law, namely, Achhe Lal Yadav got him admitted in Emergency Ward of Nazreth Hospital for his medical aid after depositing requisite charges towards fees of emergency ward, medicines, doctors etc. Opposite party no.2, Dr. R.P. Shukla was assigned the work of medically treating the husband of the applicant. After medically test etc., opposite party no.2 told the applicant that presently the condition of her husband is normal and further asked the applicant to take him to her home and on the next day i.e. 28th July, 2015, she would take him to the OPD of the hospital, where he will medically examine him again, but seeing the condition of her husband, the applicant

and other family members requested opposite party to admit her husband and provide medical aid for whole night. Consequently, the husband of the applicant was admitted by opposite party no.2 namely, Dr.R.P. Shukla and on his advise medicine was given to her husband and whole night treatment was continued but despite consuming medicine as per advise of the opposite party no.2 (Dr. R.P. Shukla), the health condition of her husband became critical, due to which a hot talk was exchanged between the applicant and the opposite party no.2. Because of aforesaid hot talk it appears that opposite party no.2 being the doctor might have provided noxious medicine to her husband deliberately and ultimately on 28th July, 2015 at about 04:00 p.m. her husband died in Nazreth Hospital, Allahabad. On being asked the reason by the applicant that at morning in pathology test report, ailment of malaria was reported and platelets were found less than accurate and the applicant thereafter had been praying for providing medicine for increasing platelets but all went in vain and after some time husband of the applicant died due to negligence and improper treatment of the opposite party no.2, therefore, for punishing him, the applicant has moved an application under Section 156 (3) Cr.P.C. on 17th September, 2015, but the same has been treated as a complaint case i.e. the present complaint case. With a view to prove prima facie negligence on the part of the opposite party no.2 and the management of Nazreth Hospital, the applicant got her statement recorded under Section 200 Cr.P.C. The applicant has also got examined Achhe Lal Yadav as P.W.-1 and another witness, namely, Amar Nath Yadav. The concerned Magistrate has proceeded further. However, without considering the contents of the application and statements of the witnesses, the concerned Magistrate has illegally rejected the complaint of the applicant filed under Section 156 (3) Cr.PC. The grounds mentioned in rejecting the complaint of the applicant are that on 12th October, 2015, the Chief Medical Officer, Allahabad was directed to constitute a medical board, which would conduct an enquiry with reference to the averments made in the complaint and submit report before the court of concerned Magistrate. It is further submitted that the report of the medical board appears to have submitted its report and about the cause of death the opinion of the medical board is mentioned in the impugned order. With reference to the report of the medical board, it is submitted by the learned counsel for the applicant that no notice was ever given to the applicant by the medical board, so that the applicant could have factual scenario and negligence of the opposite party no.2. Learned counsel for the applicant further submits that in the judgment and order, there is no recital that the medical board has made an inquiry about the skill of opposite party no.2 as to whether he was competent person to exercise ordinary skill particularly with regard to ailment of applicant's husband.

4. It is lastly submitted that at the stage of issuing process, the concerned Magistrate is only required to be prima facie satisfied on the basis of allegations made in the complaint and entering into a detailed discussion of merits and demerits at this state is not permissible as held by the Apex Court in its various judgments. Both the courts below have committed manifest error in law and facts in dismissing the complaint case as framed and filed by the applicant.

5. On the commutative strength of the aforesaid, learned counsel for the applicant

urges that the both the impugned orders are liable to be quashed and the concerned Magistrate be directed to revisit the complaint filed by the applicant.

6. Per contra, Mr. Prashant Kumar, learned A.G.A. for the State submits that if the application under section 156 (3) Cr.P.C. contains the allegations of commission of a cognizable offence, then the Magistrate is under obligation to direct investigation after registration of the FIR in each and every case. It is then submitted that the present complaint case made by the applicant, namely, Geetanjali through an application under Section 156 (3) Cr.P.C. is nothing but a bundle of lie and the same has been made only for exploiting the opposite party nos. 2 and 3 by indulging their names in a fake, false and frivolous case. The entire prosecution story as unfolded in the present complaint case is absolutely a self-made story projected by the applicant. The application made by the applicant under Section 156 (3) Cr.P.C., which has been treated to be complaint case, has been filed after more than one month and twenty days from the date of death of the husband of the applicant. Neither in the affidavit filed in support of the present application nor in the application filed under Section 156 (3) Cr.P.C. by the applicant, there is any averment that initially the applicant has tried to lodge first information report before filing the application under Section 156 (3) Cr.P.C., which makes the prosecution case doubtful. Apart from the above, learned A.G.A. further submits that the court below has not found any substance in the prosecution case and he has rightly rejected the application of the applicant, which has been treated as complaint case, on the basis of enquiry report submitted by the Police and the report of the medical board submitted by the Chief Medical Officer, wherein it has been mentioned that due to septicemia, ARDS (Acute Respiratory Distress Syndrome), Fever Multi Organ Failure, husband of the applicant had expired. The court below has not committed any error while passing the impugned order. The court below has recorded pure finding of fact after relying upon the judgment of the Apex Court in the case of Jacob Mathew Vs. State of Punjab & Others (Criminal Appeal No. 144-145/2004, decided on 5th August, 2005). The appellate court has also rightly rejected the appeal filed by the applicant and affirmed the order of the concerned Magistrate. He, therefore, submits that the impugned orders passed by the courts below are legal and just and the same do not warrant any interference by this Court.

7. I have considered the submissions made by the learned counsel for the parties and have gone through the record of the present application under Section 482 Cr.P.C.

8. In **Mahboob and others vs. State of U.P. and another, reported in 2017 (2) JIC, 320, (All) (LB)**, specifically in paragraph Nos. 10, 11 and 12, this Court has observed as follows:-

"(10) Hon'ble Apex Court has further dealt with the nature of inquiry which is required to be conducted by the Magistrate and referring the case of Vijay Dhanuka (supra) it was held as under:

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry

" has been defined under Section 2(g) of the Code, the same reads as follows:

"2. (g) "inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court,"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

(11) In the present case, the learned Magistrate has not conducted any inquiry so as to satisfy himself that the allegations in the complaint constitute an offence and when considered alongwith the statements recorded and the result of such inquiry. There is ground for proceedings against the petitioners under Section 204 CrPC. There is nothing on record to show that the learned Magistrate has applied his mind to arrive at a prima facie conclusion. It must be recalled that summoning of accused to appear the criminal court is a serious matter affecting the dignity self-respect and image in the society. A process of criminal court cannot be made a weapon of harassment.

(12) Learned Magistrate has passed a very cryptic order simply by saying that the statement of complainant as well as witnesses recorded under Sections 200 and 202 CrPC are perused and accused are summoned such order per se itself illegal which could not stand the test of law."

9. Reliance is also placed upon the judgement of this Court in the case of **Smt. Shiv Kumar and others vs. State of U.P. and another, reported in 2017 (2) JIC, 589, (All) (LB).** Paragraph No. 10 of the aforesaid judgement is relevant for the controversy in hand. The same is as under:-

"Learned Magistrate was required to atleast mention in the order about the prima facie satisfaction for summoning the accused. The order must reflect that the learned Magistrate has exercised his jurisdiction in accordance with law after satisfying himself about the prima facie allegations made in the complaint. The accused cannot be summoned mechanically merely by writing that perused the statements under Sections 200 and 202 Cr. P. C."

10. Reference may also be made to the judgement of this Court in the case of **Hariram Verma and 4 Others Vs. State of U.P. and Anohter,** reported in **2017 (99) ALL CC 104,** wherein the following observations have been made in paragraphs 7 to 16:

"7. A perusal of this impugned summoning order indicates that learned Magistrate had noted in the impugned order the contents of complaint and evidences u/s 200 and 202 CrPC but had neither any discussion of evidence was made, nor was it considered as to what overt act had allegedly been committed by accused. This contention of learned counsel for the applicants cannot be ruled out that leaned counsel have noted the contents of complaint and statements without considering its

probability or prima facie case, and whether he had actually considered statements u/ss 200, 202 CrPC or the documents of the original. At stage of summoning, the Magistrate is not required to meticulously examine or evaluate the evidence. He is not required to record detailed reasons. A brief order which indicate the application of mind is all that is expected of him at the stage.

8. But in 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 or 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.

*9. In ruling "**M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998 UPCrR 118**" Hon'ble Supreme Court held :-*

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

*10. In "**Paul George vs. State, 2002 Cri.L.J. 996**" Hon'ble Supreme Court held :-*

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.- - - - - It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary but some brief indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

*11. In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89** the Apex Court had held :*

"Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

12. It is settled principle that while summoning an accused, the court has to see prima facie evidence. The "prima facie evidence' means the evidence sufficient for summoning the accused and not the evidence sufficient to warrant conviction. The enquiry u/s 202 CrPC is limited only to ascertain of truth or falsehood of allegations made in the complaint and whether on the material placed by the complainant a prima facie case was made out for summoning the accused or not.

13. As held by the Courts as above, the passing of order of summoning any person as accused is a very important matter, which initiates criminal proceeding against him. Such orders cannot be passed summarily or without applying judicial mind.

14. In light of this legal position I have gone through the impugned order. A perusal of this order indicates that neither any discussion of evidence was made by learned, nor was it considered as to which accused had allegedly committed what overt act. The five accused persons of complaint were summoned for offences mentioned in it. 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 the facts and circumstances of the case and the evidence or the 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. Therefore it is liable to be quashed.

15. In ***Anita Malhotra v. Apparel Export Promotion Council, (2012) 1 SCC 520*** *the Apex Court had hld as under:*

"20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is

incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction u/s 482 of the Code."

16. Considering the uncontroverted averment of present petition u/s 482 CrPC as well as affidavit supporting it, the incorrect and unbelievable complaint case, and false implication of five petitioners and the general allegations levelled by informant in her FIR without allegations of any specific act, the incorrectness of cause of action for the complaint and considering the vagueness of information mentioned in complaint, and in light of verdict mentioned in aforesaid rulings of Hon'ble Apex Court, this appears to be a case in which applicants should succeed and the impugned summoning order as well as the complaint case are liable to be quashed.

11. From the perusal of the aforesaid laws laid down by the Apex Court, this Court is of the firm opinion that Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If these were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the opposite party/respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.

12. From the aforesaid, this court finds substance in the submissions made by the learned A.G.A. for the State that entire prosecution story as unfolded in the present complaint case is absolutely a self-made story projected by the applicant. The application made by the applicant under Section 156 (3), which has been treated to be complaint case, has been filed after more than one month and twenty days from the date of death of the husband of the applicant. Neither in the affidavit filed in support of the present application nor in the application filed under Section 156 (3) Cr.P.C. by the applicant, there is any averment that initially the applicant has tried to lodge first information report before filing the application under Section 156 (3) Cr.P.C.

13. In light of the above facts and above proposition of law, this Court is of

the view that the court below has not found any substance in the prosecution case and he has rightly rejected the application of the applicant, which has been treated as complaint case, on the basis of enquiry report submitted by the Police and the report of the medical board submitted by the Chief Medical Officer, wherein it has been mentioned that due to septicemia, ARDS (Acute Respiratory Distress Syndrome), Fever Multi Organ Failure, husband of the applicant had expired. The appellate court has also rightly rejected the appeal filed by the applicant and affirmed the order of the concerned Magistrate. Both the courts below have not committed any error while passing the impugned orders. The court below have recorded pure finding of fact after relying upon the judgment of the Apex Court in the case of Jacob Mathew Vs. State of Punjab & Others (Criminal Appeal No. 144-145/2004, decided on 5th August, 2005). Thus, the complaint of the applicant has rightly been rejected by the court below under the order impugned.

14. In light of above facts, this Court is of the view that both the orders impugned do not warrant any interference by this Court under Section 482 Cr.P.C. The present application lacks merit and deserves to be dismissed. It is accordingly dismissed.

(2020)06ILR A109
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2020

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Application U/S 482 No. 5289 of 2020

Rajeev Gupta ...Applicant

Versus

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

Counsel for the Applicant:
Sri Anmol Tiwari, Sri S.K. Tiwari

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

Criminal Law - Criminal Procedure Code (2 of 1974)- Section 204- Section 482 - Indian Penal Code (45 of 1860) , Section 376D- Section 506 - Issuance of process - At the time of passing summoning order, Magistrate is only required to see prima facie evidence and sufficient ground for proceeding - allegation levelled against accused can be adjudicated only after the evidence and truthfulness of allegation cannot be considered in the proceeding under Section 482 Cr.P.C. before High Court.

Informant supported prosecution case in her statement stated that accused applicant along with other co-accused committed rape with her - Smt. Shakuntala (mother) and Ishwari Devi u/s 202 supported the case that accused Rajeev and Prashant took victim with them by Car on the pretext that her brother was seriously ill & that victim told them on returning that accused applicant and other co - accused committed rape with her - prima facie case against accused-applicant made out– Application dismissed (Para 4, 17)

Application dismissed. (E-5)

List of case cited :

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

2.Iridium India Telecom Ltd. Vs Motorola Incorporated & ors. (2011) 1 SCC 74

3.PriyaVrat Singh & ors. Vs Shyam Ji Sahai (2008) 8 SCC 232

4.M/s Eicher Tractor Ltd. & ors. Vs Harihar Singh & ors. 2009 (64) ACC 296

5.Anil Arya Vs St. of U.P. & ors. Crl. Rev. No. 1216 of 2005 Dt 09.09.2016

6.Md. Allauddin Khan Vs St. of Bihar & ors. (2019) 6 SCC 107

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

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri S. K. Tiwari, learned counsel for applicant, learned AGA for State and perused the material available on record.

2. Applicant has invoked jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") challenging the order dated 31.08.2018, passed by Chief Judicial Magistrate, Kannauj, in Complaint Case No. 2386 of 2017, Smt. Neeraj v. Rajeev Gupta and Another, under Sections 376-D and 506 IPC, Police Station Chhibramau, District Kannauj along with entire proceeding of the said case, whereby applicant has been summoned to face the trial under the aforesaid Sections.

3. Brief facts giving rise to present case are that the complainant-Smt. Neeraj moved an application under Section 156(3) Cr.P.C. before the CJM concerned stating that on 4.9.2016, at about 7:30 pm, accused Rajeev Gupta and his friend Prashant came to her house by Car with driver and told that her brother was ill believing them she went with them by Car. They reached near Akbarpur stopped the Car at lonely place and accused persons Rajeev and Prashant molested her, put off her clothes by force and committed rape and took Rs. 9,000/- from her purse. Accused persons extended threat to kill her brother, if any complaint is made to anywhere. On the application of Informant, a Case Crime No. 99 of 2017 under the aforesaid sections in the Police Station concerned was registered. Matter was investigated by Investigating Officer who submitted final report. Protest application was made by Informant on the Final Report (FR) submitted by Investigating Officer, came to be registered as complaint case. Trial Court proceeded to record the statement of prosecutrix under Section 200 Cr.P.C. and statement of Shakuntala Devi (her mother) and Ishwari Devi under Section 202 Cr.P.C., found prima facie evidence and sufficient ground for proceedings, summoned the present applicant to face the trial under the aforesaid Sections by impugned order dated 31.8.2018, which is under challenge.

4. Informant herself supported the prosecution case in her statement under Section 202 Cr.P.C. and mainly stated that accused applicant along with other co-accused committed rape with her and took Rs. 9,000/- from her purse. Smt. Shakuntala and Ishwari Devi also supported the case before them that accused Rajeev and Prashant took victim with them by Car on the pretext that her brother was seriously ill. It is further stated in their statement that victim told them on returning that accused applicant and other co-accused committed rape with her.

5. Learned counsel for applicant submits that the applicant is innocent; he has committed no offence and has been falsely implicated in the present case by complainant. In the matter, Investigating Officer, finding no evidence during investigation submitted final report. It is further submitted that there is no medical of

victim, no statement of victim under Section 164 Cr.P.C., there is no public witness of incident. It is a counter blast case because applicant has filed a complaint case against the mother of complainant prior to the present incident. Prosecution story is false and fake and sheer concoction.

6. It is further submitted that from the allegation made in application under Section 156(3) Cr.P.C. and from the statement of victim and her witnesses, no case under Section 376-D and 506 IPC is made out but learned counsel for applicant showed some documents and statements in support of his contention. Despite repeated query by the Court whether these papers, which are being shown before this Court, have been brought to the notice of Magistrate before passing the summoning order or not? He remained silent and could not satisfy the query of the Court.

7. Learned AGA submitted that Trial Court, finding prima facie case and sufficient ground for proceedings against the applicant, summoned the accused-applicant for facing trial and all the submissions made by learned counsel for applicant relates to disputed question of fact which cannot be adjudged at this stage under Section 482 Cr.P.C. He further submitted that defence of learned counsel for applicant can be considered in Lower Court after the evidence is produced by both the parties.

8. I have considered the rival submissions made by the parties and perused the records.

9. Before I enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 Cr.P.C. vested in the High Court. Section 482 Cr.P.C. saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

10. It is settled that the power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice.

11. Time and again, Apex Court and various High Courts, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not pre-empt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. (See : **State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.**

12. In **Priya Vrat Singh and others vs. Shyam Ji Sahai, 2008 (8) SCC 232**, Court observed that the inherent power should not be exercised to stifle a legitimate prosecution. The High Court

being the highest court of a State should normally refrain from giving a prima-facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.

13. In **M/s Eicher Tractor Ltd. And Others v. Harihar Singh and Another, 2009 (64) ACC 296,** Court said in para 5 of the judgment, which reads as under :-

"5. Exercise of power under Section 482 of the Code in a case of this nature is an exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

14. In **Anil Arya v. State of U.P. and Others, Criminal Revision No. 1216 of 2005, decided on 09.09.2016,** this Court held as under :-

"Whether evidence is correct or not or credible enough or not to sustain conviction and punishment is a matter which would be seen after revisionist put in appearance, lead evidence and thereafter Trial Court examine the entire evidence and record its finding thereon, but at the stage of summoning of revisionist on the basis of aforesaid statement in Trial under Section 319 Cr.P.C., the probable defence of accused summoned under Section 319 Cr.P.C. cannot be examined for the first time in a revisional jurisdiction by this Court."

15. In **Md. Allauddin Khan Vs. The State of Bihar and others, (2019) 6 SCC 107,** Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under :-

"12. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have *committed the offences punishable under Sections 323, 379 read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.*

13. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

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

16. In **State of Haryana and others v. Bhajan Lal and others, 1992 Supp (1) SCC 335,** Court has elaborately considered the scope and ambit of Section 482 Cr.P.C. Although in the above case Court was considering the power of the High Court to quash the entire criminal proceeding including the FIR, the case arose out of an FIR registered under Section 161, 165 IPC and Section 5(2) of the Prevention of Corruption Act, 1947. Court elaborately considered the scope of Section 482 Cr.P.C./ Article 226 of the Constitution of India in the context of quashing the proceedings in criminal investigation. After noticing various earlier pronouncements of Court, Court enumerated certain Categories of cases by way of illustration where power under Section 482 Cr.P.C. can be exercised to prevent abuse of the process of the Court or secure ends of justice. Paragraph 102 which enumerates 7 categories of cases where power can be exercised under Section 482 Cr.P.C. are extracted as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

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

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

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

17. From the perusal of allegations made in the complaint and statement of complainant under Section 200 Cr.P.C. and his witnesses Shakuntala Devi (her mother) and Ishwari Devi under Section 202 Cr.P.C., it cannot be said that no prima facie case against the accused-applicant is made out. At the time of passing summoning order, Magistrate is only required to see prima facie evidence and sufficient ground for proceeding.

18. The allegation levelled against him can be adjudicated only after the evidence and truthfulness of allegation cannot be considered in the proceeding under Section 482 Cr.P.C. before this Court and trial must go on.

19. Considering facts and circumstances of the case, allegation made in complaint, statement of complainant and witnesses under Sections 200 and 202 Cr.P.C. respectively and legal preposition discussed herein before, application under Section 482 Cr.P.C. fails and is accordingly **dismissed.**

(2020)06ILR A115
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 5330 of 2012

Sri Munish Jain ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Ranjit Saxena, Sri Ajay Kumar Pathak, Sri V.S. Kushwaha

Counsel for the Opposite Parties:
A.G.A., Sri Arun Kumar Singh, Sri Dhruv Narayan Misra, Sri Digvijay Singh, Sri R.P. Mishra, Sri Rajul Bhargava, Ms. Zia Naz Zaidi, Sri Rajesh Kumar Mishra

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 320 - Compounding of offence - Indian Penal Code (45 of 1860), S.498A, S.323, S.504, S.506, S.408 - Quashing of proceedings on ground of compromise - for compounding, as per Section 320 Cr.P.C., the fact of compromise, entered voluntarily and duly verified by Magistrate, in presence of both sides, is required

In mediation between parties before Delhi High Court it was agreed that husband will unite with his family and he will live together and on this assurance, mediation agreement was entered - however this was not complied with by husband rather a divorce petition by husband was filed before Delhi High Court - *Held* - Admittedly, neither parties filed compromise duly and freely entered in between before court of Magistrate, before whom trial was pending nor it was verified by trial court concerned - Proceedings, not liable to be quashed (Para 12)

Application dismissed. (E-5)

List of case cited :
Gian Singh Vs St. of Punj. (2012)10 SCC 303

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 / 483 Cr.P.C., has been filed by applicant with a prayer for setting aside the order dated 01.08.2009, passed in Criminal Case No. 987 of 2009, State Vs. Manish Jain, under Sections 498-A, 323, 504, 506, 408 I.P.C. and Section 3/4 Dowry Prohibition Act, P.S. Hathras Gata, District Mahamayanagar.

2. Learned counsel for applicant argued that there had been a mediation in between, wherein Delhi High Court passed following order:-

"...The respondent, who is present in Court, submits that she is ready and willing to withdraw all pending cases. In respect of the F.I.R. lodged against the petitioner under Section 498-A I.P.C. etc., she submits that the petition had been drafted and had been provided to the petitioner. The petitioner submits that he has filed his own petition before the Allahabad High Court under Section 482 of the Cr.P.C. being Crl. M.A. No.5330 of 2012. A copy of the order dated 10.2.2012 passed in those proceedings has been shown to the Court. It appears that the Court has directed the listing of the case after the expiry of four weeks time which

was granted for filing of the counter affidavits. ***Since the period has expired, it appears that it is open to the parties to now again approach the Allahabad High Court to have the F.I.R. quashed. The parties agree that they would jointly move an application before the Allahabad for that purpose without any delay. The respondent states that she is willing to accompany the petitioner in the next week itself for moving the said application...."***

It appears that this matrimonial dispute has been taken to mediation centre, Tis Hazari Court, Delhi wherein following compromise was filed:-

"The present suit for performance injunction has been referred by referral judge Shri Rakesh Kumar-I, CJ, Delhi and assigned to me for mediation. Process of Mediation explained. Matter discussed in joint session. After mutual discussions both the parties have reached at an amicable settlement on the following terms and condition:

(1) That the respondent is owner of flat in question i.e. B-403, Plot No.4 and 6, Sector 17, Sampada, Sea Wood Garden, Navi Mumbai. It is agreed between both the parties that one key of the flat would be remained with plaintiff and one key with defendant.

(2) That the Plaintiff can live in the above mentioned flat with her children and respondent can visit and see her children any time as and when he wishes and also he can live with their children and wife but for the first yer only wife will live with her children.

(3) Approximately Rs.20 lacs mutual fund, NSC, KVP and FDR's in the name of petitioner which defendant has deposited and will give to petitioner upto 25 th January, 2010.

(4) Respondent will deposit Rs.1 lac in the bank account of petitioner on 01.01.2010.

(5) After getting job the respondent will give Rs.25,000/-to 30,000/- to the petitioner towards maintenance of wife and children.

(6) That the parties will withdraw the following cases:

(a) Complaint under sections 498-A, 406, 34 I.P.c. on the date fixed i.e. 16.2.2010.

(b) Complaint under Section 125 Cr.P.C. on the date fixed i.e. 17.2.2010.

(c) Complaint under Section 12 of D.V. Act on the date fixed i.e. 15.01.2010.

(d) Above mentioned suit on date fixed i.e.23.01.2010

(e) The respondent will withdraw complain case under Section 323 I.P.C. on the date fixed i.e. 06.01.2010.

(7) That both the parties will live happily from today and will not file any case/complaint against each other. This is the full and final settlement between the parties and all the above mentioned cases will be withdrawn on the date fixed in the concerned court."

3. Despite this order, opposite party no. 2 has not filed joint affidavit before trial court. Applicant has given an accommodation for residence, in view of above mediation agreement, wherein she is residing. Huge amount of money has also been given to opposite party no. 2. But, in disregard of above settlement, entered in between, opposite party no. 2 is making hindrance in disposal of this case, whereas in a proceeding, in between, High Court of Delhi, has passed order on 06.09.2012 that respondent was present in Court and submitted that she is ready and willing to withdraw all pending cases in respect of F.I.R. lodged against petitioner under Section 498-A I.P.C. etc. She had submitted that mediation had been drafted and had been provided to the petitioner. The petitioner submitted that he had filed his own application before Allahabad High Court under Section 482 Cr.P.C. being Criminal Misc. Application No. 5330 of 2012. Meaning thereby, there had been

mediation. Terms were agreed. It was there that this criminal proceeding shall be withdrawn. Opposite party no. 2 had made settlement before Delhi High Court in CONT. CAS(C) 789/2011 & CM APPL. 19484 of 2011 & CM APPL. 19793/12; Shikha Jain through Mr. A.K. Tripathi, Advocate Versus Munish Jain through Mr. Sunil Satyarthi, Advocate, but the recital entered in between is being retracted by opposite party no. 2, which she can never retract. This Court had ordered for disposal of this case, after disposal of Transfer Application, moved before apex court. The apex court vide order dated 21st February, 2017, passed in Transfer Petition (Criminal) No. 45 of 2016; Shikha Jain Vs. Munish Jain and another, has dismissed the transfer application with an option to the petitioner to approach this High Court for expeditious hearing of matter. Hence, now nothing remained for adjudication, but to quash the proceeding in view of agreement entered in mediation, in this matrimonial dispute, in view of law laid down in **Gian Singh v. State of Punjab, (2012) 10 SCC 303.**

4. Smt. Shikha Jain, in person, argued that mediation proceeding was taken at Delhi High Court. Therein agreement was there. Terms argued were very well there. The same were accepted before Delhi High Court, in above alleged proceeding. But this agreement was to reunite the family. It was very well written in mediation proceeding that husband will unite with his family and he will live together and on this assurance, above mediation agreement was occurred. But this was not complied with by husband. Money given was nothing new to be given, rather the fixed deposits and other securities, which were already in her name and were under custody of husband, were agreed and delivered to opposite party no. 2. A divorce petition by husband has been filed before Delhi High Court. Hence, mediation was denied by husband himself and in this criminal proceeding, no compromise was entered, in view of above defiance. Hence, this petition be dismissed.

5. Apex court in **Gian Singh v. State of Punjab, (2012) 10 SCC 303** as well as many other cases has propounded that in matrimonial disputes, if the parties are amenable to compromise, then, even if offence, punishable under Section 498-A I.P.C. i.e. cruelty with regard to dowry, is not compoundable by Legislature, High Court of Judicature in exercise of inherent jurisdiction under Section 482 Cr.P.C. may quash proceeding for peaceful living of family. This power is there in High Court, under Section 482 Cr.P.C.

6. Section 320 of the Code articulates public policy with regard to the compounding of offences. It catalogues the offences punishable under IPC which may be compounded by the parties without permission of the Court and the composition of certain offences with the permission of the court. The offences punishable under the special statutes are not covered by Section 320. When an offence is compoundable under Section 320, abatement of such offence or an attempt to commit such offence or where the accused is liable under Section 34 or 149 of the IPC can also be compounded in the same manner. A person who is under 18 years of age or is an idiot or a lunatic is not competent to contract compounding of offence but the same can be done on his behalf with the permission of the court. If a person is otherwise competent to compound an offence is dead, his legal representatives may also compound the offence with the permission of the court. Where the accused has been committed for trial or he has been convicted and the appeal is pending, composition can only be done with the leave of the court to which he has been committed or

with the leave of the appeal court, as the case may be. The revisional court is also competent to allow any person to compound any offence who is competent to compound. The consequence of the composition of an offence is acquittal of the accused. Sub-section (9) of Section 320 mandates that no offence shall be compounded except as provided by this Section. Obviously, in view thereof the composition of an offence has to be in accord with Section 320 and in no other manner.

7. Compounding of offence, as has been given by Legislature in Section 320 Cr.P.C., has given first table, wherein few of offences are to be compounded, upon the consent and option of victims. In the second table, offences are compoundable on the option of victim with permission of Court concerned. Those offences are of grave nature, but with permission of Court, offence given in second table, may be compounded. Regarding those offences, which have not been compoundable, under provision of Legislature, this law has been developed by apex court that where union of family seems to be probable and the dispute is of matrimonial nature and they are not of heinous offence, then in the interest of justice, with a view to avoid children from any ruin, out of dispute in between parents, the offence punishable under Section 498-A I.P.C or likewise, which are not of grave consequences and effect into society, may be quashed, in exercise of inherent jurisdiction of High Court acknowledged under Section 482 Cr.P.C. Under this provision of law, developed by Hon'ble Apex Court, quashing of proceeding for offence of dowry demand and cruelty etc., where compromise has been entered in between, are being made by High Court, though it is not within domain of trial court Magistrate or Sessions Judge.

8. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, "nothing in this Code' which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e., to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court necessary to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

9. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine qua non.

10. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express

terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

11. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.

12. In present case, the compromise agreed at Mediation Centre of Delhi High Court, is with specific recital that family will unite. Husband and wife along with children will reunite and all cases filed by wife including that civil case, wherein mediation was referred, will be withdrawn. There were all prospective acts to be taken, but this all was with prime condition of union of family, but admittedly union of family did not occur, rather a proceeding for divorce has been filed and is pending. Hence, the terms, for which, there was mediation and agreement, could not be fulfilled. The mediation proceeding took place on the reference made in a civil case by Civil Judge before Mediation Centre of Delhi High Court, wherein other cases were also taken in reference including present case. Parties entered in agreement that the family will unite. Husband and wife along with children will live together and wife will withdraw her all cases. Money etc., as per above agreement written, as above, was to be exchanged. But, admittedly the union of family could not be happened, rather divorce petition has been filed by husband. Hence, above mediation agreement could not be complied by both sides. But, in this criminal case, for compounding, as per Section 320 Cr.P.C., the fact of compromise, entered voluntarily and duly verified by Magistrate, in presence of both sides, is required and the same is not there. Admittedly, neither parties have filed a compromise duly and freely entered in between before court of Magistrate, before whom this trial is pending nor it has been verified by trial court concerned. Hence, this Court, in exercise of inherent jurisdiction, under Section 482 Cr.P.C., is not to embark upon question of fact, because it may prejudice fair trial and it remain within domain of trial court, which is to be decided on the basis of evidence led by parties before trial court, but apparently there was an F.I.R. of demand of dowry coupled with cruelty and it was registered as case crime number, wherein investigation was made. There was statement of informant victim with other witnesses, examined under Section 161 Cr.P.C., and on the basis of these evidence, collected by Investigating Officer, charge sheet was submitted, whereupon cognizance has been taken by Magistrate concerned. Hence, prima facie there was evidence for taking of cognizance and it was taken. Now compromise is not there. Hence, nothing appears to be abuse of process of law. Accordingly, this application merits its dismissal. The application is **dismissed** as such.

(2020)06ILR A119
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 5567 of 2020

Smt. Savita Devi @ Savitri Singh & Anr.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sri Pradeep Yadav, Sri Jeetendra Kumar Yadav

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

Criminal Law - Criminal Procedure Code (2 of 1974), Explanation to Section 2 (d) - Indian Penal Code (45 of 1860) , Section 323, 504 - F.I.R. U/ss 323 and 504 IPC - Charge sheet filed under non-cognizance offences U/ss 323, 504 IPC - Magistrate took cognizance & proceeded as a State/police case - Held - charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint & and the police officer who submitted the report has to be deemed to be a complainant under Explanation to Section 2 (d) of Cr.P.C. – Magistrate directed by High Court to proceed with as a complaint case & follow the procedure prescribed for hearing of a complaint case under Chapter XV of the Code of Criminal Procedure - order of cognizance and summoning order quashed.

Application allowed. (E-5)

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

1. Heard learned counsel for the applicants and learned A. G. A. and perused the record.

2. This application under Section 482 Cr. P. C. has been filed by applicants with a prayer for quashing the entire proceedings of NCR No. 193 of 2015 (State vs. Savita Devi and another), under Sections 323 and 504 I.P.C., P.S. Rohniya, district-Varanasi, pending in the court of Special Chief Judicial Magistrate, Varanasi.

3. Learned counsel for the applicants submitted that initially an NCR was lodged by the opposite party no. 2 at P.S.- Rohniya, district-Varanasi in the aforesaid case. However, after completion of investigation charge sheet was submitted by the Investigation Officer under Sections 323 and 504 I.P.C.

4. Learned counsel for the applicants submitted that the offence under Sections 323 and 504 I.P.C. is non-cognizable, hence in view of the Explanation to Section 2 (d) of the Code of Criminal Procedure, the case could not proceed as State Case and it has to proceed as a complaint case. He further submitted that the learned Magistrate has erroneously taken the charge-sheet as a State case.

5. Learned A. G. A. vehemently opposed the submissions made by learned counsel for the applicants.

6. It is not disputed that the offence under Sections 323 and 504 I. P. C. is non-cognizable.

7. Explanation to Section 2 (d) of the Cr. P. C. runs as under:

"Explanation- A *report made by a police officer in a case which discloses, after investigation the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."* 8. In view of the said Explanation, report of the police officer after investigation disclosing commission of non-cognizable offence is to be deemed to be a complaint and the police officer who submitted the report has to be deemed to be a complainant. In other words the charge-sheet submitted by the police in a non-cognizable offence shall be
treated to be a complaint and the procedure prescribed for hearing of complaint case shall be applicable to that case."

9. In the present case from the material brought on record it transpires that the charge-sheet submitted by the Investigating Officer instead of being treated as a complaint, has been treated as a State Case by the concerned Magistrate, which is not permissible under law.

10. In view of the discussions made above, this Court came to the conclusion that impugned order of cognizance and summoning order dated 01.04.2017 upon charge-sheet in a case arising out of NCR in respect of bailable and non-cognizable offences is wrong and incorrect and is liable to be quashed.

11. The application is allowed accordingly and the impugned order dated 01.04.2017 is quashed with a direction to learned Magistrate for passing appropriate order in accordance with law as well as provisions of explanation to Section 2(d) Cr.P.C.

12. Let a copy of this order be sent to court below for proceeding with the case in accordance with law.

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(2020)06ILR A121
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 5575 of 2020

Anurag Yadav & Ors. ...Applicants
Versus
State of U.P. & Anr.
...Opposite Parties

Counsel for the Applicants:
Sri Devendra Kumar

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

Criminal Law - Criminal Procedure Code (2 of 1974), Explanation to Section 2 (d) - Indian Penal Code (45 of 1860) , Section 323, 504 - F.I.R. U/ss 323 and 504 IPC - charge-sheet submitted u/s 323 &504 I.P.C. - both the offences are bailable and non-cognizable as per 1st Schedule of Cr.P.C.- held - Magistrate illegally took cognizance & proceeded as a State/police case - charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint & and the police officer who submitted the report has to be deemed to be a complainant under Explanation to Section 2 (d) of Cr.P.C. – Magistrate directed to proceed with as a complaint case & follow the procedure prescribed for hearing of a complaint case under Chapter XV of the Code of Criminal Procedure - order of cognizance and summoning order quashed (Para6,7,8)

Application allowed. (E-5)

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

1. Heard learned counsel for the applicants and learned A. G. A. and perused the record.

2. This application under Section 482 Cr. P. C. has been filed by applicants with a prayer for quashing the chargesheet dated 25.01.2019 and the entire proceedings of Case No.2169 of 2019, arising out of NCR No. 0140 of 2018, under Sections 323 and 504 I.P.C., P.S. Sipri Bazaar, district-Jhansi, pending in the court of A.C.J.M, Jhansi.

3. Learned counsel for the applicants submitted that the applicants have been falsely implicated in NCR No.0140 of 2018, under Sections 323 and 504 I.P.C., P.S. Sipri Bazar, District Jhansi, in which upon investigation charge-sheet has been

submitted under Sections 323 and 504 I.P.C. and both the offences are bailable and non-cognizable as per 1st Schedule of Cr.P.C. and accordingly, the provisions of Explanation to Section 2(d) of Cr.P.C., the charge-sheet6 filed before the Magistrate is to be treated as complainant and so the order of Magistrate taking cognizance dated 25.01.2019 is liable to be quashed.

4. Per contra, learned A.G.A. though did not dispute the legal position provided in Section 2(d) of Cr.P.C. but contended

2. Definitions.--In this Code, unless the context otherwise requires,--

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

6. Upon hearing learned counsel for the parties and perusal of record, I find that it may
not be disputed that offences under Sections 323 & 504 I.P.C. are bailable and non-cognizable and so the provisions of explanation to Section 2(d) are applicable to the case. The Magistrate has taken cognizance without considering the provisions of Section 2(d) Cr.P.C. and its explanation clause. Undoubtedly in view of the provisions of Section 2(d) Cr.P.C., the Magistrate was required to adopt the procedure of a complaint case as provided.

that the application under Section 482 Cr.P.C. for quashing the proceedings of criminal case is malafide and misconceived and is liable to be dismissed.

5. Before proceeding further, the relevant provisions of Section 2 (d) of Cr.P.C. are being reproduced for ready reference as under:-

"Section 2(d) of Code of Criminal Procedure, 1973

7. In view of the discussions made above, this Court came to the conclusion that impugned order of cognizance and summoning order dated 25.01.2019 upon charge-sheet in a case arising out of NCR in respect of bailable and non-cognizable offences is wrong and incorrect and is liable to be quashed.

8. The application is allowed accordingly and the impugned order dated 25.01.2019 is quashed with a direction to learned Magistrate for passing appropriate order in accordance with law as well as provisions of explanation to Section 2(d) Cr.P.C.

9. Let a copy of this order be sent to court below for proceeding with the case in accordance with law.

(2020)06ILR A122
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 5642 of 2020

Rajiv Kaushik ...Applicant

Versus

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

Counsel for the Applicant:
Sri Abhishek

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

Criminal Law - Criminal Procedure Code (2 of 1974)- Section 2 (d) - Indian Penal Code (45 of 1860) - Section 506 - Punishment for criminal intimidation - Notification dated 31.07.1989 passed by U.P. State Govt. under S.10 of Criminal Law Amendment Act, 1932 made offence under S.506 of Penal Code as cognizable and non bailable - provisions of Section 2 (d) of CrPC do not apply - Magistrate rightly treated it as a State /police case.

Application dismissed (E-5)

List of case cited :

1.Raj Kapoor @ Lallu Vs St. of U.P. & anr. (2017) 1 JIC 322

2.MataSevakUpadhyaya & anr. Vs St. of U.P. & ors. (1995) JIC 1168 Alld

4.Virendra Singh Vs St. of U.P. & ors (2002) 45 ACC 609

4.Parveen Kumar & ors. Vs St. of U.P. & anr. ADJ (2011) 5 418

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

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

2. The present application under Section 482 Cr.P.C. has been filed for quashing the order dated 21.10.2019 passed by the learned Addl. Chief Judicial Magistrate, Court No. 5, Meerut in Case No. 25579 of 2018 (State Vs. Rajiv Kaushik), arising out of Case Crime No. 0249 of 2018, under Sections 323, 506 of IPC, PS Civil Lines, District Meerut along with entire proceedings.

3. By the impugned order dated 21.10.2019 the application moved by the accused applicant in relation to Section 2 (d) has been rejected by the learned Trial Court.

4. The learned counsel for accused applicant submits that the offences as alleged are non conginzable and therefore neither the charge sheet could have been submitted by the Investigating Officer nor the learned Magistrate could have taken cognizance in view of Section 2(d) of Cr.P.c. and it was further submitted that only course open to the learned Magistrate was to have treated it as a complaint case and, accordingly, ought to have proceeded with in accordance with law.

5. On the other hand, the learned AGA appearing for the State submits that the impugned order passed by the learned Magistrate is perfectly valid and correct as it was passed in consonance with the ratio of the judgments passed by this Court in **Raj Kapoor @ Lallu Vs. State of U.P. and another, 2017 (1) JIC 322, Allahabad and others** and has further contended that the relief sought by means of this application under Section 482 Cr.P.C. for quashing of the impugned order is malafide, misconceived and the application is liable to be dismissed.

6. In this matter it is necessary to have a glance on Section 2 (d) of Cr.P.C., therefore, the relevant provisions of the same are being reproduced below:-

Section 2(d) of Code of Criminal Procedure, 1973

2. Definitions. *- In this Code, unless the context otherwise requires, -*

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation*. - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognisable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."*

7. It is settled position of law that the offences under Sections 323 and 504 of IPC are bailable and non-cognizable. Therefore, the Explanation to Section 2 (d) is applicable. The offence under Section 323 of IPC is bailable and non cognizable and Section 506 is cognizable and non bailable and not compoundable. So the provisions of Explanation to Section 2 (d) are not applicable to the present case. Offence under Section 506 IPC has been made non bailable and congnizable vide Notification 777/VIII 9-4 (2)87 dated 31.07.1989 published in Gazette, Extra, Pt-A Section (Kha) dated 2nd August, 1989 and the provisions of Section 2 (d) of Cr.P.C. do not apply to the present case.

8. In the case of **Mata Sevak Upadhyaya and another Vs. State of U.P. and others, 1995 JIC 1168 (Alld.)** wherein the validity of the above provisions was upheld observing that the above notification still holds good and has not been deleted or withdrawn in pursuance of the Division Bench judgment in the case of **Virendra Singh Vs. State of U.P. and others, 2002 (45) ACC 609.**

9. Having heard the arguments advanced by learned counsel for the parties and also having gone through the record of the case, the controversy involved in this case has to be decided taking into consideration the relevant statutory provisions of Section 10 of Criminal Law Amendment Act, 1932, Section 506 of I.P.C., as also relevant part of Ist Schedule of Cr.P.C. relating to the offence under Section 506 IPC with State Amendment, as well as the provisions of Section 2 (d) of Cr.P.C. are being reproduced for ready reference as under:-

"Section 10 of Criminal Law Amendment Act, 1932:-

Section 10 Power of State Government to make certain offences, cognizable and non-cognizable.

(1) The State Government may, by notification in the official Gazette, declare that any offence punishable under Sections 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code, 1860, when committed in any area specified in the Notification shall notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and thereupon the Code of Criminal Procedure, 1898, shall while such notification remains in force, be deemed to be amended accordingly.

(2) The State Government may, in like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under Section 188 or Section 506 of the Indian Penal Code, 1860, shall be non-bailable.

Section 506 of Indian Penal Code:-

*"**506. Punishment for criminal intimidation.**--Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either*

description for a term which may extend to two years, or with fine, or with both;

***If threat be to cause death or grievous hurt, etc**.--And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life] or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.*

CLASSIFICATION OF OFFENCE

Para I: *Punishment--Imprisonment for 2 years, or fine, or both--Non-cognizable -Bailable--Triable by any Magistrate--Compoundable by the person intimidated.*

Para II: *Punishable--Imprisonment for 7 years, or fine, or both--Non-cognizable--Bailable--Triable by Magistrate of the first class--Non-compoundable.*

STATE AMENDMENT

Uttar Pradesh.-- *Imprisonment of 7 years, or fine or both--Cognizable--Non-bailable--Triable by Magistrate of the first class--Non-compoundable. Vide Notification No.777/VIII 9-4(2)--87, dated 31st July, 1989 published in U.P. Gazette, Extra., Pt. A, Sec. (kha), dated 2nd August, 1989.*

Ist Schedule of Code of Criminal Procedure, 1973

506	Criminal Intimidation	Imprisonment for 2 years or Fine, or both.	Non-cognizable	Bailable	Any Magistrate
	If threat be to cause death or grievous hurt etc.	Imprisonment for 7 years or Fine, or both.	Non-cognizable	Bailable	Magistrate of first class

STATE AMENDMENT

Andhra Pradesh:

Offences under section 506 are cognizable and non-bailable.

[Vide A.P.G.O. Ms. No.732, dated 5th December, 1991.]

Uttar Pradesh:

The offence under section 506 are cognizable and non- bailable. [Vide Notification No.777/VIII 9-4(2)-87, dated 31st July, 1989, published in U.P. Gazette, Extra., Part A, Section (Kha), dated 2nd August, 1989.]

Section 2(d) of Code of Criminal Procedure, 1973

***2. Definitions.**--In this Code, unless the context otherwise requires,--*

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

***Explanation.-** A report made by a police officer in a case which discloses, after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."*

10. Regard being had to the aforesaid statutory provisions, this Court finds that though in the Ist Schedule of Cr.P.C. , the offence under Section 506 I.P.C. is

described as non-cognizable and bailable but by virtue of Section 10 of Criminal Law Amendment Act, 1932 the same was made cognizable and non-bailable in U.P. by the U.P. Government Notification no.777/VIII-9-4(2)87 dated 31.07.1989. Section 10 of the Criminal Law Amendment Act, 1932 gives power to the State Government to declare certain offences including offences under Section 506 IPC to be cognizable and non-bailable and it provided that on issuance of such notification the Code of Criminal Procedure, 1898 shall stand amended accordingly.

11. The Full Bench of this Court has considered the legality and validity of this notification in the case of ***Mata Sewak Upadhyay and another versus State of U.P. and others*** (supra) and it has been laid down by the Full Bench that Criminal Law Amendment Act, 1932 is not merely an Amending Act but that is a blend of substantive provisions as well as the provisions amending Cr.P.C. of 1898. So the Act of 1932 is still on the statute book, notwithstanding the repeal of Cr.P.C. 1898. It was further held by the Full Bench that applying the rule of construction as laid down in Section 8 of the General Clauses Act, it becomes clear that the notification issued u/s 10 with reference to Cr.P.C. 1998 should be read as having been issued with reference to the Cr.P.C. 1973 and that the law has to be construed in such a fashion as to make it workable and enforceable, than to make it redundant. It was also held by the Full Bench of this Court that Section 10 of the Criminal Law Amendment Act, 1932 and Government Notification no.777/VIII-94 (2)-87 dated 2.8.1998 making Section 506 I.P.C. cognizable and non-bailable offence are valid.

12. Again an occasion arose for consideration of the above matter before this Court and this Court in the case of **Parveen Kumar and others Vs. State of U.P. and another, ADJ 2011 (5) 418,** wherein it was observed that since the Full Bench decision of this Court in **Mata Sevak Upadhyaya and another Vs. State of U.P. and others** (supra) has not been overruled or the learned counsel for the applicant has not stated that above decision has been set aside by the Apex Court, so the decision of Division Bench in **Virendra Singh Vs. State of U.P. and others** (supra) case cannot given effect.

13. From a perusal of judgment of **Virendra Singh Vs. State of U.P. and others** (supra) case, it is clear that the Full Bench decision of this Court in the case of ***Mata Sevak Upadhyaya and another Vs. State of U.P. and others*** (supra) was not brought before the Division Bench and, it was neither considered nor discussed nor distinguished by the Division Bench.

14. In the result, I am of the considered view that offence under Section 506 I.P.C. may not be treated as non-cognizable as per submissions made by the learned counsel for the applicant and since the offence under Section 506 I.P.C. has been made, cognizable, non-bailable and non-compoundable vide above mentioned notification in the State of U.P., the provisions of Section 2 (d) of Cr.P.C. do not apply to the present case and so the impugned order dated 29.6.2015 of cognizance passed by Judicial Magistrate may not be considered to be wrong and illegal and is not liable to be quashed.

15. In view of the discussions made above, I find that the applicant has failed to show that in view of decision in ***Virendra***

Singh' s case (supra) or provisions of Section 2 (d) of Cr.P.C., the impugned order of cognizance dated 21.10.2019 passed upon submission of charge-sheet under Sections 323 and 506 of IPC is perfectly valid and no abuse of process of law is evident or apparent from the impugned order. It does not require the exercise of inherent power by this Court for securing the ends of justice. The application is devoid of merits and is liable to be dismissed.

16. The application under Section 482 Cr.P.C. is **dismissed** accordingly.

17. However, if the applicant appears before the Court below and moves application for bail, the same shall be disposed of expeditiously, in accordance with law.

(2020)06ILR A127
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2020

BEFORE
THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482 No. 6974 of 2020

Hemlata & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Swati Agarwal Srivastava

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

Criminal Law - Criminal procedure Code (2 of 1974) – Section 482 - Indian Penal Code (45 of 1860)- Section 323- Section 328 – Section 376 – Section 120B - Quashing of proceedings – Compromise in Sexual Offence – Impermissible - Sexual offences constitute an altogether different class of crime which is the result of a perverse mind - these crimes cannot be treated at par with matrimonial offence - Allowing quashing of charge-sheet, pursuant to a compromise, will, in such cases, only embolden the perpetrators of such crimes & would only encourage commission of such offences, as the accused, using his money power or otherwise, may be able to induce the prosecutrix/victim to enter in to settlement with him and then seek quashing of criminal proceedings, on the strength of that settlement. (Para 14)

Application dismissed (E-5)

List of case cited :

1.St. of M.P. Vs Yogendra Singh Jadon & anr passed in Cri. Appeal No. 175 of 2020 dt 31.01.2020

2. Rajeev Kourav Vs Baisahab & ors. Cri. Appeal No. 232 of 2020 dt 11.02.2020

3.St. of M.P. Vs Laxmi Narayan & ors. AIR (2019) SC 1296

4.ParbatbhaiAahir Vs St. of Gujarat (2017) 9 SCC 641

5.Ramphal Vs St. of Har. AIR Online (2019) SC 1716

6.Arun Singh & ors. Vs St. of U.P. through its Secretary & anr. Cri. Appeal No. 250 of 2020 dt 10.02.2020

7.Bodhi Sattwa Gautam Vs Subhra Chakraborty AIR (1996) SC 922

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

1. Heard Mrs. Swati Agrawal Srivastava, learned counsel for the applicants, Sri Rabindra Kumar Singh, learned Additional Government Advocate assisted by Sri Prashant Kumar Singh, learned Brief Holder for the State/opposite

party no.1 and perused the record with the assistance of learned counsel for the parties.

2. This application under Section 482 Cr.P.C. has been filed by the applicants to quash the entire proceedings of case no. 10 of 2020 (State Vs. Ram Milan @ Pintu and others) arising out of case crime no. 301 of 2019, under Sections 323, 328, 376, 120B IPC, Police Station Pipari, District - Kaushambi pending in the court of learned Magistrate, Kaushambi.

3. In short compass, the facts of this case are that FIR of the prosecutrix/opposite party no.2 was registered on 30.07.2019 through an application under Section 156(3) Cr.P.C. dated 24.06.2019 with regard to alleged incident dated 21.12.2016 making allegation inter-alia that her father was admitted in P.G.I., Lucknow. She along with her husband (applicant no.2) had gone to see and take care of him on 21.12.2016. On returning in the night at about 9.00 P.M., her husband took her in the house of applicant no.3, where she was stayed in the night. Accused persons fed her at night mixing alcoholic substance in the food, due to which she fell asleep. Next day in the morning when she wake up, she found her in naked condition and accused-applicants were found standing there. It is further alleged that on raising objection by her, she was shown a video by the applicants and threatened that if she will disclose anything, the said video will be uploaded on Whatsapp, Facebook and it will be given to all news channels. It is also alleged that she was afraid and applicant no.3 (Ram Bahadur) used to commit rape upon her in collusion with applicant nos. 1 and 2, because her husband (applicant no.2) was having illicit relation with applicant no.1 (wife of applicant no.3/Ram Bahadur). It is also alleged that on 25.05.2019, when she was alone in her house, the applicants along with unknown persons came there and insisted her to have sex with that unknown persons. On making resistance, she was beaten by them and thereafter on 26.05.2019 she went to her *Maika* saving her life and told her mother what had happened with her. It is also mentioned that on 3.6.2019 information about the said incident was given by prosecutrix/opposite party no.2 personally to Superintendent of Police, Kaushambi as well as other officers, sending her application by registered post, but no action was taken. Thereafter, she moved an application under Section 156(3) Cr.P.C. before the Magistrate concerned seeking direction to get her First Information Report registered. During investigation, statement of victim/prosecutrix under Section 161 Cr.P.C. was recorded on 1.8.2019 and statement under Section 164 Cr.P.C. was recorded on 13.08.2019, in which she has reiterated her version as mentioned in the FIR. X-ray of the prosecutrix was done on 8.8.2019 and as per radiological report, age of the prosecutrix was found 20-25 years. Investigating Officer, after investigation submitted charge-sheet dated 11.01.2020 against applicant nos. 1 and 2 under Sections 323, 328, 120B IPC and against applicant no.3 under Sections 323, 328, 376, 120B IPC.

4. On the aforesaid fact, it is submitted by learned counsel for the applicants that applicant no.1 is cousin sister-in-law *(Jethani)*, applicant no.2 is husband and applicant no.3 is cousin brother-in-law *(Jeith)* of the prosecutrix/opposite party no.2. There is a family dispute between the applicant no.2 and opposite party no.2, therefore,

applicants have been falsely implicated in this case. There are major contradiction in the version of FIR, statements under Section 161 Cr.P.C. and 164 Cr.P.C. of the victim/prosecutrix. Statement under Section 164 Cr.P.C. of victim was recorded on 13.08.2019, in which she has stated that since last four months she is living in her *Maika*. Giving much emphasis on the said averment, it is submitted by learned counsel for the applicants that meaning thereby since April, 2019 she was living in her parental house (*Maika*), but in the FIR she has shown one of the incident dated 25.05.2019 and also mentioned that she went to her *Maika* on 26.05.2019. As such, one of the date of incident is not corroborated from the statement of victim. It is also submitted that since the opposite party no.2 has no brother and she has three sisters, therefore, opposite party no.2 and her parents were insisting applicant no.2 (husband of victim) to live in in-law's house, but on refusal of the said proposal of opposite party no.2 by the applicant no.2, the dispute arose between them. It is also submitted that so far as allegation of making video is concerned, there is no alleged video clipping is on record in this case, while charge-sheet has been submitted in the present case. It is further submitted that though the allegations have been levelled against the applicants, but there is no corroborative evidence on record in support thereof. It is next submitted that in the medical examination report dated 7.8.2019 of victim, no external or internal injury has been found. It is further submitted that applicants, namely, Hemlata, Ram Milan @ Pintu and Ram Bahadur have already been granted bail vide orders dated 6.1.2020, 17.1.2020 and 20.12.2019 passed in Criminal Misc. Bail Application Nos. 56539 of 2019, 2698 of 2020 and 57610 of 2019 respectively by the co-ordinate Bench of this Court. The prosecution story as set up by opposite party no.2 in order to settle her personal score is not liable to be believed and criminal proceedings in this case against the applicants is nothing but abuse of the process of the Court, therefore, same is liable to be quashed. Lastly, it is submitted that in case this Court is not inclined to quash the proceedings, then this matter may be referred to mediation and conciliation center of this Court, because applicants are also willing to settle the issue by way of compromise/mediation.

5. Per contra, learned Additional Government Advocate for the State of U.P. refuting the submissions advanced on behalf of the applicants submitted that upon perusal of First Information Report and on the basis of the allegations made therein as well as material evidence against the accused-applicants, as per prosecution case, the cognizable offence against the applicants is made out. The criminal proceedings against the applicants cannot be said to be abuse of the process of the Court. Hence, this application is liable to be dismissed. It is also pointed out that in the present application charge-sheet dated 11.01.2020 filed against the accused-applicants has not been challenged, therefore, prayer of the applicants to quash the entire criminal proceedings of the case, without challenging the charge-sheet filed against them, is not maintainable.

6. After having heard the submissions of the learned counsel for the parties and perusing the entire record, I find that there is specific allegation of committing rape upon the victim/opposite party no.2 against applicant no.3 (Ram Bahadur). The connivance and involvement of applicant nos. 1 and 2 in the aforesaid incident has

also been mentioned in the First Information Report showing the motive against the applicants mentioning that since her husband (applicant no.2) is having illicit relation with applicant no.1 (wife of applicant no.3), therefore, applicant nos. 1 and 2 in lieu thereof were insisting the victim to establish physical relationship with applicant no.3 (Ram Bahadur). I also find that in this case, allegation of wife swapping has been levelled by the victim/opposite party no.2 against the accused-applicants. Victim in her statements under Section 161 and 164 Cr.P.C. have supported the prosecution case reiterating the main allegations against the accused-applicants. At the time of medical examination of victim, the doctor concerned has also noted the brief description of the incident as narrated by the victim, in which also, victim has made similar allegation against the applicants. Though, it is submitted from the side of accused-applicants that it is a family dispute, but no documentary evidence has been brought on record alongwith this application except oral submissions made on behalf of the applicants. The grounds taken in the application reveal that many of them relate to disputed question of fact. This Court is of the view that it is well settled that the appreciation of evidence is a function of the trial court. This Court in exercise of power under Section 482 Cr.P.C. cannot assume such jurisdiction and put to an end to the process of trial provided under the law. It is also settled by the Apex Court in catena of judgments that the power under Section 482 Cr.P.C. at pre-trial stage should not be used in a routine manner but it has to be used sparingly, only in such an appropriate cases, where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceedings or where allegations made in First Information Report or charge-sheet and the materials relied in support of same, on taking their face value and accepting in their entirety, do not disclose the commission of any offence against the accused. The disputed questions of facts and defence of the accused cannot be taken into consideration at this pre-trial stage. Factual submissions and defence as raised in the application can be more appropriately gone into by the trial court at the appropriate stage. The applicants have an alternative statutory remedy of moving discharge application at the appropriate stage.

7. The Apex Court in the case of ***Md. Allauddin Khan Vs. The State of Bihar and others 2019 (6) SCC 107*** has laid down the jurisdiction of High Court under Section 482 Cr.P.C. The observation made by the Apex Court in paragraph No.17 is reproduced herein below:

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

8. The Apex Court on 31.01.2020 in the case of **State of Madhya Pradesh Vs. Yogendra Singh Jadon and another** passed in Criminal Appeal No. 175 of 2020 has held that 'power under Section 482 of the Code of Criminal Procedure cannot be exercised where the allegations are required to be proved in court of law'.

9. Recently on 11.02.2020, the Apex Court in case of **Rajeev Kourav Vs. Baisahab and others** passed in Criminal Appeal No. 232 of 2020 (arising out of S.L.P. (Crl.) No. 1174 of 2017) has held that quashing the criminal proceedings by the High Court on the basis of its assessment of the statements recorded under Section 161 Cr.P.C. is not proper. The relevant paragraph nos. 8, 9, 10 and 11 of the aforesaid judgment are as under:-

"8. We do not agree with the submissions made on behalf of Respondent Nos.1 to 3. The conclusion of the High Court to quash the criminal proceedings is on the basis of its assessment of the statements recorded under Section 161 CrPC. Statements of witnesses recorded under Section 161 CrPC being wholly inadmissible in evidence cannot be taken into consideration by the Court, while adjudicating a petition filed under Section 482 Cr.P.C.

9. Moreover, the High Court was aware that one of the witnesses mentioned that the deceased informed him about the harassment meted out by Respondent Nos.1 to 3 which she was not able to bear and hence wanted to commit suicide. The High Court committed an error in quashing criminal proceedings by assessing the statements under Section 161 Cr. P.C.

10. We have not expressed any opinion on the merits of the matter. The High Court ought not to have quashed the proceedings at this stage, scuttling a full-fledged trial in which Respondent Nos.1 to 3 would have a fair opportunity to prove their innocence.

11. For the aforementioned reasons, the judgment of the High Court is set aside and the Appeal is allowed."

10. So far as submission of learned counsel for the applicants that the applicants are willing to settle the issue by way of compromise/settlement is concerned, it is relevant to mention that Three Judge Bench of the Apex Court in the matter of **State of Madhya Pradesh Vs. Laxmi Narayan and others AIR 2019 SC 1296** considering the guideline laid down by the Apex Court in case of **Parbatbhai Aahir Vs. State of Gujarat (2017) 9 SCC 641** has ruled that the criminal proceedings for the offence of "rape" cannot be quashed merely on the basis of compromise made between the victim and offender. The guideline laid down by the Apex Court in paragraph 13 of the said judgment is reproduced herein-below:-

"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the

special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc., which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

11. Here it is also apposite to mention that in case of **Ramphal Vs. State of Haryana AIR Online 2019 SC 1716** it was brought to the notice of the Apex Court that during pendency of appeal, the appellants, who have been convicted by the trial court, have paid Rs. 1.5 lakhs each in favour of the prosecutrix and she has accepted the same willingly for getting the matter compromised. On the said fact, the Apex Court has observed that "it is imperative to emphasis that we do not accept such compromise in matters relating to offence of rape and similar cases of sexual assault".

12. Apex Court on 10.02.2020 in case of **Arun Singh and others Vs. State of U.P. through its Secretary and another** passed in Criminal Appeal No. 250 of 2020 while considering case under Section 493 I.P.C. and 3 read with Section 4 of Dowry Prohibition Act did not approve the issue of compromise in such offences, which are against the society and not private in nature. The relevant observation made by the Apex Court in paragraph no. 15 of the said judgment is quoted herein-below:-

"15. Bearing in mind the above principles which have been laid down, we are of the view that offences for which the appellants have been charged are infact offences against society and not private in nature. Such offences have serious impact upon society and continuance of trial of such cases is founded on the overridding effect of public interests in punishing persons for such serious offences. It is neither an offence arising out of commercial, financial, mercantile, partnership or such similar transactions or has any element of civil dispute thus it stands on a distinct footing. In such cases, settlement even if arrived at between the complainant and the accused, the same cannot constitute a valid ground to quash the F.I.R. or the charge sheet".

13. In **Bodhi Sattwa Gautam Vs. Subhra Chakraborty, AIR 1996 SC 922,** the Hon'ble Supreme Court observed, inter alia, as under:-

"Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life.

Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not play things for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.

Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects."

14. Sexual offences constitute an altogether different class of crime which is the result of a perverse mind. By their very nature these crimes cannot be treated at par with matrimonial offence. Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right of privacy and sanctity of a female and is a serious blow to her supreme honor offending her self-esteem and dignity. Allowing quashing of charge-sheet, pursuant to a compromise, will, in such cases, only embolden the perpetrators of such crimes, which otherwise are on the increase, in society. If the accused in such a case is an affluent person and the prosecutrix comes from a

socially or economically weaker strata of the society, quashing in such a case would only encourage commission of such offences, as the accused, using his money power or otherwise, may be able to induce the prosecutrix/victim to enter in to settlement with him and then seek quashing of criminal proceedings, on the strength of that settlement.

15. This Court does not find that this case fall in categories as recognized by the Apex Court for quashing the criminal proceedings of the trial court at pre-trial stage. Considering the facts, circumstances and nature of allegations against the applicants in this case, the cognizable offence is made out. At this stage, it would not be appropriate to adjudge whether the case shall ultimately end in conviction or not. Only prima facie satisfaction of the Court about the existence of sufficient ground to proceed in the matter is required. The impugned criminal proceedings under the facts of this case cannot be said to be abuse of the process of the Court. There is no good ground to invoke inherent power under Section 482 Cr.P.C. by this Court.

16. The relief as sought by the applicants through the instant application is hereby **refused.**

17. This application under Section 482 Cr.P.C. lacks merit and is, accordingly, **dismissed.**

18. Office is directed to communicate this order to the concerned court below as well as victim/opposite party no.2 of this case within two weeks.

(2020)06ILR A134

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 25.02.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 7263 of 2020
With
Application U/S 482 No. 7264 of 2020
With
Application U/S 482 No. 7266 of 2020

Harshit Vij & Anr. ...Applicants

Versus

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

Counsel for the Applicants:
Sri Ravi Jha, Sri Anil Kumar Srivastava, Sri Ram Bahadur

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

Civil Law - Negotiable instruments Act, 1881 - Section 139 - Presumption in favour of holder - once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the N.I. Act in favour of the holder of cheque that is the complainant - presumptions u/s 139 of the N.I. Act is rebuttable. - burden lies upon the accused to rebut the presumption by adducing evidence - until the accused discharges his burden, the presumption under Section 139 of N.I. Act will continue to remain - When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the N.I. Act could not be quashed by the High Court u/s 482 Cr.P.C. (Para 26)

Criminal Law - Criminal Procedure Code (2 of 1974) - Section 245 - Discharge & Framing of Charge - at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence - At that stage, the court is not expected to go deep into the probative value of the material on

record -defence of the accused is not to be looked into at the stage when the accused seeks to be discharged - Veracity of by the court only after the charges have been framed and the trial has commenced. (Para 25)

Application disimissed (E-5)

List of case cited :

1.PoojaRavinderDevidasani Vs St. of Mah & anr. (2014) 16 SCC

2.RajeshbhaiMuljibhai Patel & ors. etc. Vs St. of Guj & anr. (2020) 0 Supreme SC 137

3.M.E. Shivalingamurthy Vs CBI, Bengaluru (2020) 1 Supreme 169/2020 0 Supreme (SC) 12

4.R.P. Kapur Vs St. of Punj. AIR (1960) SC 866

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

6.St. of Bihar & anr. Vs P.P. Sharma & anr (1992) Supp 1 SCC 222

7.Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohammad SharifulHaque & anr. (2005) 1 SCC 122

8.M. N. Ojha Vs. Alok Kumar Srivastava (2009) 9 SCC 682

9.Nallapareddy Sridhar Reddy Vs St. of AP & ors (2020) 0 Supreme (SC) 45

10.St. of Bihar Vs Ramesh Singh (1977) 4 SCC 39

11.Suptd. & Remembrancer of Legal Affairs, WB Vs Anil Kumar Bhunja AIR (1980) SC 52

12.Palwinder Singh Vs Balvinder Singh reported in AIR (2009) SC 887

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This application under Section 482 Cr.P.C. has been filed to quash the entire deposition/material is a matter of trial and not required to be examined while framing charge- Appreciation of evidence on merit is to be done proceedings of the Complaint Case No. 21 of 2017 (Naeem Ahmed Ansari Vs. Purna Agencies Pvt. Ltd. & Others), under Sections 138/141 of the Negotiable Instrument Act, 1881 as well as the order dated 18th December, 2019 passed by the Additional Judge, Saharanpur on applications filed by the applicants being paper nos. 12-B and 13-B under Sections 251 read with Section 245 Cr.P.C. for seeking discharge in the aforesaid complaint case, whereby the concerned Magistrate has rejected both the applications.

2. Heard Mr. Anil Kumar Srivastava, learned Senior Advocate assisted by Mr. Ravi Jha and Ram Bahadur, learned counsel for the applicants and Mr. Amit Singh Chauhan and Mr. Pankaj Srivastava, learned Additional Government Advocates.

3. Perused the material available on record.

4. All these three applications under Section 482 Cr.P.C. raise common questions of law, issue and facts, therefore, clubbed together and are being decided by means of this common order. Application U/s 482 Cr.P.C. No. 7263 of 2020 is being treated to be the leading case.

5. Brief facts, as are borne out from the records of the present application, are as follows:

Opposite party no.2, namely, Naeem Ahmad has made complaint Sections 138/141 of the Negotiable Instrument Act, 1881 (hereinafter referred to as the "N.I. Act") before the Additional

Judge/Fast Track Court, Saharanpur on 11th January, 2017 against the company, namely, M/s Purna Agencies Private Ltd., IX/Raghubarpura No.2, Gandhi Nagar, Delhi East, Delhi through Authorized Signatory, namely, Kanika Aggi as well as four named accused persons, namely, Kanika Aggi, Kanwal Kumar, Ashok Chaudhary, Harshit Viz (all are alleged to be directors of the said company). In the said complaint it has been stated that Kanika Aggi is the director and authorized signatory and she is responsible for all the work and transactions done against the said company. Regarding payment of money of the opposite party no.2, which was due against the company, a cheque bearing no. 099242 dated 19th October, 2016 for a sum of Rs. 50,00,000/- (Rupees fifty lacs only) drawn on bank account of Purna Agencies Pvt. Ltd. with State Bank of Bikaner and Jaipur, G.T. Road, Ludhiana Branch, bearing the signature of Ms. Kanika Aggi on behalf of the all the directors of the company was handed over to opposite party no.2 towards payments of certain monies with an assurance that the same would be honoured immediately on presentation. On the assurance given by all the directors including Kanika Aggi, on 20th October, 2016 when the said cheque was presented by opposite party no.2 with his bank bearing Jammu and Kashmir Bank, Branch Parshwnath Plaza Court Road, Saharanpur, the same was dishonoured and was returned with the Wollongong endorsement on the memo of return: **"payment stopped by the drawer"**. It has further been stated that when opposite party no.2 conveyed the above to the accused, he was orally informed that the said cheque be presented again in the first week of December, 2016 with an assurance that the cheque would be cleared.

On 5th December, 2016 opposite party no.2, on the basis of such assurance, presented the said cheque again with his bank, being Jammu and Kashmir Bank, Branch Parshwnath Plaza Court Road, Saaharanpur. However, once again, the same was dishonoured and was returned with the following endorsement on the memo of return dated 5th December, 2016:"payment stopped by drawer".

On 15th December, 2016, a statutory legal notice under Section 138 N.I. Act was issued by opposite party no.2 through his advocate to the applicants, the said company, Kanika Aggi and Kanwar Kumar *inter alia* seeking payment of Rs. 50,00,000/- (Rupess fifty lacs only) due to opposite party no.2 within a period of 15 days of receipt of notice. However, the aforesaid amount has not been paid to opposite party no.2.

In view of above, opposite party no.2 filed the present complaint seeking that proceedings under Section 138 N.I. Act and Section 420 I.P.C. be initiated against the accused persons including the applicant. Along with the complaint, opposite party no.2 has also an affidavit dated 11th January, 2017 in lieu of statement under Section 200 Cr.P.C., bank return memos and cheque. On the complaint being filed, the concerned Magistrate has taken cognizance vide order dated 14th July, 2017 and thereafter passed an order dated 14th July, 2017 summoning the all accused persons including the applicants. Both the applicants have been granted bail by the court below vide orders dated 24th August, 2017 and 7th September, 2017 respectively.

On 7th September, 2017, applicants filed separate applicantion being application no. 12-B by applicant no.1 and application no.13-B by applicant no.2, under Section 251 read with Section 245

Cr.P.C. seeking discharge in the said complaint case. On 18th December, 2019, both the applications have been dismissed by the concerned Magistrate. It is against this order, summoning order and entire proceedings of the aforesaid complaint case that the present application has been filed.

6. Mr. Srivastava, learned Senior Advocate appearing for the applicants submits that except a mere bald cursory statement that the applicants are directors and authorized signatories of the said company, no specific averment has been made as to their role in the day-to-day affairs of the company. As aforesaid, while the applicant no.1 ceased to be a director of the said company on 1st April, 2016, applicant no.2 resigned as the director thereof on 5th October, 2016. As such the applicants were neither directors of the said company nor engaged in day-to-day affairs thereof as on the date of the commission of the alleged offence or on the date of issuance of cheque in question. The applicants cannot in any manner be held liable for the alleged offence. Thus, the entire proceedings against the applicants are based on erroneous facts.

7. Learned counsel appearing for the applicants further submits that the present complaint has been filed by suppressing the crucial facts in respect of the applicants' position in the said company, disclosure of which would have revealed that the said complaint cannot under any circumstances lie against the applicants. Opposite party no.2 thus approached the court with clean hands and on this ground the entire proceedings of the present complaint is liable to be quashed. Despite the above, the applicants have been erroneously and in a mechanical manner arrayed as accused nos. 4 and 5 in the present complaint, the same is nothing but an attempt to harass the applicants and extort money from them.

8. It is further submitted that the amount of Rs. 50,00,000/- alleged to be payable to opposite party no.2 is not supported by any purchase order, invoice or any documentation whatsoever. Thus, the entire case of opposite party no.2 is based on a mere avement that the cheque was issued by the said company to opposite party no.2 towards payments of certain monies. Thus, even prima facie the said complaint has failed to disclose the existence of any legally enforceable debt.

9. It is further submitted that the concerned Magistrate erred in holding that the cognizance of the complaint has already been taken, therefore, the applications filed by the applicants seeking discharge would not be maintainable. The judgments referred to in the impugned order by the concerned Magistrate i.e. Adalat Prasad Vs. Roop Lal Jindal; (2004) SCC (Cri) 1927 and Iris Computers Ltd. Vs. Askari Infortech Pvt. Ltd.; (2016) 2 SCC (Cri) 389, are not applicable to the case of the applicants.

10. It is lastly submitted that while passing the impugned order, the concerned Magistrate failed to consider, much less distinguish, the decisions of the Apex Court cited by the applicants. On the cumulative strength of the aforesaid, learned counsel for the applicants urges that the said complaint is mala fide and is liable to be quashed and asking the applicants to stand the trial in the present case would be abuse of the process of the court.

11. In support of his case, Mr. Srivastava, learned Senior Counsel appearing for the applicants has referred to paragraph nos. 17, 18, 23, 24, 25A, 27 and 28 of the judgment of the Apex Court in the case of **Pooja Ravinder Devidasani Vs.**

State of Maharashtra & Another reported in (2014) 16 SCC.

12. Per contra, Mr. Amit Singh Chauhan and Mr. Pankaj Srivastava, learned Additional Government Advocates for the State have vehementally opposed the prayer made by the learned counsel for the applicants by contending that the submissions made by the learned counsel for the applicants relate to disputes questions of fact and legality, veracity or otherwise of the same cannot be examined at summoning or pre-trial stage. In support of their submissions, they have referred paragraph no.20 of the judgment of the Apex Court in the case of **Rajeshbhai Muljibhai Patel & Others Etc. Vs. State of Gujarat & Another Etc.** reported in *2020 0 Supreme (SC) 137*.

13. On the issue of rejection of discharge applications filed by the applicants, learned A.G.As. submits that the concerned Magistrate after considering all the documents available on record and after relying upon the various judgments of the Apex Court has rightly rejected the applications of the applicants for seeking discharge. There is no illegality or infirmity in the order passed by the concerned Magistrate rejecting the discharge applications of the applicants. In support of their case, they have referred paragraph nos. 15, 25, 26, 27 and 28 of the judgment of the Apex Court in the case of **M.E. Shivalingamurthy Vs. Central Bureau of investigation, Bengaluru** reported in *2020 1 Supreme 169/2020 0 Supreme (SC) 12*. On the cumulative strength of the aforesaid, learned Additional Government Advocates urge that the present application under Section 482 Cr.P.C. is liable to be rejected.

14. I have considered the submissions made by the learned counsel for the applicants and have gone through the records of the present application as also the orders impugned.

15. Before going on the merits of the case set up by learned counsel for the parties, this Court comes to the paragraphs of the judgments of the Apex Court as relied upon by the learned counsel for the parties herein-above.

16. Paragraph nos. 17, 18, 23, 24, 25A, 27 and 28 of the judgment of the Apex Court in the case of Pooja Ravinder Devidasani (Supra), as relied upon by the learned counsel for the applicants, are as follows:

"17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit of the provision.

Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:

"Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

18. In Girdhari Lal Gupta Vs. D.H. Mehta & Anr. (1971) 3 SCC 189, this Court observed that a person 'in charge of a business' means that the person should be in overall control of the day to day business of the Company.

23. In Gunmala Sales Private Ltd. (supra) on which learned counsel for the respondents has heavily relied, this Court at Para 33(c) held : "In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm- twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out".

24. In the light of the law laid down by this Court, the present case be examined. It is not in dispute that two persons, namely, Parag Tejani and Hitesh Haria, were inducted as Director-Operations of the Company w.e.f. 17th December, 2005 by virtue of a resolution passed by the Company on the same date. It

is on the same date the appellant had ceased to be a Director as per the Annual Report which is not disputed by the Respondent No. 2. A perusal of the Complaint shows that Respondent No. 2 has made the newly appointed Directors-Operations Parag Tejani and Hitesh Haria also as accused stating that all the accused approached him with a request for trade finance facility and accordingly the said facility was granted as per their request. It thus gives an impression that Respondent No. 2 is well aware of the change of Directors in the accused Company. In spite of knowing the developments taken place in the Company that the appellant was no longer a Director of the Company and two new Directors were inducted, the Respondent No. 2 has chosen to array all of them as accused in the Complaints. Moreover, Respondent No. 2 had not disputed this fact emphatically in the proceedings before the High Court. We have gone though the reply affidavit filed by Respondent No. 2 before the High Court of Bombay.

25. A bare reading of the averment of Respondent No. 2 before the High Court, suggests that his case appears to be that the appellant has not proved her resignation in unequivocal terms and it is a disputed question of fact. It is noteworthy that the respondent No. 2 except making a bald statement and throwing the burden on the appellant to prove authenticity of documents, has not pleaded anywhere that the public documents Form 32 and Annual Return are forged and fabricated documents. Curiously, respondent No. 2 on the one hand raises a doubt about the genuineness of Form 32, a public document, through which the default Company had communicated the change of Directors to the Registrar of the Companies with the effect of resignation of the appellant and induction of two Directors-Operations and on the other hand, he has arrayed the two newly appointed Directors-Operations as accused whose names were communicated to the Registrar of Companies by the very same Form 32. The respondent/complainant cannot be permitted to blow hot and cold at the same time. When he denies the genuineness of the document, he cannot act upon it and array the newly appointed Directors as accused.

27. Unfortunately, the High Court did not deal the issue in a proper perspective and committed error in dismissing the writ petitions by holding that in the Complaints filed by the Respondent No. 2, specific averments were made against the appellant. But on the contrary, taking the complaint as a whole, it can be inferred that in the entire complaint, no specific role is attributed to the appellant in the commission of offence. It is settled law that to attract a case under Section 141 of the N.I. Act a specific role must have been played by a Director of the Company for fastening vicarious liability. But in this case, the appellant was neither a Director of the accused Company nor in charge of or involved in the day to day affairs of the Company at the time of commission of the alleged offence. There is not even a whisper or shred of evidence on record to show that there is any act committed by the appellant from which a reasonable inference can be drawn that the appellant could be vicariously held liable for the offence with which she is charged.

28. In the entire complaint, neither the role of the appellant in the affairs of the Company was explained nor in what manner the appellant is responsible for the conduct of business of the Company, was explained. From the record it appears that the trade finance facility was extended

by the Respondent No. 2 to the default Company during the period from 13th April, 2008 to 14th October, 2008, against which the Cheques were issued by the Company which stood dishonored. Much before that on 17th December, 2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under Section 138read with Section 141 of the N.I. Act is a pure abuse of process of law and it has to be interdicted at the threshold."

17. Paragraph no.20 of the judgment of the Apex Court in the case of **Rajeshbhai Muljibhai Patel (Supra)** as relied upon by the learned Additional Government Advocates for the State, is as follows:

"20. The High Court, in our view, erred in quashing the criminal case in C.C.No.367/2016 filed by appellant No.3-Hasmukhbhai under Section 138 of N.I. Act. As pointed out earlier, Yogeshbhai has admitted the issuance of cheques. ***When once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the N.I. Act in favour of the holder of cheque that is the complainant-appellant No.3. The nature of presumptions under Section139 of the N.I. Act and Section 118(a) of the Indian Evidence Act are rebuttable. Yogeshbhai has of course, raised the defence that there is no illegally enforceable debt and he issued the cheques to help appellant No.3-Hasmukhbhai for purchase of lands. The burden lies upon the accused to rebut the presumption by adducing evidence. The High Court did not keep in view that until the accused discharges his burden, the presumption under Section 139 of N.I. Act will continue to remain.*** *It is for Yogeshbhai to adduce evidence to rebut the statutory presumption. When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the N.I. Act ought not to have been quashed by the High Court by taking recourse to Section 482 Cr.P.C. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the N.I. Act on the legal issues like limitation, etc. Criminal complaint filed under Section 138 of the N.I. Act against Yogeshbhai ought not have been quashed merely on the ground that there are inter se dispute between appellant No.3 and respondent No.2. Without keeping in view the statutory presumption raised under Section 139 of the N.I. Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in C.C.No.367/2016 filed under Section 138 of N.I. Act.*

(Emphasis added)

18. Paragraph nos. 15, 25 to 27 of the judgment of the Apex Court in the case of **M.E. Shivalingamurthy (Supra)** as relied upon by the learned Additional Government Advocates for the State, are as follows:

"15. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.PC (See State of J & K v. Sudershan Chakkar and another, AIR 1995 SC 1954). The expression, "the record of the case", used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to

produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the Police (See State of Orissa v. Debendra Nath Padhi, AIR 2005 SC 359).

25. It is here that again it becomes necessary that we remind ourselves of the contours of the jurisdiction under Section 227 of the Cr.PC. The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, ***if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the Trial Court to discharge the accused.***

26. It is not open to the accused to rely on material by way of defence and persuade the court to discharge him.

27. ***However, what is the meaning of the expression "materials on the basis of which grave suspicion is aroused in the mind of the court's", which is not explained away? Can the accused explain away the material only with reference to the materials produced by the prosecution? Can the accused rely upon material which he chooses to produce at the stage?***

28. In view of the decisions of this Court that the accused can only rely on the materials which are produced by the prosecution, it must be understood that the grave suspicion, if it is established on the materials, should be explained away only in terms of the materials made available by the prosecution. No doubt, the accused may appeal to the broad probabilities to the case to persuade the court to discharge him."

(Emphasis added)

19. Now, this Court comes on the issues whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicants. The aforesaid issue has elaborately been discussed by the Apex Court the following judgments:

(i) **R.P. Kapur Versus State of Punjab**; *AIR 1960 SC 866,*

(ii) **State of Haryana & Ors. Versus Ch. Bhajan Lal & Ors.**;*1992 Supp.(1) SCC 335,*

(iii) **State of Bihar & Anr. Versus P.P. Sharma & Anr.;** *1992 Supp (1) SCC 222,*

(iv) **Zandu Pharmaceuticals Works Ltd. & Ors. Versus Mohammad Shariful Haque & Anr.**; *2005 (1) SCC 122, and*

(v) **M. N. Ojha Vs. Alok Kumar Srivastava;** *2009 (9) SCC 682.*

20. In the case of R.P. Kapur (Supra), the following has been observed by the Apex Court in paragraph 6:

"Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under s. 561 -A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in

regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under s. 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the a11egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under s. 561-A in the matter of quashing criminal proceedings, and that is the effect

of the judicial decisions on the point (Vide: In Re: Shripad G. Chandavarkar AIR 1928 Bom 184, Jagat Ohandra Mozumdar v. Queen Empress ILR 26 Cal 786), Dr. Shanker Singh v. The State of Punjab 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Ray v. Govind Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. K. Sivarama Subrahmanya Ayyar ILR 47 Mad 722: (AIR 1925 Mad 39)."

21. In the case of **State of Haryana (Supra),** the following has been observed by the Apex Court in paragraph 105:

"105. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

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

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

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

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

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

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

22. In the case of **State of Bihar (Supra),** the following has been observed by the Apex Court in paragraph 22. :-

"The question of mala fide exercise of power assumes significance only when the criminal prosecution is initiated on extraneous considerations and for an unauthorised purpose. There is no material whatsoever is this case to show that on the date when the FIR was lodged by R.K. Singh he was activated by bias or had any reason to act maliciously. The dominant purpose of registering the case against the respondents was to have an investigation done into the allegations contained in the FIR and in the event of there being sufficient material in support of the allegations to present the charge sheet before the court. There is no material to show that the dominant object of registering the case was the character assassination of the respondents or to harass and humiliate them. This Court in State of Bihar v J.A.C. Saldhana and Ors., [1980] 2 SCR 16 has held that when the information is lodged at the police station and an offence is registered, the mala fides of the informant would be of secondary importance. It is the material collected during the investigation which decides the fate of the accused person. This Court in State of Haryana and Ors. v. Ch. Bhajan Lal and Ors., J.T. 1990 (4) S.C. 650 permitted the State Government to hold investigation afresh against Ch. Bhajan Lal inspite of the fact the prosecution was lodged at the instance of Dharam Pal who was enimical towards Bhajan Lal."

23. In the case of **Zandu Pharmaceuticals Works Ltd. (Supra)**, the following has been observed by the Apex Court in paragraphs nos. 8 to 12:

"8. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is

made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In R. P. Kapur v. State of Punjab (AIR 1960 SC 866) this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

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

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

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying

an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

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

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

As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. ***The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.*** *(See: Janata Dal v. H. S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the*

allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi v. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P. P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O. C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O. P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi (1999 (3) SCC 259.

12. The above position was recently highlighted in State of Karnataka v. M. Devendrappa and Another (2002 (3) SCC 89)."

(emphasis added)

24. Thereafter, in the case of **M.N. Ojha Vs. Alok Kumar Srivastava,** *reported in 2009 (9) SCC 682* has made observations in paragraphs 25, 27, 28, 29 and 30 regarding the exercise of power under section 482 Cr.P.C. as well as the principles governing the exercise of such jurisdiction:-

"25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the complainant and others with regard to same transaction.

26. This Court in Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998)5 SCC 749 held:

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

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the

contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even adverting to the basic facts which were placed before it for its consideration.

29. It is true that the court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

*30. I**nterference by the High Court in exercise of its jurisdiction under Section 482 of Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in progress of the inquiry in a criminal case which may not be in the public interest.** But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the Complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint." (emphasis added)*

25. The Apex Court in its latest judgment in the case of **Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh & Ors.** reported in 2020 0 Supreme (SC) 45, dealing with a cases under Sections 406 and 420 I.P.C. has observed that the Court does not have to delve deep into probative value of evidence regarding the charge. It has only to see if a prima facie case has been made out. Veracity of deposition/material is a matter of trial and not required to be examined while framing charge. The Apex Court further observed that the veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The Apex Court in paragraph nos. 21, 22 and 24 has observed as follows:

"21 The appellant has relied upon a two-judge Bench decision of this Court in Onkar Nath Mishra v The State, (2008) 2 SCC 561 to substantiate the point that the ingredients of Sections 406 and 420 of the IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

*"11. **It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their***

face value, disclosed the existence of all the ingredients constituting the alleged offence. *At that stage, the court is not expected to go deep into the probative value of the material on record.* ***What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out.*** *At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."*

(Emphasis supplied)

22 In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

"LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-in- law, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant's daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide a job to his daughter and that A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. ***Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.***

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the attention of the lower court due to which the additional charges could not be framed."

(Emphasis supplied)

24 The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 of the IPC are

attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference."

(Emphasis added)

26. In view of the aforesaid, this Court finds substance in the submissions made by the learned Additional Government Advocates for the State. It is admitted case of the applicants that they tendered their resignations from the post of directors of the said company in the year 2016. When once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the N.I. Act in favour of the holder of cheque that is the complainant-appellant No.3. The nature of presumptions under Section139 of the N.I. Act and Section 118(a) of the Indian Evidence Act are rebuttable. The submissions made by the applicants' learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the complaint and the material available before the court below on the basis of which the applicants have been summoned makes out a prima facie case against the applicants at this stage and there appear to be sufficient ground for proceeding against the applicants. I do not find any justification to quash the complaint or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing. The judgment of the Apex Court in the case of **Pooja Ravinder Devidasani (Supra)** relied upon by the learned counsel for the applicants is distinguishable in the facts of the present case.

27. So far as the legality, veracity or otherwise of the order passed by the concerned Magistrate rejecting the discharge applications of the applicants are concerned, before proceeding to adjudge the validity of the impugned order it may be useful to cast a fleeting glance to some of the representative cases decided by the Apex Court have expatiated upon the legal approach to be adopted at the time of framing of the charge or at the time of deciding whether the accused ought to be discharged. It shall be advantageous to refer to the observations made by the Hon'ble Apex Court in the case of **State of Bihar vs. Ramesh Singh** reported in 1977 (4) SCC 39 which are as follows :-

"4. Under S. 226 of the Code while opening the case for the prosecution the prosecutor has got to describe the charge against the accused and State by what evidence he proposes to prove the guilt of the accused. Thereafter, comes at the initial stage, the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either u/s. 227 or u/s. 228 of the Code. If "the Judge considers that there is not sufficient ground for proceeding against the accused, he

shall discharge the accused and record his reasons for so doing", so enjoined by s. 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which .....

(b) in exclusively triable by the court, he shall frame in writing a charge against the accused," as provided in S. 228.

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

28. Aforesaid case was again referred to in another Apex Court's decision **Superintendent and Remembrancer of Legal Affairs, West Bengal Versus Anil Kumar Bhunja** reported in AIR 1980 (SC) 52 and the Apex Court proceeded to observe as follows:

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed

out by this Court in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."

29. In yet another case of **Palwinder Singh Vs. Balvinder Singh** reported in *AIR 2009 SC 887* the Apex Court had the occasion to reflect upon the scope of adjudication and its ambit at the time of framing of the charge and also about the scope to consider the material produced by the accused at that stage. Following extract may be profitably quoted to clarify the situation :

"12. Having heard learned counsel for the parties, we are of the opinion that the High Court committed a serious error in passing the impugned judgment insofar as it entered into the realm of appreciation of evidence at the stage of the framing of the charges itself. The jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal Procedure is limited. Charges can be framed also on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. This aspect of the matter has been considered by this Court in state of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568 wherein it was held as under :

"23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's Case holding that the trial Court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

30. The following observations made by the Apex Court in the case of **Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary reported in** *AIR 2009 SC 9* also reiterated the same position of law :-

"10. After analyzing the terminology used in the three pairs of sections it was held that despite the differences there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of a prima facie case to be applied.

11. The present case is not one where the High Court ought to have interfered with the order of framing the charge. As rightly submitted by learned counsel for the appellant, even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction. That being so, the impugned order of the High Court cannot be sustained and is set aside. The appeal is allowed."

31. The prayer for quashing or setting aside the impugned orders summoning the

accused and rejecting the discharge applications of the applicants as also quash the entire proceedings of the complaint case at this stage is refused as I do not see any illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge. There is absolutely no abuse of court's process perceptible in the same. The present matter also does not fall in any of the categories recognized by the Apex Court which might justify interference by this Court in order to upset or quash them.

32. The present application under Section 482 Cr.P.C. is accordingly rejected. There shall be no order as to costs.

(2020)06ILR A154
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 8272 of 2020

Lokesh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Romeshwari Prasad, Sri Sheo Prasad Misra

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

Criminal Law- Criminal Procedure Code (2 of 1974) - Explanation to Section 2 (d) - Indian Penal Code (45 of 1860) , Section 323, 504 - F.I.R. U/ss 323 and 504 IPC - Charge sheet filed under non-cognizance offences U/ss 323, 504 IPC - Magistrate took cognizance & proceeded as a State/police case - Held - charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint & and the police officer who submitted the report has to be deemed to be a complainant under Explanation to Section 2 (d) of Cr.P.C. – Magistrate directed to proceed with as a complaint case & follow the procedure prescribed for hearing of a complaint case under Chapter XV of the Code of Criminal Procedure - order of cognizance and summoning order quashed

Application allowed (E-5)

List of case cited :

1. Rakesh Kumar Sharma Vs St. of UP & anr. (2007) 3 JIC 654 (All), (2007) 9 ADJ 478, (2007) Law Suit (All) 2322

2. Balwant Singh & anr. Vs St. of UP & anr. Application u/s 482 No. 45945 of 2014 decided on 14.11.2014

3. Smt. Saroj Devi Vs St. of UP & anr. Application u/s 482 No. 30184 of 2016 decided on 6.10.2016

4. Arjun Yadav & 2 ors. Vs St. of UP & anr. Application u/s 482 No.31491 of 2016 decided on 19.10.2016

5. Keshav Lal Thakur Vs St. of Bihar (1996) 11 SCC 557

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

1. Applicants have approached before this Court by way of filing the instant Criminal Misc. Application u/s 482 Cr.P.C. for quashing of charge sheet dated 06.12.2019 as well as summoning order dated 01.01.2020 and all its consequential proceedings in Case No. 26 of 2020, arising out of F.I.R. No. 0212/2019 under Sections 323 and 504 IPC, Police Station Khanpur, District Bulandshahar pending in the Court of Chief Judicial Magistrate, Bulandshahar. A prayer has also been sought that the learned Court below be directed to proceed

with the present case as complaint case as per Chapter XV of Code of Criminal Procedure. Lastly, it has been prayed that during the pendency of the present Judicial Magistrate, Bulandshahar be stayed.

2. The impugned order dated 01.01.2020, which has been passed by the concerned Chief Judicial Magistrate, Bulandshahar taking coginizance of the charge sheet dated 06.12.2019, reads as such:-

"आज दिनांक 1.1.2020 को उक्त अपराध संख्या में विवेचक ने आरोप पत्र मय केस डायरी प्रेषित किया है। सम्पूर्ण केस डायरी का विधिनुसार परशीलन किया गया अपराध का प्रसंज्ञान लिया गया आधार पर्याप्त है। दर्ज रजिस्टर हो। नकल दी जावे एवम अभियुक्तगणों को सम्मन दिनाँक 2.2.2020 क़े लिये तलब किया जाये ।"

3. Learned counsel for the applicants has submitted that as the charge sheet has been submitted for non-cognizance offences (Sections 323/504 IPC), therefore, it shall be deemed to be complaint under Explanation to **Section 2 (d) of Cr.P.C.** Hence, the order taking cognizance as well as summoning order, as a State case, is not a correct procedure and, therefore, the order of cognizance and summoning order is liable to be quashed.

4. Learned counsel for the applicants in support of his submissions has relied upon the judgment passed by a co-ordinate Bench of this Court in the matter of **"Rakesh Kumar Sharma vs. State of U.P. and another"** reported in **2007 (3) JIC 654 (All), 2007 (9) ADJ 478: 2007 Law Suit (All) 2322** and specifically para Nos. 5 and 6 of the said judgment, which is mentioned hereinafter, states that:-

" 5. He submitted that in the present case originally the F.I.R. Was lodged under Section 307 IPC but after investigation the Investigating Officer came to the conclusion that no offence under Section 307 IPC was made out and only a case under Section 504 IPC was mad out against the applicant and so a charge-sheet under Section 504 IPC was submitted against the applicant. He contended that in view of the aforesaid Explanation to Section 2 (d), Cr.P.C. the case could not proceed as a police case in respect of an offence punishable under Section 504 I.P.C. Because the offence under Section 504. I.P.C. Is non-cognizable and so the case could proceed only as a complaint case in view of the aforesaid Explanation.

6. The above contention of the learned counsel for the applicant is correct. I, therefore, allow this application under Section 482 Cr.P.C. to this extent that the cognizance taken by the Magistrate in the case on the basis of the report of the police for the offence punishable under Section 504 I.P.C. and the orders passed by him for issuing warrant against the applicant are hereby quashed. The Magistrate shall not proceed with the case as a State case but he shall proceed with it as a complaint case as provided in the Explanation to Section 2 (d), Cr.P.C. and he shall follow the procedure prescribed for hearing of a complaint case."

5. Heard learned counsel for the applicants and learned AGA for the State.

Since the legal issue is involved in the present matter, I am deciding it on merits at the admission stage only.

6. The relevant provisions of law involved in the present case are mentioned hereinafter :-

Explanation to Section 2 (d) Cr.P.C.- *A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complaint;*

Section 155 Cr.P.C.- Information as to non-cognizable cases and investigation of such cases:-

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

Section 190 Cr.P.C. - Cognizance of offences by Magistrates :-

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

Section 200 Cr.P.C.- *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."

7. In ***"Balwant Singh and another vs. State of U.P. and another"*** (Application u/s 482 No. 45945 of 2014, decided on 14.11.2014), wherein the co-ordinate Bench of this Court has held that :-

"But in the case of ***Ghansahyam Dubey alias Little and others Vs. State of U.P. and another*** *(supra) as well as in case of* ***Budhi Ram and 3 others Vs. State of U.P. and another*** *mentioned above Honourable Single Judges of this Court have held that charge sheet submitted by*

police in non-cognizable case even after investigation made by police in pursuance of order passed by Magistrate shall be deemed to be complaint under section 2(d) of Cr.P.C. In these cases provisions of section 155(2) and 15(3) Cr.P.C. as well as pronouncements of Honourable Apex Court rendered in the case of ***Keshab Lal Thakur Vs. State of Bihar (supra)*** *have not been considered and these pronouncements do not lay correct law.*

In view of above I am of the view that this matter should be placed before Hon'ble Division Bench for consideration."

8. Another co-ordinate Bench of this Court is the case of ***"Smt. Saroj Devi vs. State of U.P. and Another"*** (Application u/s 482 No. 30184 of 2016, decided on 6.10.2016) after considering the judgments passed in ***Rakesh Kumar Sharma*** (Supra), ***Ghanshyam Dubey @ Little & others vs. State of U.P. & Ors. 2010 Law Suit (All) 3093*** and ***Balwant Singh and Another vs. State of U.P. & Another*** (Application u/s 482 No.45945 of 2014, decided on 14.11.2014) has held that:-

"In pursuance of this order without registering the check F.I.R the investigation was conducted and during the investigation the charge sheet was submitted only under Sections 323 and 504 I.P.C. The offence under section 307 I.P.C alleged by the opposite party No.2 was found to be not made out.

Now the question arises whether the investigation conducted by the Investigating Officer can be said to be illegal in the present case, I do not think so. Now came to a situation where while investigating a cognizable offence, the police officer conducting an investigation subsequently opines that only non-cognizable offences are made out. This report has to be treated as complaint under section 2(d) Cr.P.C. Now the question arises whether the cognizance on such complaint has been rightly taken by the Magistrate or it is barred by law or without jurisdiction. In this regard section 190 Cr.P.C comes into play which is quoted herein below:-

Cognizance of offence by Magistrate. (1) subject to the provision of this chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in his behalf under sub-secion (2), may take cognizable of any offence (a) upon receiving a complaint of fact which which constitute such offence ; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offense has been committed.

Clause-(1) herein above authorises the Magistrate to take cognizance upon receiving a complaint of that facts which constitute offences. vide Fakhruddin Ahmad Vs. State, 2008 (Cri. L.J, 4377 (SC).

Now the question arises whether on a complaint the summoning of the accused after having taken cognizance under section 190(1)(a) Cr.P.C can be made without examining the witnesses. Ist Proviso to section 200 Cr.P.C answer this question whether it provides the following:-

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:

Thus, when a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint and his witnesses the Magistrate is fully empowered to take cognizance and proceed with the matter. Therefore, issue of process against the present applicant cannot be said to be illegal and neither cognizance is barred nor the prosecution is vitiated.

Now first submission made on behalf of the applicant stands negated by the proviso to section 200 Cr.P.C.

The second submission that the instant case has to be tried as a complaint case and not as a State case, this submission is also without comprehending the procedure prescribed in Chapters XIX and XX of the Code of Criminal Procedure. As is evident from these chapters for the cases instituted on a police report if it is a warrant trial a different procedure has to be applied by the Magistrate and for other kind of cases Part-B (Sections 244-247) prescribes a departure from the first kind of case but Chapter XX of the Code of Criminal Procedure for trial of summon cases, as the present one is, no separate procedure has been prescribed either it may be a case instituted on a police report or other case. Thus, the second submission has no bearing to make the trial of case No.417 of 2016 (State of U.P. Vs. Dinesh Chandra Pathak and another), under sections 323 and 504 I.P.C illegal.

The application is without substance, hence dismissed."

9. Another Co-ordinate Bench of this Court in the matter of ***"Arjun Yadav and 2 Ors. vs. State of U.P. and Another"*** (Application u/s 482 No.31491 of 2016, decided on 19.10.2016), in similar circumstances has held that charge-sheet should be treated as complaint.

10. In the judgment passed by the Hon'ble Supreme has held in the matter of ***"Keshav Lal Thakur vs. State of Bihar"*** reported in 1996 (11) SCC 557 has held that :-

"3. We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of such investigation. On the own showing of the police, the offence under Section 31 of the Act is non-cognizable and therefore, the police could not have registered a case for such an offence under Section 154 Cr. P.C, Of course, the police is entitled to investigate into a non- cognizable offence pursuant to an order of a competent Magistrate under Section 155(2) Cr. P.C. but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. While on this point, it may be mentioned that in view of the proviso to Section 2(d) Cr. P.C., which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that relates to a case where the police initiates investigation into a cognizable offence - unlike the present one - but ultimately finds that only a non- cognizable offence has been made out."

11. In the present matter, investigation was undertaken for non-cognizance offence and charge-sheet filed under non-cognizance offences only, therefore, charge-sheet should be treated as a

complaint. Therefore, the order impugned i.e. order of taking cognizance is set aside and the learned trial court shall proceed the case as a complaint case under Chapter XV of the Code of Criminal Procedure.

12. With these observations, the application stands ***disposed off.***

(2020)06ILR A159
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 8481 of 2020

Smt. Manju Tiwari ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Gyanendra Pratap Singh

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

Criminal Law - Criminal Procedure Code, 1973 - Section 389 - Stay of compensation pending appeal - Appellate court have power to stay conviction or compensation, pending appeal - such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences

Husband of the applicant died, who was the sole earning member and financial condition of the applicant is very weak - Applicant does not have any source of income & is not in a position to deposit 20% of compensation amount. Held - Since the appeal of the applicant has been admitted for final hearing and she was released on bail and the applicant is hopeful of succeeding in the appeal, it is justifiable to keep the amount of penalty in abeyance till disposal of appeal. (Para 10)

Application disposed off. (E-5)

List of case cited :.

1. Manoj Kumar Vishwakarma Vs St. of U.P. & anr. (2019) 10 ACC (SH) 329

2. Rama Narang Vs Ramesh Narang (1995) 2 SCC 513

3. Ravikant S. Patil Vs Sarvabhouma S. Bagali reported in (2007) 1 SCC 673

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Sri Gyanedra Pratap Singh, learned counsel for the applicant and Mr. P.K. Shahi, learned A.G.A assisted by Mr. Madnesh Prasad Singh, learned counsel for the State as also perused the record.

2. Learned counsel for the applicant and learned A.G.A. for the State agree that the present application may be disposed of at this stage without issuing notice or calling for any further affidavits in view of the order proposed to be passed today.

3. This application 482 Cr.P.C. has been filed to quash the judgment and order dated 24.01.2020 passed by the District and Sessions Judge, Lalitpur in Criminal Appeal No. 15 of 2019 (Smt. Manju Tiwari Vs. State of and another), which has been filed against the judgment and order dated 12.03.2019 passed by the Additional Chief Judicial Magistrate, Lalitpur, under Section 138 N.I. Act, Police Station-Lalitpur, District-Lalitpur. Under the impugned judgment, the appellate court has issued recovery notice for recovery of interim compensation amount.

4. It has been submitted by learned counsel for the applicant that a complaint was filed by the opposite party no.2 against

the applicant under Section 138 N.I. Act before the concerned court below. On the complaint filed by the opposite party no.2, the concerned court below took cognizance and summoned the applicant for facing the trial. After conclusion of trial, the concerned court below vide judgment and order dated 12.03.2019 convicted the applicant under Section 138 N.I. Act for six months simple imprisonment and awarded fine of Rs. 4,00,000/- and in default of payment of fine one month additional simple imprisonment. The concerned court below has also clarified that out of total amount of fine/compensation of Rs. 4 lacs, Rs. 3.90 lacs has been directed to be paid in favour of opposite party no.2. Feeling aggrieved by the judgment and order of the trial court dated 12.03.2019, the applicant preferred Criminal Appeal No. 15 of 2019 before the Sessions Judge, Lalitpur on 11.04.2019 along with interim bail application. Thereafter, the Appellate Court vide order dated 11.04.2019 has admitted the appeal and released the applicant on bail with furnishing two sureties of Rs. 25,000/- and further directed the applicant to deposit 50% amount of total fine imposed by the trial court. Subsequently, against the order dated 11.04.2019 passed by the Appellate Court, the applicant approached before this Court and the co-ordinate Bench of this Court has modified the order dated 11.04.2019 passed by the Appellate Court to the extent that applicant would deposit 20% of total fine imposed by the trial court. Taking into account the order passed by the co-ordinate Bench of this Court, the Appellate Court vide order dated 24.01.2020 directed the applicant to deposit 20 % of the compensation amount.

5. It has further been submitted by learned counsel for the applicant that husband of the applicant died in jail on 11.11.2019 during medical treatment and the applicant is also continuously ill and undergoing treatment after death of her husband. Therefore, she is not in a position to deposit 20% of compensation amount. In such circumstances, considering the condition of the applicant, till disposal of appeal, the amount of fine/penalty, which is to be paid by the applicant may be kept in abeyance. In support of his contention, learned counsel for the applicant has placed reliance upon the judgment of this Court in the case of ***Manoj Kumar Vishwakarma vs. State of U.P. and another reported in 2019(10) ACC (SH) 329,*** wherein, it has been held that since the appeal was admitted for final hearing and the applicant is hopeful of being successful in the appeal, it is justifiable to keep the amount of penalty in abeyance till disposal of appeal.

6. Per contra, learned A.G.A. for the State has conceded the submission advanced by the learned counsel for the applicant and submitted that in the special circumstances, wherein the appeal has been admitted for final hearing and it is hopeful that the applicant may succeed in the appeal, it is justifiable to keep the amount of penalty/fine in abeyance till the disposal of appeal.

7. I have considered the argument of the counsel for the applicant as well as learned A.G.A. for the State. Provision of Section 389 of Cr.P.C is reproduced as under:-

"389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

8. A Bench of three Hon'ble Judges of Apex Court in the case of ***Rama Narang v. Ramesh Narang*** *reported in* ***(1995) 2 SCC 513*** wherein the Apex Court has held that in certain situation the order of conviction can be executable and in such a case the power under Section 389(1) of the Code could be invoked. The ratio of the judgment can be traced out, which is extracted below:-

"In certain situations the order of conviction can be executable, in the sense it may incur a disqualification as in the instant case. ***In such a case the power under Section 389 (1) of the Code could be invoked. In such situations the attention of the appellate court must be specifically invited to the consequences which are likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order for reasons to be recorded by it in writing.*** *If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate."*

9. Again three Hon'ble Judges Bench of the Apex Court in ***Ravikant S. Patil v. Sarvabhouma S. Bagali reported in (2007) 1 SCC 673,*** held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. In the paragraph nos.11 and 12.3 has held as follows:-

"11) It deserves to be clarified that ***an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative.*** *Be that as it may. Insofar as the present case is*

concerned, an application was filed specifically seeking stay of the order of conviction specifying that consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.

12.3) In K.C. Sareen vs. CBI, Chandigarh, (2001) 6 SCC 584, it was held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, ***its exercise should be limited to very exceptional cases. It was further held that merely because the convicted person files an appeal to challenge his conviction, the court should not suspend the operation of the conviction and the court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance.*** *The Bench also noted that the evil of corruption has reached a monstrous dimension. While declining the prayer of the appellant for grant of an order of stay of conviction, the Bench observed that when conviction is on a corruption charge against a public servant, the appellate court should not suspend the order of conviction during the pendency of the appeal, even if the sentence of imprisonment is suspended. The Bench further observed that it would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision. These observations would equally apply when a prayer for stay of order of conviction is made so as to remove the disability to contest an election except, as already noted, in a very exceptional and rare case.*

10. A careful reading of the aforesaid judgments of the Apex Court, while recognizing the power to stay conviction or compensation, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences. In the present case, the husband of the applicant died, who was the sole earning member of the family and financial condition of the applicant is very weak. The applicant does not have any source of income. Therefore, in such situation, the applicant is not in a position to deposit 20% of compensation amount. Since the appeal of the applicant has been admitted for final hearing and she was released on bail and the applicant is hopeful of succeeding in the appeal, it is justifiable to keep the amount of penalty in abeyance till disposal of appeal.

11. Having regard to the facts and circumstances of the case, the amount of penalty/fine imposed by the Appellate Court vide order dated 24.01.2020 shall be kept in abeyance till the disposal of the appeal. It is further directed that the Appellate Court may decide the appeal, in accordance with law, preferably within a period of four months from the date of production of a certified copy of this order, if there is no other legal impediment.

12. With the aforesaid observations, this application is finally **disposed of.**

13. It is made clear that any observations made hereinabove, shall not affect the right or claim of any of the

parties in the appeal pending before the Appellate Court.

(2020)06ILR A163
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2020

BEFORE
THE HON'BLE AJAY BHANOT, J.

Application U/S 482 No. 11114 of 2005

Satish Mishra & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicants:
Sri C.K. Parekh, Sri M.A. Ansari

Counsel for the Respondents:
A.G.A., Sri A.K. Singh, Sri Prashant Singh Soni, Sri Prashant Singh 'Som'

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1862-Sections 392,504,506- quashing of-complaint-trial court neglected to make a searching enquiry into the veracity of the allegations and credibility of witnesses-criminal trial cannot be set in motion in a cursory manner-the dispute is of civil nature-concealment of material facts while instituting the criminal proceedings just to harass the applicant is established-A litigant at his own whim cannot invoke the authority of the Magistrate-A really grieved person with clean hands must have access to invoke the said power-the conduct of the complainant has been that of a defaulting borrower who has abused the process of law to defeat his creditors-the complaint clearly mislead the court as it was based on false and frivoulous story.(Para 43,44, 45 ,63, 64,65 to 70)

B. In an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and owenership remains with the latter.Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is repossessing the goods owned by him.(Para 54 to 60)

In the instant case, complainant acquired the bus with financial assistance rendered by the financial institution. The agreement between the parties was a hire purchase agreement. The complainant defaulted in the payment of instalments. The bus was seized by the financier upon the default. This led to the criminal complaint against the financier.(Para 7 to 11)

The application is allowed. (E-6)

List of Cases Cited:-

1. Rajiv Thapar & ors. Vs Madan Lal Kapoor (2013) 3 SCC 330

2. Y. Abraham Ajith & ors. Vs Inspector of Police Chennai & anr. (2004) 8 SCC 100

3. Sardar Trilok Singh & ors. Vs Satya Deo Tripathi, AIR (1979) SC 850

4. K.A. Mathai @ Babu Vs Kora Bibbikutty (1996) 7 SCC 212

5. Charanjit Singh Chadha Vs Sudhir Mehra (2001) 7 SCC 417

6. K.L. Johar & Co. Vs Dy. Commercial Tax Officer, AIR (1965) SC 1082

7. Anup Sarmah Vs Bhola Nath Sharma & ors. (2013) 1 SCC 400

8. Priyanka Srivastava & anr. Vs St. Of U.P.& ors. (2015) 6 SCC 287

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The application under Section 482 has been instituted with the following prayer:-

"Quash entire proceedings along with complaint of Criminal Case No. 1635 (7635) of 2004, Pradeep Kumar Singh Vs Ashish Pandey & others (initiated on the

application i.e. under Section 156(3) Cr.P.C., dated 20.12.2002 which has been treated by order dated 24.03.2004 as (Criminal Complaint), pending in the court of Additional Chief Judicial Magistrate, Court no. 1, Varanasi under the sections 392, 504, 506, I.P.C. Police Station Jaitpura, District Varanasi as well as the order dated 13.07.2005 of the Additional Chief Judicial Magistrate, Court no. 1, Varanasi (Annexure-19)."

2. Sri C. K. Parekh, learned Senior Counsel assisted by Sri M.A. Ansari, learned counsel for the applicants, assailing the impugned orders and the proceedings before the court below, contends that the court at Varanasi does not possess the jurisdiction to try the offences even if the allegations in the complaint are taken on their face value (though the said allegations are denied as false). Learned counsel further contends that the dispute is essentially of civil profile. The criminal proceedings have been instituted to defeat the creditors. The proceedings are actuated by malafide. He further contends that even if evidences in the record are taken on their face value, no offence is disclosed against the applicants. Learned Senior Counsel for the applicants lastly submits, that the complaint is an abuse of process of court. The respondent no. 3 concealed material facts and documents before the learned trial court. The conduct of the complainant/respondent no. 3 deserves to be severely censured and held accountable to law. The complainant/respondent no. 3 has mislead the court by concealing material facts.

3. Per contra, Sri A. K. Singh, learned counsel for the respondent no. 3 submits that part of the offence was committed in District Varanasi and the trial court at Varanasi has the territorial jurisdiction to try the offence. Learned counsel for the respondent no. 3 thereafter contends that on a perusal of the material in the record a prima facie offence is made out against the applicants.

4. Heard learned counsel for the parties.

5. The facts leading upto the instant Section 482 Cr.P.C. proceedings, shall be considered.

6. An application was filed by respondent no. 3, Pradeep Kumar Singh under Section 156(3) Cr.P.C. before the learned Additional Chief Judicial Magistrate, Varanasi.

7. According to the application the complainant/respondent no. 3 is engaged in the business of running buses, under the name and style of an entity M/s Kumar Travels. One bus in the ownership of the complainant/respondent no. 3, bearing registration no. UP65 R 1659 was booked to transport a marriage party from Varanasi to Lucknow, on 27/28.11.2002.

8. On 27.11.2002 when the aforesaid bus arrived at the office of respondent no. 3/complainant at Varanasi, some persons including Satish Mishra, Ashish Pandey, Rajeev Dixit, threatened the bus driver Kamlesh that they will deal with him at Lucknow. The aforesaid persons tailed the bus in a Tata Sumo till Lucknow. On the night of 27/28.11.2002 at about 1.30 a.m. the said Ashish Pandey, Rajeev Dixit, Satish Mishra and two other persons carrying fire arms with criminal intent and common intention entered the lodging place of the marriage party at Milan Guest House, Manak Nagar, Lucknow. The said persons threatened and assaulted the driver and the cleaner of the bus, robbed a sum of Rs. 5000/-, and escaped with the bus and a VCR fixed therein. The bus driver and one member of the marriage party Raghunath Singh informed the Police Station, Manak Nagar, Lucknow about the aforesaid incident. When the bus driver Kamlesh and

the members of the marriage party arrived at Lucknow Bus Station on 28.11.2002 for return journey to Varanasi, at about 1.00 p.m. Ashish Pandey, Rajeev Dixit, Satish Mishra and two other persons forcefully evicted bus driver Kamlesh from the bus by holding a gun to his head. The said persons abducted the bus driver Kamlesh and escaped in their Tata Sumo. The said persons threatened members of the marriage party namely Ravi Chaubey, Rajesh Chaubey and Shashi Singh, who had resisted them. The complaint concludes by summing up the allegation that Ashish Pandey, Satish Mishra, Rajeev Dixit and two other persons with the common intent committed the criminal act of robbing the applicant of his bus and abducted the driver of the bus. Members of the marriage party informed the applicant about the incident. The applicant intimated the Superintendent of Police, Lucknow and Senior Superintendent of Police, Varanasi about the incident on 29.11.2002, however no action in regard thereto was taken by the concerned officials.

9. The learned Trial Court by order dated 03.01.2003 directed the police authorities "to register the case and submit the report of the investigator".

10. The custody of the vehicle was taken by the police authorities. On an application made by respondent no. 3, the aforesaid bus bearing registration no. UP65 R 1659 was released by the learned Additional Chief Judicial Magistrate, Court no. 1 Varanasi by order dated 04.04.2003. The order dated 04.04.2003 passed by the learned Additional Chief Judicial Magistrate, Court no. 1 Varanasi, releasing the vehicle in favour of the respondent no. 3 described the respondent no. 3 as the registered the owner of the vehicle and consequently entrusted the same to his custody with the following conditions;

The respondent no. 3, was required to deposit the installments, as per the law, during the pendency of the case. The registered owner (respondent no. 3) was also required to produce the vehicle at his own cost before the learned Trial Court as and when required. The S.O. Jaitpura, District Varanasi was directed to make over the possession of the bus to the registered owner of the bus.

11. Pursuant to the investigation under taken by the police authorities on the first information report registered as Case Crime No. 25 of 2002, the police authorities submitted a final report before the learned Trial Court on 10.05.2003. The final report submitted by the police authorities records that upon investigation it came to light that the "matter related to finance". The bus was financed by Tata Finance Ltd. The applicant failed to deposit the amount due to the finance company. The applicant got the criminal proceedings registered, as he was not inclined to deposit the amount due from him to the finance company. The investigating officer concluded that the dispute was civil in nature and no criminal case was made out against the accused persons.

12. The respondent no. 3 filed a protest petition, refuting the final report submitted by the police authorities after investigation.

13. The learned Trial Court allowed the protest petition submitted by the respondent no. 3 by the impugned order dated 24.03.2004. The order dated 24.03.2004 passed by the Additional Chief Judicial Magistrate, Court no. 1, District

Varanasi, rejected the final report submitted by the police authorities, after investigation and directed that the matter be treated as a complaint case.

14. The learned Trial Court in the order dated 24.03.2004, found that the investigating officer was not justified in submitting the final report, merely on the foot that the matter related to finance. In the wake of such discussion the final report submitted by the investigating officer was rejected.

15. The complainant-Pradeep Kumar Singh, respondent no. 3, testified before the learned trial court and gave a statement under Section 200 Cr.P.C., on 24.04.2004. In his statement before the learned trial court P.W.1 Pradeep Kumar Singh stated that on 27.11.2002 when the bus bearing Registration No.U.P. 65 R/1659 was departing from Varanasi to Lucknow with the marriage party, Ashish Pandey, Satish Misra and Rajeev Dixit and two or three other persons accompanying them came to the office and made enquiries regarding the aforesaid bus. The said persons with criminal intent chased after the bus till Lucknow. On the night of 27/28.11.2002 at about 1.30 a.m., the accused persons armed with gun and rifle entered the Milan Restaurant and Guest House at Lucknow, with criminal intent and assaulted the bus driver-Kamlesh. The said persons threatened the bus driver and dragged out him from the bus. The aforesaid persons looted Rs.5,000/- from the person of the driver, and sped away with the bus with the TV and VCR (fixtures in the bus). The information regarding the incident was given immediately thereafter, to the Police Station Manak Nagar, District-Lucknow immediately on 28.11.2002. The accused then arrived at Roadways Bus Stand at about 1.30 a.m. on 28.11.2002, where the driver Kamlesh was awaiting his bus for Varanasi. The said accused persons abducted the driver Kamlesh at gun point. The information about the incident was given to him (complainant) by the members of the marriage party on 29.11.2002. The respondent no. 3 (complainant) submitted a complaint to the Superintendent of Police, Lucknow, Senior Superintendent of Police (Crime Branch), Lucknow and Senior Superintendent of Police, Varanasi. However, no action was taken on the aforesaid complaints.

16. Shashi Singh S/o Shiv Shanker Singh, PW-2 testified before the learned Trial Court. Shashi Singh in his statement under Section 202 Cr.P.C. deposed before the learned Trial Court, that on 27.11.2002, he travelled Varanasi to Lucknow in Bus No. UP 65 R 1659 as part of the marriage party. The bus was parked at Manak Nagar at Milan Guest House, when at 1.00 a.m. many persons bearing arms (gun and rifle) were seen assaulting the driver Kamlesh. When he came close to the bus, he saw the accused Ashish Pandey, Rajeev Dixit, Satish Mishra and two or three other persons forcibly pushed driver Kamlesh out the bus. Thereafter the said persons made a get away with the bus. The information of the incident was given to the Police Station, Manak Nagar on 27/28.11.2002. On 28.11.2002, when the marriage party was set to board a bus to Varanasi from Lucknow bus station, the said accused persons arrived and abducted the driver from the bus at about 1.00 p.m. The information in regard to the said incident was given to the Investigating Officer, Police Station, Jaitpura.

17. One Ravi Chaubey S/o Bachhan Chaubey also testified before the learned

Trial Court as PW-3, and got his statement recorded under Section 202 Cr.P.C. In his testimony before the Trial Court the said PW-3, Ravi Chaubey deposed that on 27.02.2003 he travelled from Varanasi to Lucknow on 27.11.2002 in Bus No. UP 65 R 1659. The marriage party was staying at Milan Guest House, Manak Nagar, Lucknow. After dinner as he was preparing to go to bed, a sudden noise was heard. He went in the direction of the noise. When he approached the bus he saw many persons armed with rifle and gun assaulting the bus driver. They forced the bus driver out the bus and escaped with the bus. Information regarding the incident was given to the Police Station, Manak Nagar on the same day. On the next date i.e. 28.11.2002, the marriage party had assembled at Lucknow Roadways (bus stand). He had boarded the bus when he saw the same accused arrived at 1.00 p.m. and abducted the driver Kamlesh, at gun point. The said Ravi Chaubey witnessed the incident and recognised the accused persons. He also gave a statement to this effect to the investigating officer. However, he was not aware whether his correct statement was recorded by the investigating officer.

18. In the wake of the aforesaid evidences, the learned trial court in criminal case no.236 of 2003, summoned the applicants under Sections 392, 504 and 506 IPC by order dated 25.05.2004. The applicants assailed the said order by instituting criminal revisions, registered as Criminal Revision No.2891 of 2004, Ashish Pandey Vs. State of U.P. and Criminal Revision No.2890 Satish Misra and another Vs. State of U.P. before this court. The aforesaid companion criminal revisions were decided by a common order and judgement dated 03.12.2004 rendered by this Court.

19. The operative portion of the said judgement is extracted hereunder:

"The learned Magistrate may, however, again consider the criminal complaint along with any other evidence, which may be produced before it and pass suitable orders thereafter in accordance with law."

20. Pursuant to the order passed by this Court, the respondent No.3 introduced two more witnesses, to support his case in the complaint. Sri Kamlesh Singh as P.W.4 testified before the learned trial court. In his statement under Section 202 of the Cr.P.C., the said Kamlesh deposed that he was the driver of the bus No.U.P.65 R 1659. The owner of the bus is Pradeep Kumar Singh. On 27.11.2002, he took the bus to Kumar Travels Agency of respondent no. 3 at Lanka (Varanasi), for obtaining the permit to purchase diesel for onward journey to Lucknow. When he stopped the bus at Kumar Travels, one unnumbered Tata Sumo carrying Ashish Pandey, Satish Mishra and Rajeev Dixit and two other persons came to the office and started a disputation in regard to the ownership of the bus. The said persons asked him for the destination of the marriage party. When he declined to provide such information, they threatened him. When the bus started its onward journey to Lucknow, the said Ashish Pandey, Satish Mishra and Rajeev Dixit and two or three others persons started following the bus. They chased the bus till Milan Guest House at Lucknow. On 26/27.11.2002 at about 1.30 a.m. the aforesaid accused persons armed with a rifle and gun entered into the bus and assaulted him grievously with the buts of the gun. The said persons also threatened him. The said persons extorted Rs.5,000/- from him (which was paid by the marriage

party as fare), and forcibly took away the bus, along with the VCR which was installed in the bus. The information regarding the incident was given by one Jadunath Singh, a member of the marriage party to Police Station Manak Nagar, Lucknow. On 28.11.2002 at about 1.00 pm. when he was standing at the roadways bus stand, for return journey to Varanasi, the said accused persons came and abducted him at gun point in a Tata Sumo. The said incident was in the knowledge of the members of the marriage party, who informed the bus owner. The said accused persons wanted him to sign some blank papers, which he refused to do. The statement was given before the learned Magistrate on 21.03.2005.

21. The second witness introduced by the applicant/respondent no. 3, was one P.W. 5 Rajesh. In his deposition before the learned trial court under Section 202 Cr.P.C. the said P.W. 4 Rajesh stated that on 27.11.2002 he was part of the marriage party which was travelling in bus No.U.P. 65 R 1659 from Lanka, Varanasi to Lucknow. The bus stopped at the office of Kumar Travels for taking out the permit. Some persons in an unnumbered Tata Sumo arrived at that point of time and started an altercation with the owner of the bus. The said persons threatened to take the money at Lucknow. The said persons tailed the bus from Varanasi to Lucknow. The driver of the bus informed him that the said persons Ashish Pandey, Satish Misra and Rajeev Dixit and another person, had criminal antecedents. On the night of 27/28.11.2002 at about 1.30 a.m., the said persons carrying a rifle and a gun, boarded the bus while it was located at Milan Guest House, Lucknow. The accused persons looted a sum of Rs.5,000/- from the bus driver, and escaped with the bus and the fixtures therein (CD VCR). The said persons threatened the members of the marriage party, who resisted them and assaulted the driver grievously. On 28.11.2002 at 1.00 pm. when the members of the marriage party gathered for their return journey from Lucknow, the accused persons abducted the driver Kamlesh at the gun point and made a get away in the Tata Sumo vehicle.

22. In the light of the aforesaid evidences and the order passed by this Court, the learned trial court considered the controversy afresh. The learned trial court summoned the applicants under Sections 392, 504, 506(2) IPC, by order dated 13.07.2005.

23. Learned trial court in its order dated 13.07.2005, referenced the earlier proceedings including the complaint and the deposition of P.W. 1 as well as P.W. 2, the order passed by the learned trial court on 25.05.2004 and the judgement and order of this Court dated 03.12.2004. Thereafter, the order dated 13.07.2005, embarks on a consideration of the deposition of P.Ws. 3 and 4. The learned trial court noticed the statements of P.W. 4, Driver Kamlesh and P.W. 5 Rajesh a member of the marriage party, who had testified that the accused persons had threatened the Driver at Varanasi by saying that "he will deal with you". On the foot of the aforesaid testimonies of the P.Ws. 3 and 4, the trial court found that it possessed the jurisdiction to try the accused persons since part of the offence was committed in the territorial jurisdiction of district Varanasi.

24. In the wake of these findings, the trial court summoned the applicants under Sections 392, 504, 506(2) I.P.C. by recording that a prima facie offence was made out against the accused persons under the provisions of the Indian Penal Code.

25. Some facts relevant for a judgment in the instant case have been established beyond a pale of dispute and are admitted by the parties.

26. As per undisputed averments in the application under Section 482 Cr.P.C. the applicant no. 1 was an Assistant Manager in Tata Finance Ltd. at Lucknow at the time of the incident. The applicants no. 2 and 3 are the employees of Motor and General Sales Limited, 45, Muir Road, Rajapur, Allahabad. M/s Motor and General Sales Limited is a dealer of Tata Engineering and Locomotive Companry (TELCO).

27. The respondent no. 3 had availed financial assistance from Tata Finance to purchase the bus which came into subsequent dispute. A hire purchase agreement was duly executed on 31.03.2001 between the respondent no. 3 and the Tata Finance Ltd. Company. The agreement and the execution thereof is not disputed by the respondent no. 3, though it was not disclosed before the trial court in the complaint. The agreement is annexed as annexure 1 to the application.

28. The document is admitted by both parties, and most relevant to the dispute, is being looked into by this Court.

29. The jurisdiction of the High Court under Section 482 Cr.P.C. to consider material produced by the accused for the first time when the said material is not before the trial court came up for consideration before the Hon'ble Supreme Court in **Rajiv Thapar and others Vs Madan Lal Kapoor reported at 2013 (3) SCC 330.** The Hon'ble Supreme Court in **Rajiv Thapar (supra)** allowed consideration of unimpeachable material tendered by the accused under Section 482 Cr.P.C. proceedings by holding thus:

"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable

quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC."

30. The material in the nature of the hire-purchase agreement and other related documents relied upon by the applicants are of unimpeachable quality and are not disputed by the complainant/respondent no. 3.

31. The first covenant of the hire purchase agreement describes the parties to the agreement as follows:-

(I) Tata Finance Ltd. a Company incorporated under the Companies Act. 1956, having its Registered Office at Ahura Centre, Mahakali Caves Road, Andheri(E), Mumbai (hereinafter called "The Owners", which expression shall include their successors and assigns, where the context so admits) and the owners are parties to the first part. The respondent no. 3/complainant Pradeep Kumar Singh is described as follows Pradeep Kumar Singh (hereinafter called the 'Hirer'). Trilokinath the last party is described as under (hereinafter called the 'Guarantor').

32. The consequence of default in payment are described in Clause 17 of the agreement:-

"17. An event of default shall occur hereunder if the Hirer:-

"(a) fails to pay any of the hire charges or part thereof or other payment required hereunder when due and such failure in the opinion of the Owners, continues for a period of 14 days after notice is sent to the Hirer; or"

33. The options available at the discretion of the owner upon default by the borrower/hirer are described in Clause 18:-

"18. Upon the occurrence of any event of default and at any time thereafter, the Owners shall be entitled to declare all sums due and to become due hereunder for the full term of the Agrement as immediately due and payable and upon the Hirer failing to make the said payment in full within 14 days thereof, the Owners may, at their sole discretion, do any one or more of the following:

(a) Upon notice to the Hirer terminate this Agreement.

(b) Demand that the Hirer return the Vehicle to the Owners at the risk and expenses of the Hirer in the same condition as delivered (ordinary wear and tear excepted), at such location as the Owners may designate and upon failure of the Hirer to do so within 14 days from the date of demand, enter upon premises where the vehicle is located and take immediate possession of and remove the same without liability to the Owners of their Agents for such entry or for damage to property or otherwise.

(c) On such terms and conditions and for such consideration as the Owners may deem fit and with or without any

notice to the Hirer sell the vehicle at a public or private sale, otherwise dispose of, hold, use, operate, lease to others or keep idle such Vehicle, all free and clear of any rights to the Hirer and without any duty to account to the Hirer for such action or inaction or for any proceeds in respect thereof.

(e) Exercise any other right or remedy which may be available to them under the applicable law."

34. An arbitration clause is also provided for resolution of any dispute, differences or claim arises out of a contract. Clause 25 is the arbitration clause:

"25. All disputes, differences and/or claims arising out of these presents or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by Arbitration to be held in Mumbai in accordance with the provisions of the Arbitration and Conciliation Ordinance, 1996 or any statutory amendments thereof or any statute enacted for replacement thereof and shall be referred to the sole arbitration of a person to be nominated by the Owners in the even of death, refusal, neglect, inability or incapability of the person so appointed to act as an Arbitrator, the Owners may appoint a new arbitrator. The award including interim award/s of the arbitrator shall be final and binding on all parties concerned. The arbitrator shall not give any reason for his award including interim award/s. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct arbitration proceedings in such manner as he considers appropriate."

35. The rights interse the parties are created by the agreement mentioned herein above. In terms of the agreement the Tata Finance Company is the absolute owner of the vehicle at all points in time. The status of the respondent no. 3 is that of an hirer. In terms of the agreement, the hirer can become the owner of the vehicle after he has paid the entire due amount by way of principal and interest to the Tata Finance Company Ltd. A critical feature of the contract is that the owner (Tata Finance Company Ltd.) has an irrevocable right to enter any premises or places where the vehicle is located and recover possession of the same in the event of default by the hirer. The owner of the vehicle shall not be liable for any criminal or civil action for any attempt on his part to respossess the vehicle in the event of a default.

36. The vehicle sales invoice attest the fact of the delivery to the Hirer by respondent no.3 by Motor and General Sales Limited is also an undisputed document. The vehicle was duly insured by the New India Assurance Company Ltd.

37. The vehicle sales invoice is appended as annexure 3 to the application. The aforesaid document is also not in dispute.

38. The contractual relationship between the parties is established beyond any doubt being duly admitted. The relationship between the complainant/respondent no. 3, and the applicants is governed and regulated by the aforesaid contract. The complainant/respondent no. 3 was a hirer, under the terms of the agreement and not the owner. Respondent no. 3 had not become the owner in terms of the contract.

39. The vehicle was financed by the Tata Finance Ltd. The complainant/respondent no. 3 had not paid timely installments and had defaulted in the payment. The details of the default in payment brought in the record by the applicant could not be disputed by the complainant. On the date of seizure of the vehicle by the Tata Finance Ltd., the complainant/respondent no. 3 was clearly a defaulter.

40. The vehicle was seized by the Tata Finance Ltd., under the clauses of the contract which enable it to take all necessary steps to take possession of the vehicle. The right to resume possession was legally vested in the Tata Finance Ltd. by the covenants of the contract. The actions taken by the applicants/accused to resume possession of the vehicle was at the instance of Tata Finance Ltd. On the date possession was resumed Tata Finance Ltd. was the undisputed owner of the bus while the complainant was admittedly a hirer in default. The action flows entirely from the contract between the parties and being consistent with the same, no criminal liability can be fastened upon the applicant/accused. The dispute is entirely civil in nature.

41. Finance companies have to take steps to repossess the financed properties, in the event of a default in payment of loan. Such clauses are clearly made part of the contracts between the hirer and financer. These rights of the financer are critical to protect the credibility of the financial system.

42. The courts have however noticed, that a number of borrowers adopted novel devices, to avoid paying the loan installments and defeating their creditors. One such ingenious device, is institution of false criminal cases. Even institution of false criminal cases, triggers prolonged prosecution of the officials named therein. This results in the harassment of the officials of the finance company. Very often the finance company and the officials succumb to this black mailing of the defaulting borrowers. This is no doubt an the abuse of the process of court by the defaulting borrowers. Such conduct of defaulting borrowers of instituting false cases to defeat their creditors, cannot be countenanced by the courts, if the stream of justice is to remain pure. In such matters, the courts have to come down with a strong hand as per law, against the persons who abuse the process of courts. If any leniency is shown in these matters or false prosecutions are simply permitted to take their course, it would not only destroy the credibility of the judicial process, but also inflict a mortal blow to the financial system. The courts have to ensure that the sanctity of the contract is protected and the process of the courts is not prone to abuse.

43. In the facts of this case the conduct of the complainant/respondent no. 3 has been that of a defaulting borrower who has abused the process of courts to defeat his creditors.

44. The falsity of the allegations made in the complaint is apparent. The abduction story was totally bald and was never established, even in a primafacie manner before the trial court. No injuries on the person of the driver have been established by any corroborative medical report. The version of grievous assault on the driver by the accused with buts of rifles is clearly figment of a fertile and conspiring imagination. Such exaggerated versions are regular features in the play book of unscrupulous, defaulting borrowers.

45. There is another and most critical aspect of the matter. The complainant while instituting the complaint, concealed

material facts and evidences. The suppression of these material facts was akin to assertion of false facts. The complaint clearly mislead the court. His hands were not clean.

46. In the instant case the complainant/respondent no. 3 did not bring the contractual agreement between the complainant/respondent no. 3 and Tata Finance Ltd. in the record before the trial court. The complainant/respondent no. 3 did not reveal his status as that of a hirer who had got the vehicle financed from the Tata Finance Ltd. Nor was the default in payment by the complainant disclosed by respondent no. 3/complainant before the trial court.

47. On the contrary, the complainant/respondent no. 3 created an illusion of ownership of the bus before the courts below. This is evident from a perusal of the order of the court, which made over the custody of the vehicle, to the complainant/respondent no. 3, on the foot that he was the owner of the vehicle.

48. The act of taking custody of the bus by the financier was clearly relatable to a covenant in the contract between the parties. The action taken in exercise of contractual powers and obligations cannot be given a criminal colour to frustrate the contract and avoid the obligation to repay the loan. The criminal prosecution set on foot by concealing such material facts is an abuse of the process of the court.

49. The cause of action of the complaint, if any, even as per the case of the complainant taken on its face value, took place entirely at Lucknow. Even according to the complaint no part of the offence was committed in the territorial jurisdiction of Varanasi. The learned Court below at Varanasi exceeded its territorial jurisdiction by entertaining the complaint in the instant case. The proceedings are liable to be set aside on the ground of lack of territorial jurisdiction alone.

There is good authority to hold that the learned court lacked territorial jurisdiction to entertain the complaint in these facts.

50. In **Y. Abraham Ajith and others Vs Inspector of Police, Chennai and Another,** reported at **(2004) 8 SCC 100**, the issue regarding territorial jurisdiction in regard to a criminal complaint came to be challenged. The facts of the case as recorded in **Y. Abraham Ajith and others (supra)** were thus:

"When the matter stood thus, the appellants filed an application under Section 482 of the Code before the High Court alleging that the Magistrate concerned has no jurisdiction even to entertain the complaint even if the allegations contained therein are accepted in toto. According to them, no part of the cause of action arose within the jurisdiction of the court concerned. The complaint itself disclosed that after 15-4-1997, the respondent left Nagercoil and came to Chennai and was staying there. All the allegations which are per se without any basis took place according to the complainant at Nagercoil, and therefore, the courts at Chennai did not have the jurisdiction to deal with the matter. It was further submitted that earlier a complaint was lodged by the complainant before the police officials concerned having jurisdiction; but after inquiry no action was deemed necessary.

51. Interpreting Section 177 Cr.P.C. as regards territorial jurisdiction of a criminal court the Hon'ble Supreme Court held thus:

"12. The crucial question is whether any part of the cause of action arose within the jurisdiction of the court concerned. In terms of Section 177 of the Code, it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.

13. While in civil cases, normally the expression "cause of action" is used, in criminal cases as stated in Section 177 of the Code, reference is to the local jurisdiction where the offence is committed. These variations in etymological expression do not really make the position different. The expression "cause of action" is, therefore, not a stranger to criminal cases.

14. It is settled law that cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

15. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously, the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "cause of action".

16. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.

17. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. In Black's Law Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In Words and Phrases (4th Edn.), the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.

18. In Halsbury's Laws of England (4th Edn.) it has been stated as follows:

" "Cause of action' has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. "Cause of action' has also been taken to mean that a particular act on the

part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

52. Thereafter applying the aforesaid principles the Hon'ble Supreme Court in **Y. Abraham Ajith and others (supra)** concluded the controversy in the following manner:

"19. When the aforesaid legal principles are applied, to the factual scenario disclosed by the complainant in the complaint petition, the inevitable conclusion is that no part of cause of action arose in Chennai and, therefore, the Magistrate concerned had no jurisdiction to deal with the matter. The proceedings are quashed. The complaint be returned to Respondent 2 who, if she so chooses, may file the same in the appropriate court to be dealt with in accordance with law. The appeal is accordingly allowed."

53. The stage is now set for discussion on the judicial authorities in point on the maintainability of the complaints. The validity of criminal proceedings instituted by a defaulting borrower upon lodgment of a complaint with exaggerated versions of an offence fell for consideration before the Hon'ble Supreme Court in **Sardar Trilok Singh and others Vs Satya Deo Tripathi reported at AIR 1979 SC 850.**

54. In **Sardar Trilok Singh (supra)** the complainant acquired the truck with financial assistance rendered by the firm of the appellant/accused Triloki Singh under the name and style of Sardar Finance Corporation, Kanpur. The agreement between the parties which was in the form of a duly executed formal agreement was a hire purchase agreement. The complainant defaulted in the payment of installments. The truck was seized by the financier upon the default. This led to the criminal complaint against the financier. The complaint was lodged under Sections 395, 468, 465, 471, 412, 120-B/34 I.P.C. in the court of Chief Judicial Magistrate, Kanpur. Initially a first information report was lodged in regard to the said offence. The final report was submitted by the investigating officer. The final report was rejected by the learned trial court. The Sessions court dismissed the revision. This court rejected the application under Section 482 Cr.P.C. Thereafter a complaint was filed against the applicant under the aforesaid provisions of IPC. The Hon'ble Supreme Court in **Sardar Trilok Singh (supra)** quashed the criminal proceedings by holding thus:

"5. We are clearly of the view that it was not a case where any processes ought to have been directed to be issued against any of the accused. On the well-settled principles of law if was very suitable case where the criminal proceeding ought to have been quashed by the High Court in exercise of its inherent power. The dispute raised by the respondent was purely of a civil nature even assuming the facts stated by him to be substantially correct. Money must have been advanced to him and his partner by the financier on the basis of some terms settled between the parties. Even assuming that the agreement entered on 29th March, 1973 was not duly filled up and the signature of the complainant was obtained on a blank form, it is to be noticed that the amount of the two monthly installments admittedly paid by him was to the tune of Rs. 3,566/- exactly @ Rs. 1,783/- per month. The complaint does not

say as to when these two monthly installments were paid. In the First Information Report which he had lodged he had not, stated that the third monthly installment was payable on July 31, 1973. Rather, from the statement in the First Information Report it appears that the installment had already become due on 28-7-1973 when the complainant went out of Kanpur according to his case. The question as to what were the terms of the settlement and whether they were duly incorporated In the printed agreement or not were all questions which could be properly and adequately decided in a civil court. Obtaining signature of a person on blank sheet of paper by itself is not an offence of forgery or the like. It becomes an offence when the paper is fabricated into a document of the kind which attracts the relevant provisions of the Penal Code making it an offence or when such a documents is used as a genuine document. Even assuming that the appellants either by themselves or in the company of some others went and seized the truck on 30-7-1973 from the house of the respondent they could and did claim to have done so in exercise of their bonafide right of seizing the truck on the respondent's failure to pay the third monthly installment in time. It was therefore, a bona fide civil dispute which led to the seizure of the truck. On the face of the complaint petition itself the highly exaggerated rated version given by the respondent that the appellants went to his house with a mob aimed with deadly weapons and committed the offence of dacoity in taking away the truck was so very unnatural and untrustworthy that it could not sake the matter out of the realm of civil dispute. No body on the side of the respondent was hurt. Even a scratch was cot given to any body.

6. In our opinion on the facts and in the circumstances of this case the criminal prosecution deserves to be quashed. On behalf of the respondent it was argued that the appellants' filing petition in the High Court for quashing the proceeding before issuance of the summons was pre mature and the high Court could not have quashed it. In our opinion the point is so wholly with out substance that it has been stated merely to be rejected. Since the parties during the course of the hearing in this appeal showed their inclination to settle up and end all their disputes and quarrels in relation to the matter in question after we indicated our view that we are going to allow the appeal and quash the proceeding, we have not thought it necessary to elaborately give other reasons in support of our order."

55. Similarly lawfulness of criminal proceedings arising upon exercise of the right by a financier to resume possession of vehicle flowing from a hire purchase agreement in which the borrower had defaulted in the loan instalment arose for determination before the Hon'ble Supreme Court in **K.A. Mathai alias Babu Vs Kora Bibbikutty reported at 1996 (7) SCC 212.** The case arose out of a conviction in criminal appeal by the High Court under Section 379 IPC read with Section 114 IPC in the said fact situation. The Hon'ble Supreme Court held thus:

"3. It is more than clear that the hire-purchase agreement with the financier was entered into much prior in time, whereafter the agreement of sale between A-2 and the complainant took place, and which was subject to the rights of the financier. It is even otherwise understandable that A-2 could not have passed a better title of the bus to the

complainant than that she had acquired for herself under the hire-purchase agreement. Though we do not have the advantage of reading the hire-purchase agreement, but as normally drawn it would have contained the clause that in the event of the failure to make payment of instalment/s the financier had the right to resume possession of the vehicle. Since the financier's agreement with A-2 contained that clause of resumption of possession, that has to be read, if not specifically provided in the agreement, as part of the sale agreement between A-2 and the complainant. It is, in these circumstances, the financier took possession of the bus from the complainant with the aid of the appellants. It cannot thus be said that the appellants, in any way, had committed the offence of theft and that too, with the requisite mens rea and requisite dishonest intention. The assertion of rights and obligations, accruing to the appellants under the aforesaid two agreements, wiped out any dishonest pretence in that regard from which it could be inferred that they had done so with a guilty intention. In this view of the matter, we think that the High Court was in error in upsetting the well-considered judgment of the Court of Session. We thus set aside the impugned judgment and order of the High Court and acquit the appellants of the charges. They are on bail. Their bail bonds stand cancelled. Fine if already paid, be refunded to the appellants. The appeal is, thus allowed."

56. In the case of **Charanjit Singh Chadha Vs Sudhir Mehra** reported at 2001 (7) SCC 417, the legality of criminal proceedings instituted against a non banking financial institution which had seized possession of a financed vehicle upon default by the borrower by recourse to the provisions of hire purchase agreement between the parties was in issue. The Hon'ble Supreme Court likened to hire purchase agreement to a contract of bailment. Relying upon the law laid down by the Hon'ble Supreme Court in **K.L. Johar and Co. Vs Deputy Commercial Tax Officer** reported at **AIR 1965 SC 1082,** the elements of hire purchase agreement were crystalised as follows "(1) element of bailment; and (2) element of sale, in the sense that it contemplates an eventual sale. The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and the option is exercised a sale takes place of the goods which till then had been hired."

57. In **Charan Singh Chadha (supra)** the Hon'ble Supreme Court set forth the rationale and elements of a hire purchase agreement as follows:

"5. Hire-purchase agreements are executory contracts under which the goods are let on hire and the hirer has an option to purchase in accordance with the terms of the agreement. These types of agreements were originally entered into between the dealer and the customer and the dealer used to extend credit to the customer. But as hire-purchase scheme gained in popularity and in size, the dealers who were not endowed with liberal amount of working capital found it difficult to extend the scheme to many customers. Then the financiers came into the picture. The finance company would buy the goods from the dealer and let them to the customer under hire-purchase agreement. The dealer would deliver the goods to the customer who would then drop out of the transaction leaving the finance company to collect instalments directly from the customer.

Under hire-purchase agreement, the hirer is simply paying for the use of the goods and for the option to purchase them. The finance charge, representing the difference between the cash price and the hire-purchase price, is not interest but represents a sum which the hirer has to pay for the privilege of being allowed to discharge the purchase price of goods by instalments."

58. Finally in **Charan Singh Chadha (supra)** the Hon'ble Supreme Court ruled out the applicability of Section 378 IPC in view of the hire-purchase agreement on the foot of the following reasons:

"12.Before the learned Single Judge, the respondent had contended that the vehicle was in the possession of the respondent and it was taken out of his custody without his consent and therefore, the offence of theft is made out. This plea is also without any basis as the appellants have taken repossession of the vehicle in exercise of their right under the agreement. There may be instances where the owner of the goods may commit theft of his own goods. Illustration (k) of Section 378 IPC, which is an instance of such a theft, is to the following effect:

"(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession withoutZ's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly."

13. But in the instant case, the owner repossessing the vehicle delivered to the hirer under the hire-purchase agreement will not amount to theft as the vital element of "dishonest intention" is lacking. The element of "dishonest intention" which is an essential element to constitute the offence of theft cannot be attributed to a person exercising his right under an agreement entered into between the parties as he may not have an intention of causing wrongful gain or to cause wrongful loss to the hirer. It is appropriate to note that the term "dishonestly" is defined under Section 24 IPC as follows:

"24. "Dishonestly'.--Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly'."

59. Finally after reiterating the law laid down in **Sardar Triloki Singh (supra)** and **K.A. Mathai (supra)** the Hon'ble Supreme Court in **Charan Singh Chadha (supra)** held:

"17. The hire-purchase agreement in law is an executory contract of sale and confers no right in rem on the hirer until the conditions for transfer of the property to him have been fulfilled. Therefore, the repossession of goods as per the term of the agreement may not amount to any criminal offence. The agreement (Annexure P-1) specifically gave authority to the appellants to repossess the vehicle and their agents have been given the right to enter any property or building wherein the motor vehicle was likely to be kept. Under the hire-purchase agreement, the appellants have continued to be the owners of the vehicle and even if the entire allegations against them are taken as true, no offence was made out against them. The learned Single Judge seriously flawed in his decision and failed to exercise jurisdiction vested in him by not quashing the proceedings initiated against the appellants. We, therefore, allow this appeal and set aside the impugned judgment. The complaint and any other proceedings initiated pursuant to such complaint are quashed."

60. Lastly in the case of **Anup Sarmah Vs Bhola Nath Sharma and others,** reported at **2013 (1) SCC 400**, the

Hon'ble Supreme Court adopting the reasoning in **Trilok Singh and others (supra)** and following the ratio of **Charanjit Singh Chadha and others (supra), K.A. Mathai alias Babu and another (supra)** summarised the legal position in similar terms:

"8. In view of the above, the law can be summarised that in an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and ownership remains with the latter. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is repossessing the goods owned by him.

61. The authorities cited in the preceding paragraphs are fully applicable to the facts of this case and the impugned criminal proceedings are vulnerable to a judicial interdict.

62. The courts have set their face against the abuse of process of law by unscrupulous litigants. The courts have consistently adopted various stringent measures to discourage unscrupulous litigants by imposing costs and institution of criminal prosecution for false cases.

63. The Hon'ble Supreme Court in **Priyanka Srivastava and another Vs State of Uttar Pradesh and others** reported at **2015 (6) SCC 287,** considered an issue relating to institution of false criminal proceedings only to harass an adversary. The Hon'ble Supreme Court in Priyanka Srivastava (supra) with a view to curb the abuse of court by institution of false complaint and triggering criminal prosecution to harass or ward of creditors held:

"29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

32. The present lis can be perceived from another angle. We are slightly surprised that the financial institution has been compelled to settle the dispute and we are also disposed to think that it has so happened because the complaint cases were filed. Such a situation should not happen."

64. The trial court is thus under obligation to make a searching enquiry and accord full consideration to the veracity of

allegations before finding a prima facie case to set the trial on foot. Criminal trial cannot be set in motion in a cursory manner by the trial court.

65. In the instant case, the learned trial court neglected to make a searching enquiry into the veracity of the allegations and credibility of witnesses. The approach of the learned trial court was superficial and cursory to say the least. This factor vitiates the impugned orders passed by the learned trial court.

66. The cumulative effect of the preceding discussion is a prima facie offence was not made out against the applicants for the trial to proceed.

67. In the wake of the preceding discussion this Court finds that the criminal proceedings instituted against the applicants are not only unlawful but an abuse of the process of court and are liable to be quashed.

68. The proceedings along with complaint of Criminal Case No. 1635 (7635) of 2004, Pradeep Kumar Singh Vs. Ashish Pandey and Others (initiated on the application under section 156(3) Cr.P.C. dated 20.12.2002 which has been treated by order dated 24.03.2004 as Criminal Complaint), pending in the court of Additional Chief Judicial Magistrate, Court No. 1, Varanasi under Sections 392, 504, 506 IPC, Police Station Jaitpura, District Varanasi as well as the order dated 13.07.2005 passed by Additional Chief Judicial Magistrate, Court No. 1, Varanasi, are quashed.

69. Concealment of material facts while instituting and processing the criminal proceedings has been established. The complaint is an abuse of the process of court. The respondent no. 3 cannot escape the consequences of coming to the court with unclean hands.

70. In these facts the ends of justice will be secured by imposition of costs upon the respondent no. 3. The respondent no. 3 shall pay Rs. 25,000/- to each of three applicants and Rs. 25,000/- to the State Legal Services Authority. The entire payment shall be deposited within eight weeks before the Chief Judicial Magistrate, Varanasi. In case of default the Chief Judicial Magistrate, Varanasi, shall ensure recovery of the amount as arrears of land revenue.

71. The application is allowed.

(2020)06ILR A180
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.06.2020

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

Application U/S 482 No. 11269 of 2020

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

Counsel for the Applicants:
Sri Shiv Bahadur Yadav

Counsel for the Opposite Parties:
A.G.A., Sri R.P. Yadav

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 - Indian Penal Code,1860- Section 147,149,452, 323, 504, 506-quashing of-complaint-compromise between the litigants accepted-dispute/incident occurred 35 years ago-

Though,many offences are in the realm of es/s 482 would justify to defile the matter.(5 to 10)

B. Apex Court laid down guidelines for the exercise of inherent power u/s 482 while quashing criminal proceedings in case of non-compoundable offences-Section 320 Crpc provides for compounding of certain offences-Apex court held that high court must refrain from quashing criminal proceedings if the offence is a serious and heinous or when public interest is involved.where the wrong is personal in nature and the parties have resolved their dispute, the proceeding may be quashed. If possibility of conviction is remote and continuation of criminal cases would cause extreme injustice to the accused, high courts may quash the criminal proceedings. (Para 8,9)

The application is allowed. (E-6)

List of Cases Cited:-

1.Navindra Singh & ors. Vs St. Of Punj. (2014) 6 SCC 466

2. Saifula Vs St. Of U.P. (2013) SCC Online Ald 5681

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

1. The matter has been placed at the behest of Hon'ble the Chief Justice.

2. Shri R.P. Yadav has filed his Vakalatnama for the original complainant Lakhan Singh son of Sri Shankar.

3. The parties are litigating since 1989, the accused eight in numbers belong to a group of persons of the same village.

4. Mahendra Singh Accused No.1, now 65 years old and has been authorized to litigate for all. It appears that compromise came to be entered into on 7.2.2020, the complaint came to be filed noncompoundableoffence,butfortheendofjustice, exactly 35 years back in 1985. The dispute/incident occurred on 4.9.1984, it was not that major issue between the family members.

5. The learned Magistrate on 3.2.1988 took cognizance and summoned the accused for facing trial under Sections 147, 149, 452, 323, 504 and 506 of Indian Penal Code. The Trial Court has not proceeded further for 35 years, no witnesses were examined on 7th February, 2020 compromise before a notary has been entered into which has been filed as Annexure-3 to the petition.

6. The learned counsel for respondent-complainant has also accepted there is a compromise between the parties. The fact that many of the offences are in the realm of non compoundable offence, but the question is what would be end result of the litigation which is pending since 1985. If this Court does not accept the compromise and relegates the parties to undergo the process of going before the trial court, what would be the end result? It would be that the evidences would be led and at the end of the trial for want of evidence, the accused would be acquitted. It would be resulting into what I would call default acquittal when we are faced with both the pendamic and pendency as there is no element of morality or public damage at large. The Dispute being in the realm of petty dispute, the doctrine of judicial restrain cannot be brought into action here in this case.

7. The recent judgments of the Apex Court and this High Court will permit this Court to quash the proceedings defile the same and direct the court below to defile the proceedings. The reliance placed by the

counsel for the petitioners on the decisions of the Apex Court for similar matter under Sections 149, 147, 452 relied by my brother (Justice Om Prakash VII) would be applicable.

8. The guidelines laid down in ***2014 6 SCC 466***, ***Navindra Singh and others versus State of Punjab*** would apply to the facts of this case. The material on record would go to show that end of the justice would justify exercising the power under Section 482 of Criminal Procedure Code. I am also supported in my view by ***2013 SCC OnLine Ald 5681, Saifula versus State of U.P.***

9. The petition is accepted. The proceedings of Complaint Case No.481 of 1989 **(Lakhan Singh Versus Basudev and others),** under Sections 323, 147, 149, 452, 504, 506 I.P.C. in the Court of Judicial Magistrate, Jhansi are quashed and set aside.

10. The learned Judge to defile the matter without insisting the presence of parties.

11. Order be communicated through the District Judge, Jhansi to concerned Court by e-mail as expeditiously as possible.

(2020)06ILR A182
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Application (U/S 482 CR.P.C.) No. 12176 of 2013
&
Application U/S 482 No. 41464 of 2013

Sunil Pathak & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anurag Shukla, B0123, Sri Bharat Bushan Dubey

Counsel for the Opposite Parties:
A.G.A., Sri Satya Dheer Singh Jadaun, Sri Mangala Prasad Pandey, Sri Pankaj Pandey

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 - Indian Penal Code,1862- Section 395-quashing of-summoning order-trial court failed to assess the materials on record-criminal antecedents of any accused do carry weight but on this ground alone, the applicants cannot be summoned-difference of averments made in complaint and statements of complainant put a serious question mark to the authenticity of the case-moreover, injury report is a procured document-the court is required to atleast mention in the order about the prima facie satisfaction for summoning the accused-the accused cannot be summoned mechanically merely by writing that perused the statements u/s 200 and 202 CrPC-Since it is a cross-case, the impugned order quashed in a one complaint while proceeding in other case shall proceed unabated.(Para 17 to 23 & 1 to 5)

Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts and the law applicable thereto.(Para 17)

The application is partly allowed. (E-6)

List of Cases Cited:-

1. Vijay Dhanuka etc. Vs Naijma Mamtaz (2014) 14 SCC 638

2. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & ors. (2017) 3 SCC 528

3. Mehmood UlRehman & ors. Vs Khazir Mohd. Tunda & ors. AIR (2015) SC 2195

4. Mahboob & ors. Vs. St. Of U.P. & anr. (2017) 2 JIC 320 (All) (LB)

5. Smt. Shiv Kumar & ors. Vs St. Of U.P. & anr. (2017) 2 JIC, 589, (All) (LB)

6. Hariram Verma & 4 ors. Vs St. Of U.P. & anr. (2017) 99 ALL CC 104

7. M/s Pepsi Food Ltd.& anr Vs S.J.M. & ors. (1998) UPCrR 118

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

[1] On 29.01.2020, Registrar(Listing) of this Court has apprised me about two orders of Hon'ble the Apex Court dated 12.09.2019 and 30.01.2020, by which Hon'ble the Apex Court has expressed its desire to decide aforementioned cases as expeditiously as possible within a period of two months. Since, there was a clear and unambigous directions from Hon'ble the Apex Cout, both the applications filed under Section 482 Cr.P.C. numbered above, should be taken at top most priority but for one reason or other, the matter is being deferred till 05.03.2020. Today(05.03.2020), this Court heard learned counsel for the parties at length and judgments are ordered to be dictated in chamber.

[2] Since parties, its genesis as well as dates and its events are almost one and same in both the cases and thus, for the sake of convience and brevity, the Court is proposing to decide/dispose of the matter by one common judgment after hearing the counsels for both the parties on merits.

APPLICATION U/S 482 No. - 12176 of 2013 (Sunil Pathak And 7 Others vs. State of U.P. and Another

[3] Heard Sri Anurag Shukla and Sri Bharat Bhushan Dubey, learned counsels for the applicants, Sri Satya Dheer Singh Jadaun, learned counsel for opposite party as well as learned A.G.A. Pleadings have been exchanged between the parties and the matter is ripe for final submissions.

[4] There are eight applicants who are jointly invoking the extra-ordinary jurisdiction of this Court under section 482 Cr.P.C. with the prayer to quash the entire proceeding of complaint case no.52 of 2011(Smt. Sunita Vs. Sunil Pathak and others) under section 395 IPC, Police Station-Dibiyapur, District-Auraiya pending in the court of Additional Sessions Judge/Special Judge(D.A.A) District-Auraiya and summoning order dated 15.02.2013. Bench of this Court vide its order dated 11.04.2013 has granted interim protection by staying the proceedings of the case referred above by issuing notices to the private parties.

Before deciding the case, it is imperative to spell out the bare skelton facts of the case in hand.

[5] Contention raised by learned counsel for the applicants is that the contesting parties are at the warring ends since long. Wayback in the year 1994, husband and other family members of Ms. Sunita Tiwari(opposite party no.2) have brutally assaulted and killed one Ram Asre, brother of applicant nos. 4, 5 and 6. An FIR to this effect was lodged by one Ram Das Pathak against five named persons specifying the role of actual assault on the deceased to one Pintu@Pradyum Tiwari, husband of opposite party no.2. The said FIR was registered as Case Crime No.444

of 1994 under sections 147, 148, 149, 302, 504, 506 IPC, Police Station-Dibiyapur, District-Etawah. Few of the named assailants were on run and the police has submitted its report under section 173(2) Cr.P.C. endorsing the names in the column of "Absconders".

[6] Again, in the year 2007, history has repeated when husband and family members of opposite party no.2 again assaulted and committed yet another murder of brother of present applicant namely Ram Das Pathak(now deceased) of which Ram Swaroop Pathak has got an FIR registered against seven named accused persons including the husband of opposite party no.2, Pintu@Praduman Tiwari as one of the named accused. The incident took place on 18.11.2007 at 1:30 p.m. of which the FIR was got registered on the same day at 15:30 p.m. as Case crime no.300 of 2007 under sections 147, 148, 149, 302, 307 IPC, Police Station-Dibiyapur, Distric-Auraiya.

The story set up in the instant FIR was that at 18.11.2007 around 1:30 in the afternoon, informant's brother Ram Das@Allu Pathak and informants neice Km. Sarita went to purchase some domestic goods from Hari Kishan Tiwari, a quota dealer, all of sudden, named accused persons who are eight in numbers including Pintu@Praduman Tiwari all armed with lethal fire arms assaulted upon informant's brother Ram Das@Allu. All the assailants armed with deadly fire arms(licensed or even otherwise) virtually pumped bullets in the body of deceased Ram Das@Allu Pathak causing a cold-blooded murder of the deceased in broad day light in a most brutal and barbaric way. An FIR of this case too was registered as Case Crime No.300 of 2007 under sections 147, 148, 149, 302, 307 IPC, Police Station-Dibiyapur, District-Auraiya on 18.11.2007 at 15:30 hrs against Pintoo@Praduman Tiwari and six others causing murder of Ram Das Pathak@Allu Pathak and injuring Anuj.

[7] Prompt FIR was got registered at 15:30 hours at Police Station-Dibiyapur, District-Auraiya. It is next contended that place of incident is near the shop of Hari Kishan Tiwari, Quota Dealer, village-Chapauli. It is also worthwhile to point out here that Pintoo@Praduman Tiwari is the common name in both the case crime numbers of 1994 as well as 2007.

[8] The next contention raised by learned counsel is that in order to "create" counter pressure/case and to save themselves from the wrath of the present FIR i.e. case crime no.300 of 2007, opposite party no.2, left no stone unturned to lodge the FIR against the applicants by creating an imaginary story. When all the attempts went in vain, thereafter, with the aid and help of local political leaders, on 06.05.2008(almost six months after), opposite party no.2 has succeeded in lodging the FIR as case crime no.300A of 2007 under section 395 IPC against as many as eleven named accused persons for committing dacoity on 18.11.2007 around 2:00 p.m. on the same day of which, earlier FIR, having case crime no.300 of 2007 was got registered. At this juncture, learned counsel for the applicants has drawn attention of the Court to the date and time of both the incidents. Intrestingly, time and date of case crime no.300 of 2007 is 18.11.2007 at 1:30 in the day, whereas, time and date of incident of case crime no.300A of 2007 is 18.11.2007 itself but at 2:00 p.m, whereby allegations of dacoity has been pasted upon all the applicants. It is contended that no plausible justification

coming forward explaining the inordinate delay of six months in lodging the FIR having Case Crime No.300A of 2007.

[9] After conducting thorough investigation, police has submitted **"closure report"** under section 173(2) Cr.P.C. on 17.11.2008 in case crime no.300A of 2007 under section 395 IPC against applicants. Dissatisified by the ultimate result of invsetigation of case crime no.300A of 2007, opposite party no.2 has filed protest petition before the court below which too was consigned to records after being rejected on 08.06.2011 and learned Special Judge, D.A.A. Auraiya has accepted the final outcome of the investigation and put a seal of approval over the said "Closure Report. Aggrieved by the order of Special Judge, D.A.A., an application under section 482 Cr.P.C. was preferred before Bench of this Court bearing No.20615 of 2011 decided on 05.07.2011 and this Court too did not oblige the opposite party no.2 in upsetting the orders of Special Judge, D.A.A. and rejected the aforesaid application, part of which is quoted hereinbelow :-

"From perusal of the record, it appears that the learned Special Judge has passed well reasoned order dated 08.06.2011. The trial court has not committed any error in passing the impugned order. Therefore, the prayer for quashing the aforesaid order is refused.

It shall be open to the applicant to file a complaint in respect of the commission of alleged offence. In case, any complaint is filed by the applicant before the court concerned, the court concerned shall proceed further in accordance with law.

With the above direction, this application is finally disposed of. "

[10] While passing the aforesaid order confirming the orders of Special Judge(D.A.A.) Auraiya, a tangent/casual observation was made by this Court that it shall be open for the applicant that applicant, if so advised, may file complaint in respect of the alleged offence and in case such application is filed, the court concerned shall proceed strictly in accordance with law. There was no obligation or mandate by the High Court to file complaint case.

[11] On the strength of abovementioned casual and tangent observation of the court, opposite party no.2, just to create counter pressure on 23.07.2011, has filed complaint case against the accused persons with the allegation of committing dacoity of Rs.9,000/- from the complainant. As per the procedure laid down in Chapter XV of Cr.P.C., statement of opposite party no.2 was recorded under section 202 Cr.P.C. on 08.08.2011. Thereafter, on 04.10.2011, statements under section 200 Cr.P.C. of Mithelesh Kumari(CW-1), Shashi Prabha(CW-2) were recorded and on 27.03.2012 statements of Virendra Kumar(CW-3) and Sita Ram(CW-4) were recorded. The entire endeavour and attempt on the part of opposite party no.2 is to anyhow create counter version/pressure of the aforementioned muder case may be diluted and mellow down. In this spree, they managed to procure the injury report of one Anurag Krishna the alleged injured from the doctor on 23.11.2007 which is annexed on record. Learned Special Judge/Additional Sessions Judge, D.A.A. Auraiya vide order dated 15.02.2013 was pleased to summon the applicants under section 395 IPC by passing an order without furnishing necessary details for recording his satisfaction it it. It seems that

learned Judge was over-awed by the alleged criminal antecendents few of applicants

[12] Submission advanced by learned counsel for the applicants is that impugned summoning order dated 15.02.2013 by learned Special Judge(D.A.A.) Auraiya is a usual one. In the opening paragraph, there is narration of prosecution case and its genesis. Not only this, learned trial Judge has completely misread the orders of this Court while disposing the earlier 482 Cr.P.C. application. This Court has never directed or granted any liberty to file the complaint as mentioned in the impugned summoning order. In the next paragraph, the material supplied by the complainant in support of her case, including the alleged criminal history of few of the applicants and in the last paragraph of impugned summoning order, it is dedicated to drop the names of Smt. Shakuntl Devi and Smt. Shanti Devi as an accused. Being ladies, no case against them is make out under section 395 IPC. Since, the rest of the accused are male members and few of them are having criminal history, thus, per opinion of the Additional Sessions Judge, D.A.A. Auraiya, they are *prima facie* culprit of Section 395 IPC. Except, this, no other reason has been attributed by the court concerned after assigning any other good reason for summoning the applicants as accused.

[13] Per contra, Sri S.D. Jadaun, learned counsel for the opposite party no.2 has filed counter affidavit sworn by none other than Smt. Sunita Tiwari herself. In the counter affidavit, answering respondents has seriously disputed the contents of paragraph no.4 of the affidavit. In paragraph no.6 of the counter affidavit, much emphasis has been laid upon the injury report of Anurag Krishan(Devar of opposite party no.2) who has allegedly sustained the fire arm injury. In this paragraph, number of lame excuses were extended for not lodging case crime no.300A of 2007 within time. In paragraph no.8 of the counter affidavit, strange averment has been made, that case crime no.300 of 2007 and present case are related to same incident and the applicants have succeeded in lodging their FIR against husband of opposite party no.2 and other family members on account of his political approach. Besides this, there is not even reference that the applicants have got long criminal history to their credit.

[14] Learned counsel for the applicants has drawn the attention of the Court with regard to time and date of incident of both the cases is 18.11.2007. In case crime no.300 of 2007 is at 1:30 p.m. whereas time and date of incident in case crime no.300A of 2007 is at 2:00 p.m. in the day. There is a difference of only half hour between these two incidents but there are two different places of incident. In case crime no.300 of 2007, place of incident is in front of shop of Hari Kishan Tiwari, Quota dealer whereas in the instant complaint case, place of incident is residence of complaint village chapauli. Secondly in paragraph no.2 of the complaint, it has been mentioned that on the date and time of the incident, all the accused persons armed with rifle, gun, tamancha, kanta, bhala barged into the house of applicants. They started firing by their respective fire arms and looted Rs.9,000/- from the coffers of Mithelesh Kumar and various jewellery and ornaments including golden chain, finger rings, silver ornaments etc. During this transaction, it is allged in paragraph no.3 that since, accused persons were assaulted

upon indiscriminately, therefore, deceased Ram Das Pathak has sustained gun shot injury from his own persons and Anurag Krishna has also sustained injuries. In this firing, informant's family members has also sustained gun shot injury. In paragraph no.6 of the complaint, it has been mentioned that investigation of case crime no.300A of 2007 was transmitted to C.B.C.I.D who after holding indepth investigation, has submitted final report which was eventually accepted by learned Additional Sessions Judge/Special Judge, D.A.A, Auraiya. After misreading orders of this Court dated 05.07.2011, whereby application under section 482 Cr.P.C. preferred by opposite party no.2 was rejected after making a tangent remark regarding filing of the complaint case. Opposite party no.2 has taken it as "direction" to file complaint case and accordingly, present complaint case was filed.

[15] I have perused the impugned summoning order dated 15.02.2013 as well as the injury report of Anurag Krishna, an alleged injured from the side of complainant of which learned counsel for opposite party no.2 has laid much emphasis. This injury report is of 23.11.2007 issued/procured from one doctor of Unnao and after observing singular injury over his person that too on the right side of the leg. The doctor concerned has opined, that duration of the injury is three days back. If it is computed then, these injuries sustained by alleged injured Anurag Krishna would come around 20.11.2007, whereas the incident is of 18.11.2007. Therefore, there is no parallel between the incident and the injuries sustained by Anurag.

[16] It is lastly argued by learned counsel for the applicants that in paragraph no.2 of the complaint, it has been alleged that assailants were armed with rifal, bhala, kanta, tamancha but Smt. Sunita Tiwari in her statement under section 200 Cr.P.C., has specified that Sunil was carrying rifal and Pawan was having gun only. Rest of the persons were unarmed who barged into the house. There is marked deviaton and shift from the prosecution story and the eye witness account given by Ms. Sunita Tiwari-opposite party no.2. A perusal of the impugned summoning order dated 15.02.2013 clearly shows that names as mentioned above i.e. Shakuntla Devi and Shanti Devi have been dropped and it seems that learned Additional Sessions Judge was got extra conscious of the fact that the applicants are having criminal antecendents and therefore, they might have committed this offence. Though, there is no concrete or confidence generating material on record to indict the applicants in commission of present offence. Without bothering the fact that there is no recovery of any incriminating material or looted article, just because that the applicants have got criminal antecedent, has summoned the applicants in perfunctory manner.

[17] In the summoning order, learned court concerned has narrated the material available on record and other facts but no *prima facie* satisfaction has been recorded to summon the applicants under section 395 IPC. In fact, it is non-speaking order without any application of judicial mind without recording *prima facie* satisfaction. The criminal antecedent of accused/applicants do carries weigth but solely on that ground, they cannot be summoned unless, *prima facie* satisfaction is not on record showing the complicity of the accused in commission of the present

offence and proximity to commit the offence. At this juncture, learned counsel for the applicants targetted the impugned summoning order passed by learned Special Judge, D.A.A. Auraiya is in the stark contrast with the consistent stand of Hon'ble the Apex Court in this regard viz **(i) Vijay Dhanuka etc. Vs. Naijma Mamtaz (2014) 14 SCC 638 ;(ii) Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and others (2017) 3 SCC 528 ;(iii) Mehmood Ul Rehman and others Vs. Khazir Mohd. Tunda and others AIR 2015 SC 2195** whereby Hon'ble the Apex Court has casted an obligation upon learned Judge that steps taken by the Magistrate under section 190(1)(a) of Cr.P.C. followed by Section 204 Cr.P.C. should reflect that Magistrate has applied his mind to the facts and statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged to appear before the Court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence and when considered along with the statement recorded would *prima facie* make the accused answerable before the Court. In other words, the Magistrate is not to act as post office as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that allegations in the complaint constitute an offence, when it is considered along with statements recorded. Application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under section 190/204 Cr.P.C., the High Court must quash such orders in exercise of powers under section 482 Cr.P.C. Para 23 of Mehmood Ul Rehman and others (supra) is quoted hereinunder :-

"Having gone through the order passed by the Magistrate, we are satisfied that there is no indication on the application of mind by the learned Magistrate in taking cognizance and issuing process to the appellants. The contention that the application of mind has to be inferred cannot appreciated. The further contention that without application of mind, the process will not be issued cannot also be appreciated. Though no formal or speaking or reasons orders are required at the stage of Section 194/204 Cr.P.C., there must be sufficient indication on the application of mind by the Magistrate to the facts constituting commission of an offence and the statements recorded under Section 200 Cr.P.C. so as to proceed against the offender. No doubt, the High Court is right in holding that the veracity of the allegations is a question of evidence. Question is not about about veracity of allegations' but whether the respondent are answerable at all before the criminal court. There is no indication in that regard in the order passed by learned Magistrate"

The court concern has not taken into account the abovementioned glaring discrepancies while forming the *prima facie* opinion against the applicants. It seems that this subsequent complaint case has been lodged just to counter the cold blooded murder of late Ram Das in which husband of opposite party no.2 and other named accused persons are facing prosecution. Learned counsel has enumerated the statements of complaint and witness and documents in support of their case including the criminal antecedents of the applicants.

I am of the considered opinion that the criminal history of any accused applicants do carry weight but on this ground alone, the applicants cannot be summoned. Moreover, there is mark difference and deviation in the averments of complaint and statements of complainant put a serious question mark to the authencity and genesis of the criminal case against the applicants. The injury report of the alleged injured too seems to be a procured document. All these factors cumulatively shakes confidence of this court at the threshold stage. But ignoring all these aspects of the issue, learned Special Judge(D.A.A.) Auraiya for the strange reasons has hold that *prima facie* case is made out against the applicants. But to my mind, the order impugned is tangent to the established norms set up by this Court as well as by Hon'ble Apex Court in this regard and deserves to be set-aside at this stage alone.

[18] To buttress his contention, learned counsel for the applicants has relied upon few other judgments of this Court in the case of ***Mahboob and others vs. State of U.P. and another,*** reported in ***2017 (2) JIC, 320, (All) (LB)***. Paragraph No. 12 of the said judgement is relevant for the controversy in hand and is accordingly reproduced herein under :

"(12) Learned Magistrate has passed a very cryptic order simply by saying that the statement of complainant as well as witnesses recorded under Sections 200 and 202 CrPC are perused and accused are summoned such order per se itself illegal which could not stand the test of law."

[19] Learned counsel for the applicants has also relied upon the judgement of this Court in the case of **Smt. Shiv Kumar and others vs. State of U.P. and another,** *reported in 2017 (2) JIC, 589, (All) (LB). Paragraph No. 10 of the aforesaid judgement is relevant for the controversy in hand. The same is as under:-*

"Learned Magistrate was required to atleast mention in the order about the prima facie satisfaction for summoning the accused. The order must reflect that the learned Magistrate has exercised his jurisdiction in accordance with law after satisfying himself about the prima facie allegations made in the complaint. The accused cannot be summoned mechanically merely by writing that perused the statements under Sections 200 and 202 Cr. P. C."

[20] *Reference may also be made to the judgement of this Court in the case of* **Hariram Verma and 4 Others Vs. State of U.P. and Another,** *reported in* **2017 (99) ALL CC 104,** *wherein the following observations has been made in paragraphs 8 :-*

"8. But in 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 or 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.

[21] *In ruling "**M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998 UPCrR 118**" Hon'ble Supreme Court held :-*

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

[22] For the foregoing reasons spelled out in paragraph nos.15, 16 and 17 of the judgment, I am of the considered opinion that the impugned summoning order is a non-speaking order, abrupt without any cogent reasons and connecting the applicants in commission of the alleged offence. The learned trial Judge has miserably failed to assess the materials on record in its correct prospective. He seems overawed by criminal antecedent of few of the applicants and jumped into conclusion that these applicants are *prima facie* involve in the commission of alleged offence under section 395 IPC.

[23] Accordingly, the present application stands allowed and impugned summoning order dated 15.02.2013 and all the subsequent proceedings is hereby set-aside for the reasons mentioned above.

APPLICATION U/S 482 No. - 41464 of 2013

(Smt. Mithlesh Kumari Vs. State of U.P. and another)

[1] Smt. Mithlesh Kumari, wife of late Krishna Babu Tiwari and mother of Pintu@Praduman Tiwari, prime accused of Case Crime No.300 of 2007 has filed the present 482 Cr.P.C. application with the following prayer :-

(a) Quashing the order dated 26.06.2013 passed by the Additional Sessions Judge/Special Judge, D.A.A. Auraiya in S.T. No.53 of 2012, "State Vs. Mithlesh Kumari" arising out of case crime no.300 of 2007 under sections 147, 148, 149, 302, 307 IPC, Police Station-Dibiyapur, District-Auraiya ;

(b) Stay the further proceeding of S.T. No.53 of 2012, "State Vs. Mithlesh Kumari" pending in the court of Additional Sessions Judge/Special Judge, D.A.A. Auraiya arising out of the same case crime number.

[2] I have keenly perused the order impugned dated 26.06.2013 passed by Additional Sessions Judge/Special Judge, D.A.A. Auraiya whereby learned trial Judge after hearing the parties, has held that S.T. No.53 of 2012 and S.T. No. 52 of 2011 are the cross-case and it is expedient in the interest of justice that both the cases should be heard and decided but it is not

feasible or expedient to record the evidence on the same date, and therefore, proceedings cannot be stayed.

[3] Aggrieved by this order, Smt. Mithlesh Kumar(applicant) preferred the present 482 Cr.P.C. application and this Court on 19.11.2013 directed to list this case along with Application U/S 482 No.12176 of 2013 and has stayed the proceeding of S.T. no.53 of 2012 arising out of case crime no.300 of 2007 under sections 147, 148, 149, 302, 307 IPC, Police Station-Dibiyapur, District-Auraiya pending in the court of Additional Sessions Judge/Special Judge, D.A.A. Auraiya.

[4] After hearing the parties, I, in the earlier part of the judgment have allowed in Application U/S 482 No.12176 of 2013 while quashing the summoning order dated 15.02.2013 in complaint case no.52 of 2011 and thus as natural corollary, the entire castle goes to shambles. The entire sessions trial arising out of complaint case would be in nullity and the proceeding arising out of case crime no.300 of 2007 in S.T. No.53 of 2012 under sections 147, 148, 149, 302, 307 IPC pending in the court concerned shall proceed unabated.

[5] Under the changed circumstances, when the impugned order dated 15.02.2013 arising from complaint case no.52 of 2011 initiated by Smt. Sunita Tiwari has already been quashed, as a natural outcome, court concerned is absolutely free to proceed with sessions trial arising out of case crime no.300 of 2007 and S.T. No.53 of 2012, State VS. Mithilesh and others, under sections 147, 148, 149, 302, 307 IPC and conclude the same as expeditiously as possible.

[6] The present application stands rejected. Interim order granted on 19.11.2013 is hereby discharged.

(2020)06ILR A191
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 15022 of 2020

Jiya Afzal & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Kamal Kumar Singh

Counsel for the Opposite Parties:
A.G.A., Sri D.V. Singh, Sri S.N. Singh

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1862-Sections 419, 420, 467, 468,471 -challenge to –forged and fictitious appointment of Anudeshak (teacher) in Madarsa-complainant found that appointment was against the law- regarding locus or competence to make complaint, it is a settled law that court cannot decline to take cognizance-offence of forgery, fraud, making fabricated document and having appointment fraudulently in public office, requiring no condition precedent or competence of any person to initiate criminal proceeding-Moreso,Service Rules 1984 prohibits appointment of any relative of any member of Management Committee-however, father of Anudeshak resigned in the Committee before such appointment just to make such appointment legal but the same resignation was not forwarded to Assistant Registrar,Firms, Societies and Chits for deleting name from the list of members of Management Committee of Madarsa Concerned.(Para 1 to 6)
In the Instant case, the applicants are father and son.they played fraud to the institution for

appointment as Anudeshak which was illegal and against the Rules, 1984.forged and fictitious resignation and acceptance was shown.

(Para 3 & 4)

The application is dismissed. (E-6)

List of Cases Cited:-

Vishwa Mitter of M/s Vijay Bharat Cigarette Stores, Dalhousie Road, Pathan-Kot Vs O.P. Poddar & ors. (1983) 20 ACC 367

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application, under Section 482 Cr.P.C., has been filed by Jiya Afzal and Akhlaq Ahmad against State of U.P. and another, with a prayer for setting aside entire proceeding of Criminal Case No. 3520 of 2011 (State Vs. Akhlaq Ahmad and others), arising out of Case Crime No. 550 of 2011, under Sections 419, 420, 467, 468, 471 I.P.C., Police Station Kotwali Nagar, District Mau, pending in the court of Chief Judicial Magistrate, Mau.

2. Learned counsel for applicants argued that accused-applicants are innocent. They have been falsely implicated and charge sheeted for offences, as above. Institution known as Madarsa Talimul Qurran Mohsinpura (Makkhanwan), Maunath Bhanjan, District Mau is recognized by Arbi and Farsi Madarsa Board, U.P., governed under the recognition and Service Rules, 1987, approved by State of U.P. (Education Department of State of U.P.). This Institution obtained recognition from Arbi and Farsi Madarsa Board, of which certificate of recognition to this Institution dated 16.06.2003 was issued by Registrar Arbi and Farsi Examination U.P., Lucknow. Above institution was being regulated by a society of Committee of Management, registered under Society Registration Act, of which applicant no. 2 was member. He had submitted his resignation from membership of the Committee, before Manager of Committee of Management on 01.05.2008, which was accepted by Committee of Management in above meeting held on 11.05.2008, wherein agenda regarding resignation and acceptance of resignation of applicant no. 2 Akhlaq Ahmad, S/o Late Abdul Latif, was drawn. After acceptance of resignation in meeting of Committee of Management, held on 11.05.2008, he was not a member of Management Committee anymore. State of U.P. Government, under the scheme of Sarv Shiksha Abhiyan, issued a circular for guaranteeing education at primary level to each children of State, wherein Shiksha Guarantee Yojna was proclaimed and directed to be implemented by every District Basic Education Officer in U.P. A direction for appointment on the post of *Anudeshak* for imparting education to the children at primary level, on the contractual basis, was provisioned. This scheme was operative in Madarsas, recognized and imparting education till primary level. The Director of Education of State Programme, Uttar Pradesh, had issued a circular letter to each District Basic Education Officer, U.P. for ensuring compliance of above programme, thereby providing guidelines and appointing *Anudeshak* at every primary school as well as Madarsa level, imparting primary level education to children. Under said scheme, Committee of Management of Madarsa Talimul Qurran Mohsinpura (Makkhanwan), Maunath Bhanjan, District Mau, invited applications for appointment on the post of *Anudeshak* in his Institution under above Shiksha Guarantee Yojna, for which applicant no. 1 was eligible. Manager of Institution as well as its Committee, by way of resolution,

appointed applicant no. 1 as *Anudeshak* on 25.05.2008. This was submitted for approval by Basic Shiksha Adhikari, Mau and after its approval, applicant no. 1 imparted teaching as *Anudeshak* in above Madarsa. Mohd. Hanif, one native of area, moved a complaint before Basic Shiksha Adhikari, Mau making a complaint of appointment of applicant no. 1 illegally. A notice was issued to Management Committee of Madarsa concerned on 28.07.2010, wherein reply by Madarsa was submitted mentioning therein that applicant no. 2 had not been a member of above Committee of Management on the date of appointment of applicant no. 1. Moreso, *Anudeshak* was not a regular service, either in Group D or as a Clerk, for which there was bar in Basic Education Act with Rules framed therein. Even after it, District Basic Education Officer, Mau ceased appointment of applicant no. 1. Again Shamim Ahmad, who was earlier Manager of Madarsa concerned and was replaced by the then Manager Kabir Ahmad, created a disturbance in the peaceful functioning of Madarsa and with mala fide motive, moved an application under Section 156(3) Cr.P.C. against the applicants as well as Manager of Institution with other members with contention of fabrication of documents for getting job of *Anudeshak* by applicant. This application was allowed by Court of Chief Judicial Magistrate with a direction for registration of Case Crime No. 550 of 2011, under Sections 419, 420, 467, 468, 471 I.P.C., Police Station Kotwali Nagar, District Mau. Investigation of this case crime number resulted submission of charge sheet for those offences, whereas no investigation was there nor any offence was made out. Merely on the statement of Basic Shiksha Adhikari Dr. Chandra Pal and Shamim Ahmad, above charge sheet was filed and under routine manner, with no application of judicial mind by Magistrate concerned, cognizance for offence was taken, wherein cognizance order dated 05.10.2011 was passed. U.P. Basic Education Act, 1972 with Service Rules 1984 was not applicable regarding appointment of *Anudeshak* in Sarv Shiksha Abhiyan under Shiksha Guarantee Yojna in a Madarsa, having recognition from Arbi and Farsi Madarsa Board. Moreso, at the time of appointment of applicant no. 1 as *Anudeshak*, applicant no. 2 was not member of society, hence, this allegation was of no substance. Application was filed by erstwhile Manager, having no locus. Hence, this application with above prayer.

3. Learned counsel for opposite party no. 2 vehemently opposed argument of learned counsel for applicants by way of pressing counter affidavit, filed by him, that as per statement of Dr. Chandra Pal, Basic Shiksha Adhikari as well as Assistant Registrar, Firms, Societies and Chits, Azamgarh, recorded under Section 161 Cr.P.C., opposite party no. 2 was registered member of Management Committee of Madarsa concerned. This forged and fictitious resignation and its acceptance by Management Committee, having members, who are accused in this proceeding, were subsequently manufactured. It was never communicated to Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, for making any change in list of member of Management Committee of Madarsa concerned. Rather, a certificate dated 07.07.2011 was issued by Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, mentioning name of applicant no. 2 at serial no. 14 of list of members of Management Committee of Madarsa concerned. Basic Shiksha Adhikari, Mau in his statement has categorically said that it

was an appointment under fraud and misconception of fact. Applicant no. 2 was member of Management Committee and his son applicant no. 1 was appointed as an *Anudeshak* against the Rules, because of being close relative of Management Committee's member. Madarsa was initially recognized under U.P. Basic Education Act, 1972. Thus, U.P. Basic Education Act, 1972 and Rules made therein of 1984 is fully applicable on Madarsa in question. Registrar, Arbi and Farsi Examination, U.P. Lucknow had accepted recognition given under above Act. Hence, it can never be said that subsequent Rules of 1987 was only applicable for Madarsa and its employees. Hence, opposite party no. 2 was erstwhile Manager of Committee of Management and he brought this proceeding in motion for the fraud committed with above Institution, for which he was fully competent, having locus. Hence, this application deserves to be dismissed.

4. Learned A.G.A. has vehemently opposed the application with this contention that prima facie, there was evidence of complainant, District Basis Education Officer Dr. Chandra Pal and Assistant Registrar, Firms, Societies and Chits, Azamgarh with documentary evidence, having mention that till 2011, on the date of issuing certificate by Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, concerned Madarsa and its Management Committee was having name of applicant no. 2 at serial no. 14. Hence, entire contention of submission of resignation and acceptance of it was a forged and fictitious proceeding. There was a provision that no relative of any member of Management be appointed in any primary school or Madarsa and in utter disregard of it, appointment of *Anudeshak* was made. This was not disclosed to Basic Shiksha Adhikari, who subsequently ceased this appointment and this order was not challenged before any higher Court. Hence, the defence taken by learned counsel for applicants are not to be seen till cognizance stage and this Court in exercise of inherent jurisdiction, under Section 482 Cr.P.C., is not expected to embark upon factual matrix. Hence, this application be dismissed.

5. Having heard learned counsel for both sides and gone through material placed on record, it is undisputed fact that Madarsa Talimul Qurran Mohsinpura (Makkhanwan), Maunath Bhanjan, District Mau was a registered Madarsa, having its recognition under Code of Education at Article 65. As per recognition and Service Rules, 1987, recognition from Arbi and Farsi Madarsa Board, U.P., to this Madarsa was there. It was being managed by Committee of Management, registered under Society Registration Act with Rules made therein. Applicant no. 2 was the member of Management and it was shown at serial no. 14 of list of members of Committee of Management in the office of Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, wherein members from 01.05.2008 to date of issuance of certificate in 2011 were entered and applicant no. 2 was with mention in it. Applicant no. 1 is son of applicant no. 2. Applicant no. 1 was appointed as *Anudeshak* in above Madarsa under Sarv Shiksha Abhiyan / Shiksha Guarantee Yojna under U.P. Education Programme Scheme. Prior to this issuance of recognition, on 11.06.2003 under Code of Education under Article 65, this Madarsa was recognized under U.P. Basic Education Act, 1972 and Service Rules 1984 was applicable for it. This Rule prohibits appointment of any relative of any member

of Management Committee at any Clerical or Class IV post in above Madarsa. District Basic Education Officer, after an enquiry over a complaint made by Mohd. Hanif, did found that above appointment was against the law. Hence, he ceased above appointment and no order of any higher court, quashing above order of District Basic Education Officer, has been placed before this Court on record or before Investigating Officer. The submission of resignation on 01.05.2008 and its acceptance on 11.05.2008 has been disputed by opposite party no. 2 learned A.G.A. as well as by District Basic Education Officer and Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh. No such resignation was forwarded or submitted before Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh for deleting name of applicant no. 2 from the list of members of Management Committee of Madarsa concerned. This manufacturing of resignation and acceptance of same by Management Committee along with preparation of agenda, as above, has been challenged to be product of fraud and manufacturing of fictitious document, having no mention in the office of Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh, and this is a question of fact to be seen by trial court. Apparently, it seems to be with substance, because no change or recital of acceptance of resignation, if any, is there in the office of Assistant Registrar responsible for keeping register of members of Management of a Society and its committee. Applicant no. 1 was appointed as *Anudeshak* to impart education at primary level in above Madarsa. Though, he was not a regular employee, but was a contractual teacher, but he received money and honorarium from public exchequer, for which there was guidelines for his appointment, upon recommendation of Village Education Committee, but the documents filed by applicants on this record is not of this fact i.e. when this advertisement was made, how many candidates applied, who were held to be not eligible and how this applicant no. 1 was only found to be recommended for appointment. Hence, this allegation and accusation of forged and fictitious appointment is also a question of fact to be seen by trial court upon the appreciation of evidence, but apparently there is sufficient prima facie evidence in case diary, on the basis of which charge sheet was filed for offences, as above, and cognizance over it was taken by Magistrate.

6. Regarding locus or competence to file an application for lodging a criminal proceeding apex court in **Vishwa Mitter of M/s Vijay Bharat Cigarette Stores, Dalhousie Road, Pathan-Kot versus O.P. Poddar and others; 1983 (20) ACC 367** has propounded that it is clear that anyone can set the criminal law in motion by filing a complaint of fact, constituting an offence, before a Magistrate, entitle to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file a complaint. It has been held that if any special statute prescribes offence and makes special provision for taking cognizance of such offence under the statute, then the complainant, requesting the Magistrate to take cognizance of offence, must satisfy the eligibility criteria prescribed by the statute. In present case, the allegation levelled were of offence of forgery, fraud, manufacturing of fraudulent document and thereby having appointment in public office, requiring no condition precedent or competence of any

person to lodge any criminal proceeding. Moreso, complainant i.e. opposite party no. 2 is erstwhile Manager of Madarsa concerned, having locus to initiate a proceeding regarding fraudulent appointment in above Madarsa. Hence, on this score too, this application is not with any merit.

7. Accordingly, this application merits its dismissal. The application is **dismissed** as such.

(2020)06ILR A196
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 34434 of 2016

Kallu Khan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Adil Jamal

Counsel for the Opposite Parties:
A.G.A., Sri Rajesh Kumar, Shailendra Singh

Criminal Law - Code of Criminal Procedure, 1973- Section 482 - Indian Penal Code,1860- Section 498-A, 323,504,506-quashing of complaint- Factual correctness or incorrectness or appreciation of same cannot be made, neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of complaint-To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive.(Para 10)
In the instant case, the allegations made are not general in nature rather the allegations are specific. The applicants have harassed the complainant and demanded dowry, even they tried to cause injuries to the complainant. The statements of PW-1 and PW-2 corroborated the allegations made by the complainant(Para 16)

The application is dismissed. (E-6)

List of cases cited:-

1. Geeta Mehrotra Vs St. Of U.P. LAWS (SC) (2012) 10 53; (2012) 10 SCC 741

2. Binod Kumar & ors. Vs St. Of Bih. & anr. (2014) 10 SCC 663

3. Smt. Nagawwa Vs Veeranna (1976) 3 SCC 736

4. I.O.C. Vs NEPC India Ltd. (2006) 6 SCC 736

5. G.V. Rao Vs L.H.V. Prasad & ors. (2000) 3 SCC 693

6. B.S. Joshi & ors. Vs St. Of Har. & ors. AIR (2003) SC 1386

7. Arun Singh & ors. Vs St. Of U.P.; (2020) SCC Online SC 164

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

1. Applicants who are six in numbers, have approached this Court by way of filing an application under Section 482 Cr.P.C. with prayer to quash the entire proceedings in Complaint Case No.491/IX of 2015, (Smt. Tarannum Khatoon @ Sanowar vs. Waris Khan & others) u/s 498-A, 323, 504 & 506 IPC and 3/4 D.P. Act, P.S. Naraini, District Banda including summoning order dated 22.12.2015 passed by Chief Judicial Magistrate, Banda in the aforesaid complaint case. Further prayer

has been made to stay the proceedings of the aforesaid case.

2. This Court, on 15.11.2016 has passed the following order :-

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

Learned counsel for the applicants submits that an opportunity be granted to the parties for reconciliation / settlement of their dispute by way of mediation. Applicants are also willing to settle the matter through mediation.

I agree with the submission advanced by the learned counsel for the applicants.

The matter is referred to Mediation & Conciliation Centre of this Court. The applicants are directed to deposit a sum of Rs. 10,000/- by way of demand draft/pay order in the name of Registrar General A/c, Allahabad High Court Mediation & Conciliation Centre within a period of three weeks from today. After deposit of the aforesaid money, office shall send a notice to the opposite party no. 2 fixing a date to appear before the Mediation and Conciliation Centre of this Court. The aforesaid amount shall be payable to the opposite party no. 2 on his/her appearance before the Mediation and Conciliation Centre. The Mediation Centre will submit its report in the matter within three months.

All the opposite parties may file counter affidavit within four weeks. Rejoinder affidavit may be filed within two weeks thereafter.

List this case on 27.2.2017 before the appropriate Bench along with the report of the Mediation Centre.

Till the next date of listing before the Court, further proceedings against the applicants in complaint case no. 491/IX of 2015, under Section 498-A, 323, 504, 506 IPC and Section 3/4 D.P. Act, P.S. Naraini, District Banda pending in the Court of Chief Judicial Magistrate, Banda shall remain stayed.

If the amount, as directed above, is not deposited by the applicants within the aforesaid period, the stay order shall automatically come to an end and the office shall immediately list this case for further orders before the Court."

3. In pursuance of the abovementioned order, the parties appeared before the Mediation and Conciliation Centre wherein as per the report of the Centre, the parties were entered in an interim agreement dated 19.2.2017, however, as per the report dated 26.3.2017 of the Centre, final settlement was not done despite the interim agreement dated 19.2.2017, and as such, the mediation was concluded without any agreement/settlement.

4. Opposite party no.2, who is represented by Shri Rajesh Kumar, Advocate has opted not to file any counter affidavit and the statement to this effect was recorded and mentioned in the order dated 8.1.2018 passed by this Court. For reference, the said order is quoted hereinater :-

"Mediation was not successful.

Sri Rajesh Kumar, learned counsel appearing for the opposite party no. 2 states that he will not file counter affidavit in the matter although Vakalatnama filed by him in the Registry is not on record.

Office is directed to trace the same and place on record.

List this matter on 31.1.2018 under the heading of final hearing.

Stay order, if any, shall continue till the next date of listing."

5. I have heard Shri Adil Jamal, learned counsel for the applicants, Shri

Rajesh Kumar, learned counsel for opposite party no.2 and learned A.G.A.

6. Shri Adil Jamal, learned counsel for the applicants has submitted that the present application is filed by the relatives of Waris Khan, who is the husband of opposite party no.2 (complainant). Applicants are father-in-law, mother-in-law, elder brothers of husband of opposite party no.2 and their respective wife. Learned counsel further submitted that the husband of opposite party no.2 is not before this Court and he is facing criminal proceedings. Learned counsel read out the contents of the complaint, statement of the complainant recorded u/s 200 Cr.P.C. The recorded statements of PW-1 and PW-2, being father and mother of opposite party no.2, recorded u/s 202 Cr.P.C. as well as the summoning order dated 22.12.2015 passed by the Chief Judicial Magistarte, Banda and stated that the entire allegations against the applicants are general and vague, there is no specific details with regard to nature of harassment and the role played by each of the applicants in harassing the complainants and even the places and dates when the alleged harassment was made are not indicated in the complaint as well as the statements recorded u/s 200 & 202 Cr.P.C. In support of his contention, learned counsel has relied upon a judgment passed by the Apex Court in the matter of ***"Geeta Mehrotra vs. State of U.P. reported in LAWS(SC) 2012 (10) 53; 2012 (10) SCC 741*** and specifically relied upon paragraph no.24, for reference, same is reproduced hereinafter :-

"24. However, we deem it appropriate to add by way of caution that we may not be misunderstood so as to infer that even if there are allegation of overt act indicating the complicity of the members of the family named in the FIR in a given case, cognizance would be unjustified but what we wish to emphasize by highlighting is that, if the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the court to take cognisance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law.

Simultaneously, the courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while settling down in her new matrimonial surrounding."

(emphasis supplied)

7. In view of the abovementioned submissions, learned counsel for the applicants prayed that prayer made in the present application be allowed and the entire proceedings initiated against the

applicants in the complaint case in question including summoning order be quashed.

8. Shri Rajesh Kumar, learned counsel appearing on behalf of opposite party no.2 vehemently opposed the submissions made on behalf of the applicants. He stated that the contents of the complaint, statements recorded u/s 200 & 202 Cr.P.C. discloses offences u/s 498A, 323, 504 and 506 IPC and 3/4 D.P. Act. He further submitted that learned court below has rightly taken cognizance on the basis of the complaint and the statements. He further submitted that the exercise of inherent power to quash proceedings is called for only in case where the complaint does not disclose any offence. He further submitted that the power u/s 482 Cr.P.C. should be sparingly invoked. The High Court may not embark upon an inquiry as to the probability, reliability or the genuineness of the allegations made in a complaint.

9. Learned A.G.A. has relied upon the judgment passed by the Apex Court in ***Binod Kumar and Others vs. State of Bihar and Another; 2014 (10) SCC 663*** wherein the Apex Court while dealing with the scope u/s 482 Cr.P.C. for quashing of the proceedings has relied upon the judgment passed by the Apex Court in the case of ***Smt. Nagawwa vs. Veeranna*** reported in ***(1976) 3 SCC 736*** and held in para 9 (ii) that when proceeding could be quashed :-

"(ii) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is a sufficient ground for proceeding against the accused."

10. I have heard learned counsel for the rival parties and perused the record.

10. In the matter of ***Indian Oil Corporation vs. NEPC India Ltd.; (2006) 6 SCC 736,*** the Apex Court has summarized the principles relating to the exercise of jurisdiction u/s 482 Cr.P.C. to quash complaints and criminal proceedings, which are as under :-

"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few-- Madhavrao Jiwaijirao Scindia v. Sambhajirao Chandrojirao Angre (1988) 1 SCC 692, State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335; Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995) 6 SCC 194, Central Bureau of Investigation v. Duncans Agro Industries Ltd (1996) 5 SCC 591; State of Bihar v. Rajendra Agrawalla (1996) 8 SCC 164, Rajesh Bajaj v. State NCT of Delhi (1999) 3 SCC 259; Medchl Chemicals & Pharma (P) Ltd. Biological E. Ltd (2000) 3 SCC 269, Hridaya Ranjan Prasad Verma v. State of Bihar (2000) 4 SCC 168, M. Krishnan v. Vijay Singh (2001) 8 SCC 645 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122. The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute

any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or

(b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

(emphasis supplied)

11. In view of the abovementioned judgments passed by the Apex Court, the High Court can quash a complaint only when allegation made in the complaint even they are taken at their face and accepted in their entirety, do not *prima facie* constitute any offence to make out a case alleged against the accused. While dealing with the complaint case in regard to the matrimonial disputes, the High Court should be more cautious as held in ***Geeta Malhotra (Supra)*** as well as ***in G.V. Rao vs. L.H.V. Prasad and Others; (2000) 3 SCC 693; B.S. Joshi and others vs. State of Haryana and others; AIR 2003 SC 1386.*** The Apex Court has held that in case of general and vague allegations and in the absence of specific allegations, the powers u/s 482 Cr.P.C. could be exercised, however, the Apex Court has cautioned that in case there are allegations of overact indicating the complacity of the accused named in the complaint or FIR, the High Court should not interfere with the criminal proceedings. In case, there is a clear abuse of legal and judicial process and the relatives of the main accused have been *prima facie* implicated falsely, the High Court should not shy away in exercising the powers granted u/s 482 Cr.P.C.

12. In the light of abovementioned legal position, I have to see whether on the

basis of the complaint, statement recorded u/s 200 & 202 Cr.P.C., *prima facie* offence is disclosed or not. The opposite party no.2 in her complaint has mentioned that :-

2. यह कि प्रार्थिया को प्रार्थिया के पिता द्वारा अपनी सामर्थ्य के अनुसार दान-दहेज देकर ससुराल विदा किया गया था परन्तु उक्त सभी विपक्षीगण दिये गये दहेज से सन्तुष्ट नहीं हुये एवं प्रार्थिया को गाली-गलौज पर मारपीट करते हुये 2 लाख रूपये की और दहेज की मांग करने लगे। प्रार्थिया जब मायके ससुराल से वापस आयी तो अपने माता-पिता व परिवारीजन को सारी बातें बताई।

3. यह कि प्रार्थिया के पिता ने पंचायत बुलाकर उक्त सभी विपक्षीगणों से हाथ जोड़कर प्रार्थना किया था कि मेरी हैसियत अब दो लाख रूपये देने की नहीं है एवं प्रार्थिया को यह कहकर दोबारा विदा कर दिया था कि कुछ दिन में सब ठीक हो जायेगा।

4. यह कि प्रार्थिया जीवन जीने की गरज से उक्त विपक्षीगणों के द्वारा दहेज की मांग को लेकर दी जा रही रूहानी व जिस्मानी तकलीफों को बर्दाश्त करती रही परन्तु विपक्षीगण नहीं माने।

5. यह कि दिनांक 29.09.2013को सुबह करीब 10 बजे उक्त सभी विपक्षीगण उक्त दहेज की मांग को लेकर एकराय होकर जान से मार डालने की नियत से प्रार्थिया को मारने पीटने लगे। प्रार्थिया की चिल्लाहट सुनकर मुहल्ले के व रास्ते से निकल रहे तमाम लोगों ने आकर प्रार्थिया की जान बचायी। लोगों के जाने के बाद उक्त विपक्षीगणों ने प्रार्थिया को मात्र तन में पहने कपड़ों के बच्चों सहित अपने घर से यह कहकर निकाल दिया कि जब तक अपने पिता से 2 लाख रूपये नहीं लाओंगी तब तक हम तुम्हें अपने घर में नहीं रखेगें तभी से प्रार्थिया मजबूरन अपने बच्चों सहित अपने पिता के घर में उपेक्षित जीवन जी रही है।

8. यह कि इसके बावजूद आपसी रिश्तेदारों ने पुनः पंचायत कर कोशिश की शायद विपक्षीगण मान जायें, परन्तु विपक्षीगण नहीं माने और अपनी जिद पर दहेज की मांग पर अड़े हुये हैं तब मजबूरन प्रार्थिया माननीय न्यायालय में यह वाद दायर कर रही है।

(emphasis supplied)

13. In her statement recorded u/s 200 Cr.P.C. opposite party no.2 has stated that :-

"सशपथ बयान किया कि मेरी शादी 11 जून 2007 को वारिस खां से हुई थी। वारिस खां मैजिक गाड़ी चलाता है मैने एक मुकदमा घरेलू हिंसा का पहले किया है कोई अधिवक्ता नहीं मिल रहा है। मेरे पति एवं ससुरालीजन कल्लू ससुर, सास रहिसिया जेठ अलीम जेठानी रेहाना, आरिफ, शाबादा दहेज के लिए प्रताड़ित किया। दहेज नहीं देने पर गाली गलोज मारपीट कर भगा दिया। मेरे दो बच्चे हैं जो मेरे पास रहते है। दहेज में 2 लाख रूपये की मांग की गई। मैंने सूचना पुलिस को दी एवं एस०पी० को रिपोर्ट किया। कोई कार्यवाही नहीं हुई।"

(emphasis supplied)

14. PW-1 - father of opposite party no.2 has stated in his statement recorded u/s 202 Cr.P.C. that :-

मैने अपनी पुत्री तरन्नुम खातून उर्फ सनोवर का निकाह दिनांक 11.06.2007 को श्री वारिस खां पुत्र कल्लू खां निवासी रंजीतपुर थाना नरैनी के साथ किया था। एवं अपनी हैसियत के अनुसार दान-दहेज देकर लड़की को विदा किया था। जब मेरी पुत्री ससुराल गयी तो पति वारिस खां, ससुर, कल्लू खां, सास रहिशिया, जेठ अलीम, जेठानी रिहाना, एवं दूसरा जेठ आरिफ व जेठानी शाबदा दिये गये दान-दहेज से सन्तुष्ट न होने के कारण तरन्नुम को मार पीट गाली गलौज जैसी यातनाए देकर रू० दो लाख और चौथी में लेकर दहेज के रूप में आने को कहे। जब मेरी पुत्री घर आई तो सारी बाते बतायी। दुबारा जब पति सहित ससुराल जन पुत्री को लेने आये तो मैने पंचायत जोड़कर कहा कि मैं अब और दहेज देने लायक नहीं हूँ अश्वासन के बाद मैंने पुत्री को सब कुछ ठीक कुछ दिन में हो जायेगा। कह कर उनके साथ विदा कर दिया। परन्तु उक्त ससुराली जन दहेज की मांग को लेकर मेरी पुत्री को प्रताडित करते रहे। एवं दिनांक 29.9.2013 को सुबह करीब 10.00 बजे उक्त ने एकराय होकर मेरी पुत्री के ऊपर मिट्टी का तेल डालकर जान से मार डालने की नियत से मारने की कोशिश की प्रार्थी की पुत्री को चिल्लाने पर मुहल्ले व रास्ते के राहगीर इकट्ठा होकर अभि०गण को ललकारा तब कहीं मेरी पुत्री की जान बची। उसके बाद ससुरालीजन ने मेरी पुत्री को मात्र पहने हुए कपड़ों में बच्चों सहित घर से निकाल दिया और कहा कि जब तक रू० दो लाख और नहीं लाओगी तब तक हम तुम्हें नहीं रखेंगे। तब से मेरी पुत्री मेरे घर पर बच्चों सहित रह रही है।

(emphasis supplied)

15. PW-2 - mother of opposite party no.2 in her statement has stated that :-

"मेरी पुत्री तरन्नुम का विवाह आज से करीब 8 वर्ष पूर्व वारिस पुत्र कल्लू निवासी रन्जीतपुर थाना नरैनी के साथ किया था। दिये गये दान दहेज से ससुरालीजन खुश नहीं थे। जिस की वजह से पति वारिश, ससुर कल्लू, सास रहिसिया, जेठ अलीम, जेठानी रेहाना एवं दूसरा जेइ आरिफ व जेठानी साबदा आये दिन मार पीट करके दो लाख रू० की मांग करते थे पंचायत कर समझाने की कोशिश की पर नहीं माने। आज से करीब दो साल पूर्व तरन्नुम को गाली गलोज व मारपीट करते हुए मिट्टी का तेल ऊपर डालकर जान से मार डालने की कोशिश की। तरन्नुम के चिल्लाने पर मुहल्ले के लोगों ने आकर बचा लिया। इसके बाद उक्त सभी ससुरालीजन मेरी पुत्री को उसके बच्चों सहित मात्र पहने कपड़ो में घर से निकाल दिया कहाकि जब तक दहेज के दो लाख रूपये नहीं लाओंगे तब तक तुम्हें अपने घर में नहीं रखेगें। तब से मेरे घर में तरन्नुम अपने बच्चों के साथ रह रही है। ससुरालीजन कोई खोज खबर नहीं ले रहे हैं।"

(emphasis supplied)

16. In the abovementioned complaint and statements, it has specifically been mentioned that the applicants have harassed the complainant/opposite party no.2 and demanded dowry of Rs.2,00,000/-. They even attempted to cause injuries to opposite party no.2 earlier also, however, due to negotiations, the complainant was allowed to live with them. There are specific allegations against all the applicants that on

29.9.2013, they have tried to cause injuries to the complainant/opposite party no.2 and they used to demand a dowry of Rs.2,00,000/- and also caused physical injuries to victim. The statements of PW-1 and PW-2 corroborated the allegations made by the complainant/opposite party no.2. *and thus it can not be said that no offence under the Dowry Prohibition Act are made out against the appellants. There being direct allegations of demand of Dowry in the First Information Report, the allegations prima-facie constitute a commission of an offence under the Dowry Prohibition Act and thus the charges leveled against the appellants under Section 3/4 of the said Act, are not liable to be quashed."* ***(emphasis supplied)***

17. The learned court below after considering the contents of the complaint as well as the statements recorded u/s 200 and 202 Cr.P.C. found sufficient ground for proceedings and accordingly summoned all the applicants u/s 204 Cr.P.C.

18. In the present case, the allegations made in the complaint case are not general in nature rather the allegations are specific and even the earlier incident has also been specifically mentioned in the complaint as well as the statements. Present case is not a case where it could be said that general allegations are made against the applicants rather this case falls under the categories of cases where even the Apex Court in Geeta Mehrotra (Supra) has directed to adopt a cautious approach.

19. Recently, the Apex Court in Arun Singh and others vs. State of U.P.; 2020 SCC Online SC 164 in similar circumstances has declined to quash criminal proceedings u/s 3/4 D.P. Act. For reference, para 30 of the said judgment is reproduced hereinafter :-

"30. A reading of the above provisions shows that essential ingredients of the offence under Section 3/4 of the Dowry Prohibition Act are that the persons accused should have made demand directly or indirectly from the parents or other relatives or guardians of a bride or a bridegroom as the case may be any dowry and/or abets the giving and taking of dowry. The allegations of the F.I.R. quoted hereinabove clearly go to show that a demand of dowry of Rs.5 Lakhs was made by the appellants from the complainants

20. In view of above discussion, it is my considered opinion that present case is a case where the inherent powers should not be used to stifle or scuttle the legitimate prosecution.

21. In view of the above, the present application being sans merit, accordingly ***dismissed.***

(2020)06ILR A203
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2019

BEFORE

THE HON'BLE ANIL KUMAR-IX, J.

Application U/S 482 No. 41546 of 2019

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

Counsel for the Applicants:
Sri Sri Anwar Hussain, Sri Sukhvir Singh

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

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 & Indian Penal Code,1860- Section 406-quashing of- summoning order- Factual correctness or incorrectness or appreciation of same cannot be made-at this stage only prima facie case is to be seen in the light of the law laid down- disputed defence of the accused cannot be considered while exercising power u/s 482.(Para 6, 7)

B. The grounds on which power u/s 482 can be exercised basically are (1) where the allegations made in the F.I.R. or complaint, even if they are taken at their fact value and accepted in their entirety do not prima facie constitute any offence (2) where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence (3) where there is express legal bar engrafted in any of the provisions of Code of Criminal Procedure or the concerned Act to the institution and continuance of the proceedings. But this power has to be exercised in a rare case and with great caution. (Para 6)

In the Instant case, complaint filed by the complainant against the applicants after 16 years of the marriage for misappropriation of "Streedhan". At the time of marriage, ornaments received by the applicants did not return back after reaching to her in-law's house. (Para 3)

The application is dismissed. (E-6)

List of cases cited:-

1. Monika Kumar Vs St. Of U.P. (2008) 8 SCC 781

2. U.O.I Vs Prakash P. Hinduja & anr. AIR (2003) SC 2612

3. R.P. Kapur Vs St. Of Punj AIR (1960) SC 8664. Bhajan Lal Vs St. Of Har. (1992) SCC (Cr.) 426

(Delivered by Hon'ble Anil Kumar-IX, J.)

Heard learned counsel for applicants, learned counsel for opposite party no. 2 and learned A.G.A. for State.

2. This application u/s 482 Cr.P.C. has been filed by the applicants with the prayer to quash impugned summoning order dated 20.07.2019 passed by the Chief Judicial Magistrate, Firozabad and further proceedings of Complaint Case No. 2916 of 2018 (Smt. Neetu Singh Vs. Pushpendra and others) under Section 406 I.P.C., P.S. South, District-Firozabad pending in the court of Chief Judicial Magistrate, Firozabad.

3. The brief facts of the case is that opposite party no. 2 was married with applicant no. 1 on 06.03.2002. Applicant nos. 2 and 3 are father and mother of applicant no. 1 respectively. At the time of marriage ornaments received by opposite party no. 2 as *"Streedhan"* was entrusted to the appellant nos. 1 and 2 and it was ensured by them that they will return it back to opposite party no. 2 after reaching to her-in-laws house. They misappropriated her *"Streedhan"* and handed over to appellant no. 3. On complaint moved by opposite party no. 2, statement of complainant under Section 200 Cr.P.C. and statement of two witnesses under Section 202 Cr.P.C. were recorded and by impugned order dated 20.07.2019 appellants have been summoned by learned Magistrate under Section 406 I.P.C.

4. Learned counsel for the applicants contended that no offence is disclosed against the applicants and they have been falsely implicated in this case. He further argued that applicant no. 1 was married to opposite party no. 2 but due to her bad conduct and ill behaviour with family members, on his petition ex-parte divorce

decree has been passed in his favour by the Principal Judge, Family Court, Firozabad on 29.09.2018 and after this ex-parte decree he did his second marriage on 05.10.2018 and in counterblast of it opposite party no. 2 has filed complaint against the applicants after 16 years of the marriage.

5. Learned counsel for opposite party no. 2 and learned A.G.A. opposed the prayer of the applicants and submitted that at this state it cannot be said that no offence is made out against the applicants. Impugned summoning order has been passed on sufficient ground.

6. The applicants have been summoned on the basis of allegation made in complaint and statement of complainant recorded under Section 200 Cr.P.C. and statements of two witnesses recorded under Section 202 Cr.P.C. In the case of ***Monika Kumar Vs. State of U.P.*** reported in ***(2008) 8 SCC 781***, it has been held by Hon'ble Apex Court that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down under section itself. In the case of ***Union of India Vs. Prakash P. Hinduja and another*** reported in ***A.I.R. 2003 SC 2612,*** Hon'ble Supreme Court has observed as follows:-

"The grounds on which power under Section 482 Cr.P.C. can be exercised to quash the criminal proceedings basically are (1) where the allegations made in the F.I.R. or complaint, even if they are taken at their fact value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused (2) where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and made out a case against the accused, (3) where there is an express legal bar engrafted in any of the provisions of Code of Criminal Procedure or the concerned Act to the institution and continuance of the proceedings. But this power has to be exercised in a rare case and with great circumspection."

7. From the perusal of material on the record and looking into the facts of the case, at this stage it cannot be said that no offence is made out against the applicants.All the submission made by learned counsel for applicants relates to the disputed question of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426.*** The disputed defence of the accused cannot be considered at this stage.

8. The prayer for quashing the impugned summoning order as well as further proceeding in the aforesaid case is hereby refused.

9. With the aforesaid observation, this application under Section 482 Cr.P.C. is **dismissed**.

(2020)06ILR A205
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE ANIL KUMAR-IX, J.
Application U/S 482 No. 43088 of 2019

Lalloo Khan & Ors. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:

Sri Dinesh Kumar Gupta

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

A. Criminal Law - Code of Criminal Procedure,1973-Section 482 - Indian Penal Code, 1862-Sections 379, 411- challenge to-application for delay condonation - allowed even not supported with affidavit-ground was sufficient for filing the appeal beyond 12 days from the limitation-separate affidavit in support of application is not necessary.(Para 4 to 7)

In the instant case, application u/s 5 Limitation Act was filed by the State on the ground that public prosecutor was busy in other government work, therefore appeal could not be filed within limitation period.State comes with a prayer that decision is required to be taken at various level which causes delay, therefore court should consider this aspect whether delay should be condoned or not.(Para 6)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Heera Vs St. (2004) 13 SCC 582

2. Davinder Pal Sehgal & anr. Vs M/s. Pratap Steel Rolling Mills, AIR (2001) SC 451

(Delivered by Hon'ble Anil Kumar-IX, J.)

1. Heard learned counsel for applicants and learned A.G.A. for State.

2. This application u/s 482 Cr.P.C. has been filed by the applicants with the prayer to quash the order dated 15.10.2019 passed by learned Sessions Judge, Hamirpur in Misc. Criminal Appeal No. 5/11/18 (State Vs. Lalloo and others) under Section 378 Cr.P.C. P.S.- Sumerpur, District- Hamirpur whereby the court below has allowed delay condonation application (4Ka) of opposite party on cost Rs. 200/- condoning the delay in filing the criminal appeal.

3. The brief facts of the case is that Criminal Appeal No. 1008 of 2017 (State Vs. Lalloo and others) arising out of Case Crime No. 112/2017 under Section 41, 42, 26 Indian Forest Act 1927, Section 3/28 Uttar Pradesh Aara Machine Establishment and Regulation Rules 1978 and Sections 379 & 411 I.P.C., P.S.- Sumerpur, District- Hamirpur, was finally decided by the court of A.C.J.M. Hamirpur on 30.10.2017. The applicants- accused persons were acquitted from the charges. Appeal against the above judgment was preferred by the State beyond 12 days from the limitation period with an application under Section 5 of Limitation Act on the ground that public prosecutor was busy in other government work therefore appeal could not be filed within limitation period. This application moved under Section 5 Limitation Act was allowed by Sessions Judge, Hamirpur by impugned order dated 15.10.2019 and delay in filing the appeal was condoned.

4. Learned counsel for the applicants contended that learned Sessions Judge acted illegally in allowing the application for condonation of delay in filing the appeal. The application moved under Section 5 Limitation Act was not supported by the affidavit.

5. Learned A.G.A. opposed the prayer of the applicants and submitted that delay was only of 12 days and there

was sufficient ground for allowing the application.

6. In the instant case application under Section 5 Limitation Act for condoning the delay was filed by the State and in matter concerning State it should be taken at various level which causes delay therefore court should consider this aspect in deciding whether delay should be condoned or not. In case in hand ground mentioned in the application was that public prosecutor was busy in other government works due to which appeal could be filed beyond 12 days from the limitation period. Learned court below has rightly concluded that there was sufficient ground for the delay.

7. Learned counsel for applicants vehemently contended that application moved under Section 5 Limitation Act was not supported with affidavit therefore it was argued that it was illegally allowed by the court below but when the court is satisfied that ground mentioned in the application was sufficient for filing the appeal beyond 12 days from the limitation then it was not necessary to support the application with a separate affidavit. In the case of ***Davinder Pal Sehgal & Another Vs. M/s. Pratap Steel Rolling Mills*** reported in ***A.I.R. 2001 SC 451,*** Hon'ble Apex Court has held that even separate application for condonation of delay is not necessary for condoning the delay.

8. In view of the above, the prayer made by learned counsel for applicant is hereby refused.

9. In view of the above, I am of the opinion that court below has not acted in kept in mind that generally decision is taken at various level which takes time. In ***State Vs Heera reported in (2004) 13 SCC 582,*** Hon'ble Apex Court has held that when State comes with a prayer for condonation of delay it is to be remembered that decision is required to be the exercise of its jurisdiction illegally or with material irregularity.

10. With the aforesaid observation, this application under Section 482 Cr.P.C. is **dismissed.**

(2020)06ILR A207
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Writ-B No. 20729 of 2007

Ajay Kumar & Anr. ...Petitioners
Versus
Board of Revenue, U.P & Ors. ...Respondents

Counsel for the Petitioners:
Sri D.K. Singh, Sri S.N.S. Yadav, Sri Saumitra Singh, Sri R.P. Mishra

Counsel for the Respondents:
C.S.C., Sri Anil Kumar Pathak, Sri V.K. Singh, Sri Vishnu Bihari Tiwari

Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950: Section 178 to 182

The present dispute relates to the fact whether the plot in dispute could be auctioned as the total area of the plot in the name of one persons would become less then 3-1/8 acres in view of the Section 178 of the U.P. Z.A. & L.R. Act as it existed before the amendment Act 27 of 2004

dated 20.8.2004. It is observed that after the deletion of Section 178 to 182 by way of amendment, it was permitted that plot can be transferred in fragments and all the parties should have been granted their share of the plots and there was no occasion for auctioning the property, confirming the sale and distributing the auction proceeds among remaining parties.(Para 12)

The petitioners are nowhere being prejudiced as they got their share vide order dated 16.04.2001 and since no writ petition or any proceeding was filed against aforesaid order the same would be considered to be admitted to the parties. (Para 12)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This writ petition has been filed by the petitioners with the following prayer:

"i). Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 14.3.2007 and 29.3.2006 passed by respondents no. 1 and 2 respectively and to call for the record. (Annexure Nos. 7 and 6 to this writ petition).

ii). Issue a writ, order or direction in the nature of mandamus directing the respondents not to interfere in the possession of the petitioners.

iii). Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

iv). Award the cost to the petition in favour of the petitioner."

2. The fact of the case as argued by the learned counsel for the petitioners is that the petitioners filed a suit under Section 176 of the U.P. Z.A. and L.R. Act, in the Court of Assistant Collector (I) S.D.M. Ghatampur, District Kanpur Nagar, which was numbered as 34 of 1998, in which the petitioners claimed that Gata No. 233 area 0.883 hectare, which is the joint land of the petitioners and respondent nos. 5 and 6 and the land of their shares be given to them. The said suit was contested by the respondent nos. 5 and 6 and they denied the averments made by the petitioners in the suit.

3. The Sub-Divisional Magistrate, considered all the facts and pleadings of the parties and the share of the parties were decided by order dated 23.10.1998 and petitioners got their shares in the property.

4. That aggrieved by the order dated 23.10.1998 passed by the S.D.M., the respondent no. 5 and 6 preferred an appeal before Commissioner Kanpur, Division Kanpur, which was allowed.

5. That aggrieved by the order of the Commissioner, the petitioners filed a Second Appeal No. 45 of 1998-99, before the Board of Revenue U.P., Allahabad, which was allowed vide order dated 16.4.2001 and the order dated 18.6.1999 and 14.7.1999 passed by the respondent no. 2 were set-aside. The Board of Revenue in the order dated 16.4.2001 observed that the petitioners as well as respondents are recorded tenure holders of the land in question and the parties were in possession of their respective shares and the land is less than prescribed limit it would be suitable to sell it in accordance with the provisions of law.

6. Thereafter, the petitioners filed Suit No. 22/34/2002 under Section 176 of U.P. Z.A. & L.R. Act, before the Court of Assistant Collector (I) S.D.M. Ghatampur, District Kanpur Nagar, in which a preliminaty order was passed and the petitioners share was declared as 2/3 and respondents no. 5 and 6 share was declared as 1/3 on the ground that the land was less than 3-1/8 acre, therefore, vide order dated

17.6.2004, the order for auctionining the land was passed and the auction was held on 29.7.2004 and the petitioners were the highest bidder and were given the possession of land and vide order dated 17.12.2004 and decree dated 23.12.2004, the name of the petitioners were recorded in Revenue Records and the name of respondents no. 5 and 6 were deleted.

7. Thereafter, the respondent nos. 5 and 6 filed an appeal bearing number 80 of 2005 against the order dated 17.12.2004 and decree dated 23.12.2004 on the ground that the respondent nos. 5 and 6 were not given opportunity of hearing nor they were given opportunity to adduce their evidence. The trial Court finding that the land was less than 3-1/8 hectare, therefore, the land was directed to be auctioned is perverse, the trial Court fails to consider that Section 178 to 182 of U.P. Z.A. & L.R. Act, was deleted by New Amendment Act No. 27 of 2004, therefore, in these circumstances, the proceedings of auction is against the provision of law and automatically come to an end and parties should be given their shares, the ground taken by respondent nos. 5 and 6 was considered by the appellate Court and the appeal was allowed vide order dated 29.3.2006 and the order dated 17.12.2004 and the decree dated 23.12.2004 of trial Court was set-aside and the matter was remanded back before the trial Court to consider the matter afresh in accordance with law.

8. Aggrieved by the order dated 29.3.2006, the petitioners filed Revision bearing no. 34 of 2006-07 before the Board of Revenue U.P. Allahabad. The Board of Revenue vide order dated 14.3.2007 dismissed the revision of the petitioners on the ground that Section 178 to 182 of U.P. Z.A. & L.R. Act, is deleted as per Amendment Act 27 of 2004 and the area of land measuring 3-1/8 hectares be now being partitioned between the parties as per their shares and refused to interfere in the order dated 29.3.2006.

9. Aggrieved by the order dated 14.3.2007 passed by the Board of Revenue, Allahabad- respondent no. 1 and against the order dated 29.3.2006 passed by respondent no. 2. The petitioners have preferred the present writ petition before this Court.

10. Learned counsel for the respondent nos. 5 and 6 filed their counter affidavit and denied all the averments made in the writ petition. Rejoinder affidavit filed by petitioners but no new ground was taken by petitioners.

11. Heard learned counsel for the petitioners and learned counsel for respondent nos. 5 and 6 and learned Standing Counsel for other respondetns.

12. I have perused the orders dated 29.3.2006 and 14.3.2007 passed by respondents no. 1 and 2 and considered the legal ground taken by the respondent nos. 5 and 6 in the counter affidavit, once Section 178 to 182 of U.P. Z.A. & L.R. Act, is deleted from the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as per Amendment Act 27 of 2004, there is no justification for auctioning the land in question and the land in question can be partitioned between the parties and the parties shall enjoy their shares. The Board of Revenue in its order dated 14.3.2007 need not consider the effect of the order dated 16.4.2001 by which the share of the parties was decided as the same was not in dispute. The share of the parties was given in the order dated 16.4.2001, and the petitioners are nowhere being prejudiced as

they also got their share, since no writ petition or any other proceeding was filed against the order dated 16.4.2001, therefore, the same would be considered to be admitted to the parties. The present dispute relates to the fact whether the plot in dispute could be auctioned as the total area of the plot in the name of one persons would become less then 3-1/8 acres in view of the Section 178 of the U.P. Z.A. & L.R. Act as it existed before the amendment Act 27 of 2004 dated 20.8.2004. It is relevant to observed herethat after the amendment it was permitted that plot can be transferred in fragments also in view of the fact that Section 178 to 182 of U.P. Z.A. & L.R. Act is deleted from the Act, as such all the parties should have been granted their share of the plots and there was no occasion for auctioning the property, confirming the sale and distributing the auction proceeds among remaining parties, the entire proceeding was against the provision of law. The order dated 14.3.2007 and 29.3.2006 are merely remand order and the writ petition against the remand order is not maintainable before this Hon'ble Court.

13. In the opinion of the Court there is no illegality in the order passed by the appellate Court dated 29.3.2006 and the order passed by the revisional Court dated 14.3.2007 and the finding recorded by both the Courts below is as per law and no interference is required by this Court under Article 226 of the Constitution of India.

14. In view of the legal position and considereing the arguments advanced by the parties, the present writ petition lacks merit and is, accordingly, **dismissed**.

15. Interim order, if any, stands vacated.

16. The parties shall bear their own costs.

(2020)06ILR A210
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE

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

Writ-B No. 23996 of 1994

Lakhan & Ors. ...Petitioners
Versus
The Board of Revenue, U.P & Ors. ...Respondents

Counsel for the Petitioners:
Sri S.N. Verma, Sri Ajay Krishna, Sri Ajay Shankar, Sri Archana Singh, Sri Rama Nand Gupta, Sri Shreeprakash Singh, Sri Triveni Shanker, Sri Awadhesh Kumar

Counsel for the Respondents:
S.C., Sri Anil Kumar Rai, Sri Anshika Agrawal, Sri Anupam Laloria, Sri D.N. Gupta, Sri Ekansh Verma, Sri K.B. Garg, Sri K.K. Dubey, Sri K.N. Saxena, Sri Kamlesh Kumar Tiwari, Sri Radha Kant Singh, Sri V.K. Gupta, Sri V.K. Singh, Sri Vishal Agrawal, Sri Vishal Agrawal, Sri Vishnu Singh

Civil Law - Revenue Entries - U.P. Tenancy Act, 1939: Section 35, 36(1), 180(2) - U.P. Zaminadri Abolition & Land Revenue Act, 1950: Section 229B - Claiming a right based on long standing revenue entries is that the revenue entries of long standing in favour of a land holder or co-sharer would raise a presumption and title, but would not be a conclusive about it. These entries continuing over a long period of time cannot defeat the rights of a person who has not abandoned or relinquished it, but for some oversight, has not been able to seek requisite correction. (Para 44)

The present suits have been brought to rectify revenue entries alone by expunging the name of Sadarani from the revenue records relating to suit property over which she recorded when she inherited it, and the right to which she was divested of on remarriage, going by the law governing rights of parties at that time. Here it has to be clarified that entries of howsoever long standing in the revenue records, that do not have a valid legal basis about them cannot be permitted to continue, inasmuch as such entries cannot confer title by mere long continuance. They do raise a presumption of good title but in the case in hand, it being clearly established that there is no basis to Sadarani's right to continue to be recorded, the merely long continuing entries would not be basis in themselves to perpetuate. The presumption in this case about long continuing revenue entries stands squarely rebutted. (Para 56)

B. Indian Evidence Act, 1872: Section 101, 102 - onus probandi on an issue is the burden to let in evidence on an issue and lies upon that party who would fail, if no evidence on either side were led. (Para 48)

In the instant case, Smt. Sadarani had both the onus and burden to prove that Smt. Prema was Parikshit's daughter. The case introduced by Sadarai claiming a right for Prema as Parikshit's daughter and therefore his heir entitled to inherit his share, is beyond the scope of this suit as entries are in favour of Sadarani that were recorded upon the death of her first husband, Parikshit and there is no entry in favour of Smt. Prema, in her right as Parikshit's daughter, ever recorded. The suit do not, therefore, seek any relief to expunge Prema's name. The relief sought is against Sadarani based on the continuing entries in her name. The Court further observed that in the present petition Smt. Prema is contesting is not in her right as Parikshit's daughter but as Sadarani's daughter, representing her estate after her death. The independent rights that she set up claiming to be Parikshit's daughter are not established even by as much a semblance, that may afford her any *locus standi* in that right. The pleaded case of Sadarani, however, indicates that she does not even remotely indicate the slightest of *animus possidendi* in relation to the suit property that she, from her pleaded case, acknowledges to have lost upon her remarriage to Chimman. (Para 49, 50)

C. Jurisprudence - 'Possession in fact', 'Possession in law' - The element of intent to possess or *animus possidendi* is the requirement of possession in fact as much as it is about possession in law. (Para 53)

Writ Petition Allowed. (E-10)

List of cases cited:-

1. Sharda Prasad Vs. RCEO, Allahabad 1998 (34) ALR 509

2. Jagdish Vs. State of U.P. through Secretary, Revenue Department Lucknow and ors. 2013 (121) RD 756

3. Shivaji Blaram Haibatti Vs. Avinash Maruthi PAwar (2018) SCC 652: 2018 All C.J. 119

4. Devi Died Sri Sia Ram substituted and ors. Vs. Mohd. Hanif and ors. 1963 RD 153

5. Ram Kumar and ors. Vs. Board of revenue 1982 RD 314

6. Kailash Rai Vs. Jai Jai Ram and ors. AIR 1973 SC 893: (1973) 1 SCC 527 *(distinguished)*

7. Mangroo and ors. Vs. Ram Sumer and ors. 2006 All C.J. 1924

8. Jagdev Vs. Deputy Director of Consolidation 2006 (101) RD 216

9. Smt. Gajodhari Devi Vs. Gokul AIR 1990 SC 46: 1989 Supp (2) SCC 160 *(distinguished)*

10. Shri Ram and ors. Vs. DDC Allahabad Camp Fatehpur and ors. 2011 All. C.J. 635

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

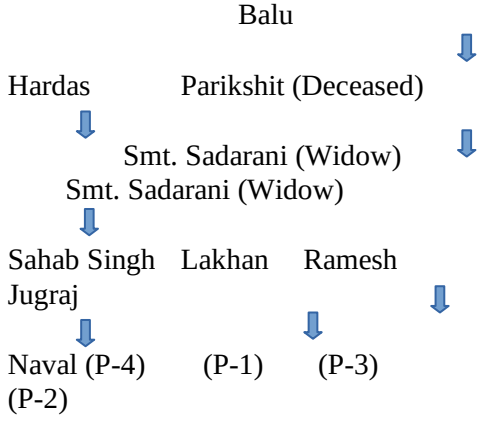
1. This writ petition is directed against judgments and decrees dated 28.04.1994 passed by the Board of Revenue, U.P. at Allahabad in Second Appeal Nos. 151, 152

and 153 of 1989-90, reversing a judgment and decree of the Additional Commissioner, Jhansi Division, Jhansi dated 24th April, 1990 passed in Appeal No. 90/6/1986-87, 91/7/1986-87, 92/8/1986-87 and restoring the decree of the Sub Divisional Officer, Jhansi dated 27.07.1987 passed in Suit No. 105 of 1984-85, dismissing the petitioner's suit.

2. Petitioners are plaintiffs of four suits being Suit Nos. 83, 84, 85 and 86 all brought against one Sadarani and various proforma respondents, all co-sharers of Khata No. 60 and 57 of village Dongari, Tehsil and District Jhansi (hereinafter referred to as "the suit property').

3. By the suits aforesaid, brought under Section 229B, the plaintiffs, sought a declaration that the name of Sadarani, widow of Parikshit, recorded co-tenureholder in the suit property, be expunged and that of the plaintiffs, along with proforma respondents to the suit, be recorded to the exclusion of Sadarani over the suit property. It must be mentioned here that from the papers placed on record of the writ petition, there is some discrepant description of the precise numbers of suit filed and there respective suit numbers. The judgment of the Trial Court indicates that two suits were filed being Suit No. 87/1984-85 and Suit No. 85/1984, both of which were consolidated into a single suit bearing No. 105/1984-85. How two suits could be consolidated and given a single suit number, is not in keeping with fundamental principals of numbering suits. But, that is how it is described in the judgment of the Trial Court. In the proceedings in Appeal before the Commissioner and in Second Appeal before the Board, four suits brought by these plaintiffs-petitioners find clear mention, bearing suit Nos. 83, 84, 85 and 86 all of 1984-85. Whichever way the proceedings have been registered and dealt with, but in substance the suits under reference were brought for a declaration to exclude the name of Sadarani, the common defendant to all the suits from the revenue records, pertaining to the suit property. Sadarani is now dead and represented by her daughter respondent no. 3, Smt. Prema before this Court.

4. The facts giving rise to the suits that have culmiated in this writ petition can be better appreciated with the aid of the following pedigree:



5. It is common ground between parties that the original owner of the suit property was one Balu, who had two sons Hardas and Parikshit. The suit property was inherited in equal share by Hardas and Parikshit. Hardas had four sons, Sahab Singh, Lakhan, Ramesh and Jugraj. In the array of parties, petitioner no. 4, Naval is shown as son of Hardas but the name of Sahab Singh is not mentioned. It is pointed out by learned counsel for the petitioner that Naval has been incorrectly described in the array as son of Hardas. In fact, he is the son of Sahab Singh, who died *pendentelite*. The other son of Balu, Parikshit, is said to

have died some time in the year 1944 leaving behind his widow, Sadarani. Parikshit died issueless. Some issue has been raised about this matter by Sadarani which in due course would be noticed and dealt with. Again, it is common ground between parties that Sadarani's name was recorded over the half share of Parikshit in the suit property, all before the abolition of Zamindari. Sadarani remarried one Chhimman, two years later. This is also not in issue between parties. The name of Sadarani continued to remain recorded in the revenue records relating to the suit property, to the extent of Parikshit's share, along with the other co-sharers that she had inherited, her remarriage notwithstanding.

6. It is the petitioner's case that their father, Hardas entered cultivatory possession of his brother's share as he had died issueless, when his widow remarried. It is the petitioners stand that after death of Parikshit and upon remarriage of Sadarani to Chhimman two years later, she lost her share in the suit property inherited from Parikshit under Section 35 of the U.P. Tenancy Act, 1939 (For short , "the Act of 1939') which by operation of law went back to Parikshit's reversionary heir, Hardas and after him his sons, the petitioners. This loss of title for Smt. Sadarani upon remarriage and its reversion to Hardas, came about under the provisions of Section 36(1) of the Act of 1939, according to the petitioner. It is pointed out with some emphasis by the petitioners that this was the law prevalent at the time, under the regime of the U.P. Tenancy Act when Parikshit died; and also, two years later when Sadarani remarried.

7. It is the petitioners' further case that their father, Hardas could not know about this entry in the name of Sadarani, continuing post her remarriage. After death of Hardas, the petitioners' mother applied for mutation in favour of her then minor children, the petitioners (here it must be mentioned that in all that record the name of Naval, petitioner No. 4, does not figure but of Sahab Singh, who is said to be his father and now dead). It was at this point of time that the petitioners' mother acting as their guardian in the mutation matter came across the illegal entry in the name of Sadarani, surviving in the revenue records. It is claimed that Sadarani was never in possession after her remarriage to Chhimman. Accordingly, the petitioners' mother brought these suits in the petitioners' name, representing them as their next friend, under Section 229B U.P.Z.A&L.R. Act, seeking declarations to expunge Sadarani's name and morefully detailed hereinbefore. This suit was contested by Sadarani who filed a written statement dated 24.04.1984. Details of her case pleaded in the written statement would be mentioned hereinafter.

8. Similar written statements have been filed in the other suits also and the stand brought to the notice of this Court during hearing is vindicated by what is recorded about it in the judgment of the Trial Court. Now, in the written statements Sadarani has not apparently claimed a right for herself in defence of the continuing revenue entries in her favour. The manner in which the Trial Court has spoken about proceedings of the suit, the evidence is noticed with reference to suit nos. 87/84 and 85/84. In suit no. 87/84, the following documents were filed on behalf of the plaintiffs-petitioners: (1) copy of a Khatauni for the Fasli Years 1389-1394 relating to Khata No. 60; (2) a copy of the notice under Section 80 CPC; (3) a copy of notice under Section 106 U.P. Panchayat Raj Act: (4) the postal receipt showing

dispatch of notice to Gram Pradhan Dongri; and (5) the postal acknowledgment from Gram Pradhan Dongri relative to the notice.

9. On the pleadings of the parties the Trial Court framed the following issues (translated into English from Hindi vernacular):

1. Whether the plaintiffs are co-sharers of a 1/4th share and Bhumidhar with transferable rights in the property in dispute comprising Khata Khatauni No. 50 comprising two plots admeasuring 5-5.6 acres and Khata Khatauni No. 57 comprising 14 plots, admeasuring 104-73 acres and are, accordingly, in possession of the same?

2. Whether defendant No. 1 Smt. Sadarani widow of Parikshit has remarried Chhimman s/o Ranjor leading to a divesting of her right and title in the property in dispute?

3. Whether the plaintiffs have served the Government of U.P. with a valid notice under Section 80 CPC and the Gaon Sabha with a valid notice under Section 106 U.P. Panchayat Raj Act? If not, its effect?

4. Whether of the wedlock of Sadarani and Parikshit, a daughter Prema was born who is alive and the sole heir of Parikshit?

5. Whether the property in dispute has been partitioned by a Court of competent jurisdication between Parikshit and Hardas? If yes, its effect?

6. Whether the suit is bad for misjoinder of parties? If so, its effect?

7. Whether the suit is barred by Section 49 U.P. Consolidation of Holdings Act?

8. Whether the plaintiffs suit is liable to be dismissed?

9. Whether the plaintiffs are entitled to relief?

10. Likewise, the plaintiffs-petitioners have filed the following documents in Suit No. 85/84: (1) a copy of the Khatauni for the Fasli years 1389-1394 relative to Khata No. 57; (2) copy of the notice under Section 80 C.P.C.; (3) a copy of the notice under Section 106 U.P. Panchayat Raj Act; (4)a copy of the registered postal receipts of notice dispatched to Gram Pradhan Dongri; (5) a copy of the postal acknowledgment received from Gram Pradhan, Dongri relative to the notice; (6) a photostat copy of the revenue receipt in the name of Sadarani, widow of Parikshit; (7) a revenue receipt in the name of Sadarani widow of Parikshit; (8) a receipt in the name of Hardas and Sadarani, widow of Parikshit; (9) a copy of the Khatauni in the name of Smt. Sadarani, widow of Chhimman; (10) a copy of the family register relating to Smt. Prema, daughter of Chhimman; (11) a copy of the voter list showing the name of Smt. Sadarani, wife of Chhimman; (12) a certificate from the Gram Sabha, Raksha that there is no family there (possibly referring to Sadarani but not clear from citation of this evidence in the Trial Court's judgment); (13) a copy of the extract of register of births and deaths showing the name of Smt. Prema daughter of Chhimman; (14) a copy of death certificate from Gram Sabha, Raksha dated 04.08.44, showing the date of death of Parikshi; (15) a copy of the *Khatauni* relating to the *Fasli* Year 1389-1391 for Khata No. 237; (16) a copy of the revenue receipt, dated 25.07.1986.

11. The Trial Court has recorded that since the two suits under reference were consolidated, both the plaintiffs and defendant, Sadarani testified in the witness

box, in one instance with their evidence being read in both suits.

12. On behalf of the plaintiffs, Saligram, Pradhan Gram Sabha, Dongri was examined as PW-1. One Dhaniram as PW-2 and Smt. Goma was examined as PW-3. It is required to be clarified here that Smt. Goma is the plaintiffs' mother and their next friend through whom the plaintiffs, then minors, brought the suits. No documentary evidence was filed on behalf of the defendant, Smt. Sadarani and all that was placed in evidence of her side was her oral testimony in support of her case.

13. Heard Sri Triveni Shankar, learned counsel for the petitioner along with Sri Awadhesh Kumar, Advocate on behalf of the petitioner and Sri Vishnu Singh, learned counsel appearing on behalf of respondent No. 3. The learned Standing Counsel has addressed this Court on behalf of respondent nos. 1,2 and 4.

14. Sri Triveni Shankar, learned counsel for the plaintiffs-petitioners submits that their short case is that upon death of Parikshit, Sadarani's name came to be recorded in the revenue records of his family as his widow. It is urged by Sri Triveni Shankar, learned counsel for the petitioner that Smt. Sadarani admitted her remarriage to Chhimman two years after death of Parikshit and by her case pleaded in paragraph 13 of the written statement has acknowledged extinguishment of her right in the suit property by non traverse. This read together with her sole defence that her daughter, Smt. Prema is begotten of Parikshit during wedlock and that she has inherited Parikshit's share in the suit property, no case of any right, title or interest in the said property remaining with Sadarani is pleaded.

15. It is pointed out by Sri Triveni Shankar that there is a pleading further, also in paragraph 13 to the effect that two years after Smt. Prema was born, Parikshit died. Sadarani has averred that two years after Parikshit's death, she remarried Chimman. It is then pleaded that Smt. Prema (written there as Smt. Prem), the sole heir of the late Parikshit, is in cultivatory possession of Parikshit's share and pays land revenue, ever since (bearing reference to Sadarani's remarriage). Sri Triveni Shankar submits that this categorical stand of Smt. Sadarani in her pleadings excludes any case of her continuing in possession of her share that she had inherited from the late Parikshit. It is emphatically urged that in the absence of a pleading that Sadarani continued in possession after her remarriage with Chhimman, there is no question about her perfecting her right under Section 180(2) of the Act of 1939, read with the IVth schedule, Group B to the said Act. Learned counsel for the petitioner, therefore, urges that the effect of failure on the plaintiffs part to bring a suit within the limitation of two years, against Sadarani, would not lead to perfection of a right based on adverse possession, once she does not plead a case of possession for herself continuing after her remarriage.

16. So far as the rights of Smt. Prema claimed for her by Smt. Sadarani are concerned, learned Counsel for the petitioners submits that there was a categorical denial that Smt. Prema was the daughter of Parikshit. Rather, it is the plaintiffs case that she was born after Sadarani's marriage to Chhimman. It is pointed out also that the family register of

Chhimman has been filed in evidence on his behalf which shows that Smt. Prema was born in the year 1950, six years after Parikshit's death. An issue about Smt. Prema being daughter of Parikshit was framed but neither any evidence was led by Smt. Sadarani or Smt. Prema, in support of that issue or that issue was ever decided by the Trial Court.

17. It is further argued by learned Counsel for the petitioner that the Courts below in failing to decide issue No. 4 have acted in breach of Order XX Rule 5 C.P.C., that mandates all issues to be decided. Learned Counsel for the petitioner submits that the Board of Revenue has committed a manifest error of law in dismissing the suit, holding that Sadarani had perfected her right to her share in the suit property, under Section 180(2) of the Act of 1939 due to the plaintiffs' failure to sue her for ejectment, within two years of her remarriage. Learned counsel for the petitioner has urged that an admission is the best form of evidence against its maker. Sadarani having admitted that she is not in possession of her share in the suit property since her remarriage to Chhimman, there is absolutely no reasoning sound in law by which the Board of Revenue could have reached the conclusions it did.

18. In support of his contention that admission is the best evidence against its maker. Shri Triveni Shankar he has placed reliance upon a decision of this Court in **Sharda Prasad vs. RCEO, Allahabad, 1998 (34) ALR 509**, where it is held:

"5. In the present case, it is an undisputed fact that the petitioner has acquired in a vacant state a residential building within the city of Allahabad. However, the tenant-petitioner asserted before the Rent Control and Eviction Officer that Section 12 (3) has no application since the tenanted accommodation is not a residential building and was being used by the petitioner for commercial purposes only. The Rent Control and Eviction Officer, however, has not accepted this assertion of the petitioner and on the other hand, has recorded a clear finding of fact that the dominant purpose of the building in question has been residential. While arriving at the said finding, the Rent Control and Eviction Officer has taken into consideration various circumstances and evidence including an important piece of evidence which is in the form of the own admission of the petitioner which he had made in the plaint filed by him in Suit No. 371 of 1998. In that plaint, the petitioner in clear and unequivocal terms admitted that in the disputed accommodation, he has been living with his son. his son's wife and children. An admission is the best piece of evidence against its maker and unless the same is satisfactorily explained it is of conclusive nature. It has been held by me in the case of Smt. Urmila Devi v. IInd A.D.J., Meerut 1998 (2) ARC 6, that an admission made by a party or his agent in earlier judicial proceedings is binding upon the party in subsequent proceedings and can be relied upon for proving the truth-incorporated therein and such an admission has the effect of shifting the onus of proving to the contrary on the party against whom it is produced and in the absence of a satisfactory explanation, it is presumed to be true. It is correct that before an admission can be acted upon as conclusive, it should be clear, definite and certain and not ambiguous, vague or confused."

19. To buttress his case that Smt. Prema is in fact born of the wedlock of

Sadarani and Chhimman, much after Parikshit's death, learned Counsel for the petitioner has emphasised the importance of the family register that shows the records of births and deaths in a family and is maintained under Rule 2 of the Rules, framed under the U.P. Panchayat Raj Act, 1947. In support of the weight to be attached to a register of this kind, learned counsel for the petitioner has placed reliance upon a decision of this Court in **Jagdish vs. State of U.P. through Secretary, Revenue Department Lucknow and others, 2013 (121) RD 756**, where it has been held:

"17. It is trite law that a voter list does prima facie reflect the status of a person but a voter list is prepared under the provisions of a statutory law relating to elections which only confers a limited right to vote and is not a clinching evidence with regard to the status of the identity of that person. The same has to be supported by further material and in this regard the respondent No. 6 had filed the extract of the family register which has been completely overlooked. The entries made in a family register are made under a statutory law relating to the status of the family of a person under the Births and Deaths Register Act and Rules framed thereunder in relation to Local Laws including Municipal Laws.

18. Thus the same has a statutory status and the impact thereof or the impact of a certified copy of the extract thereof being a public document has to be considered by the authority or by the Court while proceeding to assess the evidence led in this regard....."

20. Learned counsel for the petitioner has also urged that the Board of Revenue committed a manifest illegality in virtually dismissing the suit as not maintainable, holding it to be barred by Section 180 (2) Land Revenue Act, when no such plea was raised in the written statement on behalf of Sadarani. He points out that in the absence of a plea to that effect by the Sadarani in her written statement, no issue to the effect whether the suit was maintainable in view of the provisions of Section 180(2) of the Act of 1939 was framed by the Trial Court. In the absence of that plea and issue, it was not open to the Board in Second Appeal to consider that ground as the basis to reverse the decree. In support of this part of his submission, learned counsel for the petitioner has placed reliance upon the decision of their Lordships of the Supreme Court in **Sri Shivaji Balaram Haibatti vs. Sri Avinash Maruthi Pawar, (2018) SCC 652 : 2018 All C.J. 119**. He has drawn the attention of this Court to paragraph 24, 25 and 26 of the report, where it is held:

"24. First, the respondent (defendant) had not raised such plea in his written statement. In other words, the respondent did not set up such defence in the written statement. Second, the trial court, therefore, had no occasion to frame any issue on such plea for want of any factual foundation in the written statement. Third, the trial court and the first appellate court, in these circumstances, had no occasion to record any finding on this plea either way. Fourth, in the light of these three reasonings, the High Court ought to have seen that such plea really did not arise for consideration because in order that any question is involved in the case, the party concerned should lay its factual foundation in the pleading and invite finding on such plea. Fifth, the High Court failed to see the case set up by the respondent in his written statement. As mentioned above, the defence of the respondent was that he had denied the appellant's title over the suit

shop and then set up a plea of adverse possession contending that he has become the owner of the suit shop by virtue of adverse possession, which according to him, was from time immemorial.

25. It was clear that the respondent never claimed that he was in possession of the suit shop as tenant of the appellant's predecessor-in-title. On the other hand, the respondent had asserted his ownership right over the suit shop on the strength of his long adverse possession.

26. It is these issues, which were gone into by the two courts and were concurrently decided by them against the respondent. These issues, in our opinion, should have been examined by the High Court with a view to find out as to whether these findings contain any legal error so as to call for any interference in second appeal. The High Court, however, did not undertake this exercise and rather affirmed these findings when it did not consider it proper to frame any substantial question of law. It is a settled principle of law that the parties to the suit cannot travel beyond the pleadings so also the court cannot record any finding on the issues which are not part of pleadings. In other words, the court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Any finding recorded on an issue dehors the pleadings is without jurisdiction. Such is the case here."

21. Sri Vishnu Singh, learned counsel for respondent no. 3, Smt. Prema on the other hand has supported the impugned judgment on the foot of a case that Smt. Sadarani had asserted that she remained in possession over the land in dispute, even after the death of her husband, Parikshit. Smt. Sadarani's interest is now represented by respondent no. 3, her daughter, besides that which is claimed for her in her own right as Parikshit's daughter.

22. Learned Counsel for respondent no.3 has submitted that the Trial Court has rightly opined that Smt. Sadarani continued in possession of the suit property with her name recorded as a co-sharer in the revenue records, even after her remarriage to Parikshit. And, since no suit was brought by Hardas to eject her on extingushment of her rights upon remarriage within the statutory period of limitation of two years, under Section 180 of the Act of 1939, she had perfected her title in view of the provisions of Section 180 (2). On these findings, in the submission of the learned Counsel for respondent no.3, the suit was rightly dismissed by the Trial Court.

23. Sri Vishnu Singh, learned Counsel for respondent no.3, however, has criticized the Additional Commissioner's approach in Appeal, where he has held that no suit for ejectment of Sadarani was required to be filed. Learned Counsel for the third respondent has submitted that the Additional Commissioner went wrong in holding that no such suit was required to be filed since Smt. Sadarani had failed to prove her possession beyond doubt, and that in consequence, the possession of Sadarani over the suit property is doubtful. The finding of the Additional Commissioner to the effect that since Sadarani admitted the possession of Smt. Prema in her oral evidence over the suit property, there is no case of Sadarani continuing in possession is contrary to documentary evidence on record. In the submission of the learned Counsel for the third respondent, once Smt. Sadarani has been recorded throughout as a co-sharer over the suit property along with the plaintiff-petitioners, it was necessary

for the petitioners, rather their predecessor-in-interest to have brought a suit seeking to eject her. The possession of Smt. Prema, according to learned Counsel for respondent no.3 though not recorded, is in aid of Smt. Sadarani's possession. On this score supporting the finding of the Board of Revenue, learned Counsel for respondent no.3 submits that Smt. Sadarani had established her possession over the suit property by the fact that her name was recorded and the plaintiff-petitioners had to bring these suits, seeking to expunge her name and seeking their names to be recorded over that part of the suit property, where the name of Smt. Sadarani was recorded.

24. It is urged on behalf of respondent no.3 that even if it be assumed that Smt. Prema, daughter Smt. Sadarani was in possession of the suit property, that does not derogate from Smt. Sadarani's possession; or of Smt. Prema either. This is so as in the submission of the learned Counsel for respondent no.3, Smt. Prema's possession could be in aid of Smt. Sadarani, or in her own right as the lawful heir of the late Parikshit. He submits that the Board for all reasons assigned in the judgment has rightly concluded in favour of the third respondent.

25. Summing up his contentions, Sri Vishnu Singh, learned Counsel for respondent no.3 has emphasized that on the admitted case of parties, Smt. Sadarani remarried after death of Parikshit. At that time, the Act of 1939 was in force. Her name was recorded as a co-sharer by virtue of being Parikshit's widow. But, that right she lost upon her remarriage, two years after Parikshit's death. However so, no attempt was made to get her name mutated out on the basis that she lost title to the reversionary heirs in accordance with the provisions of Section 36(1) of the Act of 1939. Thus, when Hardas, father of the plaintiff-petitioners permitted the name of Smt. Sadarani to continue and did not take steps to get her name mutated out and to sue her for ejectment, under Section 180 of the Act of 1939, she perfected her right under Section 180(2), upon expiry of two years of her remarriage, that is said to be sometime in the year 1946. She became a *khud kasht* holder at the end of expiry of the two years' limitation to bring a suit for ejectment, along with other co-sharers, and upon the date of vesting a *bhumidhar* under the U.P. Z.A. & L.R. Act.

26. Sri Vishnu Singh, learned Counsel for the third respondent has also urged that the plaintiff-petitioners have not set up a case of ouster of Smt. Sadarani. She has continued as a co-sharer recorded in the revenue records over a period of 40 years, until these Suits were brought. She has, thus, perfected her rights. He has emphasized the well settled principle that unless ouster is pleaded and proved, possession of one co-tenant would be possession of the other.

27. Thus, even if Smt. Sadarani is not established to be in actual cultivatory possession, her recorded name continuing for over 40 years, would establish her possession through her co-sharers, that is to say, the plaintiff-petitioners as well as the others. Learned Counsel for the third respondent also submits that inaction of Hardas to seek correction of mutation entries after remarriage, by not suing for ejectment shows the plaintiff-petitioners acquiesced in the matter of Smt. Sadarani continuing as a tenant, a right that she must be credited with maturing after expiry of the period of limitation to bring

a suit, and in any case, after the date of vesting.

28. In support of his contention, learned Counsel for respondent no.3 has placed reliance upon a decision of this Court in **Devi Died Sri Sia Ram substituted and another vs. Mohd. Hanif and others, 1963 RD 153,** where it has been held:

"In the case before us the question of any adverse possession or acquisition of rights by prescription by Jamna does not arise at all. What is to be seen is whether the plaintiffs' suit for possession is within time. As soon as Jamna re-married, she ceased to have any title to retain possession over the plots in question. Thereafter she will be deemed to have been retaining possession over the plots without the consent of the person entitled to admit her to occupy such plots or otherwise than in accordance with the provisions of law for the time being in force within the meaning of sub-section (1) of Section 180 of the U.P. Tenancy Act, 1939. A suit should have, therefore, been filed against her within the period of limitation prescribed under serial No.18 of group B of Schedule IV of the U.P. Tenancy Act, 1939. This period of limitation was three years by 1947, and thereafter reduced to two years. Jamna may easily be said to have re-married by 1352 fasli, which will correspond to 1945. The suit should have in any case, therefore, been filed by 1948. Thereafter the plaintiffs' suit against Jamna became barred by time and they did not acquire any fresh right to file the suit after her death.

No decision of this Court regarding the interpretation of Section 36(1) read with section 180(1) of the U.P. Tenancy Act was cited on either side. There are, however, two decisions of the Board of Revenue, Harnath Kurmi v. Mst. Sunder Bibi. (3) and Bhagwati Prasad v. Munna Kuar (4). They are cases in which the tenancy rights reverted to the land-holder and it was held that the rights inherited by the widow of a deceased tenant expired on her re-marriage, and if she is allowed to remain in possession by the land-holder, thereafter she begins to acquire new rights in her own name from that date.

Sub-section (2) of Section 180 of the U.P. Tenancy Act lays down that where no suit is filed against a person for possession over a tenancy plot under sub-section (1) of Section 180 within the period prescribed, therefore, the person in possession becomes hereditary tenant of the land in his possession. On the expiry of the period of limitation, therefore, Jamna became a hereditary tenant of the plots."

29. Further relying on the same principle, that bars a suit by the reversionary heirs to recover possession after expiry of the period of limitation envisaged under Section 180(1) of the Act of 1939 and perfection of the widow's right, after expiry of limitation from the date of her remarriage, learned Counsel for respondent no.3 has relied upon a decision of this Court in **Ram Kumar and others vs. Board of Revenue, 1982 RD 314,** where it is held:

"No doubt, before the enforcement of the Act, a Hindu female under the provisions of Hindu law and only life interest in the Sir and Khudkasht property left by her husband. There is no provision under the Act which takes away the right of a Hindu female in the land in which she had a limited interest. The limited ownership in its nature must be a bundle of rights constituting in their totality, not full ownership but something less. She holds the same for her enjoyment

as long as she lives. Nobody is entitled to deprive her of it or to deal with the property in any manner to her detriment. She is in full occupation and control of the usufrous of it to the exclusion of all others. Therefore, in absence of expressed provisions in the Act taking away the right to make disposition inter-vivos, she becomes, on enforcement of the Act, fledged Bhumidhar and is entitled to exercise all right and benefits available to any other male Bhumidhar.

Considering the case from the other aspect, on the finding of the lower appellate court, Smt. Jurawan Dullaiya remarried long before the date of vesting and continued in possession. Therefore, the cause of action accrued in favour of the plaintiff to file a suit for her ejectment as soon as she remarried because her possession thereafter became adverse as she was not entitled to continue in possession on remarriage. Obviously, no suit was filed for her ejectment by the plaintiff within the time prescribed. Therefore, plaintiff's title extinguished in the land in occupation of Smt. Jurawan Dullaiya."

30. On the point that possession of one co-sharer must be deemed to be possession on his behalf and all the other co-sharers, constructively, even if the others are not in actual cultivatory possession, learned Counsel for respondent no.3 has relied upon the decision of the Supreme Court in **Kailash Rai vs. Jai Jai Ram and others, AIR 1973 SC 893 : (1973) 1 SCC 527**, where it is held:

"9. It should be remembered that the District Court has recorded a definite finding that the defendants have not set up any plea of ouster. This finding, so far as we could see, has not been disturbed by the High Court. The decree in Suit No. 918 of 1945 clearly recognises the right of the appellant as a co-sharer along with the defendants. In law the possession of one co-sharer is possession both on his behalf as well as on behalf of all the other co-sharers, unless ouster is pleaded and established. In this case, as pointed out by us earlier, the finding is that the defendants have not raised the plea of ouster. There is no indication in the Abolition Act or the Tenancy Act that bhumidhari rights are not intended to be conferred on all the co-sharers or co-proprietors, who are entitled to the properties, though only some of them may be in actual cultivation. One can very well visualise a family consisting of father and two sons, both of whom are minors. Normally, the cultivation will be done only by the father. Does it mean that when the father is found to be cultivating the land on June 30, 1952, he alone is entitled to the bhumidhari rights in the land and that his two minor sons are not entitled to any such rights? In our opinion, the normal principle that possession by one co-sharer is possession for all has to be applied. Further, even when one co-sharer is in possession of the land, the other co-sharers must be considered to be in constructive possession of the land. The expression "possession" in clause (a), in our opinion, takes in not only actual physical possession, but also constructive possession that a person has in law. If so, when the defendants were in possession of the lands and when no plea of ouster had been raised or established, such possession is also on behalf of the plaintiff-appellant. Under such circumstances, the lands can be considered to be in the "possession" of the appellant or, at any rate, in his constructive possession."

31. Since the reliefs in these Suits are for correction of revenue entries, that are of long standing, that is to say, 40 years until time when the Suits were instituted, learned Counsel for the third respondent has placed reliance upon a decision of this Court in

Mangroo and others vs. Ram Sumer and others, 2006 All C.J. 1924, where in the context of facts there objections under Section 9-A(2) of the U.P. Consolidation of Holdings Act, 1953 were brought to correct recorded rights based on old and consistent revenue entries. It was held in **Mangroo** *(supra)*:

"7. In consolidation maters, often it happens that people start challenging revenue entries standing for more than half, half or quarter century. The presumption attached with the correctness of revenue entries particularly if they are continuing for a very long time and since before Zamindari Abolition cannot be lightly taken to be rebutted. Oral evidence of the things which may have happened long before is not easy to find except in rare cases where something extraordinary is shown to exist. Certainly in respect of property rights is very essential. General uncertainty in respect of revenue entries standing since long and before Zamindari Abolition may lead to anarchy. In several cases consolidation Courts have done exactly the same. The purpose of consolidation is taken to be resurrection of dead (buried) disputes or revival of dormant ones. In fact this is not the spirit of consolidation Act. Under Section 9(2) of U.P.C.H. Act only disputes of recent past may be raised. Consolidation Act provides a new forum for adjudication of disputes but not a new opportunity for the same. In some cases people assert their rights on the basis of revenue entries which discontinued about 100 years before and consolidation Courts seriously entertain the said objections and some times direct reversal of revenue entries continuing for about 100 years. There are several doctrines of law on the basis of which such exercise is prohibited like Limitation, Acquiescence, Estoppel, Presumption of Correctness of Official Acts including revenue entries becoming stronger and stronger by passage of time, waiver, implied surrender and implied ouster etc. However independently of all these principles, such exercise is to be nipped in the bud on the doctrine of public policy. It is against public policy to permit a person to seek reversal of state of affairs continuing for scores of years. A certain but some what erroneous state of affairs is better than almost correct but uncertain state of affairs. To maintain state of affairs continuing since very long which may have some elements of inaccuracy is better than to thoroughly analyse the inaccuracy after expiry of long time since inception of the said affairs and reverse the same after thorough discussion of attending circumstances at the time of start of said state of affairs.

8. Revenue entries in respect of agricultural lands have got great value. A meticulous procedure has been prescribed for recording, correcting and maintaining the same under U.P. Land Revenue Act 1901 and Land Record Manual. Of course it is true that revenue entries do not confer title, however, short of that, revenue entries are most important evidence in respect of rights in respect of agricultural lands and possession thereof. These entries can not be equated with entries for the purposes of house tax etc. under Municipalities Act (or Nagar Mahapalika Adhiniyam) in respect of buildings."

This decision was followed in **Jagdev vs. Deputy Director of Consolidation, 2006 (101) RD 216.**

32. Quite distinct and apart from all these contentions, it is submitted by the learned Counsel for respondent no.3 that Smt. Sadarani who was a recorded co-tenant holder along with the petitioners and

had come to be recorded as such, upon the death of her husband, Parikshit, cannot be divested of her title to the suit property, her remarriage two years later notwithstanding. This right for Smt. Sadarani is claimed as she continued to be recorded after the date of vesting for many years, in view of the provisions of the U.P. Z.A. & L.R. Act, 1951. In support of this foundation of Sadarani's right to her husband's property, learned Counsel for the third respondent has placed reliance upon a decision of the Supreme Court in **Smt. Gajodhari Devi vs. Gokul, AIR 1990 SC 46 : 1989 Supp (2) SCC 160.** It has been held in **Smt. Gajodhari Devi** *(supra):*

"3. The short question for determination in this appeal is as to whether the appellant being admittedly the widow of a co-sharer of the holding at the time Ram Sewak died, she ceased to be a co-sharer or tenureholder on getting remarried to Raghuraj. The appellant became widow in 1953. Ram Sewak died some time in 1961. At the time of death of Ram Sewak the appellant was the widow of his son and was entitled to a share in the property on that basis. Admittedly, she remarried subsequently. The right of the appellant has to be determined with reference to the time when Ram Sewak died. There is no law which takes away the appellant's right which vested in her when succession opened and it is not the case of the respondents that on remarriage there has to be divesting. Unnecessary emphasis was laid on the fact of remarriage by the Tribunals below. We set aside the judgment of the Board of Revenue affirming the order of the Additional Commissioner which upheld the decision of the Sub-Divisional Officer in the suit for partition under Section 176 of the Act."

33. This Court has considered the rival submission of parties. The case of the petitioners who have come up seeking to quash the judgment and decree of the Board is founded on a right of reversion from Smt. Sadarani, that fructified according to the petitioners in favour of Hardas when Sadarani remarried, after Parikshit's death. There appears to be no issue between parties that the death of Parikshit and remarriage of Sadarani to Chhimman occurred at a time when the Act of 1939 was in force, which governs the rights of parties. The Trial Court has returned a finding of fact on appreciation of evidence that at the time of Sadarani's remarriage, Act of 1939 was in force. Nevertheless, to probe the matter a little further, this Court finds that there is a document recording the death of Parikshit, filed by the petitioners referred to in the summary of evidence in the Trial Court's judgment as a certificate of death, dated 14.08.1944. This would indicate that Parikshit died sometime in the year 1944 and going by Sadarani's stand in the written statement and her testimony that she remarried two years after Parikshit's death, her remarriage would be about the year 1946. It is relying on this evidence and acceptance of the fact by parties that the Trial Court held that at the time of Sadarani's remarriage, Act of 1939 was in force. This finding has not been disturbed by any of the Courts below, and they have proceeded on the basis that it was the Act last mentioned that governed rights of parties to succession when Sadarani remarried after Parikshit's death. This Court, therefore, proceeds on the basis that it was the Act of 1939, that would

govern the rights of parties to succession.

34. The petitioners who claim through Hardas have founded their right on a succession to the suit property in favour of Hardas upon remarriage by Parikshit's widow. It is claimed by them that upon Parikshit's death, his share went to Sadarani in accordance with Section 35 of the Act of 1939. This share, that is to say, the suit property on remarriage of Sadarani to Chhimman devolved upon Hardas, Parikshit's brother being the next heir entitled of the last male tenant, Parikshit. This succession is claimed to be in accordance with Section 36 of the Act of 1939.

35. Here, this Court may refer to the provisions of Sections 35 and 36 of the Act of 1939, that are quoted in extenso:

"Section 35. Succession to a male tenant. - When a male tenant, other than a tenant mentioned in Section 34 dies, interest in his holding shall devolve in accordance with the order of succession given below:-

(a) male lineal descendants in the male line of descent:

Provided that no member of this class shall inherit if any male descendant between him and the deceased is alive;

(b) widow;

(c) father;

(d) mother, being a widow;

(e) step-mother, being a widow;

(f) father's father;

(g) father's mother, being a widow;

(h) widow of male lineal descendant in the male line of descent;

(i) unmarried daughter;

(j) brother, being the son of the same father as the deceased;

(k) daughter's son;

(l) brother's son, the brother having been a son of the same father as the deceased;

(m) father's brother;

(n) father's brother's son;

Section. 36 Succession to a female tenant holding an interest inherited as a widow etc. - (1) When a female tenant, other than a tenant mentioned in Section 34, who either before or after the commencement of this Act has inherited an interest in a holding as a widow, as a mother, as a step-mother, as a father's mother, or as a daughter dies or abandons such holding, surrenders such holding, or a part of such holding or, in the case of a tenant inheriting as a widow or as a daughter, marries, such holding or such part of such holding shall, notwithstanding anything in Section 45, devolve in accordance with the order of succession laid down in Section 35 of the heir of the last male tenant, other than a tenant who inherited as a father's father under the provisions of that section.

(2) When a tenant who inherits an interest in a holding as a father's father in accordance with the provisions of sub-section (1), or of Section 35, abandons such holding or surrenders such holding or a part of such holding or dies, such holding or such part shall, notwithstanding anything in Section 45, devolve upon the nearest surviving heir of the last male tenant, such heir being ascertained in accordance with the provisions of Section 35."

36. It is true that going by the events of death of Parikshit and his widow's remarriage two years later, the time when it happened and the law that was in force at

the time, the suit property would go to Hardas upon Sadarani's remarriage. It would go by virtue of Section 36(1) of the Act of 1939. This legal position is not in issue between parties and has been accepted by all the Courts below, even so that the Courts below have disagreed on different grounds. The reason that has weighed with the Trial Court and the Board in Second Appeal to dismiss the petitioners' Suits seeking expunction of Sadarani's name from the revenue records and mutation of the petitioners in her place, along with other co-sharers, is a right that Sadarani matured to the suit property on account of the failure of Hardas to bring a suit for her ejectment within the prescribed limitation of two years, in accordance with the provisions of Section 180(2) of the Act of 1939. Sadarani, no doubt, has remained recorded in all these years over the suit property based on the succession, that opened in her favour upon Parikshit's death. It is equally true that in accordance with Section 36 of the Act of 1939, Hardas would be the heir entitled to succeed Sadarani in place of Parikshit. It is also trite that no Suit was filed for Sadarani's ejectment under Section 180(1) of the Act of 1939 within the period of limitation prescribed under Serial no.18 of Group B of Schedule IV to the Act, last mentioned. It is also true for a proposition of law that if no Suit is brought under sub-Section (1) of Section 180 within the prescribed period of limitation, the person in possession if a co-sharer would become a khud kasht holder. Here, it would profit to extract the provisions of Section 180 of the Act of 1939. These read as under:

"Section 180. Ejectment of person occupying land without consent. - (1) A person taking or retaining possession of a plot of land without the consent of the person entitled to admit him to occupy such plot and otherwise than in accordance with the provisions of the law for the time being in force, shall be liable to ejectment under this section on the suit of the person so entitled, and also to pay damages which may extend to four times the annual rental value calculated in accordance with the sanctioned rates applicable to hereditary tenant :

Provided that, notwithstanding the provisions of sub-section (1) of Section 246, where such a person taking or retaining possession is one of the co-sharers whose joint consent is required to bring such suit, he shall not be required to join as plaintiff in the suit. In such a case, the decree passed in favour of the plaintiff shall be deemed to be in favour of all such co-sharers.

Explanation I. - A co-sharer in the proprietary rights in a plot of land taking or retaining possession of such plot without the consent of the whole body of co-sharers or of an agent appointed to act on behalf of all of them, shall be deemed to be in possession of such plot otherwise than in accordance with the provisions of the law within the meaning of this section.

Explanation II. - A tenant entitled to sub-let a plot of land in accordance with the provisions of the law for the time being in force may maintain a suit under this section against the person taking or retaining possession of such plot otherwise than in the circumstances for which provision is made in Section 183.

(2) If no suit is brought under this section, or if a decree obtained under this section is not executed, the person in possession shall become a hereditary tenant of such plot, or if such person is a co-sharer, he shall become a khudkasht holder, on the expiry of the period of limitation

prescribed for such suit or for the execution of land decree, as the case may be.

Provided that where the person in possession cannot be admitted to such plot except as sub-tenant by the person entitled to admit, the provisions of this sub-section shall not apply until the interest of the person so entitled to admit is extinguished in such plot under Section 45(f)."

37. To the understanding of this Court, the moot question is whether on the case of parties the fact that revenue entries continued to remain recorded in favour of Sadarani would by itself indicate her continuing possession over the said property, so as to necessitate within limitation the institution of a suit for her ejectment, under Section 180 (1) of the Act of 1939.

38. Sri Vishnu Singh has pressed in aid the decisions of this Court in **Mangroo** *(supra)* and **Jagdev** *(supra)* which go to say that revenue entries are of particular importance, in the context of title to agricultural land. The Court has gone in that decision to the extent that while revenue entries may not confer title, but short of that, these are the most important evidence about rights of parties to agricultural land and possession thereof. The Court has differentiated the worth and value of revenue entries about their bearing on title and possession, with entries for the purpose of house tax under the Municipalities Act, or Nagar Mahapalika Adhiniyam in respect of buildings, which do not have similar worth, bearing on the question of title and possession. This Court in **Mangroo** *(supra)* also emphasised the need to uphold long standing revenue entries on the foundation of public policy. In the Court's opinion expressed in **Mangroo** *(supra)* it is against public policy to approve reversal of a state of affairs continuing for scores of years. The same principles have been reiterated in **Jagdev** *(supra)*.

39. Sri Vishnu Singh, learned counsel for the third respondent has urged that the revenue entries here continued for 40 years before institution of these suits. In between, the U.P. Zamindari Abolition and Land Reforms Act, 1951 came into force with the date of vesting there being 01.07.1949. Under the Act of 1939, since a suit for ejectment was not brought by the petitioners within the prescribed period of limitation under Sub Section (1) of Section 180 of the Act, last mentioned, Sadarani being a co-sharer of **Jagdev** became a *Khudkast* holder under Sub Section (2) of Section 180. Upon enforcement of these U.P. Zamindari Abolition and Land Reforms Act, the suit property being *Khudkast* became her *Bhumidhari* under Section 9 of the latter Act. This, according to Sri Vishnu Singh, is the effect of the 40 years long continuing revenue entries, regarding which no steps were taken by the petitioners or their predecessor-in-title, **Jagdev** by bringing a suit for ejectment or short of that to seek rectification of the revenue records within limitation.

40. Learned counsel for the third respondent has buttressed his argument that founds title as well as possession on long standing revenue entries by a submission, that is a sequel or a corollary to the first. In this part of his submissions, Sri Vishnu Singh has urged that on the point of possession, possession of one co-sharer must be deemed to be possession on behalf of all other co-sharers, constructively, even if the others are not in actual cultivatory possession. He has drawn support from the

decisions of their Lordships of the Supreme Court in **Kailash Rai** *(supra)* that has been noticed and the relevant part quoted hereinbefore. On the foot of this principle, learned counsel for the third respondent submits that the mere fact that Sadarani, after her remarriage had not remained in cultivatory possession, could not lead to her ouster and consequent loss of possession or title. He submits with much emphasis that the long standing revenue entries speak for a unimpeachable title through the changing statutory regime of the Act of 1939 and the Zamindari Abolition Act, which now constitute her into a *Bhumidhar* with transferable rights - and a co-sharer with the petitioners.

41. The fact that she has not remained in cultivatory possession of the suit property would not be of any consequence as she is protected by the principle regarding community of possession and title between co-sharers. In any case, she must be held to be in constructive possession through the other co-sharer going by the principle in **Kailash Rai** *(supra)*. It is also emphasized that there is no plea of ouster raised on behalf of the petitioners so as to denude Sadarani of her possession and consequently her title.

42. This Court must record straightway that the law laid down in **Mangroo** *(supra)* and **Jagdev** *(supra)* that has placed revenue entries on a sacrosanct pedestal if they be of long standing, almost as an unimpeachable evidence of valid possession and good title, is no longer good law in view of the decision of a Division Bench of this Court in ***Shri Ram and others*** **vs. DDC Allahabad Camp Fatehpur and others, 2011 All.C.J.635,** where the correctness of the aforesaid two decisions rendered by a learned Single Judge of this Court was in issue. Their Lordships of the Division Bench in **Sri Ram and others** *(supra)* while answering questions nos. 3, 4 and 5 held with reference to question nos. III and V, that would be best appreciated by a juxtaposition of the questions framed and their Lordships answer:

(III) Whether the learned single Judge in Jagdeo's case was justified in invoking the principles of the doctrine of estoppel and acquiescence for creating an implied bar merely because a co-tenant had failed to asset his rights under The U.P. Zamindari Abolition & Land Reforms Act and was, therefore, barred from raising an objection under the Uttar Pradesh Consolidation of Holdings Act, 1953 and the rules framed thereunder?

(3) The learned Single Judge in Jagdeo's case *(supra)* was not justified in invoking the principles of doctrine of estoppel and acquiesence for creating an implied bar merely because a co-tenant had failed to assert his rights under the Act, 1950, and a co-tenant is not barred in raising objections under the Act, 1953.

(V) Whether "long standing entries which are questioned in an objection filed under the Uttar Pradesh Consolidation of Holdings Act hold only a presumptory value or they can be taken to be an absolute proof in law on the principle of estoppel, acquiescence and waiver and thereby attract an automatic bar of Section 49 of the U.P.C.H.Act".

(5) Long Standing entries which are questioned in an objection filed under the Uttar Pradesh Consoli-dation of Holdings Act, 1953 hold only a presumptory value and they cannot be taken to be an absolute proof for pressing the principle of estoppel, acquiescence and waiver and no automatic bar of Section 49

of the Uttar Pradesh Consoli-dation of Holdings Act, 1953 is attracted.

43. The decision of the learned Single Judge in **Mangroo** *(supra)* and **Jagdev** *(supra)* were overruled by their Lordships of the Division Bench in Sri Ram *(supra)*, though all rendered in the context of U.P. Consolidation of Holdings Act, 1953. Nevertheless, the decision **Sri Ram** *(supra)* firmly put in place a principle that long standing revenue entries do raise a presumption in favour of the person whose name is entered but they cannot be regarded as absolute proof, by invoking the principles of estoppel acquiescence and waiver. Their Lordships have disapproved of the learned Single Judge's approach in **Mangroo** *(supra)* and **Jagdev** *(supra)* according sacrosanctity to long standing revenue entries on the principle of public policy "that a certain but somewhat erroneous state of affairs is better than almost correct but uncertain state of affairs", to quote the words of the learned Single Judge in **Mangroo** *(supra)*. This disapproval of the principle laid down by the learned Single Judge in **Mangroo** *(supra)* and followed in **Jagdev** *(supra)* was expressed in the following words, by their Lordships of the Division Bench:

56. We are unable to subscribe to the above view. No public policy can be found out which does not permit a person to seek reversal of the state of affairs continuing for scores of years, if he has a right to do so. The view of the learned Single Judge "that a certain but some what erroneous state of affairs is better than almost correct but uncertain state of affairs" an also not be approved. **A person who has a right to a property which right he has neither abandoned nor relinquished can be claimed even after a lapse of considerable period, provided the claim is not barred by any law of limitation.**

57. Law pertaining to land tenure is principally for determining rights of peasants of this country who earn their livelihood from agriculture. Most of them are not literate enough to know their rights and vigilantly assert their rights. Unless the claim of such person is barred by any law, barring their objection on the principle of estoppel and acquiescence is not in accordance with the purpose and object of that Act.

(Emphasis supplied in the report)

44. What, therefore, turns on the question of claiming a right based on long standing revenue entries is that the revenue entries of long standing in favour of a land holder or co-sharer would raise a presumption about possession and title, but would not be conclusive about it. These entries continuing over a long period of time cannot defeat the rights of a person who has not abandoned or relinquished it, but for some oversight, has not been able to seek requisite correction. Here, for instance, there is no evidence that **Jagdev** was a highly accomplished man or even literate enough to understand his obligations about checking up on the revenue records. He did understand the law as then in force that once his brother's widow remarried, she lost her right and, therefore, he entered upon his brother's share and took the same into his cultivatory possession, exercising dominion over it based on title as well as possession. It was upon his death that **Jagdev**'s widow, according to her case, took steps to secure mutation for the petitioners, who were then minors, acting for them as their next friend (guardian as it is described). It is then that she chanced upon revenue entries continuing in favour of Sadarani over the

part that she had inherited from Parikshit, her deceased husband. The petitioners' mother knowing that Sadarani had lost title upon remarriage to Chhimman, brought the present suits for rectification of the revenue records, seeking to expunge her name and to record the petitioners over that part.

45. Now, this case of the petitioners would have to be tested in the face of long standing revenue entries in favour of Sadarani over her late husband's share, as the said entries do raise a presumption about her possession and title. The question that would, therefore, arise in the face of this presumption based on long standing entries of 40 years in this case would be, whether Sadarani upon her marriage to Chhimman, two years after her husband's death, continued to exercise dominion over her share, even if she did not actually cultivate the land. Or, is it a case where upon her remarriage, knowing the law of the time she relinquished all her rights in the suit property, never to look back, and the entries that are now impugned in the suits brought by the petitioners, continued by sheer oversight.

46. This Court is of opinion that upon her remarriage, Sadarani knowing and going by the law in force at the time, gave up her possession and title to the suit property. Even now, she has not asserted that she has title to or possession of the suit property, as her pleaded case goes in paragraph 13 of the written statement, which reads to the following effect:

"१३. यह कि प्रेम के पैदा होने के २ वर्ष बाद मेरे पूर्व पति अर्थात प्रेम के पिता श्री परीक्षत की मृत्यु हो गयी उसके २ वर्ष बाद मिन प्रतिवादिनी ने विरादरी के रीत रिवाज के अनुसार छिम्मान पुत्र रन्जोर निवासी रकसा से दूसरा विवाह कर लिया तथा परीक्षित के हिस्से की भूमि पर मौके पर परीक्षित की एक मात्र वारिस श्रीमती प्रेम उसी समय से काबिज व दाखिल है तथा खेती कराती है व सरकारी लगान अदा करती है"

47. She has no doubt tried to assert her possession and title that she had acquired to the suit property upon Parikshit's death, in her testimony in the witness box, where she has asserted that she is cultivating the suit property with the help of her son-in-law, Ramlal but, that evidence cannot be looked into in the face of a specific case that Sadarani has taken in the written statement, where she almost admits the petitioners' case of having nothing to do with the suit property consequent upon her remarriage. Rather, she has introduced a different case that would support inheritance in favour of her daughter Prema, whom she says is begotten of Parikshit. This is contrary to the petitioners' case that Parikshit died issueless and that Sadarani after her remarriage had begotten two children of her other husband, Chhimman. Smt. Prema is, therefore, claimed to be the daughter of Chhimman and not Parikshit by the petitioners. Issue no. 4 was framed by the Trial Court to the effect: whether Prema was born of the wedlock of Smt. Sadarani and Parikshit, who is alive and his sole heir? The said issue has not been decided by the Trial Court or gone into by the Appellate Courts. It must be remarked here that issue no. 4 is *ex facie* a defendant's issue, and, therefore, the *onus probandi* as well as the burden of proof lay upon Smt. Sadarani, so far as this issue was concerned.

48. The principle concerning *onus probandi* and the discharge of it is

embodied in Section 101 of the Evidence Act, as distinguished from burden of proof that is the subject matter of Section 102 of the said Act. *Onus probandi* on an issue is the burden to let in evidence on an issue and lies upon that party who would fail, if no evidence on either side were led. Here is a case where Sadarani had both the onus and burden to prove that Smt. Prema was Parikshit's daughter. She almost let in no evidence about it, except her oral testimony. On the other hand there is evidence led on behalf of the petitioners' in the form of a Family Register, maintained under Rules framed under the Panchayat Raj Act that show the profile of Sadarani's family after her second marriage to Chhimman. There the name of Smt. Prema, described as Prem Kunvar finds place. Her date of birth is mentioned to be 1951 whereas Parikshit died in the year 1944. Also, there is consistent evidence of the three witnesses who deposed for the petitioners that Parikshit died issueless. It was perhaps in the face of this hopelessly untriable issue no. 4 about Prema being Parikshit's daughter that the same was not pressed before the Trial Court; and, therefore, never decided.

49. This apart the issue that is involved, is about entries in favour of Smt. Sadarani that were recorded upon the death of her first husband, Parikshit. There is no entry in favor of Smt. Prema, in her right as Parikshit's daughter, ever recorded. The suits do not, therefore, seek any relief to expunge Prema's name.

The relief sought is against Sadarani based on the continuing entries in her name. The case, therefore, introduced by Sadarani claiming a right for Prema as Parikshit's daughter and, therefore, his heir entitled to inherit his share, is beyond the scope of this suit. It is not part of the cause of action involved here. It is also not the third respondent's case that Sadarani ever brought a suit on behalf of Prema in order to establish her right to inherit Parikshit's share on the foot of a case that Prema is Parikshit's daughter. In these suits also, Smt. Prema has appeared and filed her written statements, through an impleadment, but neither Sadarani or Smt. Prema have sought to bring a counter-claim to establish a right that Prema is Parikshit's daughter, and, therefore, entitled to inherit his share. These suits are about Sadarani's inheritance in the first instance from Parikshit which according to the petitioner, she lost on remarriage to Chhimman. Here, it needs to be remarked that the present petition that Smt. Prema is contesting is not in her right as Parikshit's daughter but as Sadarani's daughter, representing her estate after her death. The independent rights that she has set up claiming to be Parikshit's daughter are not established even by as much a semblance, that may afford her any *locus standi* in that right.

50. The written statement filed on behalf of Sadarani clearly indicates that she has not put forward by as much as a hint that she has continued in possession of the suit property or that she has remained a co-sharer thereof, though without cultivating the same alongwith other co-sharers, constructively or on the principle that possession of one co-sharer is possession of all. Rather, she has said in the written statement that she remarried Chhimman of Raksha and possession of Parikshit's share on the spot is with his sole heir, Smt. Prem (variously described as Smt. Prem, Smt. Prema or Prem Kunvar in different documents). Since time of her remarriage, it is also pleaded, that Prema gets the suit property cultivated and pays land revenue.

The case set up about Smt. Prema need not detain this Court any further as it has been pointed out that the suits are about the right title and interest of Sadarani, based on revenue entries in her favour. The pleaded case of Sadarani, however, indicates that she does not even remotely indicate the slightest of *animus possidendi* in relation to the suit property that she, from her pleaded case, acknowledges to have lost upon her remarriage to Chhimman.

51. In this connection, it would be profitable to go to what possession "in fact' and "in law' would mean on fundamental principles of jurisprudence, so far these are relevant here. In this connection reference may be made to certain principles about "possession in fact" and "possession in law" enunciated in the celebrated treatise, Salmond on Jurisprudence, Twelfth Edition by P J Fitzgerald (Indian Economy Reprint 2007 and published by Universal Law Book Company Private Limited). There, it has been exposited what possession in fact would mean, in Chapter 9 (pages 272 to 274) thus:

So far no distinction has been made between the mental and physical aspects of possession. Many jurists have distinguished two such elements. Salmond considered that possession consisted of a *corpus possessionis* and an *animus possidendi.* The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant. Moreover, it is doubtful whether in ordinary usage possession could be ascribed to a person utterly unable to form any intentions whatsoever: it would be odd to describe a day-old baby or a man in a protracted coma as actually (as opposed to legally) possessing anything at all. As against this, however, we may find counter-examples of possession unaccompanied by intentin. I should normally be said to possess the coins in my pocket, even if unaware of their existence and so unable to form any intention in respect of them. Can we say then that what the possessor needs is at least a minimum intention, an intent to exclude others from whatever may be in his pocket? To this there are two replies. First, in its widest and loosest sense, the sense in which "possesses" simply means "has", I can be said to possess such things as a find head of hair, a stout heart or a good sense of humour without any question of intent arising. Secondly, in the narrower sense, where the subject-matter of possession consists of material objects other than parts of the possessor's own body, it is misleading to assert that the possessor must actually be intending anything at all. If I possess something, then it is true that if my possession is challenged or attacked I shall probably display an intention of excluding such interference. But unless my possession is under attack and in the normal course of events it is not; further more it would be highly unusual to find a man's possession under constant attack no question of, or need for, intent is involved.

The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it in which event he clearly has possession we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of

others. There will always, of course, be border-line cases. Suppose I become paralysed: am I still in possession of the coat by my side? Such questions need not detain us, for the ordinary concept of possession is not designed to cope with such marginal cases, while the existence of legal rules relating to legal possession will answer such questions and obviate the need for any decision in terms of possession in fact.

52. Similarly about "possession in law', it is said in Chapter 9, at pages 274 to 276:

A legal system could of course content itself with providing that in law the existence of possession should depend solely on the criteria of common sense. In this case possession in law would be identical with possession in fact; a man would in law possess only those things which in ordinary language he would be said to possess. Such a system of law, then, would concern itself only with actual possession. Even so, the concept of possession would not be free of difficulty. For possession in fact, a we saw, is not a wholly simple notion; the question whether I am in fact in possession of an article depends on such factors as the nature of the article itself and the attitudes and activities of other people. But the general outline of the concept of possession in fact, as given in the preceding section, would suffice for the purposes of a legal system that adopted this approach.

Even with such a legal system, however, there would no doubt arise borderline questions to which lay usage gave no answer but which the law would have to resolve: if A loses his golf-ball on B's golf-links and the ball is found by C, we cannot proceed with in the matter of safeguarding possession until we know who in such a case actually has possession. Yet, at the moment when C has found the ball but h as not yet picked it up, it is by no means clear which of these three parties would ordinarily, and outside the law, be held to be in possession. A legal system's solutions to such marginal problems would inevitably refine the notion of possession and produce divergences between the factual and the legal concepts.

Apart from this type of development however, the two concepts could quite easily coincide. Nor need such coincidence restrict legal protection to cases of actual possession. If A wrongfully takes possession of B's watch, the law can still afford all its possessory remedies to B, on the ground that B did originally have, and therefore ought to have, possession. The fact that the law regards as possessors only those who are actually in possession need not prevent it from protecting those who are not in possession but who in the general view of society ought to be Indeed the protection of possession would be of little point if legal protection ceased the moment possession was lost : the protection of possession entails supporting the dispossessed against the dispossessor.

But when a system of law allows possessory rights and remedies to persons not in actual possession, it may do so, not by considering them simply as entitled to possession and its attendant rights, but by regarding them as being for legal purposes in possession. Thus, we may find that one who is not actually a possessor is nevertheless considered as such in the eyes of the law; and conversely Untitled 1 one who actually has possession may be looked on by law as a non-possessor. Accordingly the concept of legal possession parts company still further from the ordinary notion of possession, as law tends to invent

instances of constructive possession, i.e., cases where something less than possession in one person is deemed possession in law, and where conversely the actual possession of some other party is reduced to something less than legal possession.

53. The principles above adumbrated so far as they bear on the case in hand would show that possession in fact certainly is one of the most obvious index to possession in law. The finer principles of possession in law apart, there has to be a definite element of intention about the person who claims possession or is claimed to have it. Apart from extreme and marginal cases that have been discussed in the exposition by the learned Author *(supra),* the element of intent to possess or *animus possidendi* is the requirement of possession in fact as much as it is about possession in law. There could be cases of a person in possession but not in the legal sense of it, and *vice versa*. Again, those finer shades of the concept need not detain this Court in answering whether Sadarani must be deemed on the basis of revenue entries over a long period of time, to be either actually in possession of the suit property or in law, through her co-sharers. As noticed above, her clear stand in the written statement discloses an *animus* on her part to relinquish her right and possession upon the event of her remarriage, two years after she inherited it from Parikshit. Its quite another matter and absolutely irrelevant that she set up right in a third person, about which there is no cause of action, right or relief involved in these suits.

54. This Court is also of considered opinion that the decision of their Lordships of the Supreme Court in Kailash Rai *(supra)* relied upon by the third respondent to canvass the point that possession of one co-sharer must be deemed possession on his own behalf, and all other co-sharers, constructively though all of them may not be in actual possession, is not at all attracted to the issue that arises on the facts here. This is so because it is not even remotely established by any evidence by Sadarani, that she has continued as a co-sharer in the suit property. The specific case of hers, to be a little repetitive, in paragraph 13 of the written statement is that after her remarriage, it is Smt. Prema who has inherited the suit property from Parikshit, claimed to be her father. There is indeed an admission by Sadarani that she lost her share/her title or interest in the suit property, once she remarried Chhimman two years after Parikshit's death. This stand about Sadarani's rights is indeed an unqualified admission that she is no longer a co-sharer. The principle in **Sharda Prasad** *(supra)* that admission is the best piece of evidence against its maker applies squarely to Sadarani, looking to the stand in her pleadings. The decision of their Lordships of the Supreme Court in **Kailash Rai** *(supra)* does not help the third respondent. There has been much ado at the instance of both parties, and in the judgments of the Courts below too, about Sadarani acquiring *Khudkast* rights under sub Section (2) of Section 180 of the Act of 1939, for the petitioners or their predecessor failure to bring a suit against her for ejectment within the statutory period of limitation, under Sub Section (1) of Section 180.

55. This Court is of clear opinion that the said question does not at all arise in this case as Sadarani never asserts to have continued in possession or as a co-sharer after her remarriage. It is for this reason that Hardas never brought a suit, seeking to

eject her within the prescribed period of limitation. Thus, Sadarani must be held not to have acquired any rights under sub Section (2) of Section 180 of the Act of 1939, and lateron, Bhumidhari on the basis of those *Khudkast* rights. The Board and the Trial Court while pronouncing upon the rights of parties to reach a conclusion in favour of Sadarani, therefore, assumed on specious ground that failure of the petitioner or their predecessor to bring a suit for ejectment against Sadarani, would defeat these suits, as Sadarani would have perfected her right under Section 180(2).

56. The present suits have been brought to rectify revenue entries alone by expunging the name of Sadarani from the revenue records relating to suit property over which she was recorded when she inherited it, and the right to which she was divested of on remarriage, going by the law governing rights of parties at that time. Here, it has to be clarified that entries of howsoever long standing in the revenue records, that do not have a valid legal basis about them cannot be permitted to continue, inasmuch as such entries cannot confer title by mere long continuance. They do raise a presumption of good title but in the case in hand, it being clearly established that there is no basis to Sadarani's right to continue to be recorded, the merely long continuing entries would not be basis in themselves to perpetuate. The presumption in this case about long continuing revenue entries stands squarely rebutted. It is precisely this contingency which their Lordhsips of the Division Bench in ***Shri Ram and others*** *(supra)* answered to overrule the two earlier decisions by the learned Single Judge in **Mangroo** *(supra)* and **Jagdev** *(supra)*.

57. The submission that learned counsel for the third respondent, urged for a last, is on the authority of the decision of their Lordships of the Supreme Court in Gajodhari Devi *(supra)*. He submits that the decision is an authority for the principle that a widow once she inherits property, she cannot be divested upon remarriage. The said decision in the opinion of this Court is of no assistance to the third respondent inasmuch as the principle laid down by their Lordships in **Smt. Gajodhari Devi** *(supra)* was in the context of a case, where succession had opened out in favour of the widow, of a pre-deceased son of the tenure holder. The tenure holder died in the year 1961 and the widow inherited a share in the property in her right as the widow of the deceased *Bhumidhar's* son. The rights of the widow were governed by the U.P.Z.A.&L.R. Act, 1951 whereas in the present case, the rights of parties, on common ground are governed by a very different law in force at the relevant time, that is to say, the Act of 1939. The U.P.Z.A.&L.R. Act does not envisage any such principle about divesting, upon remarriage of a widow, of the share that she has inherited from her husband or the husband's father. This position under the U.P.Z.A.&L.R. Act is in sharp contrast to sub Section (1) of Section 36 of the Act of 1939, where upon remarriage the widow looses her share that she had inherited from her husband, which would then devolve upon the heir of the last male tenant, that is her husband. As such, the third respondent's case is not at all remotely covered by the principle in **Smt. Gajodhari** *(supra)*.

58. In the result, the writ petition succeeds and is **allowed** with costs. The impugned judgment and decrees dated 28th April, 1994 passed in Second

Appeal Nos. 151, 152 and 153 of 1989-90 passed by the Board of Revenue, U.P. at Allahabad are hereby **set aside** and judgments and decrees of the Additional Commissioner, Jhansi Division, Jhansi dated 24th April, 1990, passed in Appeal No. 90/6/1986-87, 91/7/1986-87 and 92/8/1986-87 stand restored.

(2020)06ILR A235
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2020

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ-B No. 26978 of 2013

Bhrigurasan & Ors. ...Petitioners
Versus
Deputy Director of Consolidation, Kushinagar & Ors ...Respondents

Counsel for the Petitioners:
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Counsel for the Respondents:
C.S.C., Sri R.K. Shahi, Sri Siddharth Nandan, Sri Sita Ram Vishwakarma, Sri T.P. Singh

A. Civil Law - Primary and Secondary Evidences - Uttar Pradesh Consolidation of Holdings Act, 1953: Section 9-A(2), 4(2) - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950: Section 171(2)(h), 172(2)(b) read with 171- Uttar Pradesh Tenancy Act, 1939 - Indian Evidence Act 1872: Section 90 - If both primary and secondary evidences are on record and there is a conflict between the contents of the two, the contents of the primary evidence, i.e., the original, are to be accepted. The certified copy loses its evidentiary value if it does not correctly reflect the contents of the original. The certified copy and its contents are by themselves not an evidence of any tampering or forgery in the original if the contents of the original are different from the contents of the certified copy. The alleged tampering or manipulation in the original has to be proved by other evidence. (Para 18)

The Court observed that the S.O.C and the D.D.C. in their impugned orders have noted that a mere dot in Persian Script can change the word itself, and have, therefore concluded that the original register have been tampered and entries in the original have been changed. The aforesaid opinion is a mere surmise as no linguistic expert was called by the respondent no. 3 or the consolidation courts to verify the aforesaid fact. The Court further analyzed the Persian Script of the words 'Keoyri' and 'Lohar' and it is apparent that the script of the two words is totally different and a mere dot would not change the word itself. The way 'Keoyri' is written in the Persian Script is totally different from the way 'Lohar' is written in the Persian Script and it cannot be said that a mere addition of dot in the word 'Lohar' would change it to the word 'Keoyri'. (Para 19)

B. Probative Value - Will - Indian Evidence Act, 1872: Section 32(5), 32(6), 68 - 'Void' and 'non-est' are two different concepts.

The concept of void refers to the enforceability of a contract/document/transaction and when a contract or a document is referred as void it implies that the same is not legally enforceable. 'Non-est' means 'non-existent' and is used to deny the execution of the document itself. A void document is not necessarily 'non-est'. It is only an existing document which a party can plead to be 'void'. If a document is void then it cannot be sued upon and enforced but the aforesaid does not mean that other legal consequences of the document shall not follow. (Para 23)

Even if the Will dated 29.03.1946 is not enforceable for being void or may not be relevant under Section 32(6) of the Act of 1872 as Will it would still be admissible and relevant recital in the Will is a statement in writing of the deceased and relates to the existence of a relationship by blood about which the testator had special means of

knowledge as a husband of Shivraj. The statement is obviously *ante litem motam* i.e., made before any dispute regarding the succession to the estate of the testator started between the parties. The recitals of the Will was a material evidence which was not considered by the appellate and revisional courts. (Para 26, 27)

Writ Petition allowed. (E-10)

List of cases cited:-

1. State of Bihar Vs. Radha Krishna Singh AIR 1983 SC 683

2. M Vs. Board of Revenue 1962 RD (1) (H.C.)

3. Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326

4. Madhuri Devi & Anr. Vs. Board of Revenue, U.P. at Lucknow & ors. 2011 (114) RD 465

5. Sebastiao Luis Fernandes Vs. K.V.P. Shashtri 2014 AIR SCW 155

6. Anil Rishi Vs. Gurbaksh Singh AIR 2006 SC 1971

7. Vinod Kumar Dhall Vs. Dharampal Dhall & ors. AIR 2018 SC 3470

8. Prem Sigh & ors Vs. Birbal & ors 2006 (5) SCC 353 *(followed)*

9. Ibrahim Khan Vs. Additional Collector (Administration) Lucknow & ors. 2016 (131) RD 161 *(followed)*

10. Suzuki Parasrampuria Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd. & ors. AIR 2018 SC 4769

11. Kalpesh Hematbhai Shah Vs. Manhar Auto Stores & ors. 2014 AIR SCW 1959

12. State of U.P. & ors. Vs. Maharaj Dharmander Prasad Singh AIR 1989 SC 997

13. Mahadeo Prasad Vs. Ghulam Mohammad AIR 1947 ALL 161 *(followed)*

14. Ft. Shyam Lal Vs. Lakshmi Narain AIR 1939 ALL 269

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Heard Shri Sanjeev Singh, learned counsel for the petitioners, Shri T.P. Singh, Senior Counsel, assisted by Shri Siddharth Nandan, Advocate, representing respondent no. 3 and the learned Standing Counsel, representing respondent Nos. 1 and 2. The counsel for the parties have also filed their written arguments which are part of record.

2. The present writ petition arises from proceedings registered under Section 9-A(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as, 'Act, 1953'). The plots in dispute in the consolidation proceedings and in the present writ petition are Plot Nos. 448/2, 381/2, 447/1 and 396/1 (hereinafter referred to as, 'disputed plots') included in Khata Nos. 59 and 116 and situated in Village-Singaha, District-Kushinagar (previously District-Deoria). One Gaya, son of Parag, was the original tenure holder of the disputed plots. Shivraji was the widow of Gaya. Munia was the daughter of Gaya and Shivraji. Petitioners are the sons of Munia. Gaya belonged to the Lohar community. Gaya died before the date of vesting as defined in Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as, 'Act, 1950'), and in the revenue records of 1359 Fasli and 1379 Fasli Shivraji was recorded as tenant of the disputed plots. After the death of Shivraji, the petitioners were recorded as tenants of the disputed plots and continued to be recorded as such in the basic year records of the village, i.e., the records available on the date the notification under Section 4(2) of the Act, 1953 was published notifying the village under consolidation operations.

3. During the consolidation operations, the respondent no. 3 filed objections against the entries in the basic year records claiming himself to be the sole tenant of the disputed plots. On the objections of respondent no. 3, Case no. 1016 under Section 9-A(2) of the Act, 1953 was registered before the Consolidation Officer, Hata at Kasya, District-Deoria (hereinafter referred to as, 'C.O.'). The case set up by respondent no. 3 was that Gaya and Shivraji had two sons, namely Thakur and Pheku, and respondent no. 3 was the son of Thakur. Thakur died before Gaya. It was the case of respondent no. 3 that Pheku had died issueless, therefore, the share of Pheku also devolved on respondent no. 3.

4. The petitioners contested the.case set up by respondent no. 3. The petitioners denied that Thakur and Pheku were the sons of Gaya or that respondent no. 3 was the grandson of Gaya. However, the petitioners admitted that Thakur and Pheku were the sons of Shivraji. The case of the petitioners was that Gaya had only one daughter namely Munia, and the petitioners were the sons of Munia. The petitioners alleged that, before her marriage with Gaya, Shivraji was married to one Budhai, resident of Village-Khairatiya and Thakur and Pheku were the sons of Budhai. The petitioners alleged that Thakur and Pheku came with Shivraji after her marriage to Gaya. On their aforesaid pleadings, the petitioners claimed to be the tenants of the disputed plots under Section 171(2)(h) of the Act, 1950 because they were the sons of the daughter of Gaya. In the alternative, the petitioners also alleged that before his death, Gaya had executed a registered Will dated 29.3.1946 bequeathing his entire property, including the disputed plots, in favour of petitioner no. 1. On the aforesaid pleadings, the petitioners prayed that the objections of respondent no. 3 be rejected and the entries in the basic year records be retained.

5. In order to decide the dispute as who was the heir of Gaya and consequently the tenant of the disputed plots, the C.O. framed issues relating to the validity of the Will dated 29.3.1946 and correctness of the rival pedigrees pleaded by the parties. Before the C.O., respondent no. 3 filed certified copies of the extracts of birth register of 1916 and 1928 and certified copy of the death certificate of 1943 to prove that Thakur was the son of Gaya. The certified copies of the extracts of birth registers of 1916 and 1928 indicated that sons were born to Gaya in the said years and the death certificate indicated that one Thakur, son of Gaya had died in the aforesaid year. The petitioners, in support of their case, filed a copy of the Will dated 29.3.1946, family register of Village-Singaha and a copy of the birth register of birth for the year 1918 and 1916 to show that Thakur, referred by respondent no. 3, was not the son of Gaya Lohar, but was the son of one Gaya Koeyri. The Will dated 29.3.1946 contains a recital allegedly made by Gaya that he had no son but only one daughter namely Munia, who had one son named Bhrigurasan. Bhrigurasan is petitioner no. 1 in the present writ petition. Apart from the aforesaid evidence filed by the parties, the C.O. also summoned the original birth register of 1916, a perusal of which revealed that the entry in the original birth register related to Gaya Koeri and not Gaya Lohar and the certified copy filed by respondent no. 3 did not correctly reflect the contents of the original. Other evidence were also filed by the parties to prove their respective cases, but I am not referring to them as they are not relevant for a decision of the present writ petition and in view of

the final orders proposed to be passed in the present writ petitions. It is also relevant to note that before the C.O., the respondent no. 3 admitted in his cross-examination that Munia was the daughter of Gaya and the petitioners were the sons of Munia.

6. The C.O. vide his order dated 31.12.1984 dismissed the objections filed by respondent no. 3 and held the petitioners to be the tenure holders of the disputed plots with 1/3 share each. The C.O. rejected the certified copy of birth register of 1916 filed by respondent no. 3 because a perusal of the original birth register showed that a son was born to Gaya Koeri and not to Gaya Lohar who was the original tenure holder of the disputed plots. The certified copy of the birth register of birth for the year 1927-28 filed by respondent no. 3 showed that a son was born to Gaya Lohar but the evidence was rejected by the C.O. on the ground that it was inconsistent with the case of respondent no. 3 that Gaya had two sons namely Thakur and Pheku. The Will dated 29.3.1946 pleaded by the petitioners was also rejected by the C.O. on the ground that under the Uttar Pradesh Tenancy Act, 1939 (hereinafter referred to as, 'Act, 1939') Gaya had no right to transfer the disputed plots and, therefore, the Will was not enforceable. However, while accepting the case of the petitioners, the C.O. relied on the recital in the Will wherein Gaya had allegedly stated that he had no son, but only one daughter Munia, who had one son Bhrigurasan (the petitioner no. 1). The C.O. held the Will to be proved in light of Section 90 of the Indian Evidence Act, 1872 (hereinafter referred to as, 'Act, 1872'). Consequently, the C.O. held that the respondent no. 3 had not been able to prove that Thakur and Pheku were the sons of Gaya. The C.O. further held that after the death of Gaya, Shivraji, being the widow of Gaya, became the tenant of the disputed plots and after her death, succession had to be determined in accordance with Section 172(2)(b) read with Section 171 of the Act, 1950, and the petitioners being the sons of Munia, the daughter of Gaya, were the heirs and successors of Gaya and thus the tenants of the disputed plots under Section 171(2)(h) of the Act, 1950.

7. Against the order dated 31.12.1984, the respondent no. 3 filed Appeal no. 0839 under Section 11 of the Act, 1953, which was allowed by the Settlement Officer of Consolidation, Kasya, District-Kushinagar, i.e., respondent no. 2 (hereinafter referred to as, 'S.O.C.') vide his judgment and order dated 28.2.2003. Against the judgement and order dated 28.2.2003 passed by the S.O.C., the petitioners filed Revision no. 157/161 under Section 48 of the Act, 1953, which was dismissed by the Deputy Director of Consolidation, Kushinagar, i.e., respondent no. 1 (hereinafter referred to as, 'D.D.C.') vide her judgement and order dated 30.4.2013. In their judgement and orders dated 28.2.2003 and 30.4.2013, the S.O.C. and the D.D.C. held that the original birth register of 1916 had been tampered by changing the word 'Lohar' to 'Koeri', after the certified copy of its extract was issued to respondent no. 3 and the certified copy of the extract of birth register filed by respondent no. 3 proved the case of respondent no. 3 that a son was born to Gaya who was the original tenure holder of the disputed plots. The S.O.C. and the D.D.C. reasoned that the entries in the birth register were in 'Urdu' language and transcribed in the Persian Script where even a dot could change the alphabets and consequently the word itself. The S.O.C. and the D.D.C. also relied on the death certificate filed by respondent no. 3 which

showed that Thakur had died in 1943 and indicated that he was the son of Gaya. The S.O.C. and the D.D.C. reasoned that as the petitioners had admitted the marriage of Shivraji and Gaya and also that Thakur and Pheku were the sons of Sjivraji, therefore, the burden to prove that Thakur and Pheku were not the sons of Gaya but the sons of Budhai was on the petitioners and the petitioners had failed to prove the same. The S.O.C. and the D.D.C. rejected the Will dated 29.3.1946 on the ground that it was void. The S.O.C. and the D.D.C. held that it was proved from evidence that Thakur and Pheku were the sons of Gaya Lohar and respondent no. 3 was the son of Thakur and, therefore, respondent no. 3 was entitled to succeed to the estate of Gaya. On their aforesaid reasoning, the S.O.C. set aside the order dated 31.12.1984 passed by the C.O. and the revision filed by the petitioners was rejected by the D.D.C. The orders dated 30.4.2013 and 28.2.2003 passed by the D.D.C. and the S.O.C. have been challenged in the present writ petition.

8. Before proceeding further, it would be relevant to note that the petitioners have filed a supplementary affidavit annexing certain revenue records and proceedings of some Case No. 1002 registered under Section 9-A(2) of the Act, 1953 before the C.O. The aforesaid case relates to some Khata No. 565 of which Pheku appears to be the recorded tenant and has been registered at the instance of respondent no. 3 in which Godhani has been impleaded as the opposite party. Godhani is the daughter of Pheku. The proceedings of Case no. 1002 have been filed by the petitioners to show that Pheku had a daughter namely Godhani. The records of Case No. 1002 annexed with the supplementary affidavit reveal that in the said case, the respondent No. 3 claims himself to be the heir of Pheku on the basis of some Will executed by Pheku in his favour. It is also pertinent to note that the facts disclosed in the supplementary affidavit that Pheku had a daughter namely Godhani or that respondent no. 3 claims himelf to be heir of Pheku in Khata No. 565 on the basis of a Will executed by Pheku has not been denied by respondent no. 3 in his supplementary counter affidavit. The revenue records annexed with the supplementary affidavit are of 1333 Fasli and 1347 Fasli and the said revenue records have been annexed in support of the averment in the supplementary affidavit that one Gaya, son of Mantu Lohar, resided in the same village and respondent no. 3 had taken advantage of the records relating to Gaya, son of Mantu Lohar to prove his case. The petitioners have also annexed with the supplementary affidavit a copy of the revenue records of 1356 Fasli which shows that Shivraji was recorded as tenant of the disputed plots in 1356 Fasli. The revenue records annexed with the supplementary affidavit show that Gaya had died before the Act, 1950 came in operation.

9. Challenging the orders dated 28.2.2003 and 30.4.2013 passed by the S.O.C. and the D.D.C., the counsel for petitioners has argued that Gaya had a heritable and transferable interest in the disputed plots as he was a hereditary tenant with special privilege, i.e., Class-9 tenant as shown in Paragraph No. 124 of the Uttar Pradesh Land Records Manual, therefore, the Will dated 29.3.1946 was valid and enforceable and the findings recorded by the consolidation courts that the Will was void is contrary to law. It was further argued that the recital in the Will dated 29.3.1946 made by Gaya that he had no son and only one daughter namely Munia, who

had a son, i.e., petitioner no. 1, proved that Thakur and Pheku were not the sons of Gaya Lohar. It was argued that even if the Will dated 29.3.1946 executed by Gaya was void , the Will and the recital in the same were still admissible under Section 32(6) of the Indian Evidence Act, Act, 1872 (hereinafter referred to as, 'Act, 1872') and were relevant and material evidence to be considered while deciding the issue as to whether Thakur and Pheku were the sons of Gaya and the failure of the SO.C. and the D.D.C. to consider the Will vitiates the impugned orders for non-consideration of relevant materials. It was further argued by the counsel for the petitioners that the burden to prove the pedigree as alleged by respondent no. 3 was on respondent no. 3, who had failed to prove the pedigree as alleged by him inasmuch as the original birth register of 1916 summoned by the C.O. clearly indicated that a son was born to Gaya Koeyri and not to Gaya Lohar. Relying on the revenue records of 1333 Fasli and 1347 Fasli filed alongwith the supplementary affidavit, the counsel for the petitioners has argued that there was another person by the name of Gaya in the same village and respondent no. 3 took advantage of the records relating to the aforesaid Gaya, son of Mantu Lohar to prove his relationship with Gaya Lohar who was the original tenure holder of the disputed plots. It was further argued that the entries in the birth registers and the family registers, though relevant, are not conclusive of genealogy and relationship, but require corroboration to prove the pedigree and respondent no. 3 had not produced any evidence to corroborate the alleged entries in the certified copies of the extracts of birth registers filed by him. It was argued by the counsel for the petitioners that after the death of Gaya, his widow Shivraji, became the tenant of the disputed plots under Section 35(b) of the Act, 1939 and after the death of Shivraji succession had to be decided in accordance with Section 171 read with Section 172(2)(b) of the Act, 1950 and the disputed plots would devolve on the nearest surviving heir of Gaya, the last male tenant of the disputed plots. It was argued that the petitioners being the sons of the daughter of Gaya, became the tenants of the disputed plots under Section 171(2)(h) of the Act, 1950. It was argued that for the aforesaid reasons, the orders dated 28.2.2003 and 30.4.2013 passed by the S.O.C. and the D.D.C. are illegal and contrary to law and liable to be quashed. In support of his contention, the counsel for the petitioners has relied on the judgements of Supreme Court and of this Court reported in ***State of Bihar Vs. Radha Krishna Singh, AIR 1983 SC 683, M Vs. Board of Revenue, 1962 RD, (1) (H.C.), Ram Prasad Sharma Vs. State of Bihar, AIR 1970 SC 326, Madhuri Devi & Another Vs. Board of Revenue, U.P. at Lucknow & Others, 2011 (114) RD 465, Sebastiao Luis Fernandes Vs. K.V.P. Shashtri, 2014 AIR SCW 155, Anil Rishi Vs. Gurbaksh Singh, AIR 2006 SC 1971; and Vinod Kumar Dhall Vs. Dharampal Dhall & Others, AIR 2018 SC 3470.***

10. Rebutting the argument of the counsel for the petitioners, the counsel for respondent no. 3 has supported the reasons given by the S.O.C. and the D.D.C. in their orders dated 28.2.2003 and 30.4.2013. The counsel for respondent no. 3 has argued that in view of Section 33 of the Act, 1939 the interest of Gaya in the disputed plots was heritable but not transferable and, therefore, Gaya had no right to execute a Will regarding the disputed plots and the Will dated 29.3.1946 was void ab initio and non est and had no legal consequences. It

was argued that both the C.O. and the S.O.C. had held that the Will dated 29.3.1946 was void and the said findings were not challenged by the petitioners in the revision filed by them before the D.D.C. and, therefore, the findings recorded by the consolidation courts that the Will was not enforceable cannot be challenged by the petitioners for the first time before this Court. It was further argued that as the Will dated 29.3.1946 was void ab *initio,* therefore, it cannot be read in evidence and any recital in the same allegedly made by Gaya was also inadmissible in evidence and was rightly ignored by the appellate and the revisional courts. It was argued that the copies of the birth registers produced by respondent no. 3 for the year 1916 and 1928 showed that sons were born to Gaya, the original tenure holder of the disputed plots and the death register of 1943 proved that Thakur was the son of Gaya and no illegality has been committed by the S.O.C. and the D.D.C. in relying on the aforesaid documents to hold that Thakur and Pheku were the sons of Gaya and respondent no. 3 was the grandson of Thakur. It was argued by the counsel for respondent no. 3 that the original birth register was tampered by adding the word 'Koeyri' after the name of Gaya after the certified copy was issued to respondent no. 3. It was argued that the S.O.C. and the D.D.C. have rightly accepted the certified copies of the extracts of birth registers filed by the respondent no. 3 to hold that Gaya had two sons. It was argued that, admittedly, Shivraji was married to Gaya and also that Thakur and Pheku were the sons of Shivraji, therefore, the burden to prove that Thakur and Pheku were not the sons of Gaya Lohar was on the petitioners and the petitioners had failed to discharge their burden as they could not produce any evidence to prove that any person named Gaya Koeyri resided in the village or any evidence to prove the marriage of Shivraji with Budhai. It was argued that the findings recorded by the S.O.C. and the D.D.C. in their impugned orders dated 28.2.2003 and 30.4.2013 are based on evidence on record and not subject to interference by this Court under Article 226 of the Constitution of India. It was argued that for the aforesaid reasons, the writ petition is liable to be dismissed. In support of his argument, the counsel for respondent no. 3 has relied on the judgements of the Supreme Court and this High Court reported in ***Prem Singh & Others Vs. Birbal & Others, 2006 (5) SCC 353, Ibrahim Khan Vs. Additional Collector (Administration) Lucknow & Others, 2016 (131) RD 161, Suzuki Parasrampuria Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd. & Others, AIR 2018 SC 4769, Kalpesh Hemantbhai Shah Vs. Manhar Auto Stores & Others, 2014 AIR SCW 1959; and State of U.P. & Others Vs. Maharaj Dharmander Prasad Singh, AIR 1989 SC 997.***

11. I have considered the rival submissions of the counsel for the parties.

12. It is not disputed by the parties that Gaya had died before the date of vesting as defined in the Act, 1950 and Shivraji was recorded as tenant of the disputed plots in the revenue records of 1356 Fasli and 1359 Fasli. It is also admitted between the parties that Thakur and Pheku were the sons of Shivraji and also that Munia was the daughter of Shivraji and Gaya. The dispute between the parties relates to the paternity of Thakur and Pheku. Respondent no. 3 pleads that Thakur and Pheku were the sons of Gaya while the petitioners allege that Thakur and

Pheku were the sons of Budhai to whom Shivraji was married before her marriage to Gaya. The dispute as to whether Thakur and Pheku were the sons of Gaya is relevant to decide the heir of Gaya and the tenancy of the disputed plots under Section 171 of the Act, 1950. The answer to the question as to who is the heir of Gaya and on whom the tenancy of the disputed plots devolve is also dependent on the validity of the Will dated 29.3.1946 allegedly executed by Gaya. The Will is a registered document. The consolidation courts have rejected the Will on the ground that Gaya had no transferable interest in the suit property and, therefore, the Will was void. The petitioners have challenged the said findings of the consolidation courts. The issue regarding the relationship of Gaya with Thakur and Pheku would be relevant only if the findings of the consolidation courts on the Will dated 29.3.1946 is affirmed. Therefore, first, the issue regarding the validity of the Will.

13. The counsel for the petitioners, while challenging the findings of the consolidation courts that Gaya had no right to execute the Will dated 29.3.1946, has argued that Gaya was a hereditary tenant with special privilege, i.e., Class-9 as enumerated in Paragraph No. 124 of the U.P. Land Records Manual, and therefore, the interest of Gaya in the disputed plots was both heritable and transferable and thus the Will dated 29.3.1946 was valid and legally enforceable.

14. The contention of the counsel for the petitioners can not be accepted. The petitioners have not brought on record any document to show that Gaya was a hereditary tenant or Class-9 tenant of the disputed plots. Any consideration of the tenancy rights of Gaya, in light of the arguments raised by the counsel for the petitioner would require an enquiry into disputed question of facts, i.e., the tenancy rights of Gaya in the disputed plots, the records relating to which have not been produced before this Court. Apart from the aforesaid, a perusal of the revenue record of 1347 Fasli, annexed as Annexure no. SA-2 to the supplementary affidavit, shows that Gaya was an occupancy tenant and was recorded as Class 6(1) tenant in the revenue records. Under Section 33 of the United Provinces Tenancy Act, 1939 an occupancy tenant had no transferable interest except in the circumstances mentioned in Act, 1939. It is not the case of the petitioners that any of the circumstances mentioned in Act, 1939 existed which gave Gaya a transferable interest in the disputed plots. The said document does not support the contention of the petitioners regarding the nature of tenancy of Gaya in the disputed plots. Further, the findings recorded by the C.O. and the S.O.C. that Gaya did not have a transferable interest in the disputed plots and, therefore, the Will dated 29.3.1946 was void and not legally enforceable was not challenged by the petitioners in the revision filed by them before the D.D.C. In the circumstances the petitioners can not, for the first time before this Court in proceedings under Article 226 of the Constitution of India be permitted to challenge the said findings of the S.O.C. and D.D.C.

15. At this stage it is necessary to clarify that no statutory provision in the Act, 1939 was brought to the notice of this Court by the counsel for the respondent to show that Act 1939 prohibited bequest by the class of tenants included in Section 33 of the Act, 1939. **But as the counsel for the petitioners did not raise any argument challenging the approach of**

the consolidation courts in treating the Will to be a transfer of property, I am not expressing any opinion on the correctness of the findings of the consolidation courts regarding the legality of the Will on the said ground. The challenge by the petitioners to the findings of the consolidation courts regarding the validity of the Will is being rejected only on the ground that the petitioners, can not for the first time, be permitted to raise the said argument in the writ petition and because the argument of the petitioners that the Will was enforceable and not void is based on the nature of tenancy rights of Gaya in the disputed plots and the documents annexed with the supplementary affidavit negate the facts pleaded by the petitioners to support their argument that Gaya had a transferable interest in the plots.

16. In order to prove their respective cases, regarding the descendants of Gaya, i.e., as to whether Munia was the only child of Gaya or whether Thakur and Pheku were the sons of Gaya, the parties relied on the certified copies of the extracts of different birth and death registers. The petitioners also relied on the recital in the Will to prove their case and disprove the pedigree pleaded by respondent no. 3.

17. The respondent no. 3, in order to prove his case, filed a certified copy of the extract of Birth register of 1916 which showed that a son was born to Gaya. A reading of the judgement dated 31.12.1984 passed by the C.O. indicates that there was some doubt regarding the authenticity of the certified copy and, therefore, the C.O. summoned the original birth register. The original birth register indicated that the entries related to one Gaya who belonged to the Koeyri community. Gaya who was the original tenure holder of the disputed plots belonged to the Lohar community. The C.O., therefore, relying on the entries in the original register held that birth register of 1916 did not prove that Thakur was the son of Gaya who was the original tenure holder of the disputed plots. The findings of the C.O. was reversed by the S.O.C. on the ground that entries in the birth birth are in Urdu language and in the Persian Script where a mere dot can completely change the transcribed Urdu word. The S.O.C. and the D.D.C. relied on the certified copy filed by respondent no. 3 to hold that Thakur was the son of Gaya Lohar and held that the entries in the original birth register had been tampered because admittedly the certified copy filed by respondent no. 3 was issued to him.

18. The contents of the certified copy filed by respondent no. 3 differed from the original. The consolidation courts did not summon any officer from the concerned department to verify the genuineness of the certified copy filed by respondent no. 3. The certified copy of a document is a secondary evidence under Section 63 of the Evidence Act, 1872. The original document is a primary evidence under Section 62 of the Act, 1872. The contents of a document are, except in circumstances mentioned in Section 65 of the Act, 1872 must be proved by the primary evidence, i.e., the document itself (section 64 of the Act, 1872). It is true that certified copy of a public document is admissible in evidence under Section 77 read with Section 65(e) of the Evidence Act, 1872 **in proof of the contents of the public document** or part of the public document of which it purports to be a copy. Under Sections 77 and 79 of the Act, 1872 the courts raise a presumption that the certified copy reflects the contents of the original. The presumption in favour of the certified copy is not conclusive but a

rebuttable presumption. The presumption in favour of the certified copy that it reflects the contents of the original can be rebutted by production and perusal of the original record. The utility of a certified copy as evidence is to prove the contents of the original public document where the original is not on record. A reading of Sections 61 to 65 of the Evidence Act, 1872 indicates that secondary evidence in proof of the document or its contents can be given only where the original, i.e., the primary evidence can not or is not produced as evidence. If both primary and secondary evidences are on record and there is a conflict between the contents of the two, the contents of the primary evidence, i.e., the original, are to be accepted. The certified copy loses its evidentiary value if it does not correctly reflect the contents of the original. The certified copy and its contents are by themselves not an evidence of any tampering or forgery in the original if the contents of the original are different from the contents of the certified copy. The alleged tampering or manipulation in the original has to be proved by other evidence. Thus, the certified copy of birth register of 1916 filed by respondent No. 3 was not a material evidence to hold that the original birth register had been tempered and the S.O.C. and the D.D.C. by relying on the certified copy of birth register of 1916 have considered irrelevant material to hold that the original birth register of 1916 had been tampered.

19. In their impugned orders the S.O.C and the D.D.C. have noted that a mere dot in Persian Script can change the word itself, and have, therefore, concluded that the original register has been tampered and entries in the original have been changed. The aforesaid opinion is a mere surmise. No linguistic expert was called by the respondent No. 3 or the consolidation courts to verify the aforesaid fact. I have myself looked at the Persian Script of the words 'Koeyri' and 'Lohar' and it is apparent that the script of the two words is totally different and a mere dot would not change the word itself. The way 'Koeyri' is written in the Persian Script is totally different from the way 'Lohar' is written in the Persian Script and it can not be said that a mere addition of dot in the word 'Lohar' would change it to the word 'Koeyri'. Further, even if the birth register of 1916 was tampered and entries forged, the said tampering only reduces or extinguishes the probative value of the entries and does not prove the case of respondent no. 3 because there is nothing on record to indicate the initial entry in the records.

20. The birth register of the year 1928 indicates that one son was born to Gaya Lohar and the copy of the death register of 1943 filed by respondent no. 3 indicates that one Thakur, son of Gaya had died in the aforesaid year.

21. However, it was held by this Court in ***Madhuri Devi (Supra)*** that, "an entry in a revenue record or in the family register is no final proof of the parentage of a person". (Paragraph no. 13). The death and the birth registers, by themselves, are not conclusive proof of a pedigree pleaded by a party and the entries in the said documents require corroboration. There is no evidence on record corroborating the entries in the birth register of 1928 and the death register of 1943. In any case, the probative value of the entries in the different registers mentioned above and filed by respondent no. 3 had to be assessed in light of other evidences brought on record by the parties. The petitioners, in order to disprove that Thakur and Pheku were the sons of Gaya, had filed the Will dated 29.3.1946 which contained a recital

by Gaya that he had no son but only a daughter named Munia. The recital in the aforesaid Will has not been considered by the S.O.C. and the D.D.C. while assessing the different evidence filed by the parties to prove their respective cases. The issue before this Court is as to whether the failure of the S.O.C. and the D.D.C. to consider the Will dated 29.3.1946 and the recital in it vitiates their orders requiring interference by this Court?

22. The counsel for the petitioners has argued that the Will, even if void because Gaya had no right to execute the said Will, was admissible in evidence under Section 32(6) of the Act, 1872 to disprove the alleged relationship between Thakur and Gaya. The counsel for respondent no. 3 has argued that the Will was void and thus non est and therefore the Will or any part of it was not admissible in evidence and can not be read in evidence for any purpose and the appellate and the revisional courts rightly refused to consider the same. In support of his argument the counsel for respondent no. 3 has relied on the judgement of this Court in ***Ibrahim Khan (Supra)*** and of the Supreme Court in ***Prem Singh (Supra).***

23. 'Void' and 'non-est' are two different concepts. The concept of void refers to the enforceability of a contract/document/ transaction and when a contract or a document is referred as void it implies that the same is not legally enforceable. 'Non-est' means 'non-existent' and is used to deny the execution of the document itself. A void document is not necessarily 'non-est'. It is only an existing document which a party can plead to be 'void'. If a document is executed by a person who had no authority to execute it or no authority to indulge in the transactions incorporated in the document, the document would be void but not 'non-est'. If a document is void then it can not be sued upon and enforced but the aforesaid does not mean that other legal consequences of the document shall not follow. A contract or any other document which creates a right would be enforced by a court only if the person who executed the document has the authority to execute it, the document is admitted in evidence and proved in accordance with the provisions of Evidence Act, 1872. The admissibility in evidence or the probative value of a document or its contents does not depend on its enforceability by the courts. For example, if a Will is not proved in accordance with Section 68 of the Act, 1872 because no attesting witness of the Will who is alive, and subject to the process of the court and capable of giving evidence has been called to prove its due execution, the Will would not be enforced and the Will **shall not be read in evidence for the purposes of enforcing the Will but can still be read in evidence for any purpose other than for enforcing the Will.** In such a case, the document purporting to be a Will will be read in evidence not as Will but as any other document provided it has been proved in accordance with Sections 67, 72 and other provisions of the Evidence Act, 1872. Similarly in case, where a Will is not used or relied upon as a document conferring any enforceable right, the same can be read in evidence even if the requirement of Section 68 are not fulfilled and the said document is proved in accordance with Sections 67 and 72 of the Act, 1872. A Will which is executed by a person who had no right to make a bequest of the properties would not be enforceable by a court and in that sense it would be void. But, the said Will can be used for purposes other than its enforcement and would be admissible in evidence for such other purposes.

24. In my aforesaid view, I am supported by a Division Bench judgement

of this Court rendered in ***Mahadeo Prasad Vs. Ghulam Mohammad, AIR 1947 ALL 161.*** Paragraph Nos. 9 and 9A of the aforesaid judgement are relevant for the purpose and are reproduced below :-

"9. The main question which has to be decided in this appeal is whether the statement contained in Mt. Sahodra's will referred to above was admissible in evidence and the learned judge was right in relying on the same. it must be remembered that in the present case **we are not concerned with the validity or invalidity of the will as such. It is obvious that Mt. Sahodra, being in possession of the property as a limited owner under the Hindu Law, whether as the widow of the last owner Bhau Ram or as the mother of the last owner Kallu Ram had no right to transfer the property by will. Section 68, Evidence Act would certainly come into play if any of the two parties to this litigation had founded his claim on the will but that is not the case here.** This will of Mt. Sahodra is a registered document and it has been specifically referred to in the sale deed in favour of the defendant. It has been exhibited by the Court of first instance as Ex. QQ and, therefore, it is clear that it was tendered in evidence. The statement of the defendant's witness, Sheo Cham, in favour of whose wife Mt. Moti Kunwar, the will was executed has definitely stated in the course of his deposition that Mt. Sahodra executed "a will" in favour of his wife Moti Kunwar in 1934. No objection seems to have been raised in the course of the proceedings in the Court of first instance with regard to the existence of this Will or its execution by Mt. Sahodra. A glance at the statement of Sheo Charan would show that first of all he referred to this will in his examination in-chief. In cross-examination learned counsel for the plaintiff appears to have repeatedly questioned Sheo Charan with reference to this will, but the questions were all put to the witness with a view to eliciting from him the facts bearing upon the invalidity of the will. It is true that the will Ex.QQ does not bear on it any statement to the effect that its execution was admitted, but on a careful examination of the long statement of Sheo Charan there can be no doubt whatsoever that the cross-examination of Sheo Charan proceeded on the footing that the registered document dated 10-9-1934 purporting to be a will of Mt. Sahodra was a document executed by Mt. Sahodra.

9A. It must, therefore, be taken that the only contention raised on behalf of the plaintiff with regard to this document in the trial Court was that it has not been proved in accordance with the provisions S.68, Evidence Act. And it is well settled that an objection that a document which per se is not admissible (inadmissible?) in evidence, has been improperly admitted in evidence in the trial Court, can not be entertained in the court of appeal. If such an objection had been taken in the trial Court it might have been easily met and the proceedings regularised : vide AIR 1931 Pat 224, AIR 1915 PC 111, 34 Cal 1059: 34 IA 194 and AIR 1923 CAL 378. **As mentioned already, S.68 would apply only if the document were relied upon as a Will and therefore as a document requiring attestation. It has been repeatedly held that non-compliance with the provisions of S.68 does not prevent the document from being used in evidence under S.72 for any other or collateral purpose**. Reference might be made to the case in 13 ALJ553; also to the case in 16 ALJ 121. Similarly reference might be made to the decision of a Bench of two learned Judges of this Court in 1939 ALJ 142."

(Emphasis added)

25. Previously, a Division Bench of this Court in a judgement reported in ***Ft. Shyam Lal Vs. Lakshmi Narain, AIR 1939 ALL 269,*** *held that, "Section 68 on the other hand states : if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.* ***The question at issue is whether the words : it shall not be used as evidence until one attesting witness at least has been called", etc. are to be held to imply the words "it shall not be so used as evidence for any purpose", or whether the words are to be held merely as applying to a suit for enforcement to the document leaving the ordinary provisions of law in Sec. 67 to apply where the document is to be used for any other purpose. On general considerations it would appear difficult to hold that Sec. 68 must always apply to the use of a document in evidence which is required by law to be attested".*** *It was further observed by the Division Bench that, "The Evidence Act codified the law and we should have expected that if s.68 was intended to express that a document required by law to be attested should not be used as evidence for any purpose until on attesting witness at least had been called, then the words "for any purpose" would have found a place in the Section. Those words are not in the Section and therefore we conclude that this was not the intention of the framers of the Act.* ***It is not possible to see why an admission in one document should require a different kind of proof from an admission in another document.*** *The mere fact that one of the document requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. For these reasons we consider that the view of the appellant is correct and S. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission."*

(Emphasis added)

26. Thus, even if the Will dated 29.3.1946 is not enforceable for being void or may not be relevant under Section 32(6) of the Act, 1872 as a Will, it would still be admissible and relevant under Section 32(5) of the Act, 1872 because the relevant recital in the Will is a statement in writing of the deceased and relates to the existence of a relationship by blood about which the testator had special means of knowledge as the husband of Shivraji. The statement is obviously ante *litem motam,* i.e., made before any dispute regarding the succession to the estate of the testator started between the parties. Thus, the Will dated 29.3.1946 was admissible in evidence and was relevant under Section 32(5) of the Act, 1872 to decide the pedigree of respondent No. 3 and had to be considered by the S.O.C. and the D.D.C. while assessing the different evidence filed by the parties to prove or disprove the pedigrees as pleaded by them.

27. A reading of the impugned orders passed by the appellate and the revisional courts shows that the recital in the Will has not been considered by the said courts. The recital was a material evidence, the non-consideration of which vitiates the judgements of the appellate and the revisional courts.

28. The judgements of this Court in ***Ibrahim Khan (Supra)*** and of Supreme Court in ***Prem Singh (Supra)*** referred by respondent no. 3 do not deal with the issue regarding the relevance or admissibility in evidence of a void and uneforceable document for purposes other than the enforceability of the document and are therefore not applicable in the present case.

29. It is true that this Court under Article 226 of the Constitution of India, does not interfere in findings of fact recorded by the tribunals but in the present case the S.O.C. and the D.D.C. have ignored material evidence, i.e., the Will dated 29.3.1946 and the original birth register of 1916, and have also considered an irrelevant material, i.e., the certified copy of the birth register of 1916 filed by respondent no. 3, to support their findings. The reasons recorded by the consolidation courts to not consider the Will dated 29.3.1946 and the recital in it while assessing the different evidence filed by the parties is vitiated by error of law which is apparent on the face of record. Thus, the impugned orders passed by the S.O.C. and the D.D.C. are liable to be quashed and the matter is liable to be remanded back to the S.O.C. to pass fresh orders in accordance with law.

30. In view of the reasons recorded previously, no opinion is required to be expressed on the probative value of other evidences filed by the parties which shall be considered by the S.O.C. in light of the observations previously made in the present judgement.

31. For the aforesaid reasons, the orders dated 30.4.2013 and 28.2.2003 passed by the Deputy Director of Consolidation, Kushinagar and the Settlement Officer of Consolidation, Kasya, District-Kushinagar are hereby quashed. The matter is remanded back to the Settlement Officer of Consolidation, Kasya, District-Kushinagar to pass fresh orders in accordance with law and in light of the observations made in the judgement. The settlement Officer of Consolidation shall pass fresh orders within a period of six months from today and the consequential revision filed by the aggrieved parties shall also be decided by the Deputy Director of Consolidation within two months from the date of filing. It is clarified that in any case, the proceedings restarted as a consequence of the present order shall be completed within a period of one year from today. In order to ensure that the proceedings are completed within one year from today the consolidation authorities shall be at liberty to hold day to day hearing in the cases filed before them. The Collector, Kushinagar, is directed to ensure compliance of the present order.

32. The Register General of this Court is directed to send a copy of this order to the Collector, Kushinagar.

33. The parties shall maintain status quo and not create any third party rights in the disputed plot till the culmination of the proceedings as directed above.

34. With the aforesaid directions, the writ petition is ***allowed.***

(2020)06ILR A248
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2020

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 4682 of 2011

&

Writ-C No. 37335 of 2011

The Manager, State Bank of Bikaner and Jaipur Muzaffarnagar ...Petitioner

Versus

The Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:

Sri Vipin Sinha, Sri Satish Chaturvedi

Counsel for the Respondents:

S.C., Sri A. Khare, Sri S. Khare

A. Labour Law - The Industrial Disputes Act, 1947 - Section 25G - Non grant of back-wages - - Procedure for retrenchment, section 25H - Re-employment of retrenched workmen - The Industrial Disputes (Central) Rules, 1957 - Rules 77 - Maintenance of seniority list of workmen , Rules 78 - Re-employment of retrenched workmen - unless findings with regard to the provisions of Rules 77 and 78 of the Central Rules and with regard to the provisions of section 25G are given, the Tribunal could not have arrived at a proper conclusion as to whether the provisions of section 25H were violated - award requires no interference.

(Para – 7,8)

Management of State Bank of Bikaner & Jaipur - terminating the services of workmen - not giving them opportunity for re-employment - no proper seniority list was maintained - no proper opportunity to the respondents, as was required to be given under the Rules, was provided before regularising persons junior to them - Tribunal correctly found that the delay on the part of the respondent-workmen was negligible . (Para-7)

HELD:- The workmen must have been taken back in service as per the interim orders of this Court and, therefore, it is not appropriate to grant any back-wages as since 2011 they must have been getting their regular salaries.(Para-9)

Petitions dismissed.(E-7)

List of Cases Cited:-

1. Mukand Ltd. Vs Mukand Staff & Officers' Assc., (2004) 10 SCC 460

2. State Bank of Bikaner & Jaipur Vs Om Prakash Sharma, (2006) 5 SCC 123

3. Mang. of the Barara Cooperative Marketing-cum-Processing Society Ltd. Vs Workman Pratap Singh. (2019) 2 SCC 743

4. State Bank of Bikaner and Jaipur Vs Anurag Sharma, 2009 (9) ADJ 141

5. Prataprai N. Kothari Vs Jhon Braganza, (1999) 4 SCC 403

6. O.B.C. Vs U.O.I. & ors., (1997) 76 FLR 393

7. Gujarat State Machine Tools Corporation Limited, Bhavnagar Vs Deepak J. Desai, (1987) 55 FLR 527

8. Ajaib Singh Vs The Sirhind Co-Operative Marketing-cum-Processing Service Society Ltd. & ors., (1999) 6 SCC 82

(Delivered by Hon'ble SiddharthaVarma, J.)

1. Writ Petition No.4682 of 2011 has been filed against the award of the Central Government Industrial Tribunal-cum-Labour Court. The respondent nos.2 and 3, who are petitioners in Writ Petition No.37335 of 2011 had raised an industrial dispute and a Reference was made by the relevant Government on 23/24 June 1999 which was to the following effect :-

"Whether the action of the management of State Bank of Bikaner & Jaipur in terminating the services of Shri Dinesh Kumar Bansal and Shri Ravindra Kumar and not giving them opportunity for re-employment is legal and justified? If not, to what relief the said workmen are entitled?"

2. Respondent no.2 had come up with a case that he was engaged with the petitioner-Bank on 21.11.1983 as a temporary Clerk-cum-Cashier and was thereafter disengaged from service on 8.2.1984. The respondent no.3 also had a similar case and he stated that he was engaged on 21.3.1983 as a temporary Clerk and was disengaged on 8.6.1983. The respondent nos.2 and 3 had come up with a case that they were entitled to be absorbed as regular employees. They had taken a case that when they were retrenched they were not the junior most temporary employees in the organization, meaning thereby their services were done away with in violation of the provisions of Section 25G of the Industrial Disputes Act, 1947 (hereinafter referred to as the "Central Act"); and it was stated after they were removed, fresh hands were recruited in violation of the provisions of section 25H of the Central Act. It was stated that these actions of the employer were in violation of the SASTRY Award and the bipartite agreement between the bank and Workers' Union. The petitioner-Bank had opposed the claim of the respondent nos.2 and 3 before the Tribunal.

3. However, the Tribunal, before which pleadings were filed and oral evidence were led, on 15.7.2010 passed an award by which the respondent nos. 2 and 3 were reinstated but without back-wages.

4. Sri Satish Chaturvedi, learned counsel for the petitioner assailed the award on the following amongst other grounds :-

(i) The Reference to the Tribunal did not mention either the date of the alleged termination or the posts on which the respondent nos.2 and 3 were engaged, making the Reference vague.

(ii) Even though there was no Reference with regard to the violation of Rules 77 and 78 of "The Industrial Disputes (Central) Rules, 1957" (hereinafter referred to as the "Central Rules") yet, the Tribunal had given findings with regard to the violation of the provisions of those Rules and had found that there was definite violation of the provisions of Rules 77 and 78 of the Central Rules. Learned counsel for the petitioner submitted that the Tribunal was a Court of Reference and it was bound by the Reference made to it. In this regard, learned counsel for the petitioner relied upon **(2004) 10 SCC 460 : Mukand Ltd. vs. Mukand Staff & Officers' Association**. He further submitted that if the Tribunal exceeded its jurisdiction then the award was bad on account of a jurisdictional error. In this regard, learned counsel for the petitioner relied upon **(2006) 5 SCC 123 : State Bank of Bikaner & Jaipur vs. Om Prakash Sharma.**

(iii) When the Reference to the Tribunal in effect was as to whether there was any violation of the provisions of section 25H of the Central Act and when no information was provided as to who were the employees junior to the respondents working in the establishment then the award could not be sustained. Learned counsel submitted that Ashok Kumar Jain and Anil Kumar who were appointed in 1983 and 1984 were appointed at the time the respondents were also appointed. So far as Shyam Singh and Mukesh Kumar were concerned, they were of a different category as they had been recruited through the Bank. Learned counsel therefore submitted that regularising persons who had already been working would not attract the provisions of section 25H of the Central

Act. In this regard, learned counsel for the petitioner relied upon **(2019) 2 SCC 743 : Management of the Barara Cooperative Marketing-cum-Processing Society Ltd. vs. Workman Pratap Singh.** Learned counsel in order to give strength to his argument that a retrenched employee had no absolute right for re-employment relied upon **2009 (9) ADJ 141 : State Bank of Bikaner and Jaipur vs. Anurag Sharma**. Learned counsel further submitted that since the Reference was only with regard to the alleged violation of the provisions of section 25H of the Central Act, the only issue which was required to be seen was as to whether any opportunity to the retrenched workman was given or not for re-employment when vacancies arose and others were given employment. In this regard, learned counsel submitted that the Circular dated 16.8.1990 which was made a part of the record of the Tribunal and was also a part of the record of the writ petition was an opportunity enough for the respondent-employees to have approached the Bank. He further submitted that there was earlier to 16.8.1990, another Circular issued on 23.4.1987 in various newspapers. The respondents had purposely not responded to the Circulars and, therefore, now they could not claim any right under the provisions of section 25H of the Central Act.

(iv) Learned counsel for the petitioner further submitted that the Tribunal erred in insisting that notice to the respondents ought to have been as per the provisions of Rules 77 and 78 of the Central Rules.

(v) When there was no pleading then oral evidence as was led by the respondents was not to be read. In this regard, learned counsel for the petitioner relied upon **(1999) 4 SCC 403 : Prataprai N. Kothari vs. Jhon Braganza.**

(vi) In the end, learned counsel for the petitioner submitted that the respondent nos.2 and 3 after being disengaged, raised the industrial dispute very late in the day. The Reference itself was made on 23/24 June 1999; the award came in the year 2010; the workmen were not in employment of the petitioner since the last 37 years; the respondent no.2, at the time of filing of the counter affidavit, was aged about 48 years and now was more than 57 years of age whereas respondent no.3, at the time of filing of the counter affidavit was aged about 46 years and now he was more than 55 years of age and, therefore, they be not granted any relief. Learned counsel also submitted that the respondents were not entitled for any back-wages as they had raised the industrial dispute very belatedly and, therefore, the connected writ petition being Writ Petition No.37335 of 2011 be dismissed.

5. Learned counsel for the respondent nos.2 and 3 in Writ Petition No.4682 of 2011 (and as a counsel for the petitioners in Writ Petition No.37335 of 2011) however, supported the award to the extent that it had directed for the reinstatement of the respondent nos.2 and 3 and submitted that when the issue with regard to the violation of the provisions of section 25H of the Central Act was being considered, then it became imperative that the findings with regard to the provisions of section 25G of the Central Act and Rules 77 and 78 of the Central Rules be given. In this regard, learned counsel for respondent nos.2 and 3 relied upon **1997 (76) FLR 393 : Oriental Bank of Commerce vs. Union of India & Ors.** and **1987 (55) FLR 527 : Gujarat State Machine Tools Corporation Limited, Bhavnagar vs. Deepak J. Desai.** Learned counsel further submitted that when there was violation of the provisions

of Rules 77 and 78 of the Central Rules and when it was evident from the award that juniors were absorbed to the detriment of the petitioners then the award could not be interfered with so far as it reinstated the workmen-respondent nos.2 and 3. Learned counsel further submitted that the Industrial Disputes Act, 1947 was a welfare legislation and when an industrial dispute was raised by the respondents upon gaining knowledge of the fact that persons junior to them were being regularised then it was in the fitness of things that the delay of a few years was condoned by the Tribunal. However, learned counsel for respondent nos.2 and 3 submitted that the delay of almost 11 years which was committed by the Tribunal should not have been there. Learned counsel submitted that the High Court had protected the interest of the respondents when the orders dated 23.8.2011 and 13.7.2012 were passed. The orders dated 23.8.2011 and 13.7.2012 as were read out by the learned counsel are being reproduced here as under :-

Order dated 23.8.2011 passed in Writ-C No.4682 of 2011

"Counter affidavit and rejoinder affidavits have been exchanged. Heard counsel for the parties.

The petition is admitted for hearing.

The interim order dated 27.1.2011 is modified to the extent that petitioner shall reinstate the workmen in view of section 17-B of the Industrial Disputes Act, 1947 as the workman is said to have filed affidavit that they were not gainfully employed after alleged illegal termination from service and that the court below has recorded a categorical finding of fact that the workmen were not gainfully employed. The employer/petitioner will reinstate the workmen within a period of one month from today and pay them their salary month to month in accordance with law till further orders."

Order dated 13.7.2012 passed in Writ-C No.4682 of 2011

"(Order on Modification Application)

Heard learned counsel for the parties.

This Court vide order dated 23.8.2011 had modified its interim order dated 27.1.2011 in the following terms:

"The interim order dated 27.1.2011 is modified to the extent that petitioner shall reinstate the workmen in view of section 17-B of the Industrial Disputes Act, 1947 as the workman is said to have filed affidavit that they were not gainfully employed after alleged illegal termination from service and that the court below has recorded a categorical finding of fact that the workmen were not gainfully employed. The employer/petitioner will reinstate the workmen within a period of one month from today and pay them their salary month to month in accordance with law till further orders."

Learned counsel for the petitioner advanced an argument that it is always open to the employer to take work from the employee or not to take work from the employee and paid him his wages/salary. Section 17-B of the Industrial Disputes Act, 1947 provides for salary last drawn by the workman in whose favour award is given. It is stated that the workmen concerned are being paid wages accordingly as directed by this Court vide order dated 27.1.2011 and a modification application by the workmen concerned has been filed as the employer were compelled by the reason of contempt application filed by

the workmen concerned that they are entitled the current salary even without working.

Learned counsel for the respondents has submitted that in the meantime they will not press the contempt petition and further they may be granted time to file objection to the modification application. The petitioner has sought the modification application for not compelling to take the work from the workmen concerned.

As prayed, two weeks time is allowed to Shri Siddharth Khare, learned counsel for the respondents for filing objection to the application for modification of the order. Learned counsel for the applicant is also allowed two weeks' time to file reply to the objection, if any, filed by Shri Siddharth Khare.

List immediately after expiry of the aforesaid four weeks."

6. This would mean that the respondents had been taken back in service and must have also been granted their salaries. However, learned counsel for the respondent-workmen submitted that the Tribunal erred in not granting the back-wages and relied upon **(1999) 6 SCC 82 : Ajaib Singh vs. The Sirhind Co-Operative Marketing-cum-Processing Service Society Limited & Ors.**

7. Having heard learned counsel for the Bank and the workmen, I am of the view that the award requires no interference. Since sections 25G and 25H of the Central Act and Rules 77 and 78 of the Central Rules were referred to by the learned counsel, they are being reproduced here as under :-

"Section 25G. Procedure for retrenchment.--Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

Section 25H. Re-employment of retrenched workmen.--Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons.

Rule 77. Maintenance of seniority list of workmen.--The employer shall prepare a list of all workmen in the particular category from which retrenchment is contemplated arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on a notice board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment.

Rule 78. Re-employment of retrenched workmen.--(1) At least ten days before the date on which vacancies are to be filled, the employer shall arrange for the display on a notice board in a conspicuous place in the premises of the industrial establishment details of those vacancies and shall also give intimation of those vacancies by registered post to every one of all the retrenched workmen eligible to be considered thereof, to the address

given by him at the time of retrenchment or at any time thereafter:

Provided that where the number of such vacancies is less than the number of retrenched workmen, it shall be sufficient if intimation is given by the employer individually to the senior-most retrenched workmen in the list referred to in rule 77 the number of such senior-most workmen being double the number of such vacancies:

Provided further that where the vacancy is of a duration of less than one month there shall be no obligation on the employer to send intimation of such vacancy to individual retrenched workmen:

Provided also that if a retrenched workman, without sufficient cause being shown in writing to the employer, does not offer himself for re-employment on the date or dates specified in the intimation sent to him by the employer under this sub-rule, the employer may not intimate to him the vacancies that may be filled on any subsequent occasion.

(2) Immediately after complying with the provisions of sub-rule (1), the employer shall also inform the trade unions connected with the industrial establishment, of the number of vacancies to be filled and names of the retrenched workmen to whom intimation has been sent under that sub-rule:

Provided that the provisions of this sub-rule need not be complied with by the employer in any case where intimation is sent to every one of the workmen mentioned in the list prepared under rule 77."

8. The submission of the learned counsel for the Bank that the Reference when was with regard to the opportunity as was to be granted under section 25H, then the Tribunal could not have given further findings with regard to the provisions of section 25G and Rules 77 and 78 of the Central Rules is absolutely misplaced. I am of the view that unless findings with regard to the provisions of Rules 77 and 78 of the Central Rules and with regard to the provisions of section 25G are given, the Tribunal could not have arrived at a proper conclusion as to whether the provisions of section 25H were violated. The Tribunal, in the fitness of things, found that no proper seniority list was maintained; no proper opportunity to the respondents, as was required to be given under the Rules, was provided before regularising persons junior to them and further the Tribunal correctly found that the delay on the part of the respondent-workmen was negligible. No fault can also be found with regard to the findings viz-a-viz. the application of the SASTRY Award and bipartite agreement in the case.

9. The workmen must have been taken back in service as per the interim orders of this Court and, therefore, I do not find it appropriate to grant any back-wages as since 2011 they must have been getting their regular salaries.

10. Under such circumstances, I find that no interference is warranted in both the writ petitions. The writ petitions are, therefore, dismissed. However, if in pursuance of the interim orders, the workmen have not been reinstated, then it would be deemed that they were reinstated on the date when the first interim order dated 23.8.2011 was passed and all wages which were payable to the workman viz-a-viz. the date of the interim order dated 23.8.2011 would be granted to them. It may be stated that all consequential benefits of the award whereby the workmen were required to be reinstated shall also be provided to the respondent-workmen.

(2020)06ILR A255
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-C No. 13490 of 2009

Abul Hasan & Ors. ...Petitioners
Versus
Additional Commissioner (Second), Allahabad Division & Ors.. ...Respondents

Counsel for the Petitioners:
Sri M.N. Singh, Sri Mahesh Narain Singh

Counsel for the Respondents:
C.S.C., Sri Aun Haider, Sri Pramod Kumar Pandey, Sri Rajiv Lochan Shukla, Sri Salman Ahmad, Sri V.K. Singh

A. Civil Law - Code of Civil Procedure ,1908 - Section 5 - Order 9 Rule 13 - The Limitation Act, 1963 - allowing application under Order 9 Rule 13 of C.P.C. - setting aside decree ex parte against defendant - S.D.M committed jurisdictional error - no proper application for condonation of delay - rightly corrected by the revision court in exercise of its revisional power - order of the revision court based on settled principles of law - no illegality or infirmity in the said order - if the act of advocate is not in furtherance to accomplish the purpose for which he has been engaged by his client or against the statutory provisions or rules, such an act of advocate would not be binding upon the client (*Director of Elementary Education Odisha & Others Vs. Pramod Kumar Sahoo 2019 (10) SCC 674*). (Para - 23,27)

Respondent no.2 instituted partition suit before Sub-Divisional Magistrate - under Section 176 of U.P. Zamindari Abolition and Land Reforms Act, 1950 - ex-parte judgement and decree passed - preliminary decree prepared - quras prepared by lekhpal - application under Order 9 Rule 13 of C.P.C. filed by the petitioners - delay of four years after the exparte judgement - no application under Section 5 of The Limitation Act, 1963 filed by the petitioners - specific objection raised by respondent no.2 - regarding maintainability of application under 9 Rule 13 of C.P.C. being barred by time - S.D.M. did not consider objections - passed a cryptic order - allowing the application under Order 9 Rule 13 of C.P.C with cost of Rs.300/- - objection of the petitioners - once the cost of Rs.300/- is accepted by counsel for respondent no.2, it is not open to respondent no.2 to challenge the said order. (Para - 14,15,24)

HELD:- Acceptance of cost by the advocate of the respondent no.2 is not an act in furtherance to accomplish the purpose for which he was engaged and also in violation of statutory provision as the application under Order 9 Rule 13 of C.P.C. was incompetent in absence of delay condoantion application and any order passed condoning the delay in filing the aforesaid application - Such an act of respondent no.2 would not debar him from challenging the order of S.D.M. setting aside ex-parte judgment and decree. (Para-27)

Petitions dismissed.(E-7)

List of Cases Cited:-

1.Balwant Singh (dead) Vs Jagdish Singh & ors., AIR (2010) SC 3043

2. Ramlal & ors. Vs Rewa Coalfields Ltd., AIR (1962) SC 361

3. Ramesh Chand Sharma Vs Udham Singh Kamal & ors., (1999) 8 SCC 304

4. Himalayan Cooperative Group Housing Society Vs Balwan Singh, (2015) 7 SCC 373

5. Director of Elementary Education Odisha & ors. Vs Pramod Kumar Sahoo, (2019) 10 SCC 674

(Delivered by Hon'ble Saral Srivastava, J.)

Order on Civil Misc. Delay Condonation Application No.268647 of 2012.

1. The delay condonation application has been filed to condone the delay in filing the Substitution Application No.268649 of 2012 to substitute the legal heirs of respondent no.3 Sariful Hasan, who died on 06.03.2009 and legal heirs of respondent no.4, Nazmul Hasan, who died on 06.06.2010.

2. A joint affidavit in support of aforesaid two applications has been file by one Abul Hasan. The aforesaid substitution application has been filed on 10.09.2012. The reason for delay has been stated in paragraph 5 to 8 of the affidavit which are being extracted hereinbelow:-

"5. That subsequent to the death of the aforesaid respondents although substitution application, for bringing their heirs on record, was filed on behalf of the petitioner in case no. 54/2008 (Shamsul Hasan Versus Saliya Khatoon) which is pending before the Civil Judge (Jr. Div.) Khaga District Fatehpur but due to inadvertent mistake this substitution application, immediately after death of the deceased/respondents, could not be filed in the present writ petition.

6. That recently on 20.4.2012 an abatement application with regard to the deceased respondent no.3 and 4 was received in the office of the learned counsel for the petitioners whereby the deponent received information for taking necessary steps and for filing of reply to the same.

7. That immediately thereafter the deponent rush to Allahabad, informed the aforesaid necessary facts to his learned counsel immediately where after without any further delay, the present substitution application is being filed.

8. That the delay occurred in filing the present substitution application is neither intentionally nor knowingly as such same may be condoned and present substitution application may be allowed setting aside the abatement if any."

3. The respondent no.2 filed counter affidavit to the aforesaid delay condonation application contending inter alia that petitioner in paragraph 5 of the affidavit has not stated the date of filing the substitution application in Case No.54 of 2008 (Shamsul Hasan Vs. Saliya Khatoon) pending before Civil Judge (Junior Division), Khaga, District Fatehpur. It is further stated that the deceased and petitioners belonged to one family and were neighbours, and petitioners had full knowledge about the death of respondent nos.3 & 4. Thus, the delay in filing the substitution application was deliberate and intentional. It is further stated that the abatement application filed by respondent no.2 was served in the office of counsel for petitioner on 20.04.2012, and petitioners filed substitution application on 09.09.2012 after 114 days from the date of receiving the abatement application without stating the cause for delay of 114 days in filing the substitution application. On the basis of aforesaid pleadings, respondent no.2 has prayed for dismissal of the delay condonation application.

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

5. The respondent no.3 had died on 06.03.2009 and respondent no.4 had died on 06.06.2010, therefore, there was delay of about more than three years from the date of death of respondent no.3 and more than two years from the date of death of respondent no.4 in filing the substitution application. The paragraph 5 of the affidavit filed in support of the delay condonation application, extracted above, clearly reveals that petitioners had knowledge about the death of respondent nos.3 & 4 and they had filed the substitution application to bring the legal heirs of respondent nos.3 & 4 on

record in Case No.54 of 2008 (Shamsul Hasan Vs. Saliya Khatoon), but no reason has been given by the petitioners in the affidavit which prevented the petitioners from filing the substitution application in the present case.

6. Further, it is also admitted on record that petitioners had received abatement application filed by respondent no.2 on 20.04.2012, yet petitioners did file substitution application, and no explanation has been tendered by the petitioners in the affidavit for 114 days delay in filing the substitution application after receiving the abatement application.

7. In view of this fact, the Court is of the opinion that there is inordinate delay of more than three years from the date of death of respondent no.3 and more than two years from the date of death of respondent no..4 in filing the substitution application, and no cogent and sufficient explanation has been tendered by the petitioners which prevented them from filing the substitution application in time, therefore, delay in filing the substitution application was not bona-fide.

8. At this juncture, it would be apt to refer the judgement of Apex Court in the case of ***Balwant Singh (dead) Vs. Jagdish Singh and others, AIR 2010 SC 3043*** wherein Apex Court has refused to condone the delay of 778 days in filing the substitution application by heirs of appellant who died on 28.11.2007. Paragraph 13 of the judgement is extracted hereinbelow:-

"13. As held by this Court in the case of Mithailal Dalsangar Singh (supra), the abatement results in the denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be construed liberally. We may state that even if the term `sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of `reasonableness' as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application

should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party. In the case of State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94], this Court had taken a liberal approach for condoning the delay in cases of the Government, to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. In the case of Ramlal and others v. Rewa Coalfields Ltd., [AIR 1962 SC 361] this Court took the view:

"7. In construing Section 5 is relevant to bear in mind two important considerations.

The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chathappan, ILR 13 Mad 269.

It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;...

9. Thus, for the reasons given above and in the light of judgement of Apex Court in the case of ***Balwant Singh (dead) (supra)***, the delay condonation application lacks merit and is accordingly, ***dismissed***. Consequently, substitution application is also dismissed and abatement application No.128911 of 2012 filed by the respondent no.2 is allowed and writ petition is abated against the respondent nos.3 and 4.

Order on Writ Petition.

1. The petitioners by means of the present writ petition have assailed the order dated 14.08.2006 passed by the Additional Commissioner (Second), Allahabad Division, Allahabad in Revision No.333 of 2005 (Smt. Saiyda Saleha Khatoon Vs.

Manzar Hasan and Others) and order dated 20.12.2008 passed by Additional Commissioner (Second), Allahabad Division, Allahabad on Review Application of petitioners in Revision No.333 of 2005.

2. The facts of the present case in nutshell are that respondent no.2 Smt. Saiyda Saleha Khatoon instituted Case No.10 of 1998-99 under Section 176 of U.P. Zamindari Abolition and Land Reforms Act, 1950 in the court of Sub-Divisional Magistrate, Khaga, Fatehpur (hereinafter referred to as "S.D.M, Fatehpur') praying for decree of partition of Gata No.66 having an area of 0.767 hectare, Gata No.826 having an area of 0.065 hectare and Gata No.850 having an area of 0.720 hectare situated in Araji Mauja Bahera Sadat, Pargana Hathgaam, Tehsil Khaga, District Fatehpur.

3. The aforesaid suit has been instituted by respondent no.2 contending inter alia that she is the owner of half of the aforesaid gatas and respondent nos.3 to 5 and 7 (defendants in the suit) are the owner of remaining half of the aforesaid gatas. It appears that the suit proceeded exparte against the petitioners as well as respondent nos.3 to 5 and 7. The suit was decreed ex-parte by judgement and order dated 23.06.1999 passed by S.D.M., Khaga, Fatehpur. Thereafter, a preliminary decree was prepared on 28.05.1999. Pursuant to the aforesaid decree, quras were also prepared on 23.06.1999.

4. The petitioners allege that they came to know about the exparte decree only when quras were sought to be executed on spot on 23.06.1999. The petitioners, thereafter, filed an application under Order 9 Rule 13 of C.P.C. on 28.1.2003 registered as Misc. Case No.10 of 1998-99 before the S.D.M, Fatehpur for setting aside the exparte judgement dated 23.06.1999, preliminary decree dated 28.05.1999 and order dated 23.06.1999 directing for preparation of quras.

5. In the aforesaid application, petitioners alleged that they came to know about the exparte decree from Lekhpal when he sought to execute the quras prepared pursuant to the exparte decree. It is further stated that mother of applicant was suffering from cancer and was undergoing treatment at Sanjay Gandhi Postgraduate Institute of Medical Sciences where she died and after funeral and observing other rituals, petitioners got the record of the case inspected and came to know on 22.01.2003 about the exparte decree. It is further stated that there was no service of summons upon the petitioners and by plying fraud, respondent no.2 has obtained exparte decree. The necessary averments has been made in paragraph 3, 4 & 5 of the application which are being extracted hereinbelow:-

"दफा 3:– यह कि प्रार्थी अबुल हसन को अभी हाल में ही दिसम्बर के अन्तिम सप्ताह में जरिये हल्का लेखपाल के माध्यम से जानकारी हुई कि वाद से सम्बन्धित विवादित भूमि का सरकारी बंटवारा सालेहा खातून ने कराया है जिसकी मौके पर बॅटवारा आदेश के ही तहत कब्जा दखल करा कर उनकी मेड़ बंधवानी है, तुरन्त ही प्रार्थी अबुल हसन ने अपने अन्य भाई एवं मन्जर हसन को इसकी सूचना दी। मन्जर हसन प्रार्थी की मॉ कैन्सर से उस वक्त पीड़ित थी जिनका इलाज वह पोस्ट ग्रेजुएट संजय गॉधी संस्थान लखनउ से करा रहे थे, किन्तु दुर्भाग्यवश उनका इन्तकाल भी हो गया और जब वह अपनी मॉका चालीसवॉ वगैरह कराने के पश्चात् उन्हें जब थोड़ा दिमागी सुमूल मिला तब वकील साहब के माध्यम से पत्रावली बॅटवारा की मुआइना कराया तब उन्हें सर्व प्रथम दिनांक 22.01.03 को जानकारी हुयी कि उक्त सालेहा खातून वादिनी ने शरीफुल व जफरूल के साथ

एवं षडयंत्र के तहत अपना उक्त बॅटवारा बिना हम प्रार्थीगण के जानकारी के बगैर विधिवत् सम्मन तामीला के ही गलत तरीकों के माध्यम से बिना किसी हक व अधिकार के विवादित भूमि में अपना हक पैदा करने की नियत से करा पाने में फौरी तौर पर सफल हो गया।

दफा 4:— यह कि प्रार्थी मन्जर हसन सिविल कोर्ट फतेहपुर में जनवरी 1978 ई0 में नौकरी ज्वाइन करके अपना स्वयं का रेहाईश मोहल्ला चौधराना मकान नम्बर 67 शहर व जिला—फतेहपुर में रहता चला आ रहा है। प्रार्थी को कभी भी उक्त पते पर सम्मन नहीं भेजा गया और सर्विस पते पर भी वादिनी द्वारा कोई सम्मन भेजने का कोई भी प्रयास जानबूझ कर नहीं किया गया यद्यपि कि वादिनी द्वारा अपने प्रार्थनापत्र दिनांक 17.12.1998 ई0 में इस तथ्य का उल्लेख किया गया कि मन्जर हसन पुत्र कमरूल हसन शहर फतेहपुर में नौकरी करते हैं। इस प्रकार मन्जर हसन की फतेहपुर के पते पर कोई भी सम्मन न्यायालय द्वारा निर्गत नहीं हुआ और न ही उन पर कानूनन सम्मन का कोई भी तामीला पर्याप्त ही माना जा सकता है।

दफा 5:— यह कि मन्जर हसन प्रार्थी के अलावॉ प्रार्थीगण शमशुल हसन, हसनैन हसन, एजाज हसन व अबुल हसन पर भी सम्मन का व्यक्तिगत कोई तामीला नहीं है, किन्तु उन पर गलत तरीकों से इण्डोर्समेण्ट करा दिया गया है, जबकि उन पर हस्व मन्शा कानून ओदश 5 नियम 17 जाब्जा दीवानी का भी अनुपालन तामीला नहीं माना जा सकता है।''

6. The aforesaid application was contested by respondent no.2 by filing objection contending inter alia that restoration application filed by petitioners is highly time barred as it has been filed after four years from the date of the judgement in the partition suit. It is also contended that claim of Badrul Hasan, Kamrul Hasan and Faqrul Hasan, fathers of defendants in respect of property in dispute on the basis of some sale deed alleged to have been executed in the year 1923 was turned down by the consolidation officer by judgement dated 13.04.1976.

7. It is further averred that respondent no.2 filed a mutation case under Section 34 of L.R. Act which was opposed by judgement debtors and they lost the case upto the court of Additional Commissioner and name of respondent no.2 has been mutated in the revenue records. In the said application, respondent no.2 also gave reference to several other litigations which had been contested between the parties. In respect of service of notice, respondent no.2 gave details in paragraph 7 of the objection as to how the service of summons were effected upon the petitioner as well as other defendants in the suit. Paragraph 7 of the objection is being extracted hereinbelow:-

"7 That so far the question of so-called technical service of summon and notice is concerned, this court made every effort to procure the attendance of all the J.Ds and the deponent complied all the orders of this court in this regard. For example:-

"(I). The applicants Hasnain Hasan and Aijaz Hasan Nos. 3 and 4 are the real brothers and pairokar of the applicant nos.2 and 5 were personally served by process-server of this court on 14.12.1998 and their brothers summons was served by affixation.

(II). That later the Gram Sabha and the opposite parties Nos.2 and 3 and 4, the J.Ds were also personally served who are no other an the real uncle's son of Manzar Hasan the Chief Mischief monger and this court having been satisfied that Manzar Hasan wielding his influence is deliberately avoiding service of summons. However, this court passed orders for

summoning them by publication which was published on 13.12.1998.

(III). That none of the J.Ds appeared in the court and as such the 1/2 (Half) share purchased by the Saleha Khatoon was held and ordered to be separated. The court provided full opportunity to the defendants and passed the decree and final decree, delivered the possession. The J.Ds were taking false and lame excuses. Moreover, the share of the Vendor and that of Saleha Khatoon is not disputed now and cannot be asserted under law as the same is not only barred by principles of Resjudicata but also Role of Estoppel and the section 49 of U.P. Consolidation of Holdings Act.

(IV). That the J.Ds have suffered no loss or injury or prejudice by the preliminary/final decree as nothing has been written in this regard and as such the application under Order 9 Rule 13 is totally untenable which will mean the turning round the whole judicial process and creating confusion and dispute on spot regarding possession.

(V). That the application and affidavit of some of the Judgment Debtors are totally false and is time barred and also has no merit and is liable to be dismissed."

8. The S.D.M, Fatehpur allowed the application under Order 9 Rule 13 of C.P.C. by order dated 05.07.2005. The order dated 05.07.2005 reads as:-

"पक्षों को सुना। पत्रावली देखा। न्यायहित में एकपक्षीय आदेश दि 13.01.99, 25.05.99, व 23.06.99 मु0 300/– (तीन सौ रूपया) हर्जाना की अदायगी पर निरस्त किया जाता है।
ह0अ0
एस0डी0एम0
05.07.05
300/–तीन सौ रूपया प्राप्त किया।
ह0अ0
18.07.05""

9. Against the order dated 05.07.2005, respondent no.2 preferred Revision No.333 of 2005 before Commissioner, Allahabad which was later on transferred to the court of Additional Commissioner-II Allahabad Division, Allahabad (hereinafter referred to as "Additional Commissioner'). The revision was allowed by the Additional Commissioner by order dated 14.08.2006 by recording a finding that S.D.M., Fatehpur should have given notice of recall application to respondent no.2 (revision-applicant). It further recorded that the court below did not return any finding in respect of delay in filing the application under Order 9 Rule 13 of C.P.C. and without any order having been passed condoning the delay in filing the application under Order 9 Rule 13 of C.P.C., the ex-parte judgement and decree could not have been set aside by the S.D.M, Fatehpur.

10. The petitioner, thereafter, preferred a review application against the order dated 14.08.2006 contending therein that finding of Additional Commissioner that revision-applicant (respondent no.2 in writ petition) was not heard before passing the order on the recall application was wrong and against the record inasmuch as the counsel for revision-applicant had accepted the cost of Rs.300/-. It is further stated in the review application that no order for condoning the delay in filing the recall application is needed, and revision court has erred in setting aside the order passed by the S.D.M., Fatehpur dated 05.07.2005. The aforesaid review application was dismissed by the Additional Commissioner by order dated 20.12.2008 as the Additional Commissioner found no merit in the review application.

11. Challenging the aforesaid order, learned counsel for the petitioner has contended that the revision court has erred in setting aside the ex-parte judgment and decree inasmuch as respondent no.2 is bound by the act of acceptance of cost by his counsel which amounted to acquiescing to the order of S.D.M., Fatehpur. Thus, he submits that once the cost has been accepted by counsel of the respondent no.2, the revision court has committed jurisdictional error in allowing the revision and setting aside the order dated 05.07.2005 passed by the S.D.M., Fatehpur.

12. Per contra, learned counsel for respondents has contended that detail objections were filed by the respondent no.2 before the S.D.M., Fatehpur against the application under Order 9 Rule 13 of C.P.C. wherein respondent no.2 has averred that there was inordinate delay in filing the recall application and further, facts in detail have been stated in the said objection regarding the service of summons upon the petitioners as well as other defendants, but the S.D.M., Fatehpur while passing the order dated 05.07.2005 has failed to record any finding on the said objection. He further contends that unless the delay in filing the application under Order 9 Rule 13 of C.P.C. was condoned, the S.D.M, Fatehpur had no jurisdiction to decide the application under Order 9 Rule 13 of C.P.C. He further submits that no application under Section 5 of Limitation Act had been filed praying for condonation of delay in filing the application under Order 9 Rule 13 of C.P.C. and thus, in the absence of any such application praying for condonation of delay and any order passed by the S.D.M., Fatehpur condoning the delay in filing the recall application, the order of S.D.M., Fatehpur dated 05.07.2005 is per se illegal and without jurisdiction. Thus, the submission is that revision court has not committed any jurisdictional error which calls for interference by this Court in exercise of power under Article 226 of Constitution of India.

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

14. In the case in hand, the ex-parte judgement and decree was passed on 23.06.1999. The preliminary decree was prepared on 28.05.1999 and quras pursuant to the preliminary decree were prepared on 23.06.1999. The application under Order 9 Rule 13 of C.P.C. was filed by the petitioners on 28.01.2003 which was four years after the exparte judgement dated 23.06.1999. The record reveals that no application under Section 5 of The Limitation Act, 1963 was filed by the petitioners praying for condonation of delay in filing application to set aside ex-parte judgment and decree. Even in application under Order 9 Rule 13 of C.P.C., the petitioners have not made any averment explaining the delay in filing the application. Paragraph 3 to 5 of the application under Order 9 Rule 13 of C.P.C., extracted above, clearly reveals that vague averment has been made regarding the knowledge of the exparte judgement.

15. The respondent no.2 raised a specific objection regarding the maintainability of application under 9 Rule 13 of C.P.C. being barred by time in paragraph 7 (v) of the objection extracted above. The S.D.M. while allowing the application under Order 9 Rule 13 of C.P.C. did not deal with the objection of respondent no.2 regarding the maintainability of the application under Order 9 Rule 13 of C.P.C being barred by

time. Further, in paragraph 7 (i) to (v) of the objection, extracted above, petitioners have also made specific averment regarding the service of notice upon the petitioners. The S.D.M., Fatehpur did not consider the aforesaid objections and passed a cryptic order allowing the application under Order 9 Rule 13 of C.P.C with cost of Rs.300/-.

16. The petitioners raised specific objection in revision that application under Order 9 Rule 13 of C.P.C was barred by time and not maintainable and further, summons were duly served upon the petitioners and burden was upon the petitioners to prove that summons were not served upon them which the petitioners had utterly failed to do as they did not lead any evidence to substantiate the averment made in application under Order 9 Rule 13 of C.P.C that summons were not served upon them.

17. The revision court after hearing parties recorded specific finding that in absence of any delay condonation application or any order passed by the S.D.M., Fatehpur condoning the delay in filing the application under Order 9 Rule 13 of C.P.C, the S.D.M., Fatehpur had no jurisdiction to decide application under Order 9 Rule 13 of C.P.C. The revision court also noticed the fact that no notice fixing the date of hearing on application under Order 9 Rule 13 of C.P.C was served upon respondent no.2, and therefore, the order of S.D.M, Fatehpur dated 05.07.2005 is not sustainable as the same was without hearing the respondent no.2. The Additional Commissioner while deciding the review application found that there was no error committed by the revision court in deciding the revision and, consequently, Additional Commissioner found no merit in the review application and rejected the same by order dated 20.10.2008.

18. Now, the question that arises for consideration in the present case is as to whether S.D.M, Fatehpur had jurisdiction to proceed with the application under Order 9 Rule 13 of C.P.C filed after the period of limitation without condoning the delay in filing the application.

19. Article 123 of schedule of the Limitation Act, 1963 provides for limitation in filing an application to set aside a decree passed exparte or heard exparte. Article 123 is extracted hereinbelow:-

"THIRD DIVISION-APPLICATIONS

Description of application	*Period of Limitation*	*Time from which period begins to run.*
...		
123. To set aside a decree passed ex parte or to re-hear an appeal decreed or heard ex parte.	*Thirty days*	*The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.* *Explanation- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service."*

20. Thus, Article 123 provides 30 days time for filing application to set aside the ex-parte decree from the date of the decree or where the summons or notice was

not duly served, when the applicant had knowledge of the decree.

21. It would be apt to refer the judgement of Apex Court in the case of ***Ramesh Chand Sharma Vs. Udham Singh Kamal and Others 1999 (8) SCC 304*** where Apex Court had set aside the judgement of Central Administrative Tribunal whereby the Central Administrative Tribunal had allowed the original application without condoning the delay in filing the original application which was admittedly filed after the period of limitation. Paragraph 6 & 7 of the judgement is extracted hereinbelow:-

"6. Learned Counsel for the first respondent urged that after his representation was rejected by the Himachal Pradesh Government on 2nd July, 1991. he had made another representation pointing out the factual position and, therefore, the period of limitation needs to be counted not from 2nd July, 1991 but from the date of rejection of his second representation (no date mentioned). He also urged that the vacancy arose because one Shri Sita Ram Dholeta who was holding the post and working as Translator-cum- Legal Assistant went on deputation in March, 1990 by keeping a Hen on the said post. This respondent was under a bonafide belief that until the lien comes to an end, there may not be a clear vacancy and, therefore, as and when such vacancy arises, his claim would be considered. It is in these circumstances, he did not file O.A. at an early date. If there be any delay, the same may be condoned.

7. On perusal of the materials on record and after hearing counsel for the parties, we are of the opinion that the explanation sought to be given before us cannot be entertained as no foundation thereof was laid before the Tribunal. It was open to the first respondent to make proper application under Section 21(3) of the Act for condonation of delay and having not done so, he cannot be permitted to take up such contention at this late stage. In our opinion, the O.A. filed before the Tribunal after the expiry of three years could not have been admitted and disposed of on merits in view of the statutory provision contained in Section 21(1) of the Administrative Tribunals Act, 1985. The law in this behalf is now settled, (see Secretary to Government of India and Others v. Shivam Mahadu Gaikwad, [1995] Supp. 3 SCC 231)"

22. The S.D.M, Fatehpur while allowing the application under Order 9 Rule 13 of C.P.C has failed to appreciate that the application of the petitioners under Order 9 Rule 13 of C.P.C. was not maintainable in absence of delay condonation application. Further, even in application under Order 9 Rule 13 of C.P.C, the petitioners have not averred any fact explaining the delay in filing the application under Order 9 Rule 13 of C.P.C nor they had disclosed the date of knowledge of the ex-parte judgement.

23. The respondent no.2 has raised the issue of maintainability of application under Order 9 Rule 13 of C.P.C being barred by time and further, summons were duly served upon the petitioners. The aforesaid objections raised by the respondent no.2 were not dealt by S.D.M., Fatehpur in allowing the application under Order 9 Rule 13 of C.P.C. Thus, this Court finds that S.D.M, Fatehpur has committed jurisdictional error in allowing application under Order 9 Rule 13 of C.P.C. without there being any proper application for condonation of delay which has been

rightly corrected by the revision court in exercise of its revisional power. Thus, the order of the revision court is based on settled principles of law and there is no illegality or infirmity in the said order.

24. As regards the objection of the petitioners that once the cost of Rs.300/- is accepted by counsel for respondent no.2, it is not open to respondent no.2 to challenge the said order. In this regard, it would be worth to refer two judgements of Apex Court namely, ***Himalayan Cooperative Group Housing Society Vs. Balwan Singh 2015 (7) SCC 373 and Director of Elementary Education Odisha & Others Vs. Pramod Kumar Sahoo 2019 (10) SCC 674*** relied upon by the learned counsel for the respondents which deals with the clients and lawyers relationship.

25. Paragraph 23 of the judgement of Apex Court in the case of ***Himalayan Cooperative Group Housing Society (supra)*** is being extracted hereinbelow:-

"23. Apart from the above, in our view lawyers are perceived to be their client's agents. The law of agency may not strictly apply to the client - lawyer's relationship as lawyers or agents, lawyers have certain authority and certain duties. Because lawyers are also fiduciaries, their duties will sometimes more demanding than those imposed on other agents. The authority-agency status affords the lawyers to act for the client on the subject matter of the retainer. One of the most basic principles of the lawyer-client relationships is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/ settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly belong to the client, the lawyers conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel"

26. Paragraphs 8 and 11 of the judgement of Apex Court in the case of ***Director of Elementary Education Odisha (supra)*** relevant in the present case are extracted hereinbelow:-

"8. Learned counsel for the appellant submitted that the separate pay scales are provided for Untrained Matric Teachers (Rs.975-25-1, 150-E.B.-30-1,660) and for Trained Matric Teachers (Rs.1,080-30- 1,440-EB-30-1,800). Merely because the respondent is intermediate, that is higher qualification than the Matric, does not make him a Trained Teacher. Therefore, the concession given by the State counsel is erroneous concession in law and, does not bind the appellant. Reference was made to Himalayan Coop. Group Housing Society v. Balwan Singh & Ors.2 wherein, this Court held as under:

"32. Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a

purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions...."

(Emphasis supplied)

9....

10....

11. The concession given by the learned State Counsel before the Tribunal was a concession in law and contrary to the statutory rules. Such concession is not binding on the State for the reason that there cannot be any estoppel against law. The rules provide for a specific Grade of Pay, therefore, the concession given by the learned State Counsel before the Tribunal is not binding on the appellant".

27. In the aforesaid cases, the Apex Court has held that if the act of advocate is not in furtherance to accomplish the purpose for which he has been engaged by his client or against the statutory provisions or rules, such an act of advocate would not be binding upon the client. In the present case, acceptance of cost by the advocate of the respondent no.2 is not an act in furtherance to accomplish the purpose for which he was engaged and also in violation of statutory provision as the application under Order 9 Rule 13 of C.P.C. was incompetent in absence of delay condoantion application and any order passed condoning the delay in filing the aforesaid application. Thus, such an act of respondent no.2 would not debar the respondent no. 2 from challenging the order of S.D.M., Fatehpur setting aside ex-parte judgment and decree. Thus, the contention of petitioners that the acceptance of cost by the advocate would debar the respondents from challenging the order dated 05.07.2005 is misconceived and not sustainable in law.

28. Thus, for the reasons given above, this Court finds no merit in the submission of the counsel for the petitioner. The writ petition lacks merit and is, accordingly, ***dismissed***. There is no order as to cost.

(2020)06ILR A266
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ-C No. 25643 of 2017

Raj Nagar Extension Developers(N.H.58) Association, Ghaziabad & Anr. **...Petitioners**

Versus

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

Counsel for the Petitioners:
Sri Shashi Nandan, Sri Pankaj Agarwal, Sri Ram Bilas Yadav, Sri Mahesh Chandra Chaturvedi, Sri Mahesh Narain Singh, Sri Vrindawan Mishra

Counsel for the Respondents:
C.S.C., Sri Anoop Trivedi, Sri Ram Bilas Yadav

A. Constitution of India - Article 265 – fiscal principle - no tax shall be levied and collected except by authority of law - State or its instrumentalities can not raise any demand or collect any amount from any individual without statutory backing - the Societies Registration Act, 1860 - Uttar Pradesh Urban Planning and Development Act, 1973 - Section 15 - U.P. Urban Planning and Development (Assessment, Levy and Collection of Development Fee) Rules, 2014 - No estoppel against the Statute - if the Statute does not provide for a thing, the same can not be done and even if accepted, the person is not debarred from disputing the demand subsequently - conferment of jurisdiction is a legislative function - no authority under law can derive jurisdiction otherwise than from the Statues - any order passed without jurisdiction - would be a nullity and its validity can be challenged at any stage - doctrine of waiver or acquiescence - not allowed to prevail as it would perpetuate and perpetrate defeat of the legislative intent. (Para-13,28,29)

Petitioner - registered society - under the Societies Registration Act, 1860 - having 25 Real Estate Developers as its members - demand notices issued against the members of the Society - certain demands raised by the Ghaziabad Development Authority with regard to external development fees - includes development of elevated road and metro station, as well as fee for additional Floor Area Ratio (in short "F.A.R.") - security for rain water harvesting while sanctioning the lay out plan of each of the members of the Society - no provision in respect of demands raised by the Development Authority. (Para – 1,2,3,26)

HELD:- The demands of external development fee under the head elevated road and metro station; fee for the increased F.A.R from 1.5 to 2.5; and security for rain water harvesting are held to be illegal and without jurisdiction - demands are hereby quashed in so far as they relate to the members of the petitioner Society. (Para – 35)

Petition allowed.(E-7)

List of Cases Cited:-

1.Kishan LL Lal Vs St. of Raj. AIR (1990) SC 2269

2.Feroz Dotiwala Vs P.M. Wadhwani & ors. (2003) 1 SCC 433

3.D.D.A Vs Ravindra Mohan Agarawal (1993) 3 SCC 172

4.M.I. Builders Pvt. Ltd. Vs Radhey Shyam Sahu (1999) 6 SCC464

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

1. The petitioner no. 1 Raj Nagar Extension (NH-58) Developers Association is a registered society under the Societies Registration Act, 1860 having 25 Real Estate Developers as its members.

2. The aforesaid Society and its General Manager have preferred this writ petition aggrieved by the certain demands raised by the Ghaziabad Development Authority with regard to external development fees which includes development of elevated road and metro station, as well as fee for additional Floor Area Ratio (in short "*F.A.R.*") and security for rain water harvesting while sanctioning the lay out plan of each of the members of the Society.

3. The petitioners accordingly have prayed for quashing of some of the demand notices issued against the members of the Society and at the same time for deciding its representation disputing the aforesaid demands.

4. The parties have exchanged pleadings and have agreed for disposal of the petition at the stage of admission itself.

5. We have heard Sri Shashi Nandan, Senior Counsel assisted by Sri Pankaj Agrawal for the petitioners, learned Standing counsel and Sri M.C. Chaturvedi, Senior counsel assisted by Sri Mahesh Narain Singh, learned counsel appearing for respondents no. 2, 3 and 4 i.e. Ghaziabad Development Authority (hereinafter "G.D.A.").

6. Sri Shashi Nandan argued that the demand of additional external development charges under the head elevated road cess & metro cess as also demand of fee for additional F.A.R. and security for the rain water harvesting system is completely alien to the provisions of the Uttar Pradesh Urban Planning and Development Act, 1973 (for short the Act) and the Rules framed thereunder and as such are illegal and without jurisdiction. He submits that the individual developers/builders or the members of the Society are not concerned with the construction of any elevated road or metro station and therefore no fee on account of the same can be demanded under the head external development charges. The F.A.R. for the group housing is admissible to the extent of 2.5 and therefore the demand of fee for the additional F.A.R. from 1.5 to 2.5 is illegal. Similarly, there is no provision for demanding security of Rs. 2 lakhs for the rain harvesting system.

7. Sri M.C. Chaturvedi, Senior counsel rebuts the above arguments; first, on the ground that the demand of the above charges are against the individual Developers and not against the petitioner Society. Therefore, the petitioner Society has no locus to espouse the cause of individuals which is independent to each one of them. He submits that all the members of the petitioner Society were sanctioned their lay out plan on different dates and all of them have accepted the conditions of the sanction which includes the aforesaid demands without any let or hindrance and they even started paying the amounts as demanded.

8. In short, he contends that the members of the petitioner Society by paying part of the aforesaid demands have accepted the same and are estopped in law from disputing the said demands at this juncture.

9. The petitioner no. 1 as stated earlier is a Society of the Real Estate Developers which is duly registered. The petitioners have given the list of its members also and have even enclosed the resolution of the Society dated 24.5.2017 authorizing it to file the present writ petition on behalf of its members.

10. In view of the aforesaid even though all the members of the Society may be having a separate cause of action for challenging the demands raised against them but since the demands are of common nature, the Society is not denuded of the power to espouse the cause of its members and to file consolidated petition on behalf of all its members.

11. Accordingly, objections raised by Sri M.C. Chaturvedi in this regard are of no avail and stands overruled.

12. Now the primary question which is for our adjudication is whether the GDA can demand additional external development charges in connection with elevated road and metro station, fees on the increased additional F.A.R. other than which has been purchased by the Developers over and above the increased

F.A.R and security for rain harvesting system.

13. Article 265 of the Constitution of India in relation to imposition of tax and its collection mandates that no tax shall be levied and collected except by authority of law. Therefore, it has been well settled as a fiscal principle that no demand shall be raised and amount be collected except by an authority of law. On this very principle the State or its instrumentalities can not raise any demand or collect any amount from any individual without statutory backing.

14. The GDA is an authority constituted under the Act as a body corporate to administer the development of the area of the authority in accordance with the provisions of the said Act and the Rules framed thereunder. Therefore, all development plans, lay out plans, building maps, etc. have to be sanctioned by the Development Authority in accordance with the aforesaid Act subject to demand/payment of fees, cess and other charges as may be permitted under the Act and the Rules.

15. The "development fee" has been defined under Section 2 (ggg) of the said Act to mean a fee levied upon a person under Section 15 of the Act for construction of roads, drains, sewer lines, electric and water supplies by the development authority.

16. Section 15 of the Act provides for sanction of the plans in accordance with the bye laws and the Development Authority has been empowered to levy development fees, mutation charges, staking fees and water fees at such rate as may be prescribed, for sanctioning the plans.

17. A simple reading of the aforesaid two provisions of the Act would reveal that the authority can *inter alia* demand development fee which is primarily on account of construction of roads, drains, sewer lines and water and electric supply lines.

18. In this context it may pertinent to mention here that whenever the definition of any word begins with the word 'means' it is clearly indicative of the fact that the meaning of the said word has to be restricted to the meaning assigned therein and it would not mean anything else.1 In other words, development fee as defined under Section 2 (ggg) of the Act since it means fee for certain specific purposes, it would be confined to those charges alone and would not include within its fold any other charge or thing. Thus, the construction of elevated road or of the metro station would not be covered within the definition of development fee whether it happens to be internal or external so as to authorize the Development Authority to demand and collect the same.

19. Sri Shashi Nandan has also placed before us the U.P. Urban Planning and Development (Assessment, Levy and Collection of Development Fee) Rules, 2014 which have been framed under section 55 of the Act and notified on 17th November 2014.

20. A perusal of the aforesaid Rules would also reveal that there is no provision for demanding or collecting any development fee in context with elevated road or metro station.

21. There is no dispute to the fact that initially the GDA has permitted F.A.R. of 1.5 for group housing but subsequently the

State of U.P., vide notification dated 25.9.2008 *inter alia* provided additional F.A.R. for group housing and increased it from 1.5 to 2.5.

22. Since all the Developers who are members of the petitioners Society are engaged in group housing activity, they were entitle to F.A.R of 2.5 according to the above notification but the GDA has demanded fee on this increased F.A.R. also.

23. In this regard Sri Chaturvedi, Senior Counsel submitted that the aforesaid increased F.A.R. was again reduced to 1.5 and later on it was permitted to be increased to 2.5 and each of the development authority was left free to adopt the said increase, if necessary. The GDA has not adopted the aforesaid increase and therefore all these Developers are liable for the payment of fees in respect of the aforesaid increased F.A.R., also.

24. It is not in dispute that the order by which increase in F.A.R. was left to be adopted by each of the developers ie., the Government Order dated 4.8.2011 was not accepted by the Division Bench of this Court and it was held that when the permissible F.A.R. is 2.5 as per the notification dated 25.9.2008, then reliance on the Government Order dated 4.8.2011 is impermissible. Accordingly, the demand of fee on the aforesaid increase of F.A.R. was held to be illegal but observed that in case the Developers or Builders purchases additional F.A.R in excess of 2.5 then definitely they have to pay for the same.

25. In view of the above decision, the GDA can not demand any fee for increased F.A.R. upto 2.5. The Developers who are members of the petitioners Society are not disputing the fee/charges for the additional F.A.R. that they may have purchased beyond 2.5 upto the permissible limit of 4 as per the notification dated 25.9.2008.

26. No provision whatsoever was placed before us which empowers the Development Authority to demand development fee in reference to construction of elevated road and metro station and for the increased F.A.R. other than the F.A.R. purchased by the Developers/Builders. No provision permitting demand of any security for the purposes of rain harvesting system has also been brought to our notice. At the same time we ourselves are unable to find any provision in respect to any of the above demands raised by the Development Authority.

27. No doubt the above demands are part of the conditions of the sanction granted to the lay out plans of each of the Developers/Builders and they have started depositing the amount as demanded, Sri Shashi Nandan contended that the aforesaid amount was deposited by the Developers/Builders under duress as they have no other option as otherwise their lay out/map could not have been sanctioned jeopardizing the entire development work. This has been denied from the the side of the GDA and it is alleged that there is no material to show that any pressure was exerted upon the Developers or the Builders to deposit the amount. They have voluntarily accepted the demand and started depositing the amount and as such are estopped in law to challenge the said demands.

28. It is a cardinal principle of law that there is no estopple against the Statute. The necessary corollary of it is that if the Statute does not provide for a

thing, the same can not be done and even if accepted, the person is not debarred from disputing the demand subsequently.

29. It is settled legal proposition that conferment of jurisdiction is a legislative function and no authority under law can derive jurisdiction otherwise than from the Statues. It can neither be conferred with the consent of the parties or by any order of the Court, may be a superior Court. Thus, if any order is passed without jurisdiction it would be a nullity and its validity can be challenged at any stage. In such a situation, the doctrine of waiver or acquiescence are at times not allowed to prevail as it would perpetuate and perpetrate defeat of the legislative intent.

30. As stated earlier that any order which is patently without jurisdiction is a nullity in the eyes of law and its validity can be challenged at any stage. Thus, as the demands aforesaid are ex-facie without jurisdiction, the petitioners or the members of the petitioner Society are not precluded from challenging the same even if they may have acquiesced to the said demand earlier.

31. Moreover, waiver is in the nature of an agreement where the party accepts not to assert his rights. The waiver, therefore, is an intentional relinquishment of a right and involves a conscience decision to forgo a legal right, benefit or privilege and, as such, can not be ascertained by mere conduct of the party unless the intention to abandon the right is proved.

32. It is also tirite to mention that inaction in every case does not lead to an inference or implicate consent or acquiescence. It is also well recognized in law, when consideration of public interest are involved, there may be no estopple.

33. The doctrine of estopple by acquiescence is not permissible to be invoked to render a transaction valid even if it is otherwise not valid under the Statutes.2

34. In view of the aforesaid facts and circumstances, we find no force in the submission of Sri Chaturvedi in regard to estopple by acquiescence.

35. Accordingly, the demands of external development fee under the head elevated road and metro station; fee for the increased F.A.R from 1.5 to 2.5; and security for rain water harvesting are held to be illegal and without jurisdiction. The said demands are hereby quashed in so far as they relate to the members of the petitioner Society.

36. The writ petition stands **allowed** to the above extent with no order as to costs.

(2020)06ILR A271
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 26939 of 2017
&
Writ-C No. 26808 of 2017

Snehil Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Seemant Singh

Counsel for the Respondents:

A.S.G.I., Sri Gautam Baghel, Sri Neeraj Tripathi, Sri R.A. Akhtar, Sri Santosh Kumar Mishra

A. Civil Law - University and the University Grants Commission bound by their Resolutions and Notifications - UGC (MINIMUM STANDARDS AND PROCEDURE FOR AWARDS OF M.PHIL/PH.D. DEGREE) REGULATION, 2009 - University Grants Commission (Minimum Standards and Procedure for Award of M.PHIL./PH.D. Degrees) Regulations, 2016 - petitioners taken admission on the promise of the University - they would be allowed to continue with their D.Phil courses after they had got the requisite number of Cumulative Grade Points Average which had to be more than 6 - University bound to give admission as per their notification - never rescinded or superseded - University Grants Commission by its notification (specially Clause 12.1) - candidates registered for programmes on or after 11.7.2009 but before the notification of 5.5.2016 - continue to be governed by the provisions of the 2009 Regulations. (Para-9)

Petitioners taken admission on 17.8.2012 - commenced their study of the course of Graduation-cum-D.Phil. - completed their 10th Semester by 25.4.2017. - instead of admitting the petitioners to D.Phil. courses, they were being directed to take the Combined Research Entrance Test-2017 - by which they were required to take an admission test for admission to D.Phil. course in Globalization and Development Studies - petitioners praying to grant admission in D.Phil courses in the terms of the admission which was granted to them in the year 2012.(Para-1)

HELD:- When the petitioners had obtained their admissions in the year 2012 in accordance with the Rules/Regulations/Notifications of the University and also of the University Grants Commission, then there was nothing illegal in the admission - The University and the University Grants Commission both were bound by their Resolutions and Notifications - petitioners would be entitled for admission to the D.Phil courses. (Para-9,10)

Petition allowed.(E-7)

List of Cases Cited:-

(Delivered by Hon'ble Siddhartha Varma, J.)

1. The petitioners, in these petitions, had taken admission on 17.8.2012 and thereafter had commenced their study of the course of Graduation-cum-D.Phil. and had thereafter completed their 10th Semester by 25.4.2017. When instead of admitting the petitioners to D.Phil. courses, they were being directed to take the Combined Research Entrance Test-2017 by which they were required to take an admission test for admission to D.Phil. course in Globalization and Development Studies, then the present writ petitions were filed praying that the petitioners be granted admission in D.Phil courses in the terms of the admission which was granted to them in the year 2012.

2. Learned counsel for the petitioners in both the writ petitions have submitted that the Academic Council of the University of Allahabad had introduced for the first time a course in the name of Globalization and Development Studies and the Council on 6.8.2011 had resolved that the Degree of Philosophy in Globalization and Development Studies could be taken through a programme of Bachelor/D.Phil. dual degree integrated programme. They have submitted that it was also resolved in the Academic Council meet on 6.8.2011 that the course would start from the Academic Session 2012-13 and would end with the grant of D.Phil. Thereafter the University of Allahabad also issued various brochures and informed the public at large that the Graduation-cum-D.Phil. programme could be pursued by

students. The petitioners in both the writ petitions applied for admission and also after being admitted deposited their fee. They were admitted on 17.8.2012. From time to time the Academic Council used to assemble and decide as to in what time frame the course would be completed and as to what would be the fee structure etc.. The last resolution, with regard to the fee structure, of the Academic Council of the University of Allahabad was passed on 12.5.2015.

3. It is the contention of the learned counsel appearing for the petitioners that along with the Academic Council of the University, the University Grants Commission had also from time to time issued notifications with regard to the manner in which admissions to D.Phil. course had to be done by the Universities. The first resolution concerning the instant case was passed on 1.6.2009 and the same is being reproduced here as under :

"UGC (MINIMUM STANDARDS AND PROCEDURE FOR AWARDS OF M.PHIL/PH.D. DEGREE) REGULATION, 2009

New Delhi-110002, the 1st June 2009

F.1-1/2002 (PS) Exemp. -- In exercise of the powers conferred by clause (e) & (g) of sub-section (1) of Section 26 of University Grants Commission Act, 1956 (3 of 1956), the University Grants Commission hereby makes the following Regulations, namely:-

Short Title, Application and Commencement:

1. These regulations may be called University Grants Commission (Minimum Standards and Procedure for Award of M.Phil/Ph.D. Degree) Regulations, 2009.

2. They shall apply to every University established or incorporated by or under a Central Act, Provincial Act or a State Act, every Institution including a constituent or an affiliated College recognized by the Commission, in consultation with the University concerned under clause (1) of Section 2 of the University Grants Commission Act, 1956, and every Institution deemed to be a University under section 3 of the said Act.

3. They shall come into force with effect from the date of their publication in the Gazette of India.

4. All Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance shall be eligible for conducting M.Phil. and Ph.D. Programmes.

5. Notwithstanding anything contained in these Regulations or any other Rule or regulation, for the time being in force, no University, Institution, Deemed to be University and College/Institution of National Importance shall conduct M.Phil. and Ph.D. Programmes through distance education mode.

ELIGIBILITY CRITERIA FOR M.PHIL./PH.D. SUPERVISOR

6. All Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance shall lay down the criteria for the faculty to be recognized as Research Supervisor both for M.Phil and Ph.D. Programmes.

7. All Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance shall lay down and decide on annual basis, a predetermined and manageable number of M.Phil and doctoral students depending on the number of the

available eligible Faculty Supervisors. A Supervisor shall not have, at any given point of time, more than Eight Ph.D. Scholars and Five M.Phil. Scholars.

8. The number of seats for M.Phil and Ph.D. shall be decided well in advance and notified in the University website or advertisement. All Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance shall widely advertise the number of available seats for M.Phil/Ph.D. studies and conduct admission on regular basis.

PROCEDURE FOR ADMISSION

9. (I) All Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance shall admit M.Phil. doctoral students through an Entrance Test conducted at the level of individual University, Institution, Deemed to be University and College/Institution of National Importance. The University may decide separate terms and conditions for those students who qualify UGC/CSIR (JRF) Examination/SLET/GATE/teacher fellowship holder or have passed M.Phil Programme for Ph.D. Entrance Test. Similar approach may be adopted in respect of Entrance Test for M.Phil Programme.

(ii) It shall be followed by an interview to be organized by the School/Department/ Institution/University as the case may be.

(iii) At the time of interview, doctoral candidates are expected to discuss their research interest/area.

(iv) Only the predetermine number of students may be admitted to M.Phil/Ph.D. programme.

10. The admission to the Ph.D. Programme would be either directly or through M.Phil Programme.

11. While granting admission to students to M.Phil/Ph.D. Programmes, the Department/Institute/School will pay due attention to the National/State Reservation Policy.

ALLOCATION OF SUPERVISOR

12. The allocation of the supervisor for a selected student shall be decided by the Department in a formal manner depending on the number of students per faculty member, the available specialization among the faculty supervisors, and the research interest of the student as indicated during interview by the student. The allotment/allocation of supervisor shall not be left to the individual student or teacher.

COURSE WORK

13. After having being admitted, each M.Phil/Ph.D. student shall be required by the Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance, as the case may be, to undertake course work for a minimum period of one semester. The course work shall be treated as per M.Phil/Ph.D. preparation and must include a course on research methodology which may include quantitative methods of Computer Applications. It may also involve reviewing of published research in the relevant field. The individual Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance, as the case may be, shall decide the minimum qualifying requirement for allowing a student to proceed further with the writing of the dissertation.

If found necessary, course work may be carried out by doctoral candidates in sister Departments/Institutes either within or outside the University for which due credit will be given to them.

EVALUATION AND ASSESSMENT METHODS

14. Upon satisfactory completion of course work and research methodology, which shall form part & parcel of M.Phil/Ph.D. Programme, the M.Phil/Ph.D. Scholar shall undertake research work and produce a draft thesis within a reasonable time, as stipulated by the Institution concerned.

15. Prior to submission of the thesis, the student shall make a pre-M/Phil/Ph.D. presentation in the Department that may be open to all faculty members and research students, for getting feedback and comments, which may be suitably incorporated into the draft thesis under the advice of the supervisor.

16. Ph.D. candidates shall publish one research paper in a referred Journal before the submission of the thesis/monograph for adjudication, and produce evidence for the same in the form of acceptance letter or the reprint.

17. The thesis produce by the M.Phil/Ph.D students in the Institutions/Departments and submitted to the Universities, Institutions, Deemed to be Universities and Colleges/Institutions of National Importance concerned to have one examiner from outside the Country.

18. On receipt of satisfactory evaluation reports, M.Phil/Ph.D students shall undergo a viva voce examination which shall also be openly defended.

DEPOSITORY WITH UGC

19. Following the successful completion of the evaluation process and announcements of the award of M.Phil/Ph.D, the University shall submit a soft copy of the M.Phil/Ph.D. thesis to the UGC within a period of thirty days, for hosting the same in INFLIBNET, accessible to all Institutions/Universities.

20. Alongwith the Degree, the Degree awarding University, Institution, Deemed to be University and College/Institution of National Importance, as the case may be, shall issue a Provisional Certificate certifying to the effect that the Degree has been awarded in accordance with the provisions to these Regulations of the UGC."

4. Thereafter it was followed by a notification dated 5.5.2016 which also, since was relied upon by the learned counsel for the petitioners, is being reproduced here as under :

MINISTRY OF HUMAN RESOURCE DEVELOPMENT

UNIVERSITY GRANTS COMMISSION

NOTIFICATION

New Delhi, the 5th May, 2016

University Grants Commission (Minimum Standards and Procedure for Award of M.PHIL./PH.D. Degrees) Regulations, 2016

(In supersession of the UGC (Minimum Standards and Procedure for Awards of M.Phil./Ph.D. Degree) Regulation, 2009, notified in The Gazette of India [No.28, Part III-Section 4] for the week July 11-July 17, 2009]

No.F.1-2/2009 (EC/PS)V(I) Vol.II-In Exercise of the powers conferred by clauses (f) and (g) of sub-section (1) of Section 26 of the University Grants Commission Act, 1956 (3 of 1956), and in supersession of the UGC (Minimum Standards and Procedure for Awards of M.Phil/Ph.D. Degree) Regulation, 2009, notified in The Gazette of India [No.28, Part III-Section 4] for the week July 11 - July 17, 2009, the University Grants Commission hereby makes the following Regulations, namely --

1. Short Title, Application and Commencement:

1.1 These Regulations may be called University Grants Commission (Minimum Standards and Procedure for Award of M.Phil/Ph.D. Degrees) Regulations, 2016.

1.2. They shall apply to every University established or incorporated by or under a Central Act, a Provincial Act, or a State Act, every affiliated college, and every Institution Deemed to be a University under Section 3 of the UGC Act, 1956.

1.3 They shall come into force from the date of their publication in the Gazette of India.

2. Eligibility criteria for admission to the M.Phil. programme:

2.1 Candidates for admission to the M.Phil. programme shall have a Master's degree or a professional degree declared equivalent to the Master's degree by the corresponding statutory regulatory body, with at least 55% marks in aggregate or its equivalent grade 'B' in the UGC 7-point scale (or an equivalent grade in a point scale wherever grading system is followed) or an equivalent degree from a foreign educational Institution accredited by an Assessment and Accreditation Agency which is approved, recognized or authorized by an authority, established or incorporated under a law in its home country or any other statutory authority in that country for the purpose of assessing, accrediting or assuring quality and standards of educational institutions.

2.2. A relaxation of 5% of marks, from 55% to 50%, or an equivalent relaxation of grade, may be allowed for those belonging to SC/ST/OBC (non-creamy layer)/Differently-Abled and other categories of candidates as per the decision of the Commission from time to time, or for those who had obtained their Master's degree prior to 19th September, 1991. The eligibility marks of 55% (or an equivalent grade in a point scale wherever grading system is followed) and the relaxation of 5% to the categories mentioned above are permissible based only on the qualifying marks without including the grace mark procedures.

3. Eligibility criteria for admission to Ph.D. programme:

Subject to the conditions stipulated in these Regulations, the following persons are eligible to seek admission to the Ph.D. programme:

3.1 Master's Degree holders satisfying the criteria stipulated under Clause 2, above.

3.2 Candidates who have cleared the M.Phil. course work with at least 55% marks in aggregate or its equivalent grade 'B' in the UGC 7-point scale (or an equivalent grade in a point scale wherever grading system is followed) and successfully completing the M.Phil. Degree shall be eligible to proceed to do research work leading to the Ph.D. Degree in the same Institution in an integrated programme. A relaxation of 5% of marks, from 55% to 50%, or an equivalent relaxation of grade, may be allowed for those belonging to SC/ST/OBC (non-creamy layer)/differently-abled and other categories of candidates as per the decision of the Commission from time to time.

3.3. A person whose M.Phil dissertation has been evaluated and the viva voce is pending may be admitted to the Ph.D. programme of the same Institution:

3.4 Candidates possessing a Degree considered equivalent to M.Phil. Degree of an Indian Institution, from a Foreign Educational Institution accredited by an Assessment and Accreditation Agency which is approved, recognized or authorized by an authority, established or

incorporated under a law in its home country or any other statutory authority in that country for the purpose of assessing, accrediting or assuring quality and standards of educational institutions, shall be eligible for admission to Ph.D. programme.

4. Duration of the Programme:

4.1 M.Phil. programme shall be for a minimum duration of two (2) consecutive semesters / one year and a maximum of four (4) consecutive semesters / two years.

4.2 Ph.D. programme shall be for a minimum duration of three years, including course work and a maximum of six years.

4.3 Extension beyond the above limits will be governed by the relevant clauses as stipulated in the Statute/Ordinance of the individual Institution concerned.

4.4 The women candidates and Persons with Disability (more than 40% disability) may be allowed a relaxation of one year for M.Phil. and two years for Ph.D. in the maximum duration. In addition, the women candidates may be provided Maternity Leave/Child Care Leave once in the entire duration of M.Phil/Ph.D. for upto 240 days.

5. **Procedure for admission :**

5.1 All Universities and Institutions Deemed to be Universities shall admit M.Phil/Ph.D. students through an Entrance Test conducted at the level of Individual University/Institution Deemed to be a University. The University/Institution Deemed to be a University may decide separate terms and conditions for Ph.D. Entrance Test for those students who qualify UGC-NET (including JRF)/UGC-CSIR NET (including JRF)/SLET/GATE/teacher fellowship holder or have passed M.Phil programme. Similar approach may be adopted in respect of Entrance Test for M.Phil. programme.

5.2 Higher Educational Institutions (HEIs) referred to in sub-clause 1.2 above and Colleges under them which are allowed to conduct M.Phil. and/or Ph.D. programmes, shall :

5.2.1 decide on an annual basis through their academic bodies a predetermined and manageable number of M.Phil and/or Ph.d. scholars to be admitted depending on the number of available Research Supervisors and other academic and physical facilities available, keeping in mind the norms regarding the scholar-teacher ratio (as indicated in Para 6.5), laboratory, library and such other facilities;

5.2.2 notify well in advance in the institutional website and through advertisement in at least two (2) national newspapers, of which at least one (1) shall be in the regional language, the number of seats for admission, subject/discipline-wise distribution of available seats, criteria for admission, procedure for admission, examination centre(s) where entrance test(s) shall be conducted and all other relevant information for the benefit of the candidates.

5.2.3 adhere to the National/State-level reservation policy, as applicable.

5.3 The admission shall be based on the criteria notified by the Institution, keeping in view the guidelines/norms in this regard issued by the UGC and other statutory bodies concerned, and taking into account the reservation policy of the Central/State Government from time to time.

5.4 HEIs as mentioned in Clause 1.2 shall admit candidates by a two stage process through :

5.4.1 An Entrance Test shall be qualifying with qualifying marks as 50%.

The syllabus of the Entrance Test shall consist of 50% of research methodology and 50% shall be subject specific. The Entrance Test shall be conducted at the Centre(s) notified in advance (changes of Centres, if any, also to be notified well in advance) at the level of the individual HEI as mentioned in clause 1.2; and

5.4.2 An interview /viva-voce to be organized by the HEI as mentioned in clause 1.2 when the candidates are required to discuss their research interest/area through a presentation before a duly constituted Department Research Committee.

5.5 The interview/viva voce shall also consider the following aspect, viz. whether

5.5.1 the candidate possesses the competence for the proposed research;

5.5.2 the research work can be suitably undertaken at the Institution/College;

5.5.3 the proposed area of research can contribute to new/additional knowledge.

5.6 The University shall maintain the list of all the M.Phil/ Ph.D registered students on its website on year-wise basis. The list shall include the name of the registered candidate, topic of his/her research, name of his/her supervisor/co-supervisor, date of enrollment/registration.

6. Allocation of Research Supervisor: Eligibility criteria to be a Research Supervisor. Co-Supervisor, Number of M.Phil./Ph.D. Scholars permissible per Supervisor, etc.

6.1 Any regular Professor of the University/Institution Deemed to be a University/College with at least five research publications in referred journals and any regular Associate/Assistant Professor of the University/institution deemed to be a University/college with a Ph.D degree and at least two research publications in refereed journals may be recognized as Research Supervisor.

Provided that in areas/disciplines where there is no or only a limited number of refereed journals, the Institution may relax the above condition for recognition of a person as Research Supervisor with reasons recorded in writing.

6.2 Only a full time regular teacher of the concerned University/Institution Deemed to be a University/College can act as a supervisor. The external supervisors are not allowed. However, Co-Supervisor can be allowed in inter-disciplinary areas from other departments of the same institute or from other related institutions with the approval of the Research Advisory Committee.

6.3 The allocation of Research Supervisor for a selected research scholar shall be decided by the Department concerned depending on the number of scholars per Research Supervisor, the available Specialization among the Supervisors and research interests of the scholars as indicated by them at the time of interview /viva voce.

6.4 In case of topics which are of inter-disciplinary nature where the Department concerned feels that the expertise in the Department has to be supplemented from outside, the Department may appoint a Research Supervisor from the Department itself, who shall be known as the Research Supervisor, and a Co-Supervisor from outside the Department/ Faculty/College/Institution on such terms and conditions as may be specified and agreed upon by the consenting Institutions/Colleges.

6.5 A Research Supervisor/Co-supervisor who is a Professor, at any given point of time, cannot guide more than three (3) M.Phil. and Eight (8) Ph.D. scholars. An Associate Professor as Research Supervisor can guide up to a maximum of two (2) M.Phil. and six (6) Ph.D. Scholars and an Assistant

Professor as Research Supervisor can guide up to a maximum of one (1) M.Phil. and from (4) Ph.D. scholars.

6.6 In case of relocation of an M.Phil./Ph.D. woman scholar due to marriage or otherwise, the research data shall be allowed to be transferred to the University to which the scholar intends to relocate provided all the other conditions in these regulations are followed in letter and spirit and the research work does not pertain to the project secured by the parent institution/supervisor from any funding agency. The scholar will however give due credit to the parent guide and the institution for the part of research already done.

7. Course Work: Credit Requirements, number, duration, syllabus, minimum standards for completion, etc.

7.1 The credit assigned to the M.Phil. or Ph.D. course work shall be a minimum of 08 credits and a maximum of 16 credits.

7.2 The course work shall be treated as prerequisite for M.Phil. / Ph.D. preparation. A minimum of four credits shall be assigned to one or, more courses on Research Methodology which could cover areas such as quantitative methods, computer applications, research ethics and review of published research in the relevant field, training, field work, etc. Other courses shall be advanced level courses preparing the students for M.Phil/Ph.D. Degree.

7.3 All courses prescribed for M.Phil. and Ph.D. course work shall be in conformity with the credit hour instructional requirement and shall specify content, instructional and assessment methods. They shall be duly approved by the authorized academic bodies.

7.4 The department where the scholar pursues his/her research shall prescribe the course(s) to him/her based on the recommendations of the Research Advisory Committee, as stipulated under sub-Clause 8.1 below, of the research scholar.

7.5 All candidates admitted to the M.Phil and Ph.D. Programmes shall be required to complete the course work prescribed by the Department during the initial one or two semesters.

7.6 Candidates already holding M.Phil. degree and admitted to the Ph.D. programme, or those who have already completed the course work in M.Phil. and have been permitted to proceed to the Ph.D. in integrated course, may be exempted by the Department from the Ph.D. course work. All other candidates admitted to the Ph.D. Programme shall be required to complete the Ph.D. course work prescribed by the Department.

7.7 Grades in the course work, including research methodology courses shall be finalized after a combined assessment by the Research Advisory Committee and the Department and the Final grades shall be communicated to the institution / College.

7.8 A M.Phil/Ph.D. Scholar has to obtain a minimum of 55% of marks or its equivalent grade in the UGC 7-point scale (or an equivalent grade/CGPA in a point scale wherever grading system is followed) in the course work in order to be eligible to continue in the programme and submit the dissertation/thesis.

8. Research Advisory Committee and its functions:

8.1 There shall be a Research Advisory Committee, or an equivalent body for similar purpose as defined in the Statutes/Ordinances of the Institution concerned, for each M.Phil and Ph.D. scholar. The Research Supervisor of the scholar shall be the Convener of this Committee. This Committee shall have the following responsibilities:-

8.1.1 To review the research proposal and finalize the topic of research;

8.1.2 To guide the research scholar to develop the study design and methodology of research and identify the course (s) that he /she may have to do.

8.1.3 To Periodically review and assist in the progress of the research work of the research scholar.

8.2 A research scholar shall appear before the Research Advisory Committee once in six months to make a presentation of the progress of his/her work for evaluation and further guidance. The six monthly progress reports shall be submitted by the Research Advisory Committee to the Institution /College with a copy to the research scholar.

8.3 In case the progress of the research scholar is unsatisfactory, the Research Advisory Committee shall record the reasons for the same and suggest corrective measures. If the research scholar fails to implement these corrective measures, the Research Advisory Committee may recommend to the institution /College with specific reasons for cancellation of the registration of the research scholar.

9. Evaluation and Assessment Methods, minimum standards/credits for award of the degree etc:

9.1 The overall minimum credit requirement, including credit for the course work, for the award of M.Phil degree shall not be less than 24 credits.

9.2 Upon satisfactory completion of course work, and obtaining the marks/grade prescribed under clauses 7.8 above, as the case may be, the M.Phil/Ph.D. Scholar shall be required to under ..... and produce a draft dissertation/thesis within a reasonable time as stipulated by the Institution concerned based on these Regulations.

9.3 Prior to the submission of the dissertation/thesis, the scholar shall make a presentation in the Department before the Research Advisory Committee of the Institution concerned which shall also be open to all faculty members and other research scholars. The feedback and comments obtained from them may be suitably incorporated into the draft dissertation/thesis in consultation with the Research Advisory Committee.

9.4 M.Phil scholars shall present at least one (1) research paper in a conference/seminar and Ph.D. scholars must publish at least one (1) research paper in referred journal and make two paper presentation in conference/seminars before the submission of the dissertation/thesis for adjudication, and produce evidence for the same in the form of presentation certificates and/or reprints.

9.5 The Academic Council (or its equivalent body) of the Institution shall evolve a mechanism using well developed software and gadgets to detect plagiarism and other forms of academic dishonesty. While submitting for evaluation, the dissertation/thesis shall have an undertaking from the research scholar and a certificate from the Research Supervisor attesting to the originality of the work, vouching that there is no plagiarism and that the work has not been submitted for the award of any other degree/diploma of the same Institution where the work was carried out, or to any other Institution.

9.6 The M.Phil. dissertation submitted by a research scholar shall be evaluated by his/her Research Supervisor and at least one external examiner who is not in the employment of the Institution/College. The viva-voce examination, based among other things, on the critiques given in the evaluation report, shall be conducted by both of them

together, and shall be open to be attended by Members of the Research Advisory Committee, all faculty members of the Department, other research scholars and other interested experts/researchers.

9.7 The Ph.D. thesis submitted by a research scholar shall be evaluated by his/her Research Supervisor and at least two external examiners, who are not in employment of the Institution/College, of whom one examiner may be from outside the country. The viva-voce examination, based among other things, on the critiques given in the evaluation report, shall be conducted by the Research Supervisor and at least one of the two external examiners, and shall be open to be attended by Members of the Research Advisory Committee, all faculty members of the Department, other research scholars and other interested experts/researchers.

9.8 The public viva-voce of the research scholar to defend the dissertation/thesis shall be conducted only if the evaluation report(s) of the external examiner(s) on the dissertation/thesis is/are satisfactory and include a specific recommendation for conducting the viva-voce examination. If the evaluation report of the external examiner in case of M.Phil dissertation, or one of the evaluation reports of the external examiner in case of Ph.D. thesis, is unsatisfactory and does not recommend viva-voce, the Institution shall send the dissertation/thesis to another external examiner out of the approved panel of examiners and the viva-voce examination shall be held only if the report of the latest examiner is satisfactory. If the report of the latest examiner is also unsatisfactory, the dissertation/thesis shall be rejected and the research scholar shall be declared ineligible for the award of the degree.

9.9 The Institution shall develop appropriate methods so as to complete the entire process of evaluation of M.Phil. dissertation/Ph.D. thesis within a period of six months from the date of submission of the dissertation/thesis.

10. Academic, administrative and infrastructure requirement to be fulfilled by Colleges for getting recognition for offering M.Phil/Ph.D. programmes:

10.1 Colleges may be considered eligible to offer M.Phil/Ph.D. programmes only if they satisfy the availability of eligible Research Supervisors, required infrastructure and supporting administrative and research promotion facilities as per these Regulations.

10.2 Post-graduate Departments of Colleges, Research laboratories of Government of India/State Government with at least two Ph.D. qualified teachers/scientists/other academic staff in the Department concerned along with required infrastructure, supporting administrative and research promotion facilities as per these Regulations, stipulated under sub-clause 10.3, shall be considered eligible to offer M.Phil/Ph.D. programmes. Colleges should additionally have the necessary recognition by the Institution under which they operate to offer M.Phil/Ph.D. programme.

10.3 Colleges with adequate facilities for research as mentioned below alone shall offer M.Phil./Ph.D. programmes:

10.3.1 In case of science and technology disciplines, exclusive research laboratories with sophisticated equipment as specified by the Institution concerned with provision for adequate space per research scholar along with computer

facilities and essential software, and uninterrupted power and water supply;

10.3.2 Earmarked library resources including latest books, Indian and International journals, e-journals, extended working hours for all disciplines, adequate space for research scholars in the Department/library for reading, writing and storing study and research materials;

10.3.3 Colleges may also access the required facilities of the neighbouring Institutions/Colleges, or of those Institutions/Colleges/R&D laboratories/Organizations which have the required facilities.

11. Treatment of Ph.D./M.Phil through Distance Mode/Part-time:

11.1 Notwithstanding anything contained in these Regulations or any other Rule or Regulation, for the time being in force, no University; Institution, Deemed to be a University and College shall conduct M.Phil and Ph.D. Programmes through distance education mode.

11.2 Part-time Ph.D. will be allowed provided all the conditions mentioned in the extent Ph.D. Regulations are met.

12. Award of M.Phil./Ph.D. degrees prior to Notification of these Regulations, or degrees awarded by foreign Universities:

12.1 Award of degrees to candidates registered for the M.Phil./Ph.D. programme on or after July 11, 2009 till the date of Notification of these Regulations shall be governed by the provisions of the UGC (Minimum Standards and Procedure for Awards of M.Phil/Ph.D. Degree) Regulation, 2009.

12.2. If the M.Phil./Ph.D. degree is awarded by a Foreign University, the Indian Institution considering such a degree shall refer the issue to a Standing Committee constituted by the concerned institution for the purpose of determining the equivalence of the degree awarded by the foreign University.

13. Depository with INFLIBNET:

13.1 Following the successful completion of the evaluation process and before the announcement of the award of the M.Phil/Ph.D. degree(s), the Institution concerned shall submit an electronic copy of the M.Phil dissertation/Ph.D. thesis to the INFLIBNET, for hosting the same so as to make it accessible to all Institutions/Colleges.

13.2 Prior to the actual award of the degree, the degree-awarding Institution shall issue a provisional Certificate to the effect that the Degree has been awarded in accordance with the provisions of these UGC Regulations, 2016."

5. Learned counsel for the petitioners also stressed on the fact that the University, upon being made aware of the various notifications of the University Grants Commission, had from time to time passed various resolutions. On 9.10.2016, the Centre for Globalization and Development Studies, University of Allahabad met under the Chairmanship of the Programme Committee Professor V.P. Singh and had resolved that such students who had been enrolled prior to the commencement of the programme which was subsequently being changed in the year 2016-17 would be eligible to continue with D.Phil. programme as per the provisions which were existing prior to the commencement of the programme of 2016-17. The resolution of the Programme Committee dated 9-10 February 2016 was placed before the Vice-Chancellor who, on 24.2.2016, approved the same. The resolution dated 9-10 February 2016 which

was approved by the Vice-Chancellor is being reproduced here as under :-

"Centre for Globalization and Development Studies

University of Allahabad

Allahabad

Minutes of the Meeting of the Programme Committee held on February 9-10, 2016 at 11.00 am.

Members Present:

1. Prof. Ravindra Dhar
2. Prof. Rajesh Misra
3. Prof. Parvez A. Abbasi
4. Prof. Sanjeev Bhadoria
5. Dr. Subhash Shukla
6. Dr. Pradeep K. Sharma
7. Mr. Sumit Saurabh Srivastava
8. Prof. V.P. Singh (Chairman)

Agenda Item no.1 To review Bachelor cum D.Phil (Integrated) programme.

The matter was discussed intesively. Prof. V.P. Singh shared experience of this programme and said that in-take of this programme was relatively better and had immense protential for improvement. Therefore, the programme should remain in force with provisions of lateral entry after the completion of the six semesters (Bachelor degree).

The following resolutions were adopted unanimously.

Resolution No.1. The D.Phil. Component of the existing Bachelor-cum-D.Phil. programme has been delinked and henceforth it will remain only five years integrated programme with Bachelor and Master Degrees.

Resolution No.2. It was resolved that programme will have a provision of the lateral entry after three years. Those students who have obtained 6.0 CGPA in case of General and OBC category and 5.5. CGPA in case of SC and ST shall be automatically enrolled in the Master in Development Studies Programme. Remaining vacant seats shall be filled-in through the AU PGAT.

Resolution No.3. Eligibility criteria for the remaining seats have been determined as follows: and it was asserted that these criteria should be adhered to strictly. Eligibility : Minimum 50% marks or equivalent grade in High School and Higher Secondary/Intermediate and 55% or equivalent grade in Bachelor of Social Work/B.Com./B.A. in Economics/B.Sc. (Ag.)/Bachelor in Development Studies/Globalization and Development Studies/Bachelor in Business Administration/ Management/Bachelor degree in Rural Development/Bachelor of Planning from a recognized University and minimum 50% score in PGAT.

Resolution No.4. The programme has been re-nomenclatured as Bachelor-Master (Integrated) Programme in Globalization and Development Studies as per the Gazette notification of the UGC in this regard. After three years the student will be awarded Bachelor in Globalization and Development Studies degree and on successful completion of five years he/she will be awarded the Master in Development Studies degree.

Resolution No.5. Those who are already enrolled prior to the commencement of this programme (2016-17) shall be eligible to up-grade in D.Phil. Programme as per existing provisions.

Agenda Item No.2. To review the Master in Development Studies Programme.

The following resolution was adopted unanimously.

Resolution No.6. It was resolved that since there is already an integrated programme with Master degree component

having lateral entry after three years, Two Years Master in Development Studies, be dropped from the academic session 2016-17.

Other items on the agenda were deferred for the next meeting."

6. Learned counsel for the petitioners relying upon the various notifications of the University Grants Commission and the resolution of the Programme Committee of the Centre for Globalization and Development Studies submitted that as per the Regulations of 2009 of the University Grants Commission there was no provision for taking separate admissions for the courses of graduation, post-graduation and D.Phil. and, therefore, the University correctly commenced with the admission to the Bachelor-cum-D.Phil. dual degree course. Learned counsel for the petitioners further relying upon the notification dated 5.5.2016 (which was published on a later date in the Gazette of India) submitted that Clause 12 of the notification very clearly stated that such candidates who were registered for D.Phil. programme on or after 11.7.2009 and till the date of the notification of 2016 would be governed by the provisions of 2009 Regulations. Learned counsel for the petitioners further relied upon the minutes of the meeting of the Programme Committee of the Centre for Globalization and Development Studies, University of Allahabad dated 9/12 February 2016 and stated that if Resolution 5 of it was perused, it would become crystal clear that those who had enrolled prior to the commencement of the Programme of 2016-17 would be eligible to get upgraded in the D.Phil Programme as per the provisions which were in existence prior to the commencement of the Programme of 2016-17 and, therefore, learned counsel for the petitioners submitted that when the entrance examination was being conducted in the year 2017 then the petitioners were not expected to get admission in the D.Phil course through any entrance examination. Learned counsel for the petitioners submitted that when the petitioners had taken admission in the Graduation-cum-D.Phil. Dual Degree Programme in Globalization and Development Studies (integrated programme) then it was taken as granted that as and when they got the requisite marks in a particular semester, they would be promoted to the next semester. Accordingly, they presumed that they would be promoted from Graduation to Post-Graduation classes and thereafter they would be deemed to be admitted to D.Phil. classes; provided they got the Cumulative Grade Point average of 6 or more points. Learned counsel for the petitioners submitted that when the petitioners obtained more than 6 points in the Cumulative Grade Point average then the respondent-University had no other option but to admit them to D.Phil course. Learned counsel, therefore, submitted that there was absolutely nothing which could suggest that the petitioners were not entitled for the admission in the D.Phil course without any entrance examination. Learned counsel for the petitioners further submitted that mere admission in the D.Phil. course did not mean that they would get their degrees automatically. They would be evaluated by the University and only thereafter the degrees would be awarded to them and, therefore, it could not be stated that if the petitioners, after obtaining their post-graduation degrees, took admission in the D.Phil. courses then they would in any manner be sub-standard students.

7. Learned counsel appearing for the University, however, submitted that even though the petitioners were admitted as per the resolution of the Academic Council and as per the advertisement etc. issued by the University, the University had to give

admission in the D.Phil course only by means of an entrance examination. This he submitted was only for the benefit of the students as in the notification of the University Grants Commission of the year 2016 it had been provided that if admissions were done in contravention of the notifications issued by the University Grants Commission then the degrees would not be recognized. He further submitted that the U.G.C. notification of 1.6.2009 was, though not prohibiting the Universities from coming up with integrated courses, has not very clearly stated that what would be the procedure.

8. Learned counsel appearing for the University Grants Commission also submitted that the University was bound by the notifications of the University Grants Commission and, therefore, it could not digress from the notifications issued by the University Grants Commission.

9. Having heard learned counsel for the petitioners, learned counsel appearing for the University and the learned counsel appearing for the University Grants Commission, I am convinced that the University and the University Grants Commission both were bound by their initial actions. In the year 2009, the University Grants Commission had given the University the freedom to admit students to D.Phil courses in the manner they would decide. When in the year 2011 the University of Allahabad, in the Department of Globalization and Development Studies, had decided to take students in the integrated course of Graduation and D.Phil. then they did not commit anything wrong. When the University Grants Commission came up with certain directions that the D.Phil admissions had to be done after an entrance examination then the University had issued a notification on 9/10 February 2016 and by means of Resolution No.5 it had provided that such students who had been enrolled prior to the commencement of the Programme of 2016-17 would be eligible to get themselves upgraded to the D.Phil course as per the provisions which were in existence before the commencement of the 2016-17 programme. In fact the University Grants Commission also by its notification dated 5.5.2016 had very categorically in clause 12.1 stated that degrees to the candidates registered on or after 11 July 2009 but prior to the issuance of the notification dated 5.5.2016 would be governed by the provisions of the University Grants Commission Resolution of the year 2009. I, therefore, hold that when the petitioners had obtained their admissions in the year 2012 in accordance with the Rules/Regulations/Notifications of the University and also of the University Grants Commission, then there was nothing illegal in the admission. The University and the University Grants Commission both were bound by their Resolutions and Notifications. In fact they were estopped from digressing from their earlier stands. The petitioners had taken admission on the promise of the University that they would be allowed to continue with their D.Phil courses after they had got the requisite number of Cumulative Grade Points Average which had to be more than 6 and, therefore, the University was bound to give admission as per their notification dated 6.8.2011 which was never in effect rescinded or superseded. The University Grants Commission also by its notification dated 5.5.2016 (specially Clause 12.1) had very categorically stated that such candidates who were registered for programmes on or after 11.7.2009 but before the notification of 5.5.2016 would continue to be governed by the provisions of the 2009 Regulations.

10. Under such circumstances, the petitioners would be entitled for admission to the D.Phil courses. The petitioners may now be admitted in the course forthwith.

11. The writ petitions are, accordingly, allowed.

(2020)06ILR A286
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 26944 of 2008
Connected with
Writ-C No. 33222 of 2008
And Ors.

Babu Lal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri L.P. Singh

Counsel for the Respondents:
C.S.C., Sri Arvind Srivastava, Sri Salman Ahmad

A. Civil Law - Grant of agricultural lease - Uttar Pradesh Bhoodan Yagna Act, 1952 – Section 14 - Section 15-- Grant of land to landless persons - Grants to be made in accordance with Bhoodan Yagna Scheme- Section 15-A - Cancellation of certain grants - no pleading or material on record as to on what date the alleged irregularity in allotment was discovered - no material on record to come to a conclusion that the allotment was not carried out in consonance with the mandate of Section 14 (4) (a)of the Act - order impugned based upon the two reports - which were never supplied to the petitioners and were not even based upon the inspection of original files - wholly perverse and liable to be set aside. (Para-19,20,22)

Petitioners – landless agricultural labourers - allotted Plot - Bhoodan Yagna Sub Committee - petitioners continue to be in occupation of the properties - objections - challenging the allotments – settlement – petitioners name mutated over the properties - Court called for the records pertaining to the allotments - record perused - Commissioner issued directions for investigation relating to the allotments made in favour of the petitioners - show cause notices served upon the petitioners - requested that a copy of the reports, which are proposed to be relied upon, should be supplied to the petitioners - copies of the reports were never supplied to the petitioners - order passed cancelling the allotment in favour of the petitioners - directions issued for evicting the petitioners and vesting the property in favour of the State - Further directions issued for allotment of the lands in favour of the eligible persons, the said order dated 8.5.2008 has been challenged in the present petitions.(Para - 3,4,9)

HELD:- Show cause notice is entirely vague and no prudent person could be expected to give a reply to such a vague show cause notice and thus the proceedings initiated and culminated on the basis of a vague show cause notice, are liable to be quashed - order dated 8.5.2008 are set aside, with further directions that the names of the allottees or their heirs shall be mutated over the revenue records - allotments made in respect of the said lands, after passing of the order dated 8.5.2008, cannot have any effect. (Para-24,25)

Petition allowed. (E-7)

List of Cases Cited:-

1. Joint Collector Ranga Reddy District & anr. Vs D. Narsing Rao & ors. (2015) 3 SCC 695

2. Smt. Shakuntala & 25 ors. Vs St. of U.P. (2019) 5 AWC 5007 All

3. Oryx Fisheries (P) Ltd. Vs U.O.I. (2010) 13 SCC 427

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

1. The present petitions have been filed challenging the order dated 8.5.2008 (Annexure-1), whereby the leases granted to the petitioners under the Uttar Pradesh

Bhoodan Yagna Act, 1952, has been cancelled in exercise of powers under Section 15-A of the said Act.

2. The facts of all the writ petitions are the same, however, the facts in Writ-C No. 26944 of 2008 are being considered and decided as a leading case.

3. The brief facts, giving rise to the present petition, are as under:-

The petitioners before this Court are Scheduled Castes, Scheduled Tribes and only the petitioner no. 18 belongs to General Category, they all being landless agricultural labourers were allotted Plot No. 2495/25 of different areas from the period 24.5.1982 to 7.6.1982 by the Bhoodan Yagna Sub Committee, Orai, copies of the said allotment lease have been collectively marked as Annexure-2. In terms of the said allotment, the petitioners continue to be in occupation of the properties, allotted to them. It is further alleged that consolidation operation was carried out in the village Dakore and in respect of the petitioners, one Dr. Ram Sewak Niranjan, Sanyojak, filed his objections challenging the allotments made by the earlier Sanyojak Dhani Ram, however the said proceedings culminated in a settlement and the names of the petitioners were mutated over the properties in question. Several ancillary proceedings took place, however the same are not subject matter of the present petitions.

4. This Court had called for the records pertaining to the allotments, which are subject matter of the present petitions, a perusal of the record shows that the Commissioner, Jhansi issued directions on 17.1.2003 for investigation relating to the allotments made in favour of the petitioners, in pursuance whereof, an investigation was carried out. A perusal of the said report reveals that detailed investigations were carried out and the conclusion drawn was as under:-

"In respect of 44 leases, mutation was carried out in respect of 28 leases by the Consolidation Officer and for the rest 16, the mutation was carried out and it was recorded that at the time of the allotment, the directions under Section 14 were not carried out. It was further recorded that in terms of the provisions of Section 14 (4-A) at least 50% of the allotments should have been done in favour of Scheduled Castes persons and thus it was recommended that the same were liable to be quashed. Curiously, in the said report, itself it was mentioned that the original file was not available on record, as such it could not be said conclusively as to which Sanyojak executed the leases in respect of 21 allottees."

5. The record further reveals that specific detailed reply was submitted to the show cause notices served upon the petitioners, wherein it was specifically requested that a copy of the reports, which are proposed to be relied upon, should be supplied to the petitioners. It was further pleaded that any report although can be a ground for initiating action, a full-fledged enquiry should be conducted while passing the orders under Section 15-A of the Act. The copies of the reports were never supplied to the petitioners, as the same were held to be confidential.

6. In the supplementary counter affidavit filed by the State, yet another report dated 6th February, 2003 has been relied upon, which indicates that in respect

of 21 persons, the original file is not available, however as the mutation is based only upon Form No. 23, whereas there is no inscription in Form No. 45, which makes it clear that the mutation must have been carried out in back date.

7. Based upon the said two reports dated 6th February, 2003 as well as the report in pursuance to the directions dated 17.1.2003, show cause notices were served upon the petitioners, which are available on the record, as produced by the Standing Counsel. The show cause notice alleged that the Collector was satisfied with the report dated 6.2.2003 and was of the view that the agricultural leases granted by the Bhoodan Yagna Committee on 26.5.1983 were irregular and illegal and were granted without following the instructions issued under Section 14 of the Act and, thus, the petitioners were called upon to show cause as to why the leases granted on 26.5.1982 may not be set aside. The show cause notice, from record, reveals was issued on 6.2.2003. In the said show cause notices there were no allegations with regards to the eligibility of the petitioners for allotment.

8. The petitioners filed their joint objections to the show cause notice, denying the allegations referred and also took a ground that general objections of non-compliance of Section 14 were made without there being any specific ground indicated in the show cause notice recording the error in allotment, thus the show cause notices were vague. It was also stated that the petitioners are in occupation of the land since the last 21 years and thus the show cause notice are liable to be dropped. In support of their objections, the petitioners filed the copy of Government Order No. 4381 dated 13.7.1953, copy of the order of Board of Revenue dated 14.11.1959, copy of judgment and order dated 13.3.1987 in case no. 76 to 117, 285, 286 under section 9(a) (2) of U.P. C.H. Act, copy of order of Consolidation Officer Camp at Orai in case No. 142 to 148, Hari Ram Versus Bhoodan Yagna Samiti dated 22.8.1989, copy of order dated 17.9.1998, passed by Board of Revenue accepting the reference no. 64/1995-96, Munsukh Lal and others Versus Baladin and others; photocopy of the stay order passed by Hon'ble High Court in Writ Petition No. 20796/2003, Mansukh Versus Deputy Director of Consolidation and others and copies of khatauni and khasra. Specific request was made to provide copies of the report, which were denied to be provided holding that the same were confidential and a specific defence was taken that in fact 50% of the land was allotted to the persons of the Scheduled Castes and in this respect a list of allottees showing that 50% of allottees were persons of Scheduled Castes was also annexed, which was marked as Exhibit "Ka'.

9. The hearing, in respect of the proceedings initiated, were conducted on 8.10.2007 and vide order dated 21.5.2008, an order was passed cancelling the allotment in favour of the petitioners and directions were issued for evicting the petitioners and vesting the property in favour of the State. Further directions were also issued for allotment of the lands in favour of the eligible persons, the said order dated 8.5.2008 has been challenged in the present petitions.

10. Heard counsel for the petitioners Sri L.P. Singh and Standing Counsel for the State of U.P.

11. An impleadment application has also been filed by the persons claiming themselves to be the subsequent allottees, they are represented by Sri Arvind Srivastava, Advocate.

12. Counsel for the petitioners Shri L.P. Singh has argued that the order passed are wholly arbitrary and illegal for the following reasons:-

(i) The show cause notice was vague and there was no allegation as to what illegality was committed while granting leases.

(ii) Although Section 15-A confers the power of cancellation on the Collector, and no limitation is prescribed, the said power cannot be exercised by the Collector, after the expiry of reasonable period, whereas in the present case the proceedings have been initiated after about 21 years and the orders have been passed after about 27 years which cannot be termed as reasonable period and thus are liable to be quashed on that count also.

(iii) In terms of the reports, which are the basis for initiation of proceedings, no proceedings could have been initiated, as the same were never provided to the petitioners stating it to be confidential, and because those very reports record that the original files are missing.

13. The Standing Counsel, on the other hand, argues that the allotments have been rightly cancelled, as the same were done in contravention of the directions under Section 14 of the Act. He further stressed that in terms of Section 14, 50% of the allotments had to be done in favour of persons of Scheduled Castes and Scheduled Tribes and thus the entire allotments were wholly arbitrary and illegal. Reliance in this regard was placed on the provisions of Section 14 (4) (a).

14. Relevant statutory provisions of the Bhoodan Act being Sections 14 and 15-A are quoted hereinbelow:-

*"**14. Grant of land to landless persons.** - (1) The Committee or such other authority or person as the Committee with the approval of the State Government, specify either generally or in respect of any area, may, in the manner prescribed, grant lands which have vested in it to the landless agricultural labourers, and the grantee of the land shall-*

(i) where the land is situate in any state which has vested in the State Government under and in accordance with section 4 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, acquire in such land the right and the liabilities of a bhumidhar with non-transferable rights, and

(ii) where it is situate in any other area, acquire therein such rights and liabilities and subject to such conditions, restrictions and limitations as may be prescribed and they shall have effect of any law to the contrary notwithstanding.

(2) Where the committee or other authority or person as aforesaid fails to grant any land in accordance with sub-section (1) within a period of three years from the date of vesting of such land in the committee or from the date of commencement of the Uttar Pradesh Bhoodan Yagna (Amendment) Act, 1975, whichever is later, the Collector may himself grant such land to the landless agricultural labourers in the manner prescribed, and thereupon the grantee shall acquire the rights

and liabilities mentioned in sub-section (1) as if the grant were made by the committee itself.

(3) [* *]*

(4) In making grant of land under this section, the committee or other authority or person as aforesaid or the Collector, as the case may be, shall observe the following principles:

(a) At least fifty per cent of the land available for grant shall be granted to persons belonging to the Scheduled Castes, Scheduled Tribes and persons belonging to the Kol, Pathari, Khairwar, Baiga, Dharikar, Panika and Gond Tribes and such other tribes as the State Government on the recommendation of the Committee may notify in this behalf;

(b) The land situate in one village shall, as far as possible, be granted to persons residing in that very village.

Explanation. - For the purposes of this section, the expression "landless agricultural labourer" means a person whose main source of livelihood is agricultural labour or cultivation and who at the relevant time either holds no land or holds lands not exceeding 0.40468564 hectares (one acre) in Uttar Pradesh as a bhumidhar, asami or Government lessee.

***15. Grants to be made in accordance with Bhoodan Yagna Scheme**. - All grants shall be made as far as may be, in accordance with the scheme of Bhoodan Yagna.*

***15-A. Cancellation of certain grants.** - (1) The Collector may of his own motion and shall on the report of the committee or on the application of any person aggrieved by the grant of any land made under Section 14, whether before or after the commencement of the Uttar Pradesh Bhoodan Yagna (Amendment) Act, 1975, inquire into such grant, and if he is satisfied that the grant was irregular or was obtained by the grantee by misrepresentation or fraud, he may:*

(i) cancel the grant, and on such cancellation, notwithstanding anything contained in Section 14 or in any other law for the time being in force, the rights, title and interest of the grantee or any person claiming through him in such land shall cease, and the land shall revert to the committee; and

(ii) direct delivery of possession of such land to the committee after ejectment of every person holding or retaining possession thereof, and may for that purpose use or cause to be used such force as may be necessary.

(2) Notice of every proceeding under sub-section (1) shall be given to the committee, and any representation made by the committee in relation thereto shall be taken into consideration by the Collector.

(3) No order shall be passed under sub-section (1) except after giving an opportunity of being heard to the grantee or any person known to the Collector to be claiming under him.

(4) The order of the Collector passed under sub-section (1) shall be final and conclusive."

15. On the basis of the pleadings exchanged, perusal of the record produced by the Standing Counsel and the arguments advanced, the first question to be decided is whether the power under Section 15-A of the said Act can be exercised at any time, when there is no limitation prescribed under the Act itself, moreso, when there is no allegation of fraud or forgery in allotment.

16. Counsel for the petitioners has placed reliance on the judgment of the

Supreme Court in the case of ***Joint Collector Ranga Reddy District and another v. D. Narsing Rao and others, (2015) 3 SCC 695*** and judgment of this Court in the case of ***Smt. Shakuntala and 25 others v. State of U.P.; 2019(5) AWC 5007 All.***

17. In the case of ***Smt. Shankutala and 25 Others (Supra),*** this Court was considering the power of cancellation of leases under Section 198(4) of the U.P. Z.A. & L.R. Act and a specific argument was raised that where no limitation is prescribed, the action for cancellation can be taken at any point of time. This Court on the basis of the pleading exchanged, framed four questions. Question No. (D) framed by the Court is as under:-

"(d) Whether in the case of fraud an action can be taken for cancellation of the lease without any period of limitation?"

18. This Court answering the said question relying on the judgment of ***Joint Collector Ranga Reddy District and another v. D. Narsing Rao and others (Supra)*** recorded as under:-

"The last question is to be considered whether no limitation is applicable where the allegations of fraud exists. I have already held in foregoing paras that the allegations of fraud were not existent. However, even if the allegations of fraud are existent the question to be considered is whether any limitation period is applicable or not. The Hon'ble Supreme Court considered the said question in the case of Joint Collector Ranga Reddy District and another vs. D. Narsing Rao and others, 2015 3 SCC 695 and held as under:

"25. The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.

31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority.

32. In the case at hand, while the entry sought to be corrected is described as fraudulent, there is nothing in the notice impugned before the High Court as to when

was the alleged fraud discovered by the State. A specific statement in that regard was essential for it was a jurisdictional fact, which ought to be clearly asserted in the notice issued to the respondents. The attempt of the appellant-State to demonstrate that the notice was issued within a reasonable period of the discovery of the alleged fraud is, therefore, futile. At any rate, when the Government allowed the land in question for housing sites to be given to Government employees in the year 1991, it must be presumed to have known about the record and the revenue entries concerning the parcel of land made in the ordinary course of official business. In as much as, the notice was issued as late as on 31st December, 2004, it was delayed by nearly 13 years. No explanation has been offered even for this delay assuming that the same ought to be counted only from the year 1991. Judged from any angle the notice seeking to reverse the entries made half a century ago, was clearly beyond reasonable time and was rightly quashed."

Thus even the Supreme Court has held that even in the cases of fraud the action should be taken within a reasonable time. In the present case, the action has been taken after a period of 12 years which cannot be termed as reasonable time and thus I hold that even in the cases of fraud action has to be taken within the period of limitation."

19. In the facts of the present case, even as per the show cause notices, the leases were granted on 26.5.1982 and the show cause notice was issued on 6.2.2003 i.e. after more than 20 years. There is no pleading or material on record as to on what date the alleged irregularity in allotment was discovered. Following the judgment of the Apex Court in the case of ***Joint Collector, Ranga Reddy (Supra) and Smt. Shakuntala (Supra)***, I have no hesitation in holding that the initiation of proceedings was well beyond the period, which can be termed as reasonable. Thus, the order dated 8.5.2008 is liable to be set aside on that count alone.

20. Coming to the perversity of the impugned order and the perversity in the decision making process, it is clear from perusal of the record that a specific request was made for providing copy of the reports, proposed to be relied upon against the petitioners, as they were not supplied to the petitioners on the ground that the same were confidential documents. The specific defence of the petitioners that in fact 50% of the allottees were persons of Scheduled Castes and a list was also annexed along with their defence has not even been considered while passing the orders impugned. The order impugned is based upon the two reports, which were never supplied to the petitioners and were not even based upon the inspection of original files. Thus, on all these counts, the orders impugned are wholly perverse and liable to be set aside.

21. I am also not inclined to accept the submission of the Standing Counsel that merely because 50% of the land was not allotted to the persons belonging to the Scheduled Castes in consonance with the mandate of Section 14 (4) (a), the allotments are liable to be set aside for the following reasons:-

22. Although on a plain reading of Sub Section 4 (a) of Section 14 it is clear that it prescribes for allotment of at least 50% of the land in favour of the persons belonging to the Scheduled Castes and persons belonging to Kol, Pathari, Khairwar, Baiga, Dharikar, Panika and Gond Tribes and such other tribes as the

State Government on the recommendation of the Committee may notify in this behalf. To attract the mischief of Section 14 (4) (a) there has to be specific allegation as to how much land was available for grant and how much was granted to the persons specified in Clause (a) of Section 4 (4). There is nothing on record to demonstrate as to what was the extent of land available for allotment before the Committee, which had allotted the lands and how much part of the said land was allotted to the persons specified in Sub Section (4) (a) of Section 14 and how much was allotted to the persons, who are not specified in Sub Section 4 (a) of Section 14 and thus there was no material on record to come to a conclusion that the allotment was not carried out in consonance with the mandate of Section 14 (4) (a). In fact the list of allottees relied upon by the petitioners was not even considered while passing impugned order.

23. The other important aspect to be considered is the show cause notice issued in the present cases, which only alleged that the allotments did not follow the mandate of Section 14, without there being any specific averments, as to which part of Section 14 was not observed while allotment. A show cause notice serves the purpose of putting the noticee on guard in respect of the allegations levelled in the show cause notice. A valid show cause notice must explain and allege specifically the charge, on which the action is proposed and only then the noticee can be expected to give a reply. The scope of a valid show cause notice has been explained by the Supreme Court in the case of ***Oryx Fisheries (P) Ltd. v. Union of India, (2010) 13 SCC 427,*** in the following terms:-

"27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defense and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.

31. It is of course true that the show cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impregnable wall of prejudged opinion, such a show cause notice does not commence a fair procedure..."

24. The present show cause notice is entirely vague and no prudent person could be expected to give a reply to such a vague show cause notice and thus the proceedings initiated and culminated on the basis of a vague show cause notice, are liable to be quashed.

25. For all the reasons, recorded above, the order dated 8.5.2008 are set aside, with further directions that the names of the allottees or their heirs shall

be mutated over the revenue records. Needless to add that the allotments made in respect of the said lands, after passing of the order dated 8.5.2008, cannot have any effect.

26. The writ petitions are allowed in terms of the said order.

27. The original records are being returned to Shri Mohd. Naushad Siddiqui, Standing Counsel.

(2020)06ILR A294
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Writ-C No. 30085 of 2018

Smt. Jasoda ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shravan Kumar Mishra, Sri O.P. Chaube

Counsel for the Respondents:
C.S.C.

A. Opening of an additional fair price shop in Gram Panchyat – person who raises a grievance, must show how he has suffered legal injury - Existence of a legal right is a condition precedent for invoking the writ jurisdiction - person appointed to run the fair price shop - appointed by the Government for proper distribution of essential commodities at fair prices to the public at large - objective - to make essential commodities, which are bare need of the public, available to the public at fair prices - not to benefit certain individuals who are engaged as agents nor such engagement creates any fundamental or legal right in such person to run the fair price shop.

(Para -17,18,20)

Petitioner challenged the order dated 5.12.2017 passed by the District Magistrate, rejecting the petitioner's application/representation dated 7.11.2017 for opening of an additional fair price shop in Gram Panchyat – direction to direct the respondents to pass fresh order after taking a fresh report from Block regarding present population and the number of units with further direction to the respondents that if the population as well as number of units are more than 20,000 at present, to permit the petitioner to distribute the food grains after adjusting the number of units of all fair price shop keepers.(Para – 2)

B. Fair price shop - Five fair price shops already in operation - no requirement of 6th additional fair price shop as per the Government Order - for that purpose there should be more than 20000 units in the Gram Panchyats - total units is 15858 - held - no order can be passed directing the respondents to make a roving inquiry for making fresh determination of number of units considering alleged increase of population for opening of a fair price shop for the petitioner who has no legal or fundamental right for engagement as an agent. (Para-30,31,32,33)

HELD:- Petitioner has no fundamental or legal right to be engaged as an agent nor any of her legal rights has been infringed by order dated 5.12.2007 - order may be against the petitioner as his representation has been rejected but the order does not adversely affect any of her legal or fundamental rights.(Para-26)

Petition dismissed.(E-7)

List of Cases Cited:-

1. Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed & ors. AIR (1976) SC 578

2. Ayaaubkhan Noorkhan Pathan Vs St. of Maharashtra & ors. (2013) 4 SCC 465

3. D.D.A. Vs Gaurav Kukreja (2015) 14 SCC 254

4. Director of Settlements, A.P. and ors. Vs M.R. Apparao and anr. (2002) 4 SCC 638

5. Gopi Vs St. of U.P. (2007) 6 ADJ 2001 (DB)

6. Kallu Khan Vs St. of U.P. & anr. (2008) 6 ADJ 453 DB

7. Smt. Uma Kumari Vs Asst. Commissioner, Food & Civil Supply & ors. (2011) 29 LCD 1319

8. Sabbo Khatun Vs St. of U.P. & ors. 2012 (30) LCD 1968

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

1. Heard Sri Shrawan Kumar Mishra, learned counsel for the petitioner and the learned Standing Counsel for the State-respondents.

2. By means of the present petition, petitioner has challenged the order bearing No. 705 जि0पू0अ0/मा0उ0न्या0/2017 dated 5.12.2017 passed by the District Magistrate, Mahoba, District Mahoba (Annexure-7 to the writ petition) rejecting the petitioner's application/representation dated 7.11.2017 for opening of an additional fair price shop in Gram Panchyat, Jaitpur, District Mahoba. Prayer has also been made to direct the respondents to pass fresh order after taking a fresh report from Block-Jaitpur regarding present population and the number of units with further direction to the respondents that if the population as well as number of units are more than 20,000 at present, to permit the petitioner to distribute the food grains after adjusting the number of units of all fair price shop keepers.

3. The facts of the present case are that initially one fair price shop in Gram Panchyat Jaitpur was granted to Pratap Kumar which was cancelled by order dated 07.01.2017 passed by the Sub-Divisional Magistrate, Kulpahar, District Mahoba. Thereafter the said fair price shop was allotted to the petitioner by order dated 4.5.2017 (Annexure No.2) after passing of the resolution dated 24.4.2017 in the open meeting in petitioner's favour. The petitioner did not commit any irregularity in distribution of essential commodities and there were no complaints against her.

4. Pratap Kumar filed Writ C No. 32931 of 2017 (Pratap Kumar Vs. State of U.P. and another) against the order of cancellation dated 7.1.2017 which was allowed by this Court vide judgment and order dated 31.7.2017 (Annexure No.3) whereby the order dated 7.1.2017 was quashed and the respondents were directed to restore the licence of the petitioner therein/Pratap Kumar and to resume supply to his shop forthwith. The Sub Divisional Magistrate, Kulpahar by order dated 18.9.2017 restored the allotment of the fair price shop of Pratap Kumar in compliance of the order of this Court dated 31.7.2017 and by the same order the allotment which was made in favour of Smt. Jasoda Devi (present petitioner) on 15.5.2017 was also stayed till further orders. The present petitioner thereafter filed Writ C No. 49901 of 2017 (Smt. Jasoda Devi Vs. State of U.P. and 4 others) in which this Court passed the order dated 27.10.2017 (Annexure-5.), without entering into the merits of the order dated 18.9.2017, directing the District Magistrate to decide the representation of the petitioner filed against the order dated 18.9.2017.

5. The petitioner thereafter filed representation dated 7.11.2017 before the District-Magistrate, District-Mahoba, (Annexure No.6), for opening of an additional fair price shop (6th shop) and to restore the supply of the essential commodities to her after allocation of equal units to all the fair price shops. This

representation of the petitioner was rejected by the District Magistrate-Mahoba by means of the order dated 5.12.2017 (Annexure No.7), under challenge in the present writ petition.

6. This petition was filed on 31.8.2018. This Court by order dated 5.9.2018 granted time to the learned Standing Counsel to file counter affidavit. The petitioner was granted time to file rejoinder affidavit. It was made clear that the question of laches shall remain open.

7. The learned Standing Counsel filed counter affidavit and raised a plea in paragraph 13 thereof that the writ petition should be dismissed on the ground of delay. However, at the time of hearing the learned Standing Counsel did not press the plea of laches and submitted that the matter may be heard on merits.

8. Learned counsel for the petitioner has submitted that there is some delay in filing writ petition but the same was caused as the petitioner was trying to collect some documents about the existing population of Gram Panchyat-Jaitpur and to ascertain at what ratio the population in the concerned gram panchyat increased. The petitioner obtained the letter dated 6.11.2008 (Annexure No.1) according to which the population of Gram Panchyat-Jaitpur in the year 2008 was about 22000/- and thereafter the petitioner approached this Court and in view thereof the bonafide delay deserve to be condoned.

9. Being satisfied with the explanation offered in the writ petition the Court hereby condones the latches in filing the present petition and proceeds to decide the matter on merits.

10. Learned counsel for the petitioner has argued that the order impugned is vitiated and deserves to be quashed as the population of Gram Panchyat Jaitpur is about 25000 as per the letter dated 6.11.2008 of the District Magistrate, sent to the Director, Local Bodies, Lucknow in which it is mentioned that as the population in Gram Panchyat Jaitpur was 15976 and in 2008 after increase @ 5% annually, the population is 21970. His submission is that in view of the letter dated 6.11.2008, taking the annual increase in the population @ 5%, the population of Gram Panchyat Jaitpur would be about 25,000 in 2017 but in the impugned order the population mentioned is 18783. He has submitted that the number of ration cards are about more than 4000 and the number of units are more than 21000.

11. The learned Standing Counsel has supported the order dated 5.12.2017 on the ground it has been passed. He has submitted that as per the last census of 2011 the population was 18783 which is verified from letter No. 4/398/2014-4/53/2014 sent by the Director, Panchyati Raj, U.P., Lucknow to all the District Magistrates of the State of U.P. (annexure No.CA-1). He has further submitted that as per the Government Order No. 2715/29-6-2002-162 Sa/2001 dated 17.8.2002 (Annexure No.CA2) if any Gram Panchyat has more than 4000 units then opening of more than one fair price shop can be considered. However, as in the concerned gram panchyat, as per the eligibility list of National Food Security Act (Annexure No.CA3) uptill 9.10.2018 there were total number of 3854 ration cards including of all the categories, comprising 15858 units and as 5 fair price shops were already existing and were operational, no additional fair price shop could be opened as per the

government order on the subject under which unit is the criterion and not the population. He has next submitted that the petitioner is also not an aggrieved person to maintain the writ petition.

12. I have considered the submissions advanced by the learned counsel for the petitioner as well as the learned Standing Counsel and have perused the records.

13. The matter which requires first consideration is as to whether the petitioner is an aggrieved person to maintain the writ petition against the order dated 5.12.2017 and in this respect it would be appropriate to have a look at some judgments on the point as to who is the "person aggrieved' to maintain the writ petition.

14. In the case of **Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and others AIR 1976 SC 578** the Hon'ble Apex Court held that 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 relevant paragraph Nos. 27, 29, 33, 46 and 47 of the said report are being reproduced as under:

"27. In Bar Council of Maharashtra v. M.V. Dabholkar [1975] 2 SCC 703=(AIR 1975 SC 2092) a Bench of seven learned Judges of this Court considered the Question whether the Bar Council of a State was a 'person aggrieved' to maintain an appeal under Section of the Advocates' Act, 1961. Answering the question in the affirmative , this Court, speaking through Ray C.J. indicated how the expression "person aggrieved" is to be interpreted in the context of a statute, thus:

The meaning of the words "a person, aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates' Act is comparable to the role of a guardian in professional ethics. The words "person aggrieved" in Sections 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests.

29. Typical of the cases in which a strict construction was put on the expression "person aggrieved", is Buxton v. Minister of Housing and Local Govt. . There, an appeal by a Company against the refusal of the Local Planning Authority of permission to develop land owned by the Company by digging chalk, was allowed by the Minister. Owners of adjacent property applied to the High Court under Section 31(1) of the Town and Country Planning Act, 1959 to quash the decision of the Minister on the ground that the proposed operations by the company would injure

their land and that they were 'persons aggrieved' by the action of the Minister. It was held that the expression 'person aggrieved' in a statute meant a person who had suffered a legal grievance; anyone given the right under Section 37 of the Act of 1959 to have his representation considered by the Minister was a person aggrieved, thus Section applied, If those rights were infringed; but the applicants had no right under the statute and no legal rights had been infringed and therefore they were not entitled to challenge the Minister's decision, Salmon J. quoted with approval these observations of James LJ in Re Sidebothem .

"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."

33. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226 an applicant should ordinarily be one who has & personal or individual right in the subject-matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi in the matter-(See State of Orissa v. Madan Gopal, 1952 SCR28= (AIR 1952 SC 12); Calcutta Gas Co. v. State of West Bengal, 1962 Supp 1 SCR 1= (AIR 1962 SC 1044); Ram Umeshwari Suthoo v. Member, Board of Revenue Orissa (1967) 1 SCA 413; Gadda Venkateshwara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828; State of Orissa Vs. Rajasaheb Chandanmall, AIR 1972 SC 2112; Dr. Satyanarayana Sinha v. S. Lal & Co. AIR 1973 SC 2720.

46. Thus, in substance, the appellant's stand is that the setting up of a rival cinema house in the town will adversely affect his monopolistic commercial interest, causing pecuniary harm and loss of business from competition. Such harm or Loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Juridically, harm of this description is called demnum sine injuria, the term injuria being here used in its true sense of an act contrary to law(1). The reason why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large.

47. In the light of the above discussion, it is demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He 'has no legal peg for' a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the No-objection Certificate.

15. In the case of **Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra and others reported in**

(2013) 4 SCC 465 the Hon'ble Apex Court held as under in Paragraph Nos. 9 to 12 and 17 which are being reproduced as follows:

9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of the aggrieved persons.

Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the authorities. Therefore, there must be judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking a writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. Infact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide:State of Orissa Vs. Madan Gopal Rungta, AIR 1952 SC 12; Saghir Ahmad & Anr. v. State of U.P. AIR 1954 SC 728; Calcutta Gas Company (Proprietary) Ltd Vs. State of west Bengal & others, AIR 1962 SC 1044; Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736; and Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Others, (2009) 2 SCC 784).

10. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Others v. Union of India & Others, AIR 1977 SC 1361.

11. In Anand Sharadchandra Oka Vs. University of Mumbai, AIR 2008 SC 1289, a similar view was taken by this Court, observing that, if a person claiming relief is not eligible as per requirement, then he cannot be said to be a person aggrieved regarding the election or the selection of other persons.

12. In A. Subhash Babu v. State of A.P., AIR 2011 SC 3031, this Court held:

"The expression "aggrieved person' denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant."

16. In the case of **Delhi Development Authority (2015) 14 SCC 254** the Hon'ble Apex Court held as under in Paragraph No. 19 which is being reproduced as follows:

19. In Director of Settlements, Andhra Pradesh and Ors. vs. M.R. Apparao and Anr., (2002) 4 SCC 638, while considering the scope of the power of High Court to issue a writ of mandamus under Article 226 of the Constitution, this Court has held as under:

"17. ....It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression "for any other purpose". The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along the recognised lines and subject to certain self-imposed limitations. The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed..."

17. In view of the above, the law on the said point can be summarized to the effect that a person who raises a grievance, must show how he has suffered legal injury. Generally, a stranger having no right whatsoever to any post or property, cannot be permitted to intervene in the affairs of others.

18. It has thus been settled that as a general rule inringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi in the matter. Existence of a legal right is a condition precedent for invoking the writ jurisdiction. The legal right that can be enforced must ordinarily be the right of the petitioner himself who complains of a fraction of such right. Legal right means an entitlement arising out of legal rules. If the person claiming relief is not eligible as per the requirement, he cannot be said to be a person aggrieved. Further, mere harm or loss is not wrongful in the eye of law unless it results in injury to a legal right or legally protected interest.

19. Now it requires consideration if the petitioner has any legal right or a legally protected interest to which any harm has been caused and for enforcement of such legal right the present writ petition can be maintained.

20. A person appointed to run the fair price shop is appointed by the Government for proper distribution of essential commodities at fair prices to the public at large. The objective is to make essential commodities, which are bare need of the public, available to the public at fair prices. The engagement of the agents is the means to achieve that goal. The object is not to benefit certain individuals who are engaged as agents nor such engagement creates any fundamental or legal right in such person to run the fair price shop. Such persons have no fundamental or legal right to deal with the essential commodities on behalf of the government for its distribution.

21. In the case of **Gopi Vs. State of U.P. 2007 (6) ADJ 2001 (DB)** this Court held as under:

"25. Realising the importance of the Public Distribution System, Parliament while bringing about the 73rd constitutional amendment included the Public Distribution System as one of the primary functions of the Gram Panchayat and it has been incorporated in Article 243-G of Part 9 of the Constitution. The Public Distribution System is obviously an avowed function of the State in order to ensure the distribution of essential commodities fairly. The object is clearly to provide benefit to the public at large in order to ensure supply of essential commodities which is necessary for the sustenance of daily life. The aforesaid object, therefore, has to be fulfilled keeping in view the intention of the legislature which is to promote public awareness and ensure distribution of essential commodities. In essence, the object is to provide benefit to the public at large. As a necessary corollary to the same, the object is not to set up any trade for the benefit of any individual. It may be that by virtue of this licensing system, an individual also gets the opportunity to benefit himself by setting up a fair price distribution unit. However, such a licence does not fall within the category of a fundamental right to carry on trade and business as understood under Article 19(1)(g) of the Constitution of India. The Government Order which has been issued under the provisions of the Essential Commodities Act, is to regulate the supply and distribution of essential commodities fairly."

22. In the case of **Kallu Khan Vs. State of U.P. and another [2008 (6) ADJ 453 (DB)]** this Court held as under:

"19. It would be appropriate to consider the basic idea of distribution of essential commodities under the 1955 Act and the system of appointment of agents in furtherance of discharge of the aforesaid function. It cannot be disputed that even before 73rd Amendment of the Constitution the Government has undertaken the responsibility of distribution of essential commodities to public at large at controlled or fair price. The purpose of the said responsibility is obvious. The majority of the citizens in the country live either below poverty live or almost at par or little above thereof. They are not able to meet their two times meals by the meagre income they earn and, therefore, the market forces, if are allowed to operate freely without any protection to such persons, probably majority of such people would be forced to die of starvation and they may not be able to survive at all. This experience we had even before independence and immediately after independence when the hoarders created a situation of scarcity of food items causing virtual revolution in different parts of the country at times. Various social and welfare measure were taken by the then Government and one of the major decisions taken with the intervention of Parliament is enactment of 1955 Act conferring power upon the Government to control production, supply and distribution of, and trade and commerce in certain commodities, namely, essential commodities as defined under Section 2(1) of 1955 Act. Therefore, the basic idea and intention of the legislature under the Act is to make available essential commodities to the public at large at fair price except of the cases where the availability and equitable distribution would be necessary for defence of India or for any efficient conduct of military operations. The Act intends to provide welfare measure for availability of essential commodities to public at large at fair price and rest of the machinery or mechanism is incidental for

achieving the aforesaid goal. The appointment of fair price shop dealers, therefore, as such, is not the primary objective of 1955 Act but it is a channel by which the objective of making essential commodities available to public at large at fair price is to be achieved. It is always permissible and open to the Government to make the essential commodities available to public at large at fair price through the agencies or instrumentalities of its own namely, its own officers or officials or by creating a department or alike. Simultaneously, instead of undertaking the said job on its own it can discharge the aforesaid obligation through private persons or bodies by appointing them as its agents. Bereft of the authority conferred upon such agents by the Government for distribution of essential commodities at fair price, such persons had no fundamental or legal right of dealing with such essential commodities on behalf of the Government to distribute to public at large the essential commodities at fair prices, though on their own, in their private capacity, it is always open to them to make the commodities which are essential commodities under the Act available to public at large at fair price without having any corresponding burden upon the Government if there is no otherwise prohibition under any other law and the statutory provisions otherwise controlling the production, storage etc. of such essential commodities are observed by them."

23. Indisputably, the petitioner was allotted fair price shop by order dated 4.5.2017 for the interregnum period i.e. in the vacancy caused due to cancellation of fair price shop allotted to Pratap Kumar. The order of the petitioner itself provided that it was subject to the orders passed by the competent court in the pending cases which shall be binding on the petitioner and, as such, the writ petition filed by Pratap Kumar having been allowed, the petitioner's allotment came to an end for which the order dated 18.9.2017 was passed.

24. In the case of **Smt. Uma Kumari Vs. Assistant Commissioner, Food & Civil Supply and others reported in 2011 (29) LCD 1319**, in which an interregnum arrangement made in favour of the petitioner therein was brought to an end as the appeal of the original allottee was allowed, this Court held that such person (the subsequent allottee) was not an "aggrieved person' as he was not deprived of any of his legal entitlement. Paragraph Nos. 5,6,7 and 8 are being reproduced as under:

"5. While entertaining the writ petition, this Court vide order dated 27.5.2005 provided that fair price shop license of the petitioner would not be cancelled on the ground that license of opposite party No.4 has been restored. In this regard, it is mentioned that it is an interregnum arrangement and once the appeal has been decided in favour of the opposite party no.4, the petitioner has no locus to file the instant writ petition. Furthermore, the petitioner is not an aggrieved party. As the judicial proceedings have come to an end and the order passed by the Appellate Authority attains finality, no relief can be granted to the petitioner.

6. According to my opinion, a person aggrieved means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. "Person

aggrieved' means a person who is injured or he is adversely affected in a legal sense.

7. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ Petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfied the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. [Utkal university etc. vs. Dr. Nrusingha Charan Sarangi and others. (AIR 1999 SC 943) and Laxminarayan R. Bhattad and others v. State of Maharashtra and another (2003) 5 SCC 413.

8. Legal right is an averment of entitlement arising out of law. It is, in fact, an advantage or benefit conferred upon a person by a rule of law [Shanti Kumar R. Canji v. Home Insurance Co. of New York, (AIR 1974 SC 1719) and State of Rajasthan v. Union of India and others, (AIR 1977 SC 1361)]."

25. Similarly in the case of **Sabbo Khatun Vs. State of U.P. and others reported in 2012 (30) LCD 1968** it was held as under in paragraph Nos 6 and 7 of the said judgment:

6. In support of his submission, learned Standing Counsel has relied upon the case reported in [2009 (74) ALR 61], Sri Pal Jatav vs. State of U.P. and others, in which the Division Bench of this Court has observed that on account of cancellation of licence of the Fair Price Shop of opposite party no.3, the petitioner was permitted to run the Fair Price Shop as a stop gap arrangement and since the licence of the opposite party no.3 has been restored, the petitioner evidently cannot be permitted to run the Fair Price Shop in question any longer and the same would now be run by the opposite party no.3.

7. This Court has also expressed the view in its judgment reported in 2011 (29) LCD 626, Sita Devi vs. Commissioner, Lucknow and others (W.P.No.1436 (M/S) of 2008) that a person appointed to run the Fair Price Shop, as an interim arrangement during pendency of appeal, has no locus standi. The relevant para-7 is being reproduced below:-

"So far as the grievance of the opposite party no.3 is concerned, he has no locus, as he was appointed during the period interregnum, when the appeal of the petitioner was pending and will only be a temporary arrangement, whether such arrangement was made by following due process of making regular arrangement or otherwise on the discretion of the opposite party no.2 and, as such, the opposite party no.3 has no locus to defend the order passed by the authorities."

Having considered the matter in all, its pros and cons, I am of the view that the submission made by the learned counsel for the petitioner cannot be accepted. As is evident from the narration of the facts given above, the licence was given to the opposite party no.4 for running the Fair Price Shop in question and on account of cancellation of licence of the Fair Price Shop of opposite party no.4, the petitioner was permitted to run the Fair Price Shop as a stop gap arrangement. As licence of the opposite party no.4 has been restored by the order dated 09.08.2012, the petitioner evidently cannot be permitted to run the Fair Price Shop in question any longer and the same is to be run by the opposite party no.4."

26. Thus considered I find that the petitioner has no fundamental or legal right to be engaged as an agent nor any of her legal rights has been infringed by order dated 5.12.2007. The petitioner cannot be said to be a person aggrieved from the order dated 5.12.2017 as it does not infringe any of her legal or fundamental rights. Although, by the impugned order dated 5.12.2017 the petitioner's representation has been rejected but the criteria to determine if a person is "aggrieved person' is if the impugned order infringes or takes away any of the fundamental or legal rights or legally protected interests and not mere rejection of the representation. The order may be against the petitioner as his representation has been rejected but the order does not adversely affect any of her legal or fundamental rights.

27. So far as the submission of the petitioner's counsel, based on the letter dated 6.11.2008 (Annexure No.1) is concerned, that in 2008 the population in Gram Panchyat Jaitpur was 15976 and taking the increase at the rate of 5% annually the population would be 21970 in the year 2011 and about 25000 in 2017 and consequently the number of units in the gram panchyat must have also increased, the same deserves to be rejected inasmuch as the criterion for opening of an additional fair price shop in the concerned Gram Panchyat, as per the Government Order bearing number 2715/29.6.2002-162/2002 dated 17.8.2002, is the number of units in the concerned Gram Panchyat and not the population.

28. The Government Order dated 17.8.2002 is being reproduced as under:-

"स० 2715/29-6-2002-162 सा०/2001

प्रेषक,

श्री खंजन लाल
प्रमुख सचिव,
उ०प्र० शासन।

सेवा में,

1. समस्त जिलाधिकारी उत्तर प्रदेश

2. समस्त जिलापूर्ति अधिकारी उत्तर प्रदेश।

खाद्य तथा रसद अनुभाग-6 लखनऊः दिनांक 17 अगस्त, 2002

विषयः- सार्वजनिक वितरण प्रणाली के अन्तर्गत ग्रामीण क्षेत्र की उचित दर की दुकानों के आवंटन में वर्तमान आरक्षण व्यवस्था कार्यान्वित किये जाने हेतु आवंटन प्रारम्भ किये जाने हेतु नीति-निर्देश।

महोदय,

उपरोक्त के सम्बन्ध में शासनादेश संख्या- 112/29-6-2002-162 सा०/2001 दिनांक 10 जनवरी, 2001 का सन्दर्भ लेने का कष्ट करें जिसके द्वारा राशन की दुकानों/पेटी डीजल डीलर्स की नियुक्ति/आवंटन को स्थगित रखने के निर्देश दिये गये थे।

2. इस सम्बन्ध में मुझे आपसे यह कहना का निदेश हुआ है कि विधायी अनुभाग-1 की अधिसूचना संख्या- 919/सत्रह-वि-1-2(क)-3-2002, दिनांक 06 जून, 2002 को दृष्टिगत रखते हुए शासनादेश संख्या- 2227/29-6-2001-162 सा०/2001, दिनांक 09 अक्टूबर, 2001 को अतिक्रमित करते हुए उचित दर की दुकानों के आवंटन/चयन हेतु निम्न आरक्षण व्यवस्था

तत्काल प्रभाव से पुर्नस्थापित/लागू की जाती है:-

1- अनुसूचित जाति - 21 प्रतिशत

2- अनुसूचित जनजाति - 02 प्रतिशत

3- अन्य पिछड़े वर्ग - 27 प्रतिशत

3. उपर्युक्तानुसार आरक्षित श्रेणियों में निम्नलिखित होरिजेन्टल आरक्षण भी अनुमन्य होगा--

(क) सम्बन्धित आरक्षित श्रेणी की महिलाओ को 20 प्रतिशत

(ख) सम्बन्धित आरक्षित श्रेणी के लड़ाई में मारे गये सैनिक के परिवार के सदस्य लड़ाई में घायल हुए सैनिक के परिवार के सदस्य, भूतपूर्व सैनिक 08 प्रतिशत।

(ग) सम्बन्धित आरक्षित श्रेणी के स्वतंत्रता संग्राम सेनानी, उनकी पत्नी को 5 प्रतिशत।

(घ) सम्बन्धित आरक्षित श्रेणी के विकलांग व्यक्तियों को 02 प्रतिशत

इस शासनादेश के अनुसार वर्तमान में रिक्त दुकानों में आरक्षण के प्रतिशत का ध्यान रखा जायेगा किन्तु उक्त प्रतिशत को पूर्ण करने के लिये वर्तमान में चल रही दुकानों को निरस्त नहीं किया जायेगा। यदि कोई दुकान किसी कारणवश निरस्त होती है तब उस पर नई नियुक्ति के समय इस शासनादेश के अनुसार आरक्षण पूर्ण करने की कार्यवाही की जायेगी।

4. (1) विकास खण्ड को एक यूनिट मानते हुए तहसील में आरक्षण की व्यवस्था की गणना की जायेगी। प्रत्येक विकास खण्ड में कुल स्वीकृत दुकानों में प्रस्तर संख्या 2 एवं 3 के अनुसार आरक्षण की गणना तथा चिन्हीकरण किया जायेगा।

(2) जनसंख्या के अवरोही क्रम (डिसेडिंग आर्डर) के अनुसार जिस प्रकार पंचायती राज व्यवस्था में ग्राम प्रधान के पदों में आरक्षण व्यवस्था लागू की गई है, उसी प्रकार आरक्षण की व्यवस्था दुकानों के चिन्हाँकन में लागू की जायेगी। ग्रामीण क्षेत्रों में राशन की दुकानों में आरक्षण सुनिश्चित करने हेतु यही मुख्य आधार होगा।

(3) वर्तमान में कार्यरत दुकानों की यथास्थिति बनाये रखते हुए जितनी रिक्तियाँ हैं उनमें आरक्षण की गणना निम्नानुसार की जायेगी:-

(क) कुल स्वीकृत दुकानों के सापेक्ष आरक्षण 50 प्रतिशत तक ही किया जायेगा।

(ख) भविष्य में आरक्षित श्रेणी के अन्तर्गत चिन्हित दुकानें जैसे-जैसे रिक्त होती जायेगी, उनका आवंटन उसी श्रेणी के अभ्यार्थियों को किया जायेगा।

(4) इस सम्बन्ध में दिनांक 3.7.90 के शासनादेश संख्या 3967/29- खाद्य-6 में दी गई शर्ते भी प्रभावी होगी और यदि उपर्युक्त शासनादेश की शर्ते तथा वर्तमान शासनादेश की किसी शर्त/प्रतिबन्ध में विरोधाभास हो तो वर्तमान शासनादेश की शर्ते एवं प्रतिबन्ध प्रभावी होंगे।

5- ग्राणीण क्षेत्र में राशन की दुकानों के आवंटन हेतु निम्नानुसार गठित तहसील स्तरीय समिति द्वारा किया जायेगा:-

1. उप जिला धिकारी - अध्यक्ष

2. सम्बन्धित खण्ड विकास अधिकारी - सदस्य

3. अनुसूचित जाति/जनजाति एवं पिछड़ी- सदस्य

जाति का एक-एक अधिकारी जो
जिलाधिकारी द्वारा नामित किया जाये
(यदि उपर्युक्त अधिकारियों में से कोई
इस वर्ग का हो तो अलग से नामांकन करने
की आवश्यकता नहीं होगी)
4. क्षेत्रीय खाद्य अधिकारी - सदस्य/संयोजक

6. इस शासनादेश के परिप्रेक्ष्य में उपर्युक्तानुसार विकास खण्ड की वर्गवार कुल रिक्त दुकानों की संख्या निर्धारित तथा चिन्हाँकित की जायेगी तथा होरिजेन्टल आरक्षण के अन्तर्गत महिला, लड़ाई में मारे गये सैनिक परिवार के सदस्य/घायल सैनिक अथवा उसके परिवार के सदस्य, भूतपूर्व सैनिक, स्वतन्त्रता सेनानी, उनकी पत्नी तथा विकलांग व्यक्तियों के आरक्षण को सुनिश्चित करने हेतु ग्राम सभाओं का चिन्हाँकन निर्धारित प्रतिशत तक लाटरी पद्धति के आधार पर ही किया जायेगा। प्रस्तर-3 के "क", "ख", "ग", "घ" हेतु प्रत्येक के लिये क्रमवार एक-एक पर्ची तब तक निकाली जायेगी जब तक निर्धारित आरक्षण पूर्ण नहीं हो जाता।

7. ग्रामसभाओं के उपर्युक्तानुसार चिन्हाँकन के पश्चात् ग्रामीण क्षेत्र में राशन की दुकानों का चयन ग्राम सभा की खुली बैठक में प्रस्ताव पास करके किया जायेगा तथा तीन नामों के पैनल उप जिलाधिकारी की अध्यक्षता में गठित समिति को नियुक्ति हेतु प्रेषित किया जायेगे। यदि अभ्यर्थियों की संख्या तीन से कम है तो पैनल में दो अथवा एक का नाम भी भेजा जा सकता है। ग्रामीण क्षेत्रों में यथासम्भव प्रत्येक ग्रामसभा में एक राशन की दुकान होगी और यदि ग्राम सभा में चार हजार यूनिट से अधिक हो तो एक से अधिक दुकान नियुक्त किये जाने पर विचार किया जा सकता है।

8. किसी भी आरक्षित श्रेणी की रिक्ति उसी श्रेणी के अभ्यर्थियों से ही निर्धारित प्रक्रिया के अनुसार भरी जायेगी। परन्तु किसी भी दशा में उक्त रिक्त अनारक्षित नहीं की जायेगी।

9. अनारक्षित ग्राम सभाओं हेतु किसी भी वर्ग का अभ्यर्थी निर्धारित औपचारिकताओं को पूर्ण करके आवेदन कर सकता है।

10. ग्रामीण क्षेत्र में राशन की दुकानों का चयन निम्नलिखित अनिवार्य अर्हताओं एवं शर्तों को दृष्टिगत रखते हुए किया जायेगाः-

(क) अभ्यर्थी के खाते में कम से कम 40 हजार रूपया उपलब्ध हो ताकि वह अपनी दुकान को आवंटित एक माह की सामाग्री का एक बार में उठान करने के लिए आर्थिक रूप से सक्षम हो।

(ख) सामान्य ख्याति अच्छी हो।

(ग) शिक्षित हो ताकि वह दुकान का हिसाब किताब सही रूप से रख सके।

(घ) अभ्यर्थी के विरूद्ध कोई आपराधिक मामले पंजीकृत न हो और न ही वह किसी आपराधिक मामले में दण्डित किया गया हो।

(ड़) अभ्यर्थी की आयु 21 वर्ष से अधिक हो और परिवार में किसी अन्य सदस्य के नाम कोई दुकान आवंटित न हो।

(च) दुकानदार स्थानीय निवासी हो।

(छ) अभ्यर्थी द्वारा 1000/- रूपये की अर्नेस्ट मनी का बैंक ड्राफ्ट जिलापूर्ति अधिकारी के पक्ष में जमा किया जायेगा। उपरोक्त अर्नेस्ट मनी दुकानों के आवंटन की

स्थित में प्रतिभूति राशि में समायोजित कर ली जायेगी।

(ज) दुकानों की नियुक्ति की स्थिति में अभ्यर्थी को 5000/- रूपये की प्रति भूति जमी करनी होगी तथा 100/- रूपये का नानजूडिशियल स्टाम्प पेपर लगाना होगा। यह प्रतिभूति केवल नये नियुक्ति होने वाले दुकान के अभ्यर्थियों से ली जायेगी। जिनकी दुकान पूर्व से ही नियुक्त है और संचालित है उनमे नये दर पर प्रतिभूति नहीं जमा करवायी जायेगी।

(झ) यदि दुकानदार अच्छी ख्याति का हो तो उसकी मृत्यु के उपरान्त दुकान का आवंटन उसके आश्रित को करने पर विचार किया जा सकता है। आश्रित का तात्पर्य पत्नी, पुत्र तथा अविवाहित पुत्री से है।

11. ग्रामीण क्षेत्र में जहाँ ग्रामसभा प्रस्ताव नहीं पारित करती है अथवा जहाँ-जहाँ प्रस्ताव में विवाद उत्पन्न हो जाता है जनहित में ऐसे ग्रामसभा के लिये जिलाधिकारी को यह अधिकारी होगा कि वह शासनादेशों के निर्देशों के अनुसार उप जिलाधिकारी की अध्यक्षता में गठित समिति की संस्तुति पर दुकान के आवंटन का निर्देश दे सकते है।

12. जिला पूर्ति अधिकारी को यह अधिकार होगा कि ग्रामीण क्षेत्र की दुकानों का निरीक्षण तथा अनियमितता पाये जाने पर दुकानदारों के विरूद्ध दण्डात्मक कार्यवाही कर सकते है।

13. वितरण में अनियमितता पाये जाने पर राशन की दुकान नजदीकी ग्रामसभा की दुकानदार से सम्बद्ध की जायेगी। जिस पूर्व ग्रामससभा में दुकान कार्यशील थी उसी ग्रामसभा के प्रधान पर नियत स्थल/तिथि को सम्बद्ध दुकानदार द्वारा खाद्यान्न, चीनी मिट्टी का तेल का मासिक वितरण सुनिश्चित कराया जायेगा। दोनों ग्रामसभाओं में आवश्यक सामग्री का वितरण करने हेतु नियत दिवसों में सम्बन्धित उपजिलाधिकारी को समायोजन की अनुमति देने का अधिकारी होगा।

14. शासनादेश 09 अक्टूबर, 01 के परिपालन में अनारक्षित वर्ग हेतु यदि चयन की कार्यवाही पूर्ण कर ली गई थी तो उन रिक्तियों को चयन/आवंटन की प्रक्रिया में पुनः सम्मिलित नहीं किया जायेगा।

15. चूँकि शासन स्तर पर उपलब्ध सूचनानुसार प्रदेश के लगभग सभी जनपदों में वर्तमान में उचित दर की दुकानें रिक्त चल रही है जिससे उपभोक्ताओं को सही समय पर खाद्यान्न एवं अन्य वस्तुयें उपलब्ध कराने में कठिनाई हो रही है अतएव जनहित में इन रिक्तियों को शीघ्र भरा जाना नितान्त आवश्यक है।

भवदीय,

ह० अपठनीय

(खंजन लाल)
प्रमुख सचिव।
संख्या तथा दिनांक उपरोक्त

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1. आयुक्त, खाद्य तथा रसद विभाग, जवाहर भवन, लखनऊ।

2. समस्त मण्डलायुक्त, उ०प्र०।

3. समस्त सम्भागीय खाद्य नियंत्रक, उ०प्र०।

4. समस्त सहायक आयुक्त (खाद्य), उ०प्र०।

5. समस्त उप सम्भागीय विपणन अधिकारी, उ०प्र०।

आज्ञा से,

ह० अपठनीय

(नरेन्द्र कुमार चौधरी)

विशेष सचिव"

29. A perusal of paragraph 7 of the Government Order shows that, as far as possible, in rural areas every gram panchyat shall have at least one fair price shop and if in the concerned Gram Panchyat the number of units are more than 4000 then the opening of an additional shop may be considered by the committee constituted under the said government order. Reading of the government order makes it very clear that the criterion for opening an additional shop is the number of units in the Gram Panchyat i.e. if the units exceed 4000 then such consideration may be made.

30. The impugned order has been passed specifically stating that the total number of card holders in Gram Panchyat-Jaitpur is 3309 out of which there are 250 Antodaya Card Holders and 3059 Patragrasthi (eligible household card holders). The total number of units under the above schemes are 13990. There are already five fair price shops in operation and considering the number of units there is no requirement of 6th additional fair price shop, as for that purpose there should be more than 20000 units in the Gram Panchyats.

31. Petitioner's counsel has drawn attention of this Court to paragraph 12 of the counter affidavit in which it is stated that the total units in the Gram Panchyat is 15858 and in view thereof he has submitted that there is difference in the number of units as mentioned in the counter affidavit and in the impugned order.

32. The Court finds that even if there is some difference in the number of units as mentioned in the counter affidavit and in the impugned order, still the number of units is less than 20000. There being already five fair price shops, on the ground of such difference as pointed out by the petitioner's counsel, there would be no requirement of sixth shop as per the Government Order.

33. This Court in the exercise of writ jurisdiction will not pass an order directing the respondents to make a roving inquiry for making fresh determination of number of units considering alleged increase of population for opening of a fair price shop for the petitioner who has no legal or fundamental right for engagement as an agent.

34. Thus considered I do not find any merit in the writ petition which is hereby dismissed.

(2020)06ILR A308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 31723 of 2016

Kanpur Electricity Supply Co. Ltd. (KESCO), Kanpur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pranjal Mehrotra, Sri Komal Mehrotra

Counsel for the Respondents:
C.S.C., Sri Anil Kumar, Sri Ankush Tandon

A. Labour Law - The U.P. Industrial Disputes Act, 1947 - Section 6-N - No Employer and employee relationship Labour Court duty bound to give a definite finding with regard to the fact - who appoints the workers - who pays the salary/remuneration - who has the authority to dismiss - who can take disciplinary action - Whether there is continuity of service - extent of control and supervision i.e. whether there exists complete control and supervision [(2019) 13 SCC 82 : Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola & Ors.] (Para – 11)

Award passed by labour court - statements of the parties not considered in their right perspective - no finding regarding relationship of employer and employee between the petitioner and respondent no.3 - labour court not arrived at proper conclusion .(Para - 11)

HELD:- Award set-aside – directed labour court to re-consider the matter and decide within a period of two months in the light of the law laid down in (2019) 13 SCC 82 : Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola & Others.(Para-12)

Petition allowed.(E-7)

List of Case Cited:-

BHEL Vs. Mahendra Prasad Jakhmola & ors. (2019) 13 SCC 82

(Delivered by Hon'ble Siddhartha Varma, J.)

1. Upon an industrial dispute being raised by the respondent no.3-Pramod Kumar Mishra, a Reference was made by the State Government to the respondent no-2 on 11.6.2007. The Reference reads as under :-

"क्या सेवायोजकों द्वारा अपने श्रमिक श्री प्रमोद कुमार मिश्रा पुत्र स्व0 भगवती प्रसाद मिश्रा की सेवायें दि0 05.02.2007 से समाप्त किया जाना उचित एवं वैद्यानिक है, यदि नहीं तो संबंधित श्रमिक क्या हितलाभ/अनुतोष पाने का अधिकारी है तथा अन्य किस विवरण सहित।"

2. However, when the respondent no.2 i.e. the Industrial Tribunal (3), Uttar Pradesh, Sarvodaya Nagar, Kanpur answered the Reference in favour of the respondent no.3, the instant writ petition was filed.

3. The case of the respondent no.3 had been that he was posted as a Security Guard with the petitioner on 19.6.2003 through the respondent no.4-U.P. Poorva Sainik Kalyan Nigam Limited. However, when on 5.2.2007, the respondent no.3 was, without any reason, removed from service and that too orally without any notice etc. as was contemplated under section 6-N of the U.P. Industrial Disputes Act, 1947, the cause of action arose. The further case of the respondent no.3 was that upon his removal another Guard namely Baij Nath was engaged in his place. The case was contested by the petitioner and it had taken a stand that the respondent no.3 was in fact an employee of respondent no.4 and was only sent to the petitioner for performing certain functions; there was no relationship of employer and employee between the petitioner and respondent no.3 and in fact the respondent no.4 was the employer of the respondent no.3. In fact it was pleaded and argued by the petitioner before the Labour Court that the petitioner never made any payment to the respondent no.3. It was also stated before the Labour Court that the petitioner never terminated the services of respondent no.3.

4. The respondent no.4 had also contested the case before the Labour Court and had taken a stand that the respondent no.4 was not the employer and in fact it

was the petitioner who was the employer of respondent no.3.

5. However, when the award was passed in favour of the respondent no.3 by the respondent no.2 by which the respondent no.3 was reinstated in service and was also granted back-wages from the date of termination, the present writ petition was filed.

6. The contention of learned counsel for the petitioner is that if the replication filed by the respondent no.3 to the Written Statement filed by the petitioner, before the Labour Court was perused then it could be seen that there was a clear admission of the respondent no.3 that he was sent for performing security guard's duty in the petitioner's establishment by the respondent no.4 i.e. the U.P. Poorva Sainik Kalyan Nigam Limited and that the respondent no.4 had replaced the respondent no.3 by sending in his place one Sri Baij Nath. Still further, learned counsel for the petitioner submitted that the workman i.e. the respondent no.3 in his replication to the Written Statement filed on 24.10.2007 had stated in paragraph 2 that the petitioner's establishment used to make bulk payment to respondent no.4 who in its turn made payments to workmen. Since the learned counsel for the petitioner immensely relied upon paragraph 2 of the replication of the workman, the same is being reproduced here as under :-

"यह कि सेवायोजक प्रथम के लिखित कथन का परिच्छेद–दो भ्रामक है अतः अस्वीकार है। पक्षकार–2 केवल बिचौलिया था न कि मालिक क्योंकि उनके द्वारा केस्को संस्थान में कर्मचारी वादी को कार्य करने हेतु उपलब्ध कराया गया था। सेवायोजक– प्रथम ही कर्मचारी वादी के वेतन का प्रतिमाह रू0 6500/– भुगतान बिचौलिये पक्षकार–2 को करते थे जो केवल रू0 5650/– प्रतिमाह वेतन का भुगतान कर्मचारी वादी को करते थे।"

7. Further learned counsel for the petitioner relied upon the cross-examination of the respondent no.3 and brought to the notice of the Court about the functions that the respondent no.4 was performing as an employer. Learned counsel for the petitioner relying upon the judgment of the Supreme Court reported in **(2019) 13 SCC 82 : Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola & Ors.** submitted that the Labour Court had to, while seeing as to whether there was an employer-employee relationship, give definite findings with regard to the following :-

"(i) who appoints the workers;

(ii) who pays the salary/remuneration;

(iii) who has the authority to dismiss;

(iv) who can take disciplinary action;

(v) Whether there is continuity of service; and

(vi) extent of control and supervision i.e. whether there exists complete control and supervision."

8. Learned counsel appearing for respondent no.3, however, submitted that the award of the Industrial Tribunal required no interference as the Labour Court had definitely found that it was the petitioner who was the employer.

9. The respondent no.4 had also appeared and supported the stand taken by the respondent no.3.

10. I have carefully considered the submissions advanced by the learned counsel for the parties.

11. A perusal of the award shows that the oral statements of the workman-respondent no.3 have not been considered in their right perspective. The Labour Court was duty bound to have given a definite finding with regard to the fact as to who had appointed the respondent no.3; who was paying the salary; who had the authority to dismiss; who could take disciplinary action; whether there was continuity of service and also what exactly was the extent of control and supervision of the petitioner. A perusal of the award shows that the statements of the parties were not considered in their right perspective and the finding as was required to be arrived at to come to a proper conclusion as to whether there was relationship of employer and employee was not arrived at correctly.

12. Under such circumstances, the writ petition is allowed. The award dated 28.8.2015 is set-aside. The matter shall now be re-considered and decided by the respondent no.2 within a period of two months from the date of presentation of a certified copy of this order, in the light of the law laid down in the judgment of the Supreme Court reported in **(2019) 13 SCC 82 : Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola & Others.**

(2020)06ILR A311
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ-C No. 33399 of 2019

Smt. Adarsh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Essential Commodities Act, 1955 - Section 3/7 - Restoration of Fair Price Shop licence - - mere filing of the First Information Report under section 3/7 of the Essential Commodities Act, 1955 could not be made a ground for the cancellation of a dealership of a Fair Price Shop(*2011 (3) ADJ 638 : Smt. Raj Kumari vs. State of U.P. & Ors.)* - an allottee who had been allotted a shop during the pendency of the litigation had no right to challenge the restoration of the licence*(Poonam vs. State of U.P. & Ors. reported in (2016) 2 SCC 779).*(Para -4, 8)

Petitioner - served with a show-cause notice - accompanied by an order of suspension - petitioner to submit detailed reply before the District Supply Officer - District Supply Officer cancelled the licence of the petitioner to run the Fair Price Shop petitioner - Appeal before the Commissioner dismissed - First Information Report under section 3/7 of the Essential Commodities Act, 1955 - preceded the suspension order - resulted in the submission of a Final Report by the prosecution - Final Report accepted by the Additional Chief Judicial Magistrate - No protest petition filed.(Para - 2,3)

HELD:- The orders dated 28.3.2018, 4.12.2018 and 30.4.2019 by which the licence of the petitioner was suspended, the licence was cancelled and thereafter the appeal was dismissed, respectively, are being set-aside - The licence of the petitioner to run the Fair Price Shop shall now be restored.(Para-9)

Petition allowed.(E-7)

List of cases cited:-

1. Poonam Vs St. of U.P. & ors. (2016) 2 SCC 779

2. Smt. Raj Kumari Vs St. of U.P. & ors. (2011) 3 ADJ 638

(Delivered by Hon'ble Siddhartha Varma, J.)

1. This writ petition was, even though by an order of this Court dated 19.10.2019 directed to be heard with Writ-C No.31076 of 2019, it was heard separately and a separate order is being passed in this writ petition after hearing the learned counsel for the petitioner and the learned Standing Counsel.

2. The petition in this case was served with a show-cause notice dated 28.3.2018 asking as to why her licence to run the Fair Price Shop be not cancelled. The show-cause notice dated 28.3.2018 was also accompanied by an order of suspension. Against the order of suspension, the petitioner had filed a writ petition being Writ-C No.18621 of 2018 which was disposed of with a direction that the petitioner might submit her detailed reply before the District Supply Officer and the enquiry thereafter had to be conducted. The petitioner submitted her reply and thereafter the District Supply Officer on 4.12.2018 cancelled the licence of the petitioner to run the Fair Price Shop. The petitioner thereafter filed an Appeal before the Commissioner, Meerut Division, Meerut which when was dismissed on 30.4.2019, the petitioner filed the instant writ petition.

3. In the meantime, a First Information Report dated 21.3.2018 under section 3/7 of the Essential Commodities Act, 1955 which had preceded the suspension order had resulted in the submission of a Final Report by the prosecution on 19.9.2018. This Final Report was also accepted by the Additional Chief Judicial Magistrate on 21.6.2019. No protest petition was filed against the acceptance of the Final Report.

4. The contention of the learned counsel for the petitioner was that after the lodging of the First Information Report on 21.3.2018, the proceedings by the Sub-Divisional Officer, on the basis of the show-cause notice issued on 28.3.2018, were illegal inasmuch as the show-cause notice and the suspension order both were based on the very same grounds which had resulted in the lodging of the First Information Report. Learned counsel for the petitioner relying upon a judgment reported in **2011 (3) ADJ 638 : Smt. Raj Kumari vs. State of U.P. & Ors.**, submitted that a mere filing of the First Information Report under section 3/7 of the Essential Commodities Act, 1955 could not be made a ground for the cancellation of a dealership of a Fair Price Shop. Learned counsel for the petitioner further submitted that if the charges as were levied against the petitioner in the First Information Report were perused and the charges as were there in the show-cause notice were seen, then it would become evident that both the charges were absolutely the same and, therefore, the order passed for the cancellation of the licence to run the Fair Price Shop could not be sustained in the eyes of law. Learned counsel for the petitioner further submitted that when the order cancelling the licence of the Fair Price Shop was passed, it was preceded by an approval from the District Magistrate under the relevant Government Orders. This he submits would be evident from the order dated 4.12.2018 i.e. the cancellation order itself. Learned counsel for the petitioner further submitted that the very same District Magistrate who had granted the approval to pass the order dated 4.12.2018 had also allowed the submission of the Final Report. He submitted that the filing of Final Report was only after the permission of the District Magistrate vide order dated 4.9.2018 and thereafter the A.C.J.M. Meerut had accepted the Final Report. Learned counsel for the petitioner still further submitted that the enquiry as was undergone against the petitioner did not comply with the provisions

of the various Government Orders which had contemplated for a full-fledged enquiry. Learned counsel submitted that before the final order was passed, no place or time was fixed for the conducting of the enquiry. Learned counsel submitted that the petitioner could not produce any witness of her. She could not produce any witness to rebut the evidence which were brought-forth by the Licensing Authorities. Essentially learned counsel for the petitioner submitted that malice and ill-will were writ large. On the one hand the District Magistrate was giving approval to the passing of the order of passed after the approval of the District Magistrate. Learned Standing Counsel had made his oral submissions.

6. Learned Standing Counsel had submitted that the enquiry by the Licensing Authorities was based on the "doctrine of preponderance of probabilities" whereas the investigation by the police and the acceptance of the Final Report submitted by the prosecution were not based on the doctrine of "preponderance of probabilities". Learned Standing Counsel, therefore, submitted that the fact that the Final Report was submitted and that too on the basis of the permission granted by the District Magistrate would not affect the order of termination which was upheld by the Appellate Court.

7. Having heard learned counsel for the petitioner and the learned Standing Counsel, I find that the First Information Report had preceded the show-cause notice. I also find that virtually all the charges levied in the First Information Report were similar to the charges made in the show-cause notice. I fail to understand that when the prosecution had found that the petitioner was not guilty and this finding was affirmed by the District termination and on the other he was allowing the submission of the Final Report. Learned counsel for the petitioner submitted that apart from malice and ill-will, no application of mind was also there.

5. No counter affidavit has been filed by the learned Standing Counsel as the case was heard only on a pure question of law as to whether when the Final Report was submitted on the approval of the District Magistrate then could the order of termination be upheld which also was

Magistrate, then how the order of termination could stand. I also find that there was virtually no application of mind by the District Magistrate when the approval was given before the termination order was passed. In fact malice is writ large. On the one hand approval for the termination of licence was granted by the District Magistrate and on the other he gave his consent for the submission of the Final Report. I also find that the enquiry was not conducted in the manner as was contemplated in the relevant Government Orders. No time was fixed when the petitioner could have brought her witnesses to rebut the evidence placed by the Licensing Authorities. I also find that no place was ever fixed where an enquiry had to be conducted.

8. Since, in the decision rendered by the Supreme Court in **Poonam vs. State of U.P. & Ors.** reported in (2016) 2 SCC 779, it has been held that an allottee who had been allotted a shop during the pendency of the litigation had no right to challenge the restoration of the licence, I find that there is no requirement to hear the subsequent allottee and, therefore, the writ petition is being allowed in the absence of the subsequent allottee.

9. The orders dated 28.3.2018, 4.12.2018 and 30.4.2019 by which the licence of the petitioner was suspended, the licence was cancelled and thereafter the appeal was dismissed, respectively, are being set-aside. The licence of the petitioner to run the Fair Price Shop shall now be restored.

10. The writ petition is, accordingly, allowed with the aforesaid observations.

(2020)06ILR A314
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.06.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-C No. 40096 of 2019

Uma Mittal & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Bidhan Chandra Rai

Counsel for the Respondents:
A.S.G.I., Sri Amrish Sahai, Sri C.S.C., Sri Maneesh Mehrotra, Sri Satish Chaturvedi, Sri Seema Singh, Sri Maneesh Mehrotra

A. Constitution of India - Article 226 - Article 21 - Constitution of India - Article 226 , Article 21 - Appointment of guardians qua persons lying in a comatose state - doctrine of *Parens patriae* (father of the country) - Court cannot shirk its responsibility when a distress call is given by a sinking family of a person lying in a comatose state for the past year and a half - The dominant factor - protection of the rights of a human being lying in a comatose state under Article 21 of the Constitution of India - Court under Article 226 - is the ultimate guardian - can pass orders and give direction as are necessary for subserving the ends of justice when no remedy is provided in any statute in respect to persons lying in comatose/vegetative state - may provide adequate relief of appointment of a Guardian. (Para-20,25,26)

Husband of the petitioner No.1(Wife) - sole bread earner in the family - lying in a comatose state - has properties (immovable/movable, investments, bank accounts, deposits etc.) in his name - petitioners are not in a position to deal with the same due to legal hurdles - Petitioners have incurred huge expenses for his treatment which has already lasted for more than a year and a half - for which they have even resorted to borrowing money from relatives and friends - petitioners in precarious financial condition - knocking door of this Court for appointing as a guardian of her husband. (Para-30)

HELD:- Petitioner No. 1(Wife) appointed as the guardian of her husband, who is in a comatose condition, vested with the property of her husband to do all acts, deeds and things for the proper medical treatment, nursing care, welfare and benefit of her huband and his children and with power to do all acts, deeds and things with respect to assets and properties her husband.(Para-33)

Petition disposed of finally.(E-7)

List of cases cited:-

1.Aruna Ramchandra Shanbaug Vs U.O.I. (2011) 4 SCC 454 (Paras 127 & 131)

2.Shafin Jahan Vs Asokan KM (2018) 16 SCC 368 (Paras 45 & 46)

3.Shobha Gopalakrishnan & ors. Vs St. of Kerala & ors. (2019) SCC Online Ker 739 (Para 42 & 43)

4.Vandana Tyagi Vs Govt. of National Capital Territory of Delhi & ors. (2020) SCC Online Del 32 (Para 76)

5.Philomena Leo Lobo Vs U.O.I. (2017) SCC Online Bom 8836 (Para 6)

6.Dr. Kuldeep Chand Maria Vs U.O.I. & ors. (2016) SCC Online HP 497 (Para 4)

7. Charan Lal Sahu Vs U.O.I. (1990) 1 SCC 613 (Para 35 and 36)

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. The present writ petition has been preferred seeking the following relief:

(a) issue a writ, order or direction in the nature of mandamus appointing petitioner No.1, namely Uma Mittal, W/o Sri Sunil Kumar Mittal, as the guardian of her husband to protect his interest, administer bank accounts, investments, proprietorship business, etc. and in the event of necessity, to sell the immovable property standing in the name of her husband and to use the proceeds towards medical treatment of her husband and family welfare expenses;

Backdrop

2. The material facts of the case as pleaded in the writ petition are as follows:

3. Petitioner No.1, is the wife of Sri Sunil Kumar Mittal (in short 'SKM'), son of Late Visheshwar Dayal Mittal. The couple had four children (Petitioners Nos. 2 to 5) i.e. three daughters namely Mrs. Mohini Mittal Raizada, Ms. Ritika Mittal, Ms. Ruchika Mittal and a son Mr. Raghav Mittal; Petitioner No. 2 is a married daughter, married to Sri Mukul Raizada and is presently residing with her husband at Gurgaon, Haryana. However, Petitioners No. 3 and 4 are unmarried daughters and Petitioner No. 5 is the son. The Petitioners No. 3, 4 and 5 are residing with Petitioner No. 1 at their parental house 43-A/9B, Clive Road, Civil Lines, Prayagraj;

4. It has been pleaded that on 22-12-2018 at about 1:30 a.m., it was discovered that SKM had fallen in the bathroom of his residence where he was lying unconscious, suffering from a severe head injury, nasal bleeding and vomiting. He was immediately taken to Haridaya Super-speciality Centre and thereafter to Kriti Scanning Centre where C.T. scan of his brain was carried out. On the same day about 3:30 AM, he was discharged from Haridaya Nursing Home. The discharge card mentioned that he was suffering from intracranial bleeding. The Glasgow Coma Scale (GCS) was 6 (E1V1M4) and pupil right NSRL and left dilated non-reacting; Subsequently, he was taken to Dr. Ram Manohar Lohia Institute of Medical Sciences, Lucknow where he was operated upon on 22-12-2018. Tracheostomy tube was inserted on 24-12-2018 and he was shifted to incentive care unit for almost fifteen days. The certificate dated 01-01-2019 shows that treatment of brain haemorrhage is going on and patient is in a comatose state; since treatment did not show any sign of meaningful neurological recovery at R.M.L. Institute, SKM was flown to New Delhi where he was admitted in Indraprastha Apollo Hospital on 07-01-2019, where he was kept in incentive care unit; after being hospitalized almost for five months, SKM was discharged from Apollo Hospital on 01-05-2019 at GCS E4VtM4, which means that he was in a comatose state. He was taken to his sister's residence in Noida on 01-05-2019, which is near to Apollo Hospital. The petitioner arranged two nursing staff from H.D.U. Care Unit, New Delhi to look after SKM. Petitioner No.1 stayed together with him up to 26-08-2019 for routine check-ups.

5. On 29-05-2019, SKM was again admitted for routine check-up. Thereafter he was discharged on 01-06-2019 at GCS 7 (E4VtM2). It is noteworthy that during the routine check-up, the Doctors opined that till his eventual demise, patient would remain in comatose condition. Petitioner No.1 has been further advised that continued supportive treatments have to be followed up for his entire life time; In these circumstances, SKM was brought back home at Prayagraj. A room in the house of the petitioners, has been converted into a ward (like ICU) and petitioner No.1 has arranged two nursing staff for the care and comfort of SKM. After being discharged from the Apollo Hospital, SKM has not been able to communicate and has been breathing with the help of 'Tracheotomy Tube' in his throat.

6. It has been further pleaded that petitioner No. 1 applied for a disability certificate before the Chief Medical Officer, Prayagaraj. According to Chief Medical Officer, SKM does not come within the definition of a person with multiple disabilities within the meaning of "National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act, 1999' (hereinafter referred to as "the National Trust Act, 1999"). The Chief Medical Officer issued a certificate on 04-11-2019, to the effect that he is bed ridden, in a comatose state; SKM is being fed by a 'Peg Tube' attached to his stomach. His position has to be changed after intermittent intervals to avoid bedsores. It is stated that the expenses of the treatment and nursing care of SKM has been met by the family savings and by taking loans from relatives and partly from the rent earned from his properties; SKM needs to be taken to the hospital for his periodic review. Apart from that the Petitioner No. 1 is also responsible for the marriage of the second and third petitioners for which she has to arrange the necessary expenses while also meeting the other needs of the family; medical expenses for the day-to-day treatment, are also more than the rent being received and the petitioners are also unable to repay the loans without drawing money from the bank accounts. However, the Bank accounts stand in the name of SKM, and as such petitioners are not in a position to operate the same; Petitioner No.1 has already incurred huge expenses, by borrowing money from various quarters for his treatment. Having exhausted all her financial resources, Petitioner No.1 is in state of depression, despair and abandonment, besides undergoing from irretrievable agony, stress and suffering on account of the plight of her husband lying in a vegetative state; parents of SKM have already expired. After the family settlement, the petitioners are residing in the family house at 43-A/9B Clive Road, Civil Lines, Prayagraj. The said residential house is mortgaged with the State Bank of India against two loans bearing Account Nos. 30867822772 and 31948452304.

7. It has been further pleaded that SKM was carrying on business as a sole proprietor, till December 2018. He also owns a shop bearing no. B-36, Upper Basement, Indra Bhawan, Civil Lines, Prayagraj. However, in the year 2015, he sold the shop to one Sri Zakir Husain after receiving consideration, which has been shown in his books of accounts but the registry of the said shop could not be done as SKM is lying in a comatose state; SKM is the owner of property in Vinayak Enclave, M.G. Marg, Civil Lines, Prayagraj fetching a rent of Rs. 54,000/- per month; the aforesaid property has been let out to

UPTEC Computer Consultancy Ltd. at the rate of Rs. 33,110/- in terms of agreement dated 15-11-2007; SKM also owns a shop bearing Shop No. G-1, Gayatri Dham, Milan Square, 128/24, M.G. Marg, Civil Lines, Prayagraj wherein Plywood retail business was being carried out in the name of Ply House. This shop was purchased on 24-05-2012 in the name of petitioner no. 1. The said shop is also mortgaged with South Indian Bank Ltd. against cash credit limit for running the business of Ply House as well as for getting an overdraft loan.

8. SKM has Savings Bank Account, Current Account, PPF Account, Loan Account, Overdraft Account and Cash Credit Limit Account with the Respondent No. 5, State Bank of India and Respondent No. 6, South Indian Bank Limited. SKM is the sole signatory of the accounts and being in a comatose condition, the Petitioners are unable to operate the various bank accounts, the details of which are as follows:

Bank Name	Name of Account Holder	Account Number	Type of Account
S.B.I.	SKM	11076362778	PPF
S.B.I.	SKM (HUF)	11076362778	PPF
S.I.B.L.	SKM	06270530000003369	Saving
S.I.B.L.	SKM	0627081000000061	Overdraft General
S.I.B.L.	SKM	0627652000000249	Car Loan
S.I.B.L.	S. K. Mittal (HUF)	0627053000002676	HUF
S.I.B.L.	Ply House	0627084000000005	Cash Credit
S.I.B.L.	Furniture	06270840000000	Current
	House	03	

9. It has been further pleaded that apart from the aforesaid immovable properties, SKM also holds some investments in "Anand Rathi' having customer I.D. as ALBDS176 and ALBDS177, out of which some of them are mutual funds, shares and S.I.P.'s. SKM also holds various LIC Policies, Insurance Policies from various companies;

Submissions of the learned counsel for the parties.

10. Sri Bidhan Chandra Rai, learned counsel for the petitioner, submitted that the Reserve Bank of India, in order to help sick and disabled people to operate their accounts, has issued circulars No.RBI/2007-2008 /189; DBOD No. LegB.C.51/ 09.07.005/2007-08 dated 19-11-2007 advising the Banks to accept Guardianship Certificates issued under National Trust Act, 1999 but the circular, as stated, is not applicable in respect of a person lying in a comatose state.

11. In support of his contention, learned counsel for the petitioner has placed reliance upon the following decisions:-

(I) ***Aruna Ramchandra Shanbaug Vs. Union of India; (2011) 4 SCC 454 (Paras 127 & 131);***

(II) ***Shafin Jahan Vs. Asokan KM; (2018) 16 SCC 368 (Paras 45 & 46);***

(III) ***Shobha Gopalakrishnan and others Vs. State of Kerala and others; (2019) SCC Online Ker 739 (Para 42 & 43)***

(IV) ***Vandana Tyagi Vs. Government of National Capital Territory***

of Delhi and others; (2020) SCC Online Del 32 (Para 76)

(V) ***Philomena Leo Lobo Vs. Union of India and others; (2017) SCC Online Bom 8836 (Para 6)***

(VI) ***Dr. Kuldeep Chand Maria Vs. Union of India & Others; (2016) SCC Online HP 497 (Para 4)***

12. He further submitted that this Court in exercise of its powers under Article 226 of the Constitution of India can invoke the doctrine of *Parens patriae* and appoint the petitioner No. 1, Uma Mittal as a Guardian of her husband SKM, who is still lying in a comatose state. Learned counsel for the petitioner while referring to various legislative enactments has submitted that none of the provisions of any of the Acts provide for appointment of guardians for a person in a comatose state, unlike legislations for appointment of guardian for minors and persons with other multiple disabilities or mental illnesses like mental retardation etc. In this regard he referred to the provisions of the following enactments:

(a) The Guardians and Wards Act, 1890,

(b) The Code of Civil Procedure, 1908,

(c) The Indian Lunacy Act, 1912 (repealed),

(d) The Hindu Minority and Guardianship Act, 1956,

(e) The Mental Health Act, 1987 (repealed),

(f) The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (repealed),

(g) The National Trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999,

(h) The Rights of Persons with Disabilities Act, 2016 and The Mental Health Care Act, 2017

13. Sri Saurabh Srivastava, learned Chief Standing Counsel, appearing on behalf of the Respondents No. 2 to 4 has not disputed the averments made by the petitioner and has filed a short counter affidavit annexing the Medical Report of SKM by a Three Members Committee constituted for the purpose, in pursuance of the earlier directions issued by this Court.

14. Sri Amrish Sahai, learned counsel for the Respondent No. 5, State Bank of India, has not disputed the facts narrated in the writ petition, but has raised a sole objection to the effect that the State Bank of India should have been impleaded through its main Branch, but the same has no bearing on the merit of the matter and as such we find no substance in the preliminary objection so raised.

Discussion

15. Heard learned counsel for the parties through Video Conferencing and perused the record.

16. A perusal of the order sheet dated 7.12.2019 passed by this Court indicates that the learned Standing Counsel appearing on behalf of Respondents No. 2 to 4 was granted two weeks' time to file counter affidavit annexing the medical report of SKM, husband of Petitioner No. 1. In pursuance of the aforesaid direction, a short counter affidavit has been filed annexing therewith a medical report by a "Medical Board" consisting of Dr. Rahul Singh, Deputy Chief Medical Officer, Dr. R.C. Pandey, Deputy Chief Medical Officer, Prayagraj and Dr. Anil Kumar,

Additional Chief Medical Officer, Prayagraj. For ready reference, the said report is quoted hereinebelow:-

"Medical Examination Report

As per order of Hon'ble High Court Prayagraj dated 06/01/2020, in respect to WRIT PETITION No. 40096 OF 2019, Uma Mittal and (4) Four others versus Union of India with 5 (Five) Others and C.M.O. Prayagraj, Order No. ..... A Medical board is constituted that comprised of Dr. Anil Kumar A.C.M.O Prayagraj, Dr. R.C. Pandey, Deputy C.M.O Prayagraj and Dr. Rahul Singh, Deputy C.M.O. Prayagraj, the board thoroughly examined the patient at his residence, 43A/9B, Clive Road, Civil Lines, Prayagraj at 11.30 AM on 11/01/2020.

As per records available, the patient had sustained injuries on 22/12/2018. His general condition is very poor state.

The Examination report is as follows:

Patient was found lying on bed with life support, (Tracheostomy tube is present in situ with oxygen support, pulse omimeter is there and SPO2 reading-100% on 1.5 Litre of Oxygen, with heart rate 92 beats per minute, Peg tube was in situ and Foley's Catheter is in situ.)

On examination, the patient is found in Unconscious state is not oriented in time place and person and also was not responding to any painful stimulus.

Patient is not in position to recognize surrounding people around him and not in position to make any signature or perform any other physical activity.

Patient's Right Thumb Impression is attested below.

Medical Board Members:

Dr. Anil Kumar Dr. R.C. Pandey Dr. Rahul Singh

A.C.M.O, Prayagraj Deputy C.M.O, Prayagraj Dy.C.M.O Prayagraj"

17. A perusal of the said report clearly indicates that on examination, the patient was found in an unconscious state and is not oriented in time or place and was also not responding to any painful stimuli. Patient is also not in a position to recognize the people around him and not in a position to make any signatures or perform any other physical activity. Thus, the husband of Petitioner No. 1 was found in a vegetative state.

18. From a perusal of the record and the submissions made by the learned counsel for the petitioner, it is evident that the husband of the petitioner, SKM is lying in a comatose state. The petitioners have already incurred huge expenses in connection with the treatment and have exhausted their financial resources. They are in a state of despair, abandonment, isolation and are undergoing agony, stress and depression on account of pathetic condition of the victim who is lying in a vegetative state, as such, the petitioners were compelled to approach this Court for appointing the petitioner no. 1, wife of the SKM to be his Guardian submitting that no legislation in India provides for appointment of Guardian for a person lying in comatose state unlike legislation for appointment of Guardians for minor and persons with other disabilities like mental retardation etc. While referring to the judgment passed by Kerala High Court in

the case of **Shobha Gopalkrishnan (supra),** learned counsel for the petitioner has submitted that, while invoking the doctrine of *"parens patriae"*, the Kerala High Court, has appointed the legal heir of the victim as a guardian, holding that no legislation in India provides for appointment of guardian to a person in a comatose state. The said judgment of **Shobha Gopalkrishnan (supra)** has been followed by the Delhi High Court in the case of Vandana Tyagi (supra), wherein discussions in this regard, have been made from Paragraphs 57 to 68 which are being quoted hereinbelow:-

"57. A bare perusal of the Guardians and Wards Act, 1890 (in short "the 1890 Act") would show that it deals with appointment of guardians qua minors. The 1890 Act, thus, has no applicability to persons who are major.

58. Insofar as the 1987 Act is concerned, it cannot be relied upon by the SBI which, as noticed above, even according to the SBI, stands repealed. This Act, once again, would have no applicability. The 1987 Act was repealed with the enactment of the 2017 Act. The provision qua repeal is made in Section 126 of the 2017 Act. The 1987 Act, thus, as noticed above, can have no applicability in the instant case.

59. Insofar as the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short "PWD Act") is concerned, the same also stands repealed with the enactment of the Rights of Persons with Disabilities Act, 2016 (in short "RPWD Act"). The provision to this effect is made in Section 102 of the latter Act.

60. This, essentially, leaves one with the task of considering the scope and ambit of three statutes i.e. the 2017 Act, the 2019 Act, and the RPWD Act.

61. Insofar as the RPWD Act is concerned, it was enacted with the view to give effect to the United Nations Conventions on the rights of persons with disabilities and for matters connected therewith or incidental thereto. The United Nations General Assembly adopted the aforementioned convention on 13.12.2006. India is a signatory to this convention which was ratified by it on 01.10.2007. The convention came into effect from 03.05.2008. Though, India enacted the PWD Act in 1995, subsequent learning propelled India to adopt a rights based approach. Consequent thereto, the PWD Act, as adverted to above, was repealed and RPWD Act was enacted. While, this Act, inter alia, makes provisions for rights and entitlements of persons with disability, persons with benchmark disability, and persons with disability with high support needs, there appears to be no provision in this statute concerning persons in comatose state. It is relevant to note that Section 14 of the RPWD Act makes a provision for guardianship with respect to persons with disability. The definition provided under Section 2(s) of the very same Act, qua persons with disability, does not cover a person, who is in comatose state :

"2. Definitions.-

xxx xxx xxx

(s)"person with disability" means a person with long term physical, mental, intellectual, or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."

62. Likewise, the 2017 Act which was enacted to provide for mental healthcare and services of persons with mental illness and matters connected and incidental thereto it does not take within its sweep a person, who is in comatose state. Section 2(s) of the 2017 Act which defines mental illness reads as follows:

"2. Definitions.-

xxx xxx xxx

(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub-normality of intelligence."

63. A bare perusal of the same shows that a person who is in comatose state is not covered.

64. The 1999 Act which was enacted to create a national trust for welfare of persons afflicted with autism, cerebral palsy, mental retardation and multiple disability also does not appear to cover a person, who is in comatose state. The definition of autism, cerebral palsy and mental retardation given in Sections 2(a), 2(c) and 2(g) respectively, on a plain reading, are suggestive of the fact that a person, who is in comatose state cannot fall within the scope and ambit of any of the three diseases defined in these sections.

65. Insofar as the multiple disabilities are concerned, the said expression has been defined in Section 2(h) of the 1999 Act. This provision reads as follows :

"2. Definitions.-

xxx xxx xxx

(h) "Multiple Disabilities" means a combination of two or more disabilities as defined in clause (i) of section 2 of the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996)."

66. As would be evident, the definition of multiple disabilities has been tied in with Section 2(i) of the PWD Act which, as noticed above, stands repealed. However, for the sake of convenience, Section 2(i) of the PWD Act is extracted hereafter :

"2. Definitions.-

xxx xxx xxx

(i) "disability" means-

(i) blindness;

(ii) low vision;

(iii) leprocy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness."

67. As is obvious, there are seven disabilities adverted to in Section 2(i) of the PWD Act. The definition of "mental retardation" in Section 2(r) of the PWD Act is identical to the definition of the expression "mental retardation" given in Section 2(g) of the 1999 Act. The expression "mental illness" has been defined in Section 2(q) of the PWD Act, which reads as follows:

"2. Definition.-

xxx xxx xxx

(q)"mental illness" means any mental disorder other than

mental retardation."

68. A careful perusal of these definitions would show that a person who is in comatose state is not covered."

19. We have gone carefully through the aforementioned judgments of Kerala High Court and Delhi High Court as referred to hereinabove. We are in total agreement with the analysis and the view expressed by them holding that none of legislative enactments provide for appointment of a guardian for a person lying in a comatose state.

20. Now the question arises that when there is no legislative enactment, providing for appointment of a guardian for a person lying in a comatose state, how the matter with regard to appointment of guardian should be dealt with. We cannot lose sight of the fact that we have been called upon to discharge *'parens patriae'* jurisdiction. The Court under Article 226 of the Constitution of India can pass orders and given directions as are necessary for subserving the ends of justice when no remedy is provided in any statute in respect to persons lying in comatose condition.

21. The doctrine of *Parens Patriae* (father of the country) had originated in British law as early as the 13th century. It implies that the King is the father of the country and is under obligation to look after the interest of those who are unable to look after themselves. The idea behind *'Parens Patriae'* is that if a citizen is in need of someone who can act as a parent who can make decisions and take some other action, sometimes the State is best qualified to take on this role.

22. In the Constitution Bench decision of this Court in **Charan Lal Sahu vs. Union of India (1990) 1 SCC 613** (vide paras 35 and 36), the doctrine has been explained in some detail as follows:

"In the "Words and Phrases" Permanent Edition, Vol. 33 at page 99, it is stated that *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words *parens patriae* meaning thereby `the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardianship over persons under disability. *Parens patriae* jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on the sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term *parens patriae* differs from country to country, for instance, in England it is the King, in America it is the people, etc. The government is within its duty to protect and to control persons under disability".

23. The duty of the King in feudal times to act as *parens patriae* (father of the country) has been taken over in modern times by the State.

24. The Apex Court in the case of **Shafin Jahan (supra)** has further expanded the jurisdiction of the Court in application of doctrine of *parens patriae* and has held as under:

"45. Thus, the Constitutional Courts may also act as *Parens Patriae* so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the *Parens Patriae* doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and

it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian.

46. Mr. Shyam Divan, learned senior counsel for the first respondent, has submitted that the said doctrine has been expanded by the England and Wales Court of Appeal in a case DL v. A Local Authority and others19. The case was in the context of "elder abuse" wherein a man in his 50s behaved aggressively towards his parents, physically and verbally, controlling access to visitors and seeking to coerce his father into moving into a care home against his wishes. While it was assumed that the elderly parents did have capacity within the meaning of the Mental Capacity Act, 2005 in that neither was subject to "an impairment of, or a disturbance in the functioning of the mind or brain", it was found that the interference with the process of their decision making arose from undue influence and duress inflicted by their son. The Court of Appeal referred to the judgment in Re: SA (Vulnerable Adult with Capacity : Marriage)20 to find that the *parens patriae* jurisdiction of the High Court existed in relation to "vulnerable if 'capacitous' adults". The cited decision of the England and Wales High Court (Family Division) affirmed the existence of a "great safety net" of the inherent jurisdiction in relation to all vulnerable adults. The term "great safety net" was coined by Lord Donaldson in the Court of Appeal judgment which was later quoted with approval by the House of Lords in In Re F (Mental Patient: Sterilisation21. In paragraph 79 of Re: SA (Vulnerable Adult with Capacity : Marriage), Justice Munby observes:"

The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors."

25. Thus, a perusal of the aforesaid decisions clearly indicates that the Constitutional Courts may also act as *parens patriae* so as to meet the ends of justice. The Constitutional Courts in the country have exercised *parens patriae* jurisdiction in the matter of child custody, treating the issue of custody of a child to be of paramount concern. Similarly, the doctrine has been invoked in cases where a person who is mentally retarded, is produced before a Court in a writ of Habeas Corpus. These are the rare situations, when the Court can invoke the aforesaid doctrine.

26. In our opinion, in the present case this Court cannot shirk its responsibility when a distress call is given by a sinking family of a person lying in a comatose state for the past year and a half. The dominant factor, after all, is not enforcement of rights guaranteeing protection of life of warring parties under Article 226 of the

Constitution but the protection of the rights of a human being lying in a comatose state under Article 21 of the Constitution of India. The Court under Article 226 can pass orders and give direction as are necessary for subserving the ends of justice or to protect the person who is lying in a vegetative state. Under the circumstances, this Court, under Article 226 of the Constitutions of India, is the ultimate guardian of a person who is lying in a comatose/vegetative state and may provide adequate relief of appointment of a Guardian.

27. It may be noted that the Division Bench of Kerala High Court in the case of **Shobha Gopalakrishnan (supra)** has framed certain broad guidelines with regard to appointment of guardian qua a person lying in a comatose state since no specific provision was available in any statute in this regard, The guidelines framed by the Division Bench of Kerala High Court appear to be formidable and sound and, therefore, can be used as framework for formulating guidelines that need to be implemented in the State of Uttar Pradesh till such time, the legislative enactments are framed and specific provisions are made as to how guardians are to be appointed qua persons in a comatose state.

28. Thus, taking a cue from the decision of **Shobha Gopalakrishnan (supra),** we fix the following norms/guidelines as a temporary measure till an appropriate enactment is legislated as to how guardians are to be appointed vis-a-vis an individual who is lying in comatose state:-

"Guidelines

(i) A person(s) who seek(s) to be appointed as guardians vis-à-vis an individual, who is lying in comatose state, shall in their petition to the High Court (in short 'Court') disclose the details of all tangible and intangible assets of such an individual. The details as to their location and approximate market value shall also be disclosed. In case of bank accounts, stocks, shares, and debentures and other investments are concerned, material particulars will be provided.

(ii) The Court will have the person lying in comatose examined by a duly constituted medical board which would include, inter alia, a neurologist.

(iii) The court will also direct the concerned SDM/Tehsildar in whose jurisdiction the person lying in comatose is said to be located to carry out an enquiry to establish the veracity of the assertion and to gather material particulars concerning the person(s) who approach the court for being appointed as guardians. The enquiry will, inter alia, gather information as regards the relationship that the person(s) who wish to be appointed as guardians has/have with the person lying in comatose state. Information with regard to the financial condition of persons wanting to be appointed as guardians shall also be collected apart from other aspects which may have a material bearing in their discharging the duties of a guardian. Any conflict of interest concerning the affairs of the person lying in comatose state will be brought to fore in the report generated during the course of the enquiry.

(iv) Ordinarily only that person will be appointed as guardian who is a spouse or a progeny of the person lying in comatose. The person seeking appointment as a guardian in his petition to the court will, however, disclose the particulars of all legal heirs of the person lying in comatose. In the event, the

person lying in comatose has neither a spouse nor any children or even any legal heirs or if he/she has such persons in his life but stands abandoned by them subject to the permission of the court his next friend who wishes to be appointed as a guardian can approach the court with such a request. In the alternative, the Court could direct the Department of Social Welfare, GNCTD to appoint a public official such as a Social Welfare Officer or a person holding equivalent rank to act as the guardian of the person lying in comatose state.

(v) Only that person shall be appointed as a guardian who is otherwise in law competent to act as a guardian.

(vi) The order directing appointment of a guardian shall specify the assets qua which the guardianship order is passed. The court will be empowered to modify the order and bring within its sweep other assets, if required, in the interest of the person lying in comatose state. In case liquid funds are not available and there is a requirement to sell the assets of the person lying in comatose state, upon the guardian approaching the court, necessary directions could be passed in that behalf.

(vii) The person appointed as a guardian will file every six (6) months (or within such period as the court may indicate in its order) a report with the Registrar General of this court. The report shall advert to the transactions undertaken by the guardian in respect of the assets of the person lying in comatose state. Besides this, the report shall also indicate the funds, if any, received by the guardian and their utilization for the purposes of maintaining the person lying in comatose state.

(viii) The Registrar General of this court will cause a separate register to be maintained which will set out inter alia the details of the proceedings, the particulars of the person appointed as a guardian and orders, if any, passed after the appointment of the guardian. Measures will also be taken by the Registrar General to preserve the reports filed by the guardian from time to time.

(ix) It will be open to the court to appoint a guardian either temporarily or for a limited period, as may be deemed fit.

(x) In the event, the guardian appointed by the court misuses his/her power or misappropriates, siphons or misutilizes the assets of the person lying in comatose state or fails to utilize the assets in the best interest of the person lying in comatose state, the court would have the power to remove the guardian and appoint another person in his/her place. The substituted person could also be a public officer such as a Social Welfare Officer or an officer holding an equivalent rank.

(xi) The guardian appointed by the court will ensure that the transactions entered into by him or her comport with the relevant provisions of the law.

(xii) In case a relative or a next friend of the person lying in comatose state finds that the guardian is not acting in the best interest of the person lying in comatose state, such person will also have the locus to approach the court for issuance of appropriate directions and/or for removal of the guardian.

(xii) In case, the guardian wishes to move the person lying in comatose state to another state or even to another country for

the purposes of securing better medical treatment for the person lying in comatose state, he/she would approach the court for necessary permission before undertaking such an exercise."

29. That it goes without saying that the aforesaid guidelines are general in nature and the Court would always have the power to relax the same or add certain other conditions as may be required in each case.

Conclusion:

30. Having gone through the medical examination report, (annexed with the short counter affidavit) prepared by the Medical Board constituted in pursuance of the directions given by this Court and the averments made in the writ petition, we are satisfied that SKM, husband of the petitioner No. 1, who was the sole bread earner in the family, is lying in a comatose state. Perusal of the record further indicates that SKM, has properties (immovable/movable, investments, bank accounts, deposits etc.) in his name, but the petitioners are not in a position to deal with the same due to legal hurdles. Further the Petitioners have incurred huge expenses for his treatment which has already lasted for more than a year and a half, for which they have even resorted to borrowing money from relatives and friends. Thus, petitioners who are in precarious financial condition are knocking on the door of this Court for redressal of their grievances.

31. Also, in view of the above discussions made hereinabove, there appears to be no dispute that none of legislative enactments as discussed in the earlier part of the judgment are applicable qua SKM, a person lying in a comatose state. Further, the petitioners are in dire need of money towards medical treatment of SKM and for the welfare of the family as they have exhausted their financial resources in the past one and a half years.

32. It is worthwhile to note, that the instant writ petition has been filed jointly by all the legal heirs of SKM namely Smt. Uma Mittal, Petitioner No. 1 (wife), Smt. Mohini Mittal Raizada, Petitioner No. 2 (married daughter), Ms. Ritika Mittal and Ms. Ruchika Mittal, Petitioners No. 3 and 4 (unmarried daughters) and Mr. Raghav Mittal, Petitioner No. 5 (son) with a prayer to appoint the Petitioner No. 1, Uma Mittal, wife of the SKM as guardian of her husband for the purpose of protecting his interest, administer bank accounts, investments, proprietorship business, etc. and in the event of necessity, to sale the immovable property standing in the name of SKM and to use the proceeds towards medical treatment of her husband and family welfare expenses. Thus, it is also clear that there is no dispute amongst the legal heirs of SKM.

33. Accordingly, while accepting the medical report of SKM submitted by the Medical Board, we hereby appoint the Petitioner No. 1, Uma Mittal, wife of SKM as the guardian of her husband SKM, who is in a comatose condition, vested with the property of her husband SKM to do all acts, deeds and things for the proper medical treatment, nursing care, welfare and benefit of the SKM and his children and with power to do all acts, deeds and things with respect to assets and properties of the SKM including; (i) operate bank accounts in the name of SKM; (ii) deal with shares, bonds, debentures in the name of SKM; (iii) invest the monies to earn optimum returns thereon; (iv) utilise the monies for proper upkeep and for fulfilling the needs of SKM and his children (v) represent the SKM

before all persons/authorities/bodies; (vi) sign wherever required as guardian of SKM including for discharging any person/authority/body from duty/obligation/liability owed to SKM (vii) take possession and charge of all properties movable or immovable to SKM; (viii) take actions in law to protect interest of SKM; (ix) sign all deeds, documents, cheques as guardian of SKM; (x)petitioner No. 1 shall also be entitled to incur expenses for the family welfare purposes including marriages of her daughters namely Ms. Ritika Mittal, Petitioner No. 3 & Ms. Ruchika Mittal, Petitioner No. 4.

34. It is reiterated that the upon fulfilment of requisite formalities, the conc erned Banks (Respondents No. 5 and 6)/any other financial institutes will permit the Petitioner No. 1, Uma Mittal to operate the bank accounts and deal with other financial affairs standing in the name of SKM.

35. It is made clear that the Petitioner No. 1, Uma Mittal shall not sell, alienate encumber any of the immovable properties of the SKM except with the express permission of the Registrar General of this Court. The same will however not come in the way of the petitioner no. 1 letting out the immovable properties of the SKM from time to time and getting back the possession thereof. The petitioner No. 1, Uma Mittal shall comply with other requirements of being the guardian of petitioner No.1. Needless to state, such appointment is till SKM is unable to look after his affairs and subject to revocation in accordance with law.

36. It is further directed that the Petitioner No. 1 would file a report with the Registrar General of this Court every six months, detailing the transactions in respect of the assets of SKM.

37. **Before parting, we wish to recommend to the Central Government to consider enacting an appropriate legislation pertaining to appointment of guardians qua persons lying in a comatose state, as no remedy is provided in any statute to persons in comatose/vegetative state, (as already discussed in detail in earlier part of this judgment), unlike legislations for appointment of guardians for minors and persons with other disabilities, including like mental retardation etc.**

38. With these observations, this petition stands **disposed of** finally.

39. The Copy of this Order be placed before the Registrar General for necessary follow up/compliance in the matter.

40. **Registry is required to forward a copy of this judgment to the Secretary, Law, Ministry of Law and Justice, Government of India, for information and appropriate steps.**

(2020)06ILR A327

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 16.04.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Writ-C No. 41339 of 2009

Shri Rakesh Agarwal ...Petitioner

Versus

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

Counsel for the Petitioner:

Sri B.C. Rai

Counsel for the Respondents:
C.S.C., Sri Bhanu Bhushan Jauhari, Sri Nisheeth Yadav, Sri Ramendra Pratap Singh

A. Contract Law - Indian Contract Act, 1872-Principle of contract law - parties are bound by the terms and conditions of the agreement - basic rule - promissory must perform exactly what he has undertaken to do - application of this rule is absolute and no party to a contract can avoid the same - where the terms and conditions of the agreement/lease expressly or impliedly provides that the performance is to be done in a particular manner, it must be performed in the manner so provided. (Para – 30)

Corner plot allotted to the petitioner - facing 18 mtrs. wide road and green belt on one side - additional premium was charged from him - Greater Noida Industrial Development Authority (GNIDA) changed the location/ nature of the said plot - after the execution and registration of the lease deed - with the map of plot allotted forming part of it with boundaries - no opportunity of hearing given to petitioner. (Para - 18,22,37)

HELD:- GNIDA is a "State" within the meaning of Article 12 of the Constitution of India and as such its action must satisfy the principle of Article 14 of the Constitution and have to be reasonable and fair - alteration so made in the nature of the plot is against the principle of fair play which is heart and soul of Article 14 of the Constitution - GNIDA directed to maintain the nature of the plot allotted to the petitioner.
(Para – 37,39,45)

Petition allowed.(E-7)

List of cases cited:-

1.D.D.A. & anr. Vs Joint Action Committee, allottee of SFS flats & ors.(2008) 2 SCC 672

2.Sundstrand forms (P) Ltd. Vs St. of U.P. & ors. Manupatra UP/4759/2017

3.St. of Bihar & ors. Vs Jain Plastics & Chemicals Ltd. (2002)1 SCC 216

4.Lal Bahadur Vs St. of U.P. & ors. (2018) 15 SCC 407

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Pradeep Kumar Srivastava, J.)

1. In pursuance to the advertisement dated 03.02.2004 issued by the Greater Noida Industrial Development Authority (GNIDA), the petitioner vide order dated 04.06.2004 was allotted plot No.1 Cassia Fistula Estate, Sector CHI-IV of 1000 sq. mtrs.

2. On actual measurement there was some extra land of 22.4 sq. mtrs. in the aforesaid plot for which additional premium was demanded and charged.

3. After the petitioner completed all formalities and fulfilled the conditions of allotment by depositing the premium amount, lease rent etc., a registered lease deed in respect to the whole of the said plot having an area of 1022.4 sq. mtrs. was executed in his favour on 17.12.2008. Consequently, its possession was also delivered on 18.12.08 to him.

4. The petitioner has preferred this writ petition seeking a direction that the location of the said plot from that of a corner plot adjoining to the green belt may not be changed and to declare any change or proposed change in this regard to be illegal and arbitrary. In other words, the plot should remain in its original form as a corner plot facing green belt.

5. The argument is that the petitioner had paid 15% additional amount as location charges in accordance with the terms and conditions of the allotment and that under the allotment order as well as the lease deed, the petitioner was allotted and delivered possession of a corner

plot facing 18/24 meter wide road adjoining the green belt. The said location cannot be changed after the execution of the lease deed by converting the green belt into an another plot.

6. The petitioner in response to one of his letters pertaining to the lay out plan of the scheme has been informed vide letter dated 30.06.2009 issued by the General Manager (Niyojan & Vastu) that according to the approved lay out plan plot No.1, Cassia Fistula Estate, Sector CHI-IV which has been allotted to the petitioner is not a corner plot.

7. It is alleged that this is totally in contravention of the terms and conditions of the allotment order and the lease deed. Therefore, the status of the said plot as allotted and leased out to the petitioner be restored as a corner plot.

8. We have heard Sri B.C.Rai, learned counsel for the petitioner and Sri B.B. Jauhari, learned counsel for the respondent No.2 (GNIDA) and have perused the pleadings exchanged between the parties.

9. GNIDA in the counter affidavit has admitted that in accordance with Clause A-7.2 of the brochure which provide for location charges for corner plots, plots facing park/green belt or plot facing 18/24 meter wide road, premium of 5% for the benefit of each type of location was payable and that the petitioner had paid a total of 15% additional premium over and above the fixed rate of premium on account of superior location. However, the stand taken is that the plot allotted to the petitioner was not a corner plot. In fact the plan annexed with the lease deed was not prepared by the Planning Department and therefore, it was incorrectly described as the corner plot. The area of the green belt in the entire sector is as per the approved standard and does not stand reduced on account of carving out of an additional plot in the area which the petitioner claims to be green belt. The lay out plan was amended after a report was submitted by the Senior Executive (Planning) on 05.12.2006 on the recommendation made by the Deputy General Manager (Planning) on 13.12.2006 for amending the lay out plan. Due to the change in the lay out plan to some extent, the boundaries of the plot allotted to the petitioner was altered and at present the plot allotted to the petitioner is not the corner plot or adjacent to the green belt.

10. In short, the only issue which arises in this petition, on the aforesaid pleadings and rival claims, is whether the location of the plot allotted to the petitioner facing 18/24 meter wide road; adjoining/facing park/green belt; and as a corner plot for which the petitioner has been charged additional premium to the extent of 5% for each location benefit, total 15% of the fixed premium can be altered or changed by the GNIDA after the execution and registration of the lease deed simply by an executive fiat.

11. There is no dispute that GNIDA issued an advertisement on 03.02.2004 inviting applications for allotment/lease of residential plots inter alia in Cassia Fistula Estate, Sector CHI-IV.

12. In pursuance of the above advertisement, the petitioner also applied for allotment of one residential plot of an area of 1000 sq. mtrs by depositing the registration money of Rs.3,10,000/-. The premium amount was intimated to be Rs.26,22,600/- with location charges for all the three beneficial locations as 15% of the premium fixed.

13. The petitioner deposited all the aforesaid amounts including the revised rates and the lump sum premium amount whereupon

lease deed was executed in his favour on 17.12.2008 and the possession was delivered on 18.12.2018.

14. The brochure containing the terms and conditions of allotment/lease apart from other things vide Class A-7 provided that the area of the plot may slightly vary at the time of handing over possession and therefore, premium may also proportionately vary accordingly. It further vide Clause A-7.2 provides as under:-

> A-7.2 Location Charges
> For Corner plots:
> 5% of the premium
> For plots facing park/green belt:
> 5% of the premium
> For plots facing 18/24 m. wide road:
> 5% of the premium
> Note For plots having more than one location benefit, location charges will be additive.

15. The allotment-cum-allocation letter dated 04.06.2004/17.07.2004 clearly provides that the location of the plot allotted to the petitioner is adjoining to green belt and that it is a corner plot facing 18/24 meter wide road for which 15% of the premium amount has been charged as additional premium amount.

16. The possession certificate dated 18.12.2008 mentions the area and the dimensions of the plot allotted to the petitioner as 1022.40 sq. mtrs. and that its boundaries are as per the lease plan enclosed. The enclosed lease plan clearly describes that the aforesaid plot No.1 is having an area of 1022.40 sq. mtrs. and on its one side is plot No.1-A & on the other side is the green belt. The plot faces 18 meter wide road and on its back is plot No.14. Thus, making the plot a corner plot facing 18 mtrs wide road with green belt on one side.

17. The lease deed dated 17.12.2008 is also on record and apart from mentioning the other details of the plot it mentions that the boundaries of the plot are as per the lease plan. Again the same lease plan is enclosed with the lease deed as is part of the allotment letter. It again describes the boundaries of the plot with green belt on one side and 18 meter wide road on the front thus making it a corner plot.

18. In view of the aforesaid facts and circumstances of the case, it is ample clear that the plot allotted to the petitioner was a corner plot facing 18 mtrs. wide road and green belt on one side for which additional premium was charged from him.

19. The letter of the GNIDA dated 30.06.09 of the General Manager (Niyojan & Vastu) clearly states that according to the approved lay out plan the aforesaid plot is not a corner plot.

20. It is accepted in the counter affidavit that in the area shown as green belt adjoining to the aforesaid plot, an additional plot has been carved out. Thus, materially changing the location of the said plot. On carving out of the aforesaid additional plot not only the adjoining green belt to the plot goes away but it also reduces its status from that of a corner plot to any other normal plot.

21. There is no dispute that as per the allotment order, lease deed and the site plan forming part of it, the plot allotted to the petitioner is a corner plot

with green belt on one of its side and 18 mtrs. wide road in its front.

22. Now the sole question is whether GNIDA is justified in changing the location of the said plot after the execution and registration of the lease deed with the map of plot allotted forming part of it with boundaries.

23. The submission that the site plan annexed with the possession letter and the lease dead is incorrect has no substance and cannot be accepted. The allotment letter/order mentions the same boundaries of the plot as described in the lease plan. The lay out plan was amended and corrected in the year 2006 as stated earlier whereas the lease deed was extended and registered on 17.12.2008 enclosing the lease plan. The lease plan enclosed with it is presumed to be according to the amended lay out plan of the year 2006. There is no explanation as to why the lease plan could not be corrected as per the amended lay out plan before making it a part of the lease deed. No effort was made even to rectify the allotment letter/order which describes the boundaries in words also. Thus,GNIDA have not cared at any stage to correct/rectify the aforesaid lease plan despite coming to know that it is incorrect.

24. Sri Jauhari, draws the attention of the court to condition Q-1 of the brochure which provides that the Chief Executive Officer or any officer authorised by him has the right to make such additions/alterations/modifications in the terms and conditions of allotment from time to time as may be considered just or/and expedient.

25. A similar condition is contained in Clause-F of part-3 of the lease deed which provides that the Chief Executive Officer reserves the right to make such alterations or modifications in terms and conditions as may be considered just and expedient.

26. A reading of the aforesaid two Clauses, no doubt establishes that the Chief Executive Officer has the power to add, alter or modify the terms and conditions of allotment/lease but it fails to describe the manner in which the same can be added, altered or modified or till which stage it can be done.

27. The right reserved by the Chief Executive Officer to alter and modify the terms and conditions of allotment is in context with the general terms and conditions viz the nature of the lease, its term, mode of its cancellation, the mode of payment and other liabilities and not in respect of alteration of the status/boundaries of the plot allotted which would continue to be the same as mentioned in the allotment letter, lease deed or the lease plan unless changed in a legal and valid manner.

28. The Chief Executive Officer in exercise of the powers conferred by Q-1 of the brochure would have made changes in the terms an conditions of the lease or the nature of the plot before the execution of the lease and its registration but it was not done. He is not authorised or empowered to change the terms and conditions of the lease deed which has been registered simply by an administrative order.

29. Even if clause-F of part 3 of the lease is pressed in motion to change the nature of the plot or its boundaries it has to be done in accordance with law.

30. It is well acknowledged principle of contract law that the parties are bound by the terms and conditions of the agreement and the basic rule is that the promissory must perform exactly what he has undertaken to do. The application of

this rule is absolute and no party to a contract can avoid the same. Thus, where the terms and conditions of the agreement/lease expressly or impliedly provides that the performance is to be done in a particular manner, it must be performed in the manner so provided.

31. Accordingly, if the lease deed provides for leasing out a plot of land as described therein then the lease deed has to be executed in that context and not otherwise.

32. Thus in the case at hand the lease has to be in respect of the plot as qualified in the site plan enclosed with the lease. Any deviation from the same has to be in accordance of law and not otherwise i.e. after following the procedure prescribed.

33. It is also settled legal position that where an instrument is required to be registered compulsorily either by virtue of the statute under which it is executed or registered any changes or alteration in the said registered instrument has to be necessarily by a registered instrument.

34. In the absence of any registered instrument changing the location of the plot allotted from a corner plot to any normal plot, is illegal and unsustainable.

35. The change of the status/boundaries of the plot as disclosed in the lease deed would not fall within the ambit of alteration or modification of the terms and conditions of the lease deed and that too without executing a proper instrument.

36. Lastly, it has been submitted that as the dispute in the petition has arisen out of a concluded contract, the petitioner is not entitle to maintain the writ petition.

37. There cannot be any doubt whatsoever that GNIDA is a "State" within the meaning of Article 12 of the Constitution of India and as such its action must satisfy the principle of Article 14 of the Constitution and have to be reasonable and fair. Although, the terms and conditions of the contract entered into by GNIDA can be altered or modified as provided but this cannot be done unilaterally unless their exist any provision either in the contract itself or in law. The petitioner was not taken into confidence or was given any opportunity of hearing before changing the nature of the plot allotted to him. It was simply by a letter that he has been informed that the plot allotted to him is no longer a corner plot as on the area of green belt a new plot has been created.

38. This is nothing but novation of a binding contract which could not have been done without making the proposed change known to the petitioner.

39. Accordingly, the alteration so made in the nature of the plot is against the principle of fair play which is heart and soul of Article 14 of the Constitution.

40. The effort made by Sri Jauhari, to get the petition dismissed on technicality that it is not maintainable as it arises out of a concluded contract is bereft of merit as in **Delhi Development Authority1** it has provided that when a contract emanates from a statute or is otherwise governed by the provisions thereof, the superior court can also exercise the power of

judicial review more particularly when there is infringement of Article 14 of the Constitution.

41. In **Sundstrand Forms (P) Ltd.2** another Division Bench of this court was confronted with a similar question as to the additional amount payable as location charges in respect of a corner plot or a plot facing 30 mtrs. wide road, the court held that when the premium of the plot was fixed and the scheme provided that for the corner plot 5% of the premium and for the plot facing 30 mtrs. wide road a further 20% premium would be payable the allottee is liable to pay the additional 25% for the location charges and accordingly, directions were issued to its Executive Officer, NOIDA to execute the lease deed of the plot in question and to handover possession thereof.

42. The reliance placed by Sri Jauhari upon **State of Bihar3** to object to the maintainability of the petition is not of much help to him for the simple reason that in the aforesaid decision itself it has been held that the existence of alternative remedy does not affect the jurisdiction of the writ court though it may be a ground for not entertaining the petition and it is only where seriously disputed questions or rival claims arise out of a breach of contract which requires investigation and determination on the basis of evidence that the party can be directed to avail the remedy of civil suit. Thus, the jurisdiction of judicial review under Article 226 of the Constitution does not stand ousted completely.

43. Moreover, in the instant case the petitioner is not seeking enforcement of a statutory contract. The contract in the form of lease exists between the parties and it has been acted upon but in doing so the nature of the plot leased out has been changed by carving a new plot in the adjoining green belt. This action is apparently unfair and has been held to be violative of Article 14 of the Constitution.

44. In **Lal Bahadur4** more popularly known as "Janeshwar Misra Park" case it has been held that even the statutory power to modify the plan so as to change green belt into residential area cannot be exercised in violation of public trust doctrine. Therefore, the area earmarked as green belt, park or open space cannot be changed to residential area. This is exactly the position in the instant case. The area of green belt adjoining to the plot allotted to the petitioner has been converted into one another plot for residential purpose after the execution and registration of the lease deed in favour of the petitioner clearly describing the nature of the plot. This action of GNIDA is ex facie hit by the dictum of law laid down in the above decision.

45. Accordingly, brushing aside the objection as to the maintainability of the writ petition as the action of the GNIDA in altering the nature of the plot allotted to the petitioner is unfair and the alteration has not been done in a valid manner as contemplated in law, we issue a writ in the nature of mandamus directing the GNIDA to maintain the nature of the plot allotted to the petitioner i.e. plot No.1 Cassia Fistula Estate, Sector CHI-IV of 1022 sq. mtrs. as a corner plot facing 18 mtrs. wide road with the green belt

adjacent to it as has been described in the leased plan forming part of the lease deed.

46. The writ petition is allowed with no order as to costs.

(2020)06ILR A334
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

Writ-C No. 42274 of 2019

Suneel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bharat Bhushan Paul, Sri Saurabh Pal

Counsel for the Respondents:
C.S.C.

A. Civil Law - Cancellation of the Arms licence - Arms Act, 1959 - Section 17(3) - Section 17 (7) - Section 18 of the Arms Act - appeal before the Commissioner - Indian Penal Code, 1860 - section - 307,section - 504 - order passed by District Magistrate and Commissioner - not sustainable in the eyes of law - quashed - matter remitted back to the District Magistrate - to pass a reasoned and speaking order afresh, for restoring the arms licence of the petitioner in accordance with law. (Para -21)

Petitioner having a fire arms licence - Petitioner involved in sole criminal case - acquitted by Additional Sessions Judge - conviction set aside in appeal or otherwise - suspension or revocation shall become void - arm licence has to be restored considering the provisions contained under Sections 17(3) and 17(7) of the Arms Act, 1959 - fire arm licence of the petitioner cancelled in public interest - no incident of breach of security of the public peace or public safety at the behest of the petitioner - no criminal history - police report does not indicate that the petitioner had utilized the fire arm during the said incicent - no such averment was made by the authorities concerned. (Para-19)

HELD:- Merely pendency of the criminal case or with the apprehention that the petitioner may be involved in future in any other criminal case cannot be a ground for cancellation of the arms licence under the Arms Act, 1959, unless and until a clear cutt finding is recorded by the Competent Authorities that the possession of the fire arms caused threatening of the public peace and is danger for the safety of human being which the Competent Authorities fail to record any such finding in the impugned orders.(Para-15)

Petition allowed.(E-7)

List of cases cited:-

1.Sheo Prasad Mishra Vs D.M., Basti & ors. (1978) AWC 122

2.Rajendra Deo Pandey Vs St. of U.P. & ors. (2012) 4 ADJ 716

3.Rajendra Pandit Vs St. of U.P. & ors. (2012) 10 ADJ 435

4.Ram Charan Vs St. of U.P .& 2 ors. (2016) 11 ADJ 185

5.Dr Ram Manohar Lohia Vs St. of Bihar AIR (1966) SC 740

6.Ram Murti Madhukar Vs D.M., Sitapur (1998) 16 LCD 905

7.Ganesh Chandra Bhatt Vs D.M. Almora , AIR (1993) Allahabad-291

8.Habib Vs St. of U.P. & ors. (2002) 44 ACC 783

9.Ashiq Hussain Vs Comms., Moradabad & ors. (2009) 10 ADJ 635

10.Rama Kushwaha Vs St. of U.P. & ors. (2011) 29 LCD 1045

11.Ram Murli Madhukar Vs D.M., Sitapur , (1998) 16 LCD 905,

12.Hiramani Singh Vs St. of U.P. & ors. (2011) 29 LCD 829

13.Ashok Rao Vs St. of U.P. & ors. (2010) 68 ACC 441

14.Ram Bodh Singh Vs St. of U.P. & ors. (1985) 11 Allahabad Law Reports, 114

15.Anil Kumar Singh Vs D.M., (1994) 12 LCD 1109

(Delivered by Hon'ble Shamim Ahmed, J.)

1. The present writ petition has filed by petitioner under Article 226 of the Constitution of India with the following prayers:

"(i) To issue a writ order or direction in the nature of certiorari for quashing the order dated 10.04.2017 (Annexure No.3) passed by District Magistrate, Bareilly and 1.11.2019 (Annexure No.4) passed by Commissioner, Bareilly Region, Bareilly.

(ii) To issue a writ order or direction in the nature of mandamus staying the operation of the order dated dated 10.04.2017 (Annexure No.3) passed by District Magistrate, Bareilly and 1.11.2019 (Annexure No.4) passed by Commissioner, Bareilly Region, Bareilly.

(iii) To issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in this circumstances of the case to mee the ends of justice.

(iv) To award cost of the petition to the petitioners."

2. The learned counsel for the petitioner submits that the petitioner was having a fire arms licence No.1132/2013 on which N.P.P. Rifle No.AB-84-2136 is registered and a first information report dated 28.07.2015 was lodged against the petitioner and a Case Crime No.123/2015, under sections 307/504 IPC, P.S. Bhamana, District Bareilly was registered and on the basis of the aforesaid F.I.R, Senior Superintendent of Police, Bareilly sent a show cause notice dated 25.08.2016 to the petitioner for cancelling the fire arms licence of the petitioner and the petitioner was directed to submit his reply. In response to the said show cause notice, petitioner has submitted his reply on 16.12.2016 and it was stated in the reply of the petitioner that he was enlarged on bail in the case and his fire arms was not used in that incident and the session trial is pending before the Court of Additional Session Judge, Court No.13, Bareilly.

3. Learned counsel for he petitioner further submitted that on the basis of the above allegations and notice a case was registered against the petitioner, under Section 17(3) of the Arms Act, 1959 (State Vs. Sunil) before the Court of District Magistrate, Bareilly, the District Magistrate, Bareily by his order dated 10.04.2017 cancelled the firm arms licence of the petitoner. Thereafter the petitioner challenged the above order by filing an appeal under Section 18 of the Arms Act before the Commissioner, Bareilly Region, Bareilly.

4. Learned counsel for the petitioner further submitted that the petitioner was acquitted by order dated 21.09.2017 passed by learned Additional Sessions Judge, Court No.13, Bareilly in Case No.191 of 2016 (State Vs. Rishipal and others). The copy of the judgment and order dated 21.09.2017 was filed before the Court of Commissioner, Bareilly Region, Bareilly,

but without considering the judgment and order dated 21.09.2017, the learned Commissioner, Bareilly Region Bareilly vide order dated 01.11.2019 dismissed the appeal of the petitioner.

5. The petitioner's counsel further submits that the impugned orders passed by the District Magistrate, Bareilly and the Commissioner, Bareilly Region, Bareilly are arbitrary, perverse, without jurisdiction and based on surmises and conjecture.

6. Learned counsel for the petiitoner further submitted that merely named in the criminal case is not a good ground for cancellation of the arms licence and it is clear cut case of the petiitoner that the fire arms was not used in the alleged incident on the basis of which the first information report was lodged against the petitioner and in the appeal the Commissioner has not considered the judgment and order dated 21.09.2017 passed in Case No.191 of 2016 by the Additional Sessions Judge, Court No.13, Bareily, by which, the petitioner was acquitted in the criminal case. The finding recorded by the learned Commissioner that the petitioner was acquited on the basis of benefit of doubt and his involvement in the criminal case cannot be denied and is not bound to consider the order passed by the Criminal Court once the order is passed, under Section 17(3) of the Arms Act,1959 and the arm license is cancelled, is a perverse finding.

7. Learned counsel for the petitioner further submits that while dismissing the appeal of the petitioner, the learned Commissioner has discussed about the incident, on the basis of which, he presumed that the petitioner is a person of criminal manner and he may be involved in some other criminal activities after being acquitted in the criminal case. The order passed by the learned Commissioner is totally criptic and based on surmises and conjuctures and against the provisions of Section 17 of the Arms Act, 1959 therefore, the arms licence of the petitioner may be restored and the impugned orders may be quashed.

8. Learned counsel for the petitioner further drawn the attention of the Court towards the provisions of Section 17 (3) and 17 (7) of the Arms Act, 1959 and submits that as per Section 17(3) of the Arms Act, there is no ground exists against the petitioner for cancellation of arms licence, once the acquittal order is passed in his favour.

9. Learned Standing Counsel who appears on behalf of all the respondents countered the arguments raised by the learned counsel for the petitioner and submitted that there is no illegality in the impugned orders by which the Arms licence of the petitioner was cancelled and if the petitioner possesses the arms licence, it is not in the interest of public safety and the petitioner may further involved in any other criminal activity and may use his fire arm.

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

11. From perusal of the record, this Court finds that only one criminal case was lodged against the petitioner being Case Crime No.123 of 2015, under Sections 307, 504 IPC, P.S. Bhamana, District Bareilly and on the report submitted by the authorities concerned, the arms licence was canceled by the District Magistrate, Bareilly. Thereafter, in the criminal case,

the petitioner was acquitted by the judgment and order dated 21.09.2017 passed by the learned Additonal Sessions Judge, Court No.13, Bareilly in Case No.191 of 2016 (State Vs. Rishipal and others). The Appellate Court also not considered this fact that the petitioner was already acquitted by the Session Court and no adverse finding was recorded by the Court, therefore, the order rejecting the appeal by the Commissioner Bareilly Region, Bareilly was passed without application of mind and was a cryptic order. It is also not out of place to mention here that after the acquittal order dated 21.09.2017, nothing has been mentioned in the counter affidavit filed by the respondent Nos. 2 and 3 that the petitioner was thereafter involved in any criminal activities causing danger to public peace or public safety or has used his fire arm.

12. From perusal of Section 17(3) and proviso to Section 17(7) of the Arms Act, 1959, it is crystal clear that not a single ground of Section 17(3) of the Arms Act, 1959 is applicable in the case of the petitioner, undisputedly petitioner was involved only in one criminal case and the respondents could not brought on record any material to show that the petitioner was involved in any other criminal case except the present one.

13. It is also relevant to mention here that in sole criminal case petitioner has already got the order of acquital passed by the Additional Sessions Judge, Court No.13, Bareilly vide order dated 21.09.2017. It is not out of place to mention here that as per proviso of Section 17(7) of the Arms Act, 1959 which providing that if the conviction is set aside in appeal or otherwise the suspension or revocation shall become void. It is necessary to quote Sections 17(3) and 17(7) of the Arms Act, 1959 herein as under:-

*"**Section 17(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."

*"**Section 17(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."

14. In the facts of the present case, this Court come to the conclusion that none of the ground mentioned in section 17(3) of the Arms Act 1959, is applicable in the

petitioner case. The petitioner was involved in only one criminal case and was finally acquitted by order dated 21.09.2017 passed by Additional Sessions Judge, Court No.13, Baeilly in Case No.191 of 2016, further as provided under section 17(7) of the Arms Act, if the conviction is set aside on appeal or otherwise, the suspension or revocation shall became void, therefore in that case too also the petitioner is entitled for restoration of his fire arm licence by the Authority concerned, in view of the above, the impugned orders are not sutainable in the eyes of law.

15. It is undoubtedly to say that merely pendency of the criminal case or with the apprehention that the petitioner may be involved in future in any other criminal case cannot be a ground for cancellation of the arms licence under the Arms Act, 1959, unless and until a clear cutt finding is recorded by the Competent Authorities that the possession of the fire arms caused threatening of the public peace and is danger for the safety of human being which the Competent Authorities fail to record any such finding in the impugned orders.

16. The Division Bench of this Court in the case of ***Sheo Prasad Mishra Vs. District Magistrate, Basti and others, 1978 AWC 122*** was pleased to held that merely involved in the criminal case or pendency of criminal case cannot be the ground for cancellation of arms licence and the pendency of criminal case cannot in any way effect the public security or public interest.

17. This Court in the case of ***Rajendra Deo Pandey Vs. State of U.P. And others, reported in 2012 (4) ADJ 716*** was pleased to held that merely due to pendency of criminal case or after acquittal in the criminal case, arms licence cannot be cancelled, the same view was followed in the case of ***Rajendra Pandit Vs. State of U.P. And others, 2012 (10) ADJ 435 .***

It is relevant to mention that in the above referred case, the acquittal order was passed in three cases and in the fourth case, a final report was submitted by the police, even though, the licence was cancelled. The High Court finally allowed the writ petition and the District Magistrate was directed to re-issue the arms licence to the petitioner.

18. This issue was further dealth with in the case of ***Ram Charan Vs. State of U.P. And two others, 2016 (11) ADJ 185*** and the Hon'ble Court was pleased to consider all the previous judgment in this regard and was pleased to observe in paragraph nos. 11, 12, 13, 14, 15, 16, 17 and 18 as under:

"11. The distinction between the concept of public order and that of law and order has been adverted to by the Apex Court in a catena of decisions. The question whether a man has only committed a breach of law and order or acted in a manner leading to disturbance of public order is a question of degree of the reach of the act upon society is no more res integra. In the case reported in AIR 1966 SC 740, Dr Ram Manohar Lohia v. State of Bihar it was observed that the contravention 'of law' always affects 'order' but before it could be said to affect 'public order', it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing "public order" and the smallest representing "security of State". An act may

affect "law and order" but not "public order", just as an act may affect "public order" but not "security of the State".

12. The principles settled way back in the year 1966 in the case of Dr. Ram Manohar Lohia (Supra) has been repeatedly quoted with respect and approval.

13. In 1998 (16) LCD 905, Ram Murti Madhukar Vs. District Magistrate, Sitapur, in paragrah 8 & 9 of the judgment, this Court has held as follows:-

"8. It is also well settled in law that mere pendency of criminal case or apprehension of abuse of Arms Act, are not sufficient ground for passing of the order of suspension or revocation of licence under Section 17 of the Act. A reference in this regard may be made to the decisions of this Court in Ganesh Chandra Bhatt v. D.M. Almora (AIR 1993 Allahabad-291).

9. It is also well settled in law that before passing of the order of suspension or revocation, under clause (b) of sub section (3) of Section 13 of the Act, the licensing authority must apply its mind to the question as to whether there was eminent danger to public peace and safety involved in the case. Licence cannot be suspended or revoked on the ground of 'Jan Hit'."

14. In 2002 (44) ACC 783, Habib Vs. State of U.P. & Ors. in paragraph 3 & 4 of the judgment, this Court has held as follows:-

"3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court reported in Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Masi Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking the licence of firearm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in abovementioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed.

4. There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal cases and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-1 and II to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence. It is submitted by petitioner's counsel that the petitioner has been acquitted of the charges."

15. In 2009 (10) ADJ 635, Ashiq Hussain Vs. Commissioner, Moradabad & Ors., in paragraph 6 of the judgment, this Court has held as under: -

"6. The mere involvement in a solitary criminal case cannot be a ground for cancellation of a firearm license as held by this Court in case of Mohd. Haroon Vs. The District Magistrate, Siddharth Nagar reported in 2003 (1) ACJ 124, unless and until it is shown on the basis of material on record that there was grave danger to public law and order. In the instant case it is only a solitary incident, which was not arising out of any disturbance of public law and order, that has been made the basis for ordering cancellation."

16. In 2011 (29) LCD 1045, Rama Kushwaha Vs. State of U.P. & Ors., a Single Judge of this Court in paragraph 10

& 11 of the judgment of this Court has held as follows:-

"10. In Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998(16) LCD 905], this Court has held that licence can not be suspended or revoked on the ground of public interest (Janhit).

11. It is well settled in law that mere pendency of criminal case or apprehension of abuse of arms act are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17 (3) of the Act. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealt with by a Division Bench of this Court Sheo Prasad Misra Vs. The District Magistrate, Basti & others, wherein the Division Bench relying upon the earlier decision of Masiuddin Vs. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in Habib Vs. State of U.P. Reported in 2002 ACC 783, Ram Sanehi Vs. Commissioner, Devi Patan Division, Gonda & another."

17. In 2011 (29) LCD 829, Hiramani Singh Vs. State of U.P. & Ors., this Court in paragraph no.8 of the judgment has held as follows:-

"8. This Court in the case of Ashok Rao v. State of U.P. and others, reported in 2010 (68) ACC 441 while considering the authority to be exercised under Section 17 of the Indian Arms Act has taken the view that mere pendency of criminal case cannot be ground for cancellation of firearm license unless and until finding is returned by the authority concerned that possession of firearm has the tendency of threatening public peace and public safety."

18. In 1994 (12) LCD 1109, Anil Kumar Singh Vs. Distt. Magistrate, Pratapgarh, in paragraph no. 6 of the judgment, this Court has been held as follows:-

"6. ...Therefore, it is clear that at the time of passing the order order dated 6-2-79 by the Commissioner, there was no ground on which the gun licence of the petitioner could have been cancelled. Both the grounds were wiped off before passing of the order of the learned Commissioner and the learned Commissioner could not have passed this order unless there was some fresh material against the petitioner be that date. In this connection it will by useful to refer to the case of Ram Bodh Singh v. State of U.P. & others, 1985 (11) Allahabad Law Reports, 114, in which it has been held that once petitioner was acquitted those cases could not furnish material for cancellation of his licence. Therefore, on the date on which the Commissioner passed his licence. Therefore, on the date on which the Commissioner passed his order, it cannot be said that the cancellation of licence was in the public interest and this fact could not be substantiated by the State."

19. This Court after considering the arguments advanced by the learned counsel for the parties and from perusal of record and considering the case laws on the issue involved observed here that in the present case the petitioner was involved in sole criminal case and has been acquitted by the order dated 21.09.2017 in Case No.191 of 2016 passed by Additional Sessions Judge, Court No.13, Bareilly and as per the provision contained under section 17(7) of the Arms Act, 1959, if the conviction is set aside in appeal or otherwise the suspension

or revocation shall become void, therefore the arm licence has to be restored considering the provisions contained under Sections 17(3) and 17(7) of the Arms Act, 1959. The fire arm licence of the petitioner could not have been cancelled in public interest as has been done in the present case, no incident of breach of security of the public peace or public safety at the behest of the petitioner has been pointed out. The petitioner has no previous criminal history. The police report on the basis of which the proceedings were initiated against the petitioner does not indicate that the petitioner had utilized the fire arm during the said incicent, no such averment was made by the authorities concerned. There is nothing on record to establish that petitioner was involved in the act resulting in disturbance to public peace or public safety.

20. In view of the well-settled legal proposition and the relevant case law referred above and the provisions contained under Sections 17(3) and 17(7) of the Arms Act, 1959 and going through the entire facts, this Court is of the view that the impugned order dated 10.04.2017 passed by District Magistrate, Bareilly and order dated 01.11.2019 passed by the Commissioner, Bareilly Region, Bareilly are not sustainable in the eyes of law, therefore both the orders are hereby quashed. The writ petition is **allowed.**

21. The matter is remitted back to the District Magistrate, Bareily, respndent No.3 to pass a reasoned and speaking order afresh, for restoring the arms licence of the petitioner in accordance with law, preferrably within a period of two months from the date of production of a certified copy of this order before him and communicate the same to the petitioner forthwith.

22. No order as to costs.

(2020)06ILR A341
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2020

BEFORE

THE HON'BLE ABHINAV UPADHYA, J.
THE HON'BLE SHAMIM AHMED, J.

Writ-C No. 46666 of 2013

Ravindra Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Parul Srivastava, Sri Anupam Kulshreshtha, Sri Namit Srivastava, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Registration Act, 1908 - Sections 17 - Registration of three sale-deeds rejected —- Documents of which registration is compulsory , Sections 18 - Documents of which registration is optional, Sections 32 - Persons to present documents for registration and Sections 33 - Power of Attorney recognizable for purposes of Section 32 - Power of Attorney Act, 1882 - Section 4 - Deposit of original instruments, creating powers-of-attorney - Indian Stamp Act,1899 - no bar in the Act for execution of sale deed on the basis of unregistered power-of-attorney –object of registration - designed to guard against fraud by obtaining a contemporaneus publication and an unimpeachable record of each document - instant case - no allegation of fraud has been raised - duty cast on the registering officer under Section 32 of the Act -only to satisfy himself that the document was executed by the person by whom it purports to have been signed - registrar upon being so satisfied and upon being presented with a document to be registered had to proceed with the registration of the same.(Para-19,32)

one husband and wife (couple) purchased plot - names recorded in the revenue records by registered sale deed – couple executed a power of attorney in favour of petitioner - petitioner presented three sale deeds to be registered in the office of the Sub Registrar in respect of the said property - which was bequeathed upon the petitioner through the Power of Attorney - sale-deed presented before the Sub Registrar to register them under the Registration Act, 1908 - Sub Registrar in an illegal manner,arbitrary, without application of mind and exceeding his jurisdiction has rejected the registration of all the aforesaid three sale-deeds . (Para-3,4)

HELD:- Grounds taken in the impugned order in rejecting the registration of three sale-deeds, prima faice, as per the record appears to be illegal and without application of mind and the Deputy Registrar (I) has not considered the provisions contained under Section 4 of the Power of Attorney Act, 1882 and Sections 17, 18, 32 and 33 of the Indian Registration Act, 1908 - matter remanded back to the Deputy Registrar (I) to pass an appropriate order for the registration of three sale-deed afresh. (Para -33,34)

Petition allowed.(E-7)

List of cases cited:-

1.Goswami Malti Vahuji Maharaj Vs Purushottam Lal Poddar AIR (1984) Cal 297

2.Ram Gopal Vs L. Mohan Lal & ors. AIR (1960) P & H 226

3.Rajni Tandaon Vs Dulal Ranjan Gosh Dastidar & anr. (2009) 14 SCC 782

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Shashi Nandan, learned Senior Advocate assisted by Shri Anupam Kulshrestha, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Learned counsel for the petitioner submits that he does not want to press the prayer no.1 of the writ petition and confined his relief in respect of prayer nos. 2 to 5 only.

3. Learned counsel for the petitioner argued that one Shri Rakesh Chandra Sharma and his wife Smt. Kunti Sharma had purchased plot nos.26 and 27 measuring area 324 Sq. meters in Khasra Nos. 86/3, 86/2, 83, 84/2, 87/2 situated in village Navada, District Bareilly by registered sale deed dated 14.02.1989 and thereafter, their names were recorded in the revenue records. Thereafter, the aforesaid couple on 14.03.2004 executed a power of attorney in favour of the petitioner in respect of the said property. It is also submitted that in the aforesaid power of attorney, the signatures of the persons were attested by a notary/ advocate whose registration number and all the details were mentioned in the seal on the stamp paper. Thereafter, petitioner on 29.07.2013 presented three sale deeds to be registered in the office of the Sub Registrar Ist, Bareilly (respondent no.3) in respect of the same property, which was bequeathed upon the petitioner through the Power of Attorney dated 14.03.2004 by Shri Rakesh Chandra Sharma and Smt. Kunti Sharma. It was further argued that the first sale deed was in respect of area 108.693 square meters, second sale deed was in respect of area 108.3 Sq. meters and the third sale-deed was in respect of the area 107.02 sq meters and the total area of the above sale-deed is 324 sq. meters, for which area, the petitioner has been given Power of Attorney by the aforesaid couples.

4. Learned counsel for the petitioner further submits that on the presentation of the aforesaid sale-deed before the respondent No.3 to register them under the Registration Act, 1908 (hereinafter referred to as the Act), the respondent No.3 in an illegal manner and exceeding his jurisdiction has rejected the registration of all the aforesaid three sale-deeds vide order dated 13.08.2013, copy of the order is filed as Annexure No.4 to the writ petition. He

further submits that the respondent no.3 has illegally rejected registration of the three sale-deed mainly on five points, the first point is in respect of power of attorney is attested by notary and in the notary, serial number and year is not mentioned. Regarding point no.2, it was mentioned that Khasra number and area and boundaries of the property is not mentioned, only plot nos. 26 and 27 is mentioned, the third point raised in the impugned order is in respect of the stamp duty paid in respect of the Power of Attorney, which is not paid by the executors Shri Rakesh Chandra Sharma and Smt.Kunti Sharma and in the fourth point, it is mentioned that Section 4 of the Power of Attorney Act is not applied in the case of petitioner and in the fifth point, it is mentioned that the Power of Attorney should be registered as per order dated 03.07.2013 of the Directorate General Registration, which is mentioned as Bahi No.1 and there is no evidence that the Power of Attorney is executed by Shri Rakesh Chandra Sharma and his wife and the Power of Attorney is not registered as the same is governed under Section 17 of the Registration Act.

5. Learned counsel for the petitioner submits that all the points taken in the impugned order are illegal, arbitrary and without application of mind and the respondent No.3 has exceeded his jurisdiction while passing the impugned order dated 13.08.2013 and the same is against the provisions of the Act.

6. In reply to the objection raised regarding point no.1 in the impugned order, learned counsel for the petitioner submits that the objection is illegal and baseless as the registration number of Advocate/Notary is given as 3132/2000 in the seal on the stamp paper in the Power of Attorney. In respect of point no.2, it is submitted that the said objection is also illegal in the Power of Attorney dated 14.03.2004, the details of the registered sale-deed dated 14.02.1989, through which the property was purchased by the executor of the Power of Attorney was duly registered before the Sub Registrar, Bareilly mentioning the details of the property including Khasra number, area etc. The third point raised by respondent No.3 in the impugned order is also illegal, baseless as the stamp was purchased by the petitioner, who is vendee in the aforesaid sale-deed, hence as per the law, the stamp can be purchased by the vendor or by the vendee.

7. In reply to the objection raised regarding fourth point in the impugned order by the respondent no.3 regarding Section 4 of the Power of Attorney Act, 1882, learned counsel for the petitioner submits that the original instrument creating the Power of Attorney has been submitted before respondent no.3 and the petitioner had followed the procedure prescribed under Section 4 of the Power of Attorney Act, 1882 and there is no illegality done by the petitioner.

8. Learned counsel for the petitioner further submits that as per the objection raised regarding point no.5 in the impugned order, it is submitted that as far as registration of documents of moveable or immovable property is concerned, it has to be dealt in accordance with the provisions of Sections 17 and 18 of the Act and as per Section 17 of the Act, there exists no such condition of registration of Power of Attorney, therefore, the objection raised by respondent no.3 is illegal and baseless.

9. Learned counsel for the petitioner further argued that the registration of the Power

of Attorney is not mandatory as per Section 17 and his case is falling under section 18 of the Act, were in registration of the Power of Attorney is not mandatory and submitted that the reference of order dated 03.07.2013 of Directorate General Registration is against the provision of Registration Act and hence requirement for registering of Power of Attorney in view of order dated 03.07.2013 is per se illegal and the same is without jurisdiction and the grounds taken are baseless and illegal, this order is not applicable in the case of petitioner and respondent no.3 be directed to forthwith registered the three sale deed dated 29.07.2013.

10. Learned Senior Advocate Shri Shashi Nandan further argued that in the present case when the executor of the Power-of-attorney has no objection nor he has made any allegation against the petitioner regarding fraud or misrepresentation of fact or cheating, then the respondent no.3 must have no objection for registration of the three sale deed presented by the petitioner and has drawn our attention regarding applicability of Sections 32 and 33 of the Act. He further submitted that it is not mandatory that the Power-of-attorney can only be authenticated document when it is registered document and it is also not necessary that the actual executant of the Power-of-attorney should present the document for registration, once he has executed the Power-of-attorney in favour of the petitioner, he is legally competent to execute the sale deed and present the same for registration, unless the allegation of fraud is made against the petitioner.

11. In counter affidavit, learned Standing Counsel who represents the respondents submits that the impugned order dated 13.08.2013 was rightly passed by the respondent No.3 and there is no illegality in the order impugned and was passed as per the provision of Section 4 of the Power of Attorney Act and Sections 17, 32 and 33 of the Act.

12. In rejoinder affidavit, learned counsel for the petitioner denied the averments made in the counter affidavit.

13. We have heard learned counsel for the parties and perused the record, it is not disputed that the Power of Attorney dated 14.03.2004 is an unregistered document on the basis of which, the vendee has executed three sale-deeds dated 29.07.2013 and presented for registration before respondent no.3 in respect of the same property mentioned in the Power of Attorney. The ground of rejection taken in the impugned order was carefully examined by us and we find that point no.1 taken in the impugned order was in respect of the Power of Attorney is notarized and is attested by the Notary but serial number and year are not mentioned, whereas from perusal of the documents i.e. Power of Attorney, which is filed as Annexure No.2 to the writ petition, we find that the signatures on the documents was duly attested by the Notary/Advocate, whose registration number is given as 3132/2000 in the seal on the stamp paper in the power-of-attorney, which clearly shows the serial number and year exist in the document which does not create any doubt. The signature of the parties were duly attested, therefore, the objection regarding point no.1 in the impugned order have no force in our opinion.

14. From perusal of the Power of Attorney dated 14.03.2004, the detail of registered sale-deeds dated 14.02.1989 through which the property was purchased by the executor of Power-of-attorney who became owner of the plot nos.26 and 27 measuring area 324 sq. meters which was duly registered before the Sub Registrar, Bareilly at Zild No.2942, Page No.267, 268, Silsila No.5192, therefore, it could not be said that the executor

of the Power of Attorney holder has not mentioned the correct description of the property. The objection regarding point no.2 in the impugned order has also no force in our opinion.

15. From perusal of the impugned order, the case of respondent itself in respect of point no.3 is that the stamp was purchased by the petitioner. In our opinion there is no force in the objection raised by respondent no.3 in the impugned order, the petitioner who is vendee in the sale deed and as per the Indian Stamp Act and Registration Act, the vendor or the vendee can purchased the stamp and persent the document for registration.

16. In respect of the objection raised regarding point no.4 in the impugned order, we have considered the arguments raised by the parties, and from perusal of the record, it is beyond doubt to say that the petitioner has not submitted the original instrument creating the Power of Attorney before respondent no.3, the petitioner has fairly submitted in para 14 of the writ petition that "whereas the petitioner has submitted the original instrument creating the power-of-attorney and the petitioner had followed the procedure prescribed as per the provision of Section 4 of the Power-of-attorney Act, 1882".

17. For adjudication of this point, Section 4 of the Power of Attorney Act, 1882 is quoted as under:-

*"4. **Deposit of original instruments, creating powers-of-attorney.**-- (a) An instrument creating a power-of-attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court [or District Court] within the local limits of whose jurisdiction the instrument may be.*

(b) A separate file of instruments so deposited shall be kept; and any person may search that file, and inspect every instrument so deposited, and a certified copy thereof shall be delivered out to him on request.

(c) A copy of an instrument so deposited may be presented at the office and may be stamped or marked as a certified copy, and, when so stamped or marked, shall become and be a certified copy.

(d) A certified copy of an instrument so deposited shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court [or District Court].

(e) The High Court may, from time to time, make rules for the purposes of this section, and prescribing, with the concurrence of the State Government, the fees to be taken under clauses (a), (b) and (c).

(g) This section applies to instruments creating powers-of-attorney executed either before or after this Act come into force."

18. Therefore, the objection regarding point no.4 in the impugned order has also no force in our opinion.

19. In respect of objection raised regarding point no.5 in the impugned order, we have no doubt that the Power of Attorney on the basis of which the petitioner wants to execute the three sale deeds are unregistered Power of Attorney and in our opinion there is no bar in the Act for execution of sale deed on the basis of unregistered power-of-attorney. The case of the petitioner falls under Section 18 of the Act and not under Section 17 of the Act and there is

no hurdle that unregistered Power of Attorney holder cannot execute the sale-deed unless and until there is a case of fraud established against the executor and if no allegation of fraud is made the registration is held to be proper in the eye of law. Moreso, in the present case the Power-of-attorney holder was the executant of the document, he was also legally competent to present the document for registration. Object of Registration Act, 1908 is to prevent fraud and no allegation of fraud is made against the petitioner, therefore, he is entitled to present the document for registration as per law.

20. For adjudication of this point, Sections 17 and 18 of the Registration Act, 1908 are being quoted as under:-

*"**17. Documents of which registration is compulsory.**--(l) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:--*

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (l) applies to--

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring,

assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v)[any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a
mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer.

(3) Authorities to adopt a son,executed after the 1st day of january ,1872 ,and not conferred by a will ,shall also be registered.

18. ***Documents of which registration is optional.****--Any of the following documents may be registered under this Act, namely:--*

(a) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less then one hundred rupees, to or in immovable property;

(b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(c) leases of immovable property for any term not exceeding one year, and leases exempted under section 17;

1[(cc) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether

in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;]

(d) instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property;

(e) wills; and

(f) all other documents not required by section 17 to be registered."

21. In the impugned order, the respondent No.3 has not made out any allegation against the petitioner that the Power of Attorney was obtained by playing fraud or has obtained from Shri Rakesh Chandra Sharma and Smt. Kunti Sharma by suppression of material fact or by way of cheating and is trying to execute the sale-deed of the property in question with malafide intention. Nor any such complaint was ever made by Sri Rakesh Chandra Sharma and Smt. Kunti Sharma against the petitioner before respondent no.3. We are in agreement with the argument raised by Shir Shashi Nandan, Senior Advocate that the reference of order dated 03.07.2013 of Directorate General Registration given in the impugned order is not applicable in the case of the petitioner, in view of the provision contained under Section 18 of the Act. Therefore, the objection regarding point no.5 in the impugned order has also no force in our opinion.

22. We have considered all the five objections raised in the impugned order dated 13.08.2013 for not considering the registration of the documents presented by the petitioner and we are not satisfied with the finding given by the respondent no.3. Further, it is necessary to deal with the legal argument raised by Shri Shashi Nandan, Senior Advocate that when the executor of the Power-of-attorney has no objection nor he has made any allegation against the petitioner regarding fraud or misrepresentation of fact or cheating, then the respondent no.3 must have no objection for registration of the three sale deed presented by the petitioner and has drawn our attention regarding applicability of Sections 32 and 33 of the Act. He further submitted that it is not mandatory that the Power-of-attorney can only be authenticated document when it is registered document and it is also not necessary that the actual executant of the Power-of-attorney should present the document for registration, once he has executed the Power-of-attorney in favour of the petitioner, he is legally competent to execute the sale deed and present the same for registration, unless the allegation of fraud is made against the petitioner.

23. Section 32 deals with "Persons to present documents for registration" and Section 33 deals with "Power of Attorney recognizable for purposes of Section 32", which is in Part VI of the Registration Act, 1908, Section 32 and 33 of the Registration Act are quoted as under :-

"Section 32. Persons to present documents for registration.-- *Except in the cases mentioned in 1[sections 31, 88 and 89], every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration-office,--*

(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(b) by the representative or assign of such a person, or

(c) by the agent of such a person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned.

***Section 32-A. Compulsory affixing of photograph, etc.**--Every person presenting any document at the proper registration office under section 32 shall affix his passport size photograph and fingerprints to the document:*

Provided that where such document relates to the transfer of ownership of immovable property, the passport size photograph and fingerprints of each buyer and seller of such property mentioned in the document shall also be affixed to the document.]

***Section 33. Power-of-attorney recognizable for purposes of section 32.**--(l) For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely:--*

(a) if the principal at the time of executing the power-of-attorney resides in any part of 45 [India] in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

(b) if the principal at the time aforesaid 46 [resides in any part of India in which this Act is not in force], a power-of-attorney executed before and authenticated by any Magistrate;

(c) if the principal at the time aforesaid does not reside in 45 [India], a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, 47 [Indian] Consul or Vice-Consul, or representative 48 [***] of the Central Government: Provided that the following persons shall not be required to attend at any registration-office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely:--

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in Court. 49 [Explanation.--In this sub-section "India" means India, as defined in clause (28) of section 3 of the General Clauses Act, 1897 (10 of 1897).]

(2) In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

(4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf.

24. From plain reading of Section 32 of the Act it speaks that who are those person to be legally entitled to present the instrument for registration before the proper registration office whether such registration be compulsory or optional. As per Section 32(c) of the Act, the agent, representatives or assigns of the persons

mentioned in Section 32(a), can present the instrument for registration if they are duly authorized by the Power-of-attorney executed and authenticated.

25. It is also relevant to mention here that Section 32 refers to documents presented for registration by a holder of "Power-of-attorney" as per Section 32(c) and it therefore, follows that the procedure specified under Section 33 of the Act would be attracted where a document is presented by a person holding "Power of attorney" of the person as mentioned in Section 32(a) of the Act.

26. Therefore, from the above discussion and legal position, it is carved out that as per Section 32 of the Act, the documents required to be registered before the registering authority shall be presented by the person executing it, meaning thereby that the executor of the said document has to be present personally for registration of the said document before the registering officer i.e. Sub Registrar meaning thereby that the "Person executing" the document is the person who is the actual executor of the document, whose signature exist in the document, whether it is on behalf of the Power-of-attorney or personally presenting before the registering authority along with the documents for registration.

27. The document can be presented by the Principal who executes by means of agent. The Power-of-attorney holder can execute a document as agent for someone else and present the document for registration and get it registered. Whether the Power-of-attorney is a registered or unregistered document in both the case he is the actual executant of the documents and is entitled under Section 32(a) to present it for registration and get it registered.

28. In the facts of the present case, it is not disputed that the petitioner was given full authority by Rakesh Chandra Sharma and his wife Smt. Kunti Sharma under the unregistered Power-of-attorney dated 14.03.2004 to transfer the property and to execute the document before the authorities concerned. It is admitted fact that three sale deed which were presented before the respondent no.3 for registration by the petitioner in the name and on behalf of Rakesh Chandra Sharma and Smt. Kunti Sharma, therefore, for the purpose of registration of the said three sale deed as per Section 32(a) of the Registration Act, the petitioner is certainly the "person executing" the document and is the person to present the same for registration.

29. The only purpose of registering any document is to prevent fraud or misrepresentation and in the present case there is no allegation of fraud is made by the executor of Power-of-attorney namely Rakesh Chandra Sharma and Smt. Kunti Sharma against the petitioner. Therefore, the respondent no.3 is under obligation as per Section 32 of the Registration Act was only to satisfy himself that the documents was executed by the person by whom it is signed and could not see whether it is registered or unregistered Power-of-attorney if compliance of Section 4 of the Power-of-attorney Act is made, the Sub Registrar upon being so satisfied and upon being presented with the documents to be registered had to proceed with the registration of the said document.

30. This issue was also considered by the Calcutta High Court in the case of ***Goswami Malti Vahuji Maharaj Vs. Purushottam Lal Poddar, AIR 1984 Cal 297*** and was pleased to observe in paragraph no. 13 of the judgment as under:-

"13. It is, therefore, clear that the presumption arising out of registration of a document can be rebutted by the party challenging its validity by adducing positive evidence proving the invalidity of the power-of-attorney or some other infirmity. The facts of the present case are that none of the co-owners had executed the partition deed personally. On behalf of both the co-sharers, their respective constituted attorneys executed the document. It has been repeatedly held by the Courts in India, including our Court, that where a person holds a power-of-attorney authorising him to execute the document on behalf of his principal and he executes the document, he is treated as the executant of the document for the purpose of registration. He is entitled to admit execution and to present the document for registration under Section 32(a) of the Act as the executant without production of any power-of-attorney as required under Section 33 of the Act."

31. The same view was taken by the Punjab and Haryana High Court in the case of ***Ram Gopal Vs. L. Mohan Lal and Others, AIR 1960 P & H 226,*** and was pleased to observe in paragraph nos.11 and 12 of the judgment as under:-

"11. In my view, however, on the facts of the present case this question does not at all arise for consideration. The sale deed has actually been executed by Dalip Singh himself as mukhtar-i-am of Smt. Surat Piari and not by Smt. Surat Piari herself, with the result that this sale deed was in actual fact presented to the Sub-Registrar by the executant himself and by an agent of the executant duly authorised by a power of attorney to present the document as contemplated by S. 32 of the Registration Act.

12. This vital aspect of the matter seems to have been completely lost sight of by the Court below. Section 32 of the Registration Act requires the document sought to be registered, to be presented, inter alia by "some person executing" it; this expression, in my view, means the person actually and in fact executing the document and it does not refer to the principal who may be considered to be executing the document by means of an agent. The basic principle underlying these provisions of the Registration Act is to get before the Sub-registrar the actual executant who in fact executes the document in question."

32. The Hon'ble Apex Court in the case of ***Rajni Tandaon Vs. Dulal Ranjan Gosh Dastidar and Another, 2009 (14) SCC 782,*** was pleased to consider most of the judgment of the High Court regarding similar issue and was pleased to observe that the object of registration is designed to guard against fraud by obtaining a contemporaneus publication and an unimpeachable record of each document. The instant case is one where no allegation of fraud has been raised. In view thereof the duty cast on the registering officer under Section 32 of the Act was only to satisfy himself that the document was executed by the person by whom it purports to have been signed. The registrar upon being so satisfied and upon being presented with a document to be registered had to proceed with the registration of the same reliance is placed in paragraph nos. 26, 27, 28, 29, 30, 31, 32 and 34 of the above judgment, which are quoted as under:-

"26. It is important to bear in mind that one of the categories of persons who are eligible to present documents before the registration office in terms of

Section 32 of the Act is the "person executing" the document. The expression "person executing" used in Section 32 of the Act, can only refer to the person who actually signs or marks the document in token of execution, whether for himself or on behalf of some other person. Thus, "person executing" as used in Section 32 (a) of the Act signifies the person actually executing the document and includes a principal who executes by means of an agent. Where a person hold a power of attorney which authorises him to execute a document as agent for some one else, and he executes a document under the terms of the power of attorney, he is, so far as the registration office is concerned, the actual executant of the document and is entitled under Section 32(a) to present it for registration and get it registered.

27. In view of the aforesaid legal position, we are of the considered view that the law laid down by the Andhra Pradesh High Court in D. Sardar Singh v. Seth Pissumal Harbhagwandas Bankers [AIR 1958 Andhra Pradesh 107] and the decision of Calcutta High Court in Abdus Samad v. Majitan Bibi & Anr. [AIR 1961 Calcutta 540] with regard to the interpretation of Section 32 and 33 of the Act is not the correct legal position.

28. In the facts of the present case, it is quite clear that Indra Kumar Halani, was given the full authority by Nandalal Tantia under the power of attorney to transfer the suit property and to execute the necessary document. It is an accepted position that the said document had been executed by Indra Kumar Halani in the name and on the behalf of Nandalal Tantia thereof. Therefore, for the purposes of registration office under Section 32 (a) of the Act Indra Kumar Halani is clearly the "person executing" the document. Therefore, it follows that the said sale deed which was executed and authenticated by Indra Kumar Halani could be presented for registration by him. We are of the considered view that Indra Kumar Halani acted in the aforesaid manner mandated under Section 32 (a) of the Act.

29. The object of registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document. The instant case is one where no allegation of fraud has been raised. In view thereof the duty cast on the Registering Officer underSection 32 of the Act was only to satisfy himself that the document was executed by the person by whom it purports to have been signed. The Registrar upon being so satisfied and upon being presented with a document to be registered had to proceed with the registration of the same.

30. The High Court held that since the power of attorney was not registered document, Indra Kumar Halani, was not authorized to execute and present the sale deed before the Sub-Registrar for registration. It was, therefore, held by the High Court that no right and title had passed to the Plaintiff on the basis of the aforesaid sale deed.

31. The High Court also held that upon a conjoint reading ofSection 32, Section 33 (1) (a) and Section 34 of the Act, it was difficult to conclude that Indra Kumar Halani became the executant by himself on the basis of the power of attorney which was neither executed nor authenticated in the manner provided under Section 33 (1) (a) of the Act so as to enable him to present the sale deed for registration in compliance with the provisions of Section 32 (a) of the Act.

32. We do not agree with the said findings of the High Court.

33. Where a deed is executed by an agent for a principal and the same agent signs, appears and presents the deed or

admits execution before the Registering Officer, that is not a case of presentation underSection 32 (c) of the Act. As mentioned earlier the provisions of Section 33 will come into play only in cases where presentation is in terms of Section 32 (c) of the Act. In other words, only in cases where the person(s) signing the document cannot present the document before the registering officer and gives a power of attorney to another to present the document that the provisions of Section 33 get attracted. It is only in such a case, that the said power of attorney has to be necessarily executed and authenticated in the manner provided under Section 33 (1) (a) of the Act.

34. In the instant case, Indra Kumar Halani executed the document on behalf of Shri N. L. Tantia under the terms of this power of attorney. He then presented it for registration at the Registration Office and it was registered. The plea taken by the Respondents that in order to enable him to present the document it was necessary that he should hold a power of attorney authenticated before the Sub-Registrar under the provisions of Section 33 is thus not supported by the language of Section 32. The provisions of Section 33 therefore only apply where the person presenting a document is the general attorney of the person executing it, and not where it is presented for registration by the actual executant, even though he may have executed it as agent for some one else. In this case, the presentation is by the actual executant himself and is hence is entitled under Section 32 (a) to present it for registration and to get it registered.

33. In view of the legal position and discussion made above, it is not a case of the respondents that the executor of the sale-deed is not present and there is any allegation of fraud against the petitioner, therefore, the grounds taken in the impugned order in rejecting the registration of three sale-deeds, prima faice, as per the record appears to be illegal and without application of mind and the respondent no.3 has not considered the provisions contained under Section 4 of the Power of Attorney Act, 1882 and Sections 17, 18, 32 and 33 of the Indian Registration Act, 1908.

34. In view of the above, the impugned order dated 13.08.2013 passed by respondent no.3 is hereby quashed and the writ petition is **allowed**. The matter is remanded back to the respondent no.3 to pass an appropriate order for the registration of three sale-deed dated 29.07.2013 afresh in the light of the discussions made above and the law laid down by the Hon'ble Apex Court in the case of **Rajni Tandon (supra)** preferably within a period of two months from the date of production of certified copy of this order before him.

35. No order as to costs.

(2020)06ILR A353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE

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

Writ-C No. 52897 of 2017

M/s Super Cassettes Industries Pvt. Ltd., Noida ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Diptiman Singh

Counsel for the Respondents:
C.S.C., Sri Shekhar Srivastava

A. Labour Law - The U.P. Industrial Disputes Act, 1947 - Section 4-K - The U.P. Industrial Disputes Rules, 1957 - Rule 12-E – Dubbing a transfer order as one of termination Industrial Employment (Standing Orders) Act, 1946 - Certified Standing Orders of the Employers - Model Standing Orders framed under the Act of 1946 - Industrial Employment (Standing Orders) Central Rules, 1946 - The Uttar Pradesh Industrial Employment Model Standing Orders, 1991 - Model Standing Orders, 1991 - Clause 13(6) - General Clauses Act, 1897 - Section 21 - Labour Court is a Court of referred jurisdiction and a creature of the statute - Its jurisdiction is limited to answering questions that are expressly referred to it under Section 4-K of the Act - Authority empowered under Section 4-K of the Act has utterly failed to refer what on its plain terms was an industrial dispute - termination was not referable to any other cause, act or misconduct, but the workmen' refusal to obey the order of transfer - reference in the terms made does not clothe the Labour Court with jurisdiction to look into the validity of the order of transfer. (Par 38, 41,45)

This case is one where for the disobedience of a transfer order, the workman was dismissed from service and the validity of the dismissal for no other reason but disobedience to the transfer order was the subject matter of reference - here there was no order of termination from service, dated 10.02.1996, but a simple order of transfer that might have led to adverse consequences for the workman. (Para - 42,44)

HELD:- Reference made is without any basis, and on the date it was made or with reference to the Employers' order that it was made, there was no termination of services for the workman. The industrial dispute in the terms it was referred was completely non-existent. The Labour Court being a Court of referred jurisdiction, could not have gone beyond or behind the terms of reference in which the industrial dispute sent to it was cast.(Para – 45)

Petition allowed.(E-7)

List of cases cited:-

1.Jeevan Prasad Vs Labour Court, Kanpur, (1999) 76 FLR 110

2.D.K. Yadav Vs J.M.A. Industries Limited, (1993) 67 FLR 111 (SC),

3.M/S Triveni Engineering and Industrial Ltd. Vs St. of U.P. & ors. Writ - C No.689 of 2012

4.Addisons Paints & Chemicals Ltd. Vs Workmen represented by the Secretary (A.P. & C.) Assistants' Assc. & anr. (2001) 2 SCC 289,

5.Tata Iron & Steel Comp. Ltd. Vs St. of Jh. & ors. (2014) 1 SCC 536,

6.Tobu Enterprises Limited Vs P.O., Industrial Tribunal (2009) 122 FLR 71,

7.Hamdard *(Waqf)* Laboratories Vs St. of U.P. & ors. (2014) 1 AWC 367

8.Kundan Sugar Mills Vs Ziyauddin, AIR (1960) SC 650

9.Woman of Bijlibari Tea Estate Vs Mang. of Bijlibari Tea Estate (2010) 4 Gauhati Law Reports 849

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

1. This writ petition is directed against an award of the Presiding Officer, Labour Court, U.P., NOIDA, Gautam Budh Nagar, dated 02.08.2017 (published on 04.10.2017) passed in Adjudication Case no.35 of 2008. The aforesaid Adjudication Case commenced on the determination of Conciliation proceedings by the Additional Labour Commissioner, Ghaziabad vide order dated 08.07.1996 made in C.P. Case

no.155 of 1996. Based on the said order made by the Additional Labour Commissioner, an industrial dispute, under Section 4-K of the U.P. Industrial Disputes Act, 1947 (for short, the Act) in the following terms was referred vide order dated 08.07.1996 to the adjudication of the Labour Court, Ist, Ghaziabad:

Whether act of the Employers in terminating the services of their workman, Shailesh Rai son of Sri O.P. Sangram, Operator w.e.f. 10.02.1996 is lawful and/ or valid? If not, to what benefit/ compensation/ relief is the concerned workman entitled; with what other particulars and with effect from what date?

2. Upon receipt of reference by the Labour Court, the case was registered as Adjudication Case no.258 of 1997 on the file of the Labour Court, Ghaziabad. The case aforesaid was registered between the third respondent, Shailesh Rai, represented by the Secretary of the Workers' Union (hereinafter referred to as the workman) and the petitioner here, that is to say, M/s. Super Cassettes Industries Private Limited (hereinafter referred to as the Employers). Notice was issued to both parties, whereupon the workman filed his written statement, dated 01.09.1997. The Employers filed their written statement, a copy of which is on record as Annexure-8 to the writ petition.

3. The course of proceedings show that rejoinder statement, dated 26.10.1998 was filed on behalf of the workman, and likewise, a rejoinder statement was filed on behalf of the Employers, dated 16.12.2002. The workman filed documents in support of his claim, numbering nineteen through a list of documents, dated 02.12.1998. The Employers for their part also filed documents through a list dated 06.05.2003, bearing paper no. 10-B(i), carrying eight documents with the list aforesaid, including a mention that the Employers seek leave of the Court to file additional documents at any stage of the proceedings. An undertaking was also made part of the list of documents that the original/ carbon copies of the documents would be produced at the stage of evidence, or as and when required/ directed by the Court.

4. The workman in support of his case examined himself as a witness, WW-1 on 25.08.2006 and was cross-examined by the Employers' representative. The workman was further cross-examined after an adjournment by the Employers' representative. It appears that after the workman's cross-examination was over, the Employers served a notice of closure of their Unit, where the workman was employed, that is to say, the Employers' Unit at C-26-27, Sector III, NOIDA, District Gautam Budh Nagar, U.P. upon the State Government through the Secretary in the Department of Labour Welfare, the District Magistrate, Gautam Budh Nagar, U.P., the Labour Commissioner, U.P., Kanpur, the Deputy Labour Commissioner, NOIDA, U.P., the Director of Factories, U.P., Kanpur, besides a host of other Authorities. They also pasted the closure notice on their Notice-Board. About this time, another development that took place was that the proceedings of Adjudication Case no.258 of 1997, that were in progress before the Labour Court-I, U.P., Ghaziabad were transferred to the Labour Court, NOIDA, Gautam Budh Nagar. Before the Labour Court, U.P., NOIDA, Gautam Budh Nagar, Adjudication Case no.258 of 1997 was renumbered as Adjudication Case no.35 of 2008. A notice in this regard was issued to the parties by the Labour Court, dated 22.10.2008 directing the parties to

appear before the Labour Court at NOIDA, Gautam Budh Nagar for further proceedings on 17.11.2008.

5. The Employers in the resumed proceedings before the Labour Court, NOIDA, Gautam Budh Nagar, examined one Puneet Jain, Deputy General Manager (P&A) of the Employers' Unit at Gautam Budh Nagar in support of their case, who was examined as EW-1 on 02.12.2008. He was cross-examined on 02.12.2008 by the workman's authorized representative. The cross-examination was deferred and concluded on an adjourned date. In view of the closure of the Factory/ Unit where the workman was employed, the Employers moved an application seeking amendment to their written statement by adding paragraph 20 thereto, in the following terms:

"20. That the factory had been closed down finally w.e.f. 26.12.2007 and there is neither any activities of production and no dues payable to ex-employee."

6. The aforesaid amendment was sought under Rule 12-E of the U.P. Industrial Disputes Rules, 1957. Also, along with the affidavit accompanying the application was annexed as Annexure-A, a copy of the notice of closure, dated 26.12.2007, that the Employers sought to bring on record as a document in support of the amended plea.

7. The Labour Court by means of its impugned judgment and award answered the reference in favour of the workman holding that termination of his services by the Employers w.e.f. 10.02.1996 was unlawful. It was further awarded that the workman is entitled to reinstatement, together with back-wages with effect from the date of his unlawful termination and other consequential benefits.

8. Aggrieved, the Employers have instituted the present writ petition.

9. A perusal of the workman's case set out in the written statement shows that he claims that the Employers are an electronics industry who own a number of factories/ units at NOIDA, Greater NOIDA. The Employers for the purpose of activities of production and sale employ workmen of various categories in large numbers. The workman has pleaded that he was employed by an oral order w.e.f. 01.08.1990 on the post of AC Operator on a permanent basis. During the period of his service, his work and conduct were appreciated by the Employers. The workman, however, protested against illegal reduction in the available facilities, like free tea, provision of some food and free transport etc., and, in furtherance of his protest, participated in a lawful strike. The Employers on that account are claimed to have harboured malice and ill-will against the workman. It is the workman's further case that the Employers *mala fide* demanded the workman's resignation from his permanent service; and, on protest by the workman, they suspended him on baseless, false and trumped up charges, all of which were contrary to the record and evidence. In the disciplinary proceedings that ensued, the charges could not be established. Thereupon, the Employers again demanded the workman's resignation. The workman declined to resign. Since the charges were not established at the inquiry, the Employers revoked the workman's suspension, but did not permit him to join or assign him duties. When the workman protested, the Employers transferred him unlawfully to a very distant Unit of theirs,

located at Golden Chariot Studio, Plot No.B-14, New Link Road, Behind Oshiwada, Andheri (West), Bombay-400058; and, through this unlawful transfer, they terminated the workman's services with effect from 10.02.1996.

10. It is also pleaded that the workmen who are juniors have been retained in regular service and fresh recruitment to the workman's post has been made illegally. It was also pleaded that the Employers have work available with them, that the workman was earlier discharging. It is also asserted that the Employers before terminating the workman's services did not serve him any notice or tender him notice pay, or retrenchment allowance. There is a specific plea that despite effort to secure suitable employment, the workman has been unsuccessful at it.

11. The Employers in their written statement pleaded that they are an industrial establishment registered under the Factories Act, and are engaged in manufacture as well as sale of electronic products. It is acknowledged that the workman was appointed as an Operator AC Plant w.e.f. 01.08.1990. The Employers in paragraphs 3 to 11 have raised preliminary objections, variously said, but the substance of it all is that there was no industrial dispute in existence on 10.02.1996, that could be referred to the Labour Court. It is asserted that there was no cause of action on 10.02.1996 which the order of reference regards as an industrial dispute, inasmuch as, on the said date the relationship of master and servant between the Employers and workman was subsisting. The reference order made was, therefore, infructuous and void. The basis of this preliminary objection, on facts is set out in paragraph 9 of the written statement, that reads to the following effect:

"(9) That the Opposite Party never terminated the services of the applicant. In fact the Opposite Party in order to reorganise/ restructive the working of the other Units/ branches the services of the experienced persons were required. Thus applicant being are of the experienced persons was accordingly deputed to another unit/ branch of the Opposite Party namely M/s. Super Cassettes Industries, Golden Chariot, Plot No. B-14, New Link Road, Behind Oshiwada, Andheri West Bombay (Mumbai) as per the requirements of business and administrative exigencies, vide letter dated 10.02.1996. The applicant was required to report at the assigned place of working on 19.02.1996 after availing the joining time. The letter dated 10.02.1996 was duly received by the applicant on 16.02.1996 without any objection or demur. Thus the question of termination of services on 10.02.1996 did not arise at all. The reference as such is bad in law, hence not maintainable."

12. It is on the merits pleaded by the Employers that due to administrative exigencies and requirement of work/ business, the workman was deputed to another Unit/ Factory of the Employers vide letter dated 10.02.1996. The workman vide the aforesaid letter was assigned his place of work at Bombay (Mumbai), where he was required to report on 19.02.1996, after availing joining time. It is also asserted that the workman apart from his monthly salary was also offered outstation allowance at the rate of Rs.250/- per month, besides travelling expenses/ train fare, in order to enable him to report for duty at the assigned place at Bombay (Mumbai). Also, the Employers' case is that the workman received the letter dated 10.02.1996 without any objection or demur, on 16.02.1996. It is pleaded that the

relationship of master and servant was, thus, existing between the Employers and the workman on 10.02.1996, and even thereafter. It is also the Employers' case that they never terminated the workman's services on the alleged date or thereafter. It is asserted that to the contrary, in disregard of the bona fide and lawful orders of the Employers, the workman failed to report for duty at the station of transfer/ assigned place of work. It is pleaded also, that the workman has raised this industrial dispute against the Employers alleging termination of his services with effect from 10.02.1996, under some foul advice, as on that date he was in employment. It is also claimed on behalf of the Employers that they have reasons to believe that the workman is gainfully employed elsewhere and is pursuing this industrial dispute under some foul advice, by resort to abuse of process of law.

13. The workman in his rejoinder statement has claimed this transfer to be a contrivance and a device to terminate his services. He claims the transfer to be an instance of unfair labour practice which the Employers took resort to, in order to get rid of him in an insidious manner. The Employers, according to the workman, harboured malice and ill-will against him for his activities in the trade Union. On this account by a stratagem of transferring him to a station as far off as Mumbai, for a low paid workman like him domiciled in Gautam Budh Nagar, they have effectively terminated his services. The transfer, vide order dated 10.02.1996, has been impeached by the workman as unlawful. It appears also that the workman urged before the Labour Court that in the Certified Standing Orders of the Employers, that are said to be certified under the Industrial Employment (Standing Orders) Act, 1946 (for short, the Act of 1946), there is provision for transfer of a workman, but under the Model Standing Orders framed under the Act of 1946, there is no provision for the transfer of a workman from one State to another without his consent. It was also urged before the Labour Court on behalf of the workman that if any provision about 'transfer' has been incorporated in the Certified Standing Orders of the Employers, it would be illegal and not binding on the workman. He relied on authority also in support of the said proposition.

14. On the other hand, the Employers appear to have urged before the Labour Court that there is no provision in the Model Standing Orders, appended to the Schedule to the Industrial Employment (Standing Orders) Central Rules, 1946 (for short, the Rules of 1946) on the subject of transfer, and, therefore, not lawful for the Employers to provide about it in their Certified Standing Orders. It was also urged that the subject of transfer would, therefore, be governed by terms of the order of appointment or by some other contract inter se the parties. Some authorities also appear to have been cited on behalf of the Employers, that transfer is a general incident of service, that can always be invoked. It must be remarked here that the workman was somewhat confounded about the provision regarding transfer, in the Certified Standing Orders of the Employers, evident from his stand before the Labour Court. Likewise, the Employers too were confounded about their stand regarding the provision about transfer in the Certified Standing Orders applicable to them, as also that provided under the Model Standing Orders, on the subject. But, this confusion was not reflected in the parties' stand before this Court. It was all

confined to proceedings before the Labour Court.

15. Heard Shri Diptiman Singh, learned Counsel for the Employers and Shri Shekhar Srivastava, learned Counsel for the workman.

16. A perusal of the impugned award shows that the Labour Court has looked into the evidence to conclude in substance that the Employer, in the first instance, suspended the workman vide order dated 27.04.1995 on charges, and, initiated disciplinary proceedings against him. However, in the disciplinary proceedings, those charges could not be established. The Employer, thereafter reinstated the workman in service vide order dated 10.02.1996, considering that the charges could not be established, and also adopting a benevolent approach in consideration of the workman's good service record. The Labour Court has, however, held that by an order of the same day i.e 10.02.1996 when the workman was reinstated, the Employers transferred him to a unit located far away from Noida at Mumbai; that the Labour Court upon evaluation of the two orders dated 10.02.1996, one revoking the workman's suspension, and the other transferring him to a far off unit, located at Mumbai, concluded that the Employers have been persecuting the workman, now and then. They suspended him on charges and initiated disciplinary proceedings. But, when they could not establish the charges in disciplinary proceedings, they revoked the workman's suspension ordered pending inquiry, and contemporaneously with the revocation of suspension, transferred the workman to a distant Unit at Mumbai. The Labour Court has held this act of the Employers to be unfair labour practice within the meaning of Section 2(ra) read with item 7 of the Fifth Schedule of the Industrial Disputes Act, 1947.

17. It is recorded by the Labour Court that the Employers have also said that by not complying the transfer order, the workman has abandoned his post. About this stand, the Labour Court has held that it is not at all tenable. It has also been remarked by the Labour Court that the Employers have not brought to its notice any rule or provision in the Act, to show that the transfer is a part of the workman's service conditions. It has also been held that contrary to the Employers' stand, the Model Standing Orders, 1991 vide Clause 13(6) clearly provide that without the workman's consent, he cannot be transferred from one State to another. It has been concluded, therefore, that the workman's transfer is an instance of unfair labour practice, contrary to law and the rules, where the workman has been illegally transferred by the Employers to a far off unit located at Mumbai. It has also been held that the act of the Employers in not passing a speaking order on the workman's representation against the transfer, the Employer's refusal to take the workman back in employment, the Employer's failure to give the workman a warning to present himself for duties, or to seek his explanation followed by the disciplinary proceedings on charges of unauthorized absence, and, taking the workman's stand about his transfer to be an abandonment of service, amounts to retrenchment with effect from 10.02.1996.

18. It has, particularly, been emphasized by the Labour Court in its findings that the Employer's act in taking the workman to have abandoned service without calling for an explanation, or serving him a chargesheet, or subjecting

him to disciplinary proceedings, constitutes illegal retrenchment. It has also been noted by the Labour Court that during the conciliation proceedings, or the hearing before the Labour Court, no proposal has been put forward by the Employers to take back the workman in service. Relying upon an authority of this Court in **Jeevan Prasad vs. Labour Court, Kanpur 1999(76) FLR 110** and the decision of their Lordships of the Supreme Court in **D.K. Yadav vs. J.M.A. Industries Limited 1993 (67) FLR 111 (SC),** it has been held that absence from duty cannot lead to an inference of abandonment. The Labour Court has further held that to infer abandonment would be contrary to the principles of natural justice, and would fall squarely within the definition of retrenchment. The Labour Court has also held that the workman was not engaged in any gainful employment and his casual exertions to earn his livelihood, cannot be equated with gainful employment.

19. The submission of learned counsel for the Employers that after the closure of the unit, where the workman was employed, he cannot be given any relief, has been rejected by the Labour Court, holding that the closure notice on its own terms shows that 23 workman employed in the unit have been adjusted in another unit. There is no justification for the Employers not to do so in the workman's case. The Labour Court has concluded that the services of the workman have been illegally terminated that falls within the definition of retrenchment, and that it has been done in violation of Section 6N of the Act. It has further been held that the workman was not gainfully employed elsewhere, and, that notwithstanding the closure, he is entitled to relief. In accord with these findings, the Labour Court answered the reference in favour of the workman, and, made an award in terms already detailed.

20. The principal issue on which the parties have addressed this Court is: whether in the garb of a transfer order, the services of a workman can be terminated in violation of the Certified Standing Orders?

21. It is submitted by Sri Diptiman Singh, learned Counsel for the Employers that the workman was appointed as an Operator (A.C. Plant), vide appointment letter dated 01.08.1990, drawn up in accordance with the Certified Standing Orders of the Employers. Clause 5 of the appointment letter clearly provides for transfer to any unit of the Employers, wherever it may be located. It is contented on behalf of the Employers that the workman duly received the letter of appointment and did not protest or object to the transfer clause that is an integral part of the workman's conditions of service, spelt out by the letter of appointment.

22. It is submitted further that it is not that the Certified Standing Orders have introduced a service condition about transfer unauthorisedly. Transfer is one of the conditions of service postulated under clause (4) of the 'MODEL STANDING ORDERS ON ADDITIONAL ITEMS APPLICABLE TO ALL INDUSTRIES', detailed in Schedule 1-B to the Rules of 1946. It is pointed out by the learned Counsel for the Employers that the only restriction under clause (4) of the Model Standing Orders, carried in Schedule 1-B, last mentioned is that such transfer, in case of an inter-State transfer, can either take place with the consent of the workman, or in case there is a specific provision to that effect in the workman's appointment letter.

The transfer when made in either of two contingencies is also subject to reasonable notice to the workman and allowance of reasonable time to join at the other station. The workman is also entitled to receive travelling allowance, including transport charges etc.

23. It is pointed out by Sri Diptiman Singh, learned counsel for the Employers that the transfer order was duly received by the workman on 16.02.1996. The transfer order dated 10.02.1996 is in keeping with the provisions of Clause (4) of the Model Standing Orders set out in Schedule 1-B to the Rules of the 1946, inasmuch as the letter of appointment of the workman specifically provides for a transfer to any unit of the Employers, at whatever place located. Also, the Certified Standing Orders of the Employers provide for an inter-State transfer in keeping with the Model Standing Orders, last mentioned. It is submitted, therefore, that the workman cannot really say that he has an industrial dispute to raise about his transfer.

24. It is also urged on behalf of the Employers that no dispute regarding the validity of transfer was referred to the Labour Court. Instead, the workman moved an application under Section 2-A of the Act before the Conciliation Officer, dubbing his transfer as retrenchment. In this connection, learned Counsel for the Employers has drawn the attention of the Court to the workman's application, dated 29.03.1996, which is on record as Annexure-5 to the writ petition. It is pointed out that in paragraph 1-ग it is categorically urged that the workman's services have been terminated by way of retrenchment with effect from 10.02.1996, which in fact is the date of the workman's transfer.

25. It is submitted that reference has been made under Section 4-K of the Act vide order dated 08.07.1996, relating to termination of the workman's services by the Employers on 10.02.1996. The reference order does not at all speak about the validity of transfer to be the subject matter. In this connection, learned Counsel for the Employers has drawn the attention of the Court to the workman's written statement, particularly, the averments in paragraphs 4 and 5, about which it is said that the case pleaded by the workman is one of illegal transfer.

26. It is also submitted by the learned Counsel for the Employers that they raised a preliminary objection in their written statement regarding the maintainability of the reference on ground that the workman's services were never terminated. They averred that the master and servant relationship continued between the Employers and the workman on 10.02.1996 and even thereafter, inasmuch as, on 10.02.1996 the workman was transferred, but not retrenched, or his services terminated. In this connection, it must be remarked that the relevant paragraph being no.9 of the written statement filed by the Employers has been extracted hereinabove, on the basis of which in the togetherness with pleadings in paragraphs nos.3, 4, 5, 6, 7 & 8 of the written statement aforesaid, the Employers have come up with this plea that the reference is infructuous and void; or so to speak, there was no industrial dispute in existence when the reference was made.

27. In support of the aforesaid contention, Sri Diptiman Singh, learned Counsel for the Employers has relied upon an unreported decision of this Court in **Writ - C No.689 of 2012, M/S Triveni Engineering and Industrial Ltd. vs. State of U.P. and others, decided on 30.01.2013.** He has relied upon the

principle in that case and referred to the following paragraph in the judgment:

"From the aforesaid admission of the workman concerned, it is undisputed position that even after alleged oral termination on 29th February, 2008, the employee concerned was called for duty as seasonal clerk in the employment of the petitioner industry and he had actually worked in the crushing season 2008-09 i.e. season following the order dated 29th February, 2008. It is therefore apparent that the services of the workman were not actually terminated on 29th February, 2008. He had been invited to work and he had worked in the crushing season 2008-09. Therefore there being no actual termination of the services of the workman on 29th February, 2008, the reference itself was bad."

28. He submits on the principle of the decision in **M/s Triveni Engineering and Industrial Ltd.** *(supra)* that in the present case there was no termination of service ordered by the Employers with effect from 10.02.1996. On the said date, a transfer order alone was passed that was received by the workman on 16.02.1996 requiring him to proceed to Mumbai and join at the station of transfer. Thus, the reference to the effect that termination of service of the workman with effect from 10.02.1996 was unlawful, is bad in law.

29. Learned counsel for the Employers has further placed reliance upon a decision of the Supreme Court in **Addisons Paints & Chemicals Ltd. vs. Workmen represented by the Secretary (A.P. & C.) Assistants' Association and another, (2001) 2 SCC 289,** in support of an obligation on the workman to have joined the station of transfer, and then raised an industrial dispute about it. He submits that the workman could not have declined to join. Learned counsel for the Employers has placed reliance upon paragraph 6 of the report in **Addisons Paints & Chemicals Ltd.** *(supra),* where it is held:

"6. We have heard the parties, read the impugned judgment as well as the judgment of the Single Judge and the award of the Tribunal. In our view, there is no infirmity either in the award or in the judgment of the Single Judge or in the judgment of the Division Bench. The employee Nagarajan had refused to accept the transfer order and refused to report for duty after his transfer. We see no substance in the contention that he was entitled not to join. In our view the dispute could have been raised and agitated even after joining. There was no justification for not reporting for duty. In spite of Nagarajan not having worked he has been awarded 25% of back wages. This was within the discretion of the Court and we see no reason to interfere. At the request of the appellants in CA No. 392 of 1997, they are granted time of eight weeks from today to pay 25% of the back wages."

30. Learned counsel for the Employers has also referred to the decision in **Tata Iron and Steel Company Limited vs. State of Jharkhand and others, (2014) 1 SCC 536,** in support of his contention that the Labour Court never had a dispute about the validity of the transfer order referred to it, entitling it to decide that dispute. The Labour Court had a dispute referred to it about the validity of the workman's termination, with effect from 10.02.1996 and nothing more. Learned counsel for the Employers has referred to paragraph nos. 11, 16 and 18 of the report

in **Tata Iron and Steel Company Limited** *(supra)*, where it is held:

"11. Having said so, we are of the opinion that the terms of reference are not appropriately worded inasmuch as these terms of reference do not reflect the real dispute between the parties. The reference presupposes that the respondent workmen are the employees of the appellant. The reference also proceeds on the foundation that their services have been "transferred" to M/s Lafarge. On these suppositions the limited scope of adjudication is confined to decide as to whether the appellant is under an obligation to take back these workmen in service. Obviously, it is not reflective of the real dispute between the parties. It not only depicts the version of the respondent workmen, but in fact accepts the same viz. they are the employees of the appellant and mandates the Labour Court/Industrial Tribunal to only decide as to whether the appellant is required to take them back in its fold. On the contrary, as pointed out above, the case set up by the appellant is that it was not the case of transfer of the workmen to M/s Lafarge but their services were taken over by M/s Lafarge which is a different company/entity altogether. As per the appellant they were issued fresh appointment letters by the new employer and the relationship of employer-employee between the appellant and the workmen stood snapped. This version of the appellant goes to the root of the matter. Not only it is not included in the reference, the appellant's right to put it as its defence, as a demurer, is altogether shut and taken away, in the manner the references are worded.

16. The Industrial Tribunal/Labour Court constituted under the Industrial Disputes Act is a creature of that statute. It acquires jurisdiction on the basis of reference made to it. The Tribunal has to confine itself within the scope of the subject-matter of reference and cannot travel beyond the same. This is the view taken by this Court in a number of cases including in *National Engg. Industries Ltd. v. State of Rajasthan* [(2000) 1 SCC 371 : (2007) 2 SCC (L&S) 264] . It is for this reason that it becomes the bounden duty of the appropriate Government to make the reference appropriately which is reflective of the real/exact nature of "dispute" between the parties.

18. It follows from the above that the reference in the present form is clearly defective as it does not take care of the correct and precise nature of the dispute between the parties. On the contrary, the manner in which the reference is worded shows that it has already been decided that the respondent workmen continue to be the employees of the appellant and further that their services were simply transferred to M/s Lafarge. This shall preclude the appellant to put forth and prove its case as it would deter the Labour Court to go into those issues. It also implies that by presuming so, the appropriate Government has itself decided those contentious issues and assumed the role of an adjudicator which is, otherwise, reserved for the Labour Court/Industrial Tribunal."

31. Sri Shekhar Srivastava, learned Counsel appearing for the workman has urged that the workman has been transferred *mala fide* in the guise of following the management's policy regarding transfer.

32. Sri Shekhar Srivastava, learned Counsel appearing on behalf of the workman submits that the workman's services could not be terminated in effect, in the garb of a transfer order, when there was no authority with the Employers to

transfer the petitioner outside State without his consent, in the absence of a provision to that effect in the Certified Standing Orders applicable to the Employer-establishment, or the presence of a provision in the workman's appointment letter, authorizing such a transfer. He has referred to a decision of the Delhi High Court in **Tobu Enterprises Limited vs. Presiding Officer, Industrial Tribunal, (2009) 122 FLR 71,** where it was held:

"6. I find considerable force in the submissions made on behalf of the workmen. In the present case it is seen that (a) there was no unit outside Delhi when the workmen were appointed, (b) there was no stipulation in the appointment letters that the workmen could be transferred outside Delhi, and (c) the management closed down its unit in Delhi in violation of the relevant provisions of the ID Act. It is, therefore, seen that although the certified Standing Orders of the management provided that the workmen could be transferred from one job to another or from one department/section to another or from one unit to another, as observed by the Single Judge in Civil Writ No. 3861 of 2000, the appointment letter did not give any indication that the workmen could be transferred outside Delhi, and that, therefore, in terms of the decision of the Supreme Court in*Kundan Sugar Millsv.Ziyauddin*(supra), which clearly holds that there was no inherent right in an employer to transfer his employee to another place where he chooses to start a business subsequent to the date of employment in the absence of an express term in this behalf in the contract of service, the workmen employed with the management in the instant case could not be transferred to some other independent concern started by the same management at Bhiwadi (Alwar) at a stage subsequent to the date of the employment. Also, insofar as, the contention of the management in respect of the workmen not being entitled to any relief on account of having refused to carry out the transfer orders is concerned, it is seen that under the provision of Rule 14(3)(a) of the Industrial Employment (Standing Orders) Central Rules, 1946, a wilful disobedience amounts to misconduct only if workman disobeys a lawful and reasonable order of his superior, which order in the present case has been held by the Industrial Adjudicator to be neither legal nor justified."

33. Reliance has also been placed by the learned counsel for the workman upon a decision of this Court in **Hamdard *(Waqf)* Laboratories vs. State of U.P. and others 2014(1) AWC 367** and also on a decision of their Lordship of the Supreme Court in **Kundan Sugar Mills vs. Ziyauddin AIR 1960 SC 650**. Learned counsel for the workman has referred to paragraph no. 7 of the report in **Kundan Sugar Mills** *(supra)*, where their Lordships have held:

"7. We have referred to the decisions only to distinguish them from the present case, and not to express our opinion as to the correctness of the decisions therein. It would be enough to point out that in all the said decisions the workers had been employed in a business or a concern and the question that arose was whether in the circumstances of each case the transfer from one branch to another was valid or amounted to victimization. None of these decisions deals with a case similar to that presented in this appeal, namely, whether a person employed in a factory can be transferred to some other independent concern started by the same employer at a stage subsequent to the date of his

employment. None of these cases holds, as it is suggested by the learned counsel for the appellant, that every employer has the inherent right to transfer his employee to another place where he chooses to start a business subsequent to the date of the employment. We, therefore, hold that it was not a condition of service of employment of the respondents either express or implied that the employer has the right to transfer them to a new concern stared by him subsequent to the date of their employment."

34. Expositing the same principle that the authority relied upon by Sri Shekhar Srivastava lays down, this Court has noticed a decision of the Gauhati High Court in **Woman of Bijlibari Tea Estate vs. Management of Bijlibari Tea Estate, (2010) 4 Gauhati Law Reports 849**, where considering the question of validity of dismissal from service of the workman on his refusal to accept an unlawful transfer, it was held by B.P. Katakey, J:

"14. In the instant case, it is evident from the domestic enquiry proceeding (Exhibit-1) conducted against the concerned workman, relating to the charge levelled against him that the workman had participated in such proceeding and the reasonable opportunity of being heard was given. There is no allegation of victimisation or unfair labour practice as well as the allegation against the management that it had not acted in good faith. It appears that the case of the Union is that the domestic enquiry is not fair and valid as no finding has been recorded into the charge of misconduct levelled against the workman and no reason has also been recorded, inasmuch as, the Enquiry Officer did not go into the aspect as to whether by the order of transfer the conditions of employment has been violated. According to the Union, disobedience of a transfer order which is lawful and reasonable, only amounts to the misconduct under clause 10 of the standing order in force and in the instant case, as the workman was engaged in Bijlibari Tea Estate, he cannot be transferred out of the said Tea Estate and to a new venture/Tea Estate, which was not in existence at the time of his appointment. The further case, as it appears from the evidences adduced before the labour court, is that in any case, he cannot be transferred out of Dibrugarh district and the transfer order amounts to depriving him from the enjoyment of other benefits attached to his service like housing facilities, etc.

15. The Enquiry Officer though in his report had rejected the contention of the workman that he cannot be transferred out of Dibrugarh district and also relating to deprivation from enjoyment of certain benefits, had not, however, recorded any finding relating to the plea of the workman that since he was appointed in respect of Bijlibari Tea Estate only, he cannot be transferred to any other Tea Estate subsequently established by the management, while recording the finding that the lawful order of transfer has been disobeyed by the concerned workman, which amounts to misconduct, without, however, considering as to whether the order of transfer is lawful as the concerned workman was appointed only in respect of Bijlibari Tea Estate. That aspect of the matter has also not been gone into by the labour court.

16. Clause 10 of the standing order in force provides the acts or omissions of the workman constituting gross misconduct. Clause 10(a)(1) of the standing order provides that the wilful insubordination or disobedience of only a lawful or a reasonable order of a superior

constitutes gross misconduct. In the case in hand, the charge against the concerned workman was that he did not obey the order of transfer, which was the basis for taking disciplinary action against the concerned workman. The management, therefore, has to prove that the order of transfer is lawful and reasonable so as to constitute misconduct within the meaning of clause 10 of the standing order. The concerned workman, as noticed above, has all along pleaded that he being appointed in Bijlibari Tea Estate, he cannot be transferred out of the said Tea Estate. If such plea is accepted then he cannot be transferred out of Bijlibari Tea Estate and in that case the order of transfer would not be lawful and consequently, the concerned workman cannot be punished for not carry out such an order, the same having not constituted misconduct within the meaning of clause 10 of the standing order in force.

17. As discussed above, the Enquiry Officer did not record any finding on the vital aspect of the matter as to whether the workman could be transferred out of Bijlibari Tea Estate, his appointment being in respect of Bijlibari Tea Estate only. It has not been disputed by the learned senior counsel for the management that the concerned workman was appointed in respect of Bijlibari Tea Estate and there was no other venture of the management at the point of time when the concerned workman was appointed. It is also not in dispute that by the order dated 8.8.1994, he was sought to be transferred to a new venture, which according to the management, is the out garden. The domestic enquiry held against the concerned workman, therefore, cannot be held to be fair and valid so as not to go into the merit of the case by the labour court, as has been done in the instant case, as the Enquiry Officer did not go into the vital aspect of the matter, as noticed above, which amounts to violation of the principles of natural justice.

22. It appears from the order of transfer dated 8.8.1994 that the pay and other benefits of the concerned workman had not been disturbed. The management by, proving the communication dated 7.9.1994 (Exhibit-6) has proved that all his service benefits including the salary and other incentives would be paid and he would be provided with rental housing facility or house rent commensurate to his status. That being the position, the concerned workman's salary, other incentives and the housing facilities etc. were not disturbed and he would continue to enjoy the same, which he was enjoying in Bijlibari Tea Estate. The plea of the concerned workman that he cannot be transferred out of Dibrugarh district was also rightly found to be not acceptable by the Enquiry Officer in his report. However, it is an admitted position of fact that the concerned workman was appointed initially as trainee and thereafter, as Hazira Maharar for Bijlibari Tea Estate only. It is also not in dispute that by the order of transfer dated 8.8.1994, the workman was sought to be transferred to a proposed new venture at Margherita, which naturally was not in existence while the concerned workman was appointed. Unless there is a specific condition in the order of appointment that he can be transferred out of the Tea Estate, where he was appointed and even to a new venture, the management in exercise of its right of transfer of its workman cannot transfer such workman to a new venture, as such right of the management cannot be implied as conditions of service. If a workman is appointed in respect of one Tea Estate, he cannot be transferred to another Tea Estate, as it would be the violation of his conditions of employment he being appointed in respect of a particular Tea

Estate only. In the case in hand, as noticed above, there is no dispute that the concerned workman was appointed in respect of Bijlibari Tea Estate only and hence, he cannot be transferred out of Bijlibari Tea Estate, even though the new venture is under the same management, but he can definitely be transferred to another section or to any other transferable post within the tea estate. The management though has taken the plea that the said new venture is nothing but an extension of Bijlibari Tea Estate, did not produce any evidence before the labour court in that regard. The order of transfer reveals that the concerned workman was transferred to a new venture proposed to be started.

23. The Apex Court in *Kundan Sugar Mills*, (supra) while considering almost the similar facts involved in the case in hand, has held that the employer has no inherent right to transfer his employee to another place where he chooses to start a business subsequent to the date of the employment, when there was no condition of service of employment of the employee either express or implied that the employer has the right to transfer to such new venture started or proposed to be started subsequent to the date of his employment. The Apex Court in that case has uphold the judgment of the labour Appellate Tribunal holding that the management had no right to transfer the workman to a new factory and hence, the order dismissing him from service was illegal, based on the fact that such workman employed in a factory owned by the management was sought to be transferred to a new venture. The Single Bench decision of this court in *Kakodanga Tea Estate (P.) Ltd., (supra)*, on which the learned senior counsel for the management places reliance, cannot be applied in the case in hand, in view of the aforesaid discussion and as in that case, the concerned workman was transferred from a post in the tea garden to the Head Quarter of the Tea Company."

35. This Court has keenly considered the matter urged on behalf of both sides.

36. There is much debate on both sides about the issue whether the workman could be transferred, given the provisions of the Model Standing Orders framed by the Government, called, 'The Uttar Pradesh Industrial Employment Model Standing Orders, 1991'. The aforesaid Standing Orders shall hereinafter be called the 'Model Standing Orders, 1991'.

37. The attention of the Court has been drawn to the Model Standing Orders, 1991, framed by the State Government in exercise of their powers under Clause (b) of sub-Section (2) of Section 15 of the Act of 1946 read with Section 21 of the General Clauses Act, 1897. It has been impressed upon the the Court under that Clause 13(6) of the Model Standing Orders, 1991, there is an absolute prohibition on transfer of a workman outside the State without his prior consent, if the Employers have some of their units outside the State. It has also been argued that the Model Standing Orders appended to Schedule I-B of the Rules of 1946 must give way to the Model Standing Orders, 1991 considering the definition of 'appropriate Government', under Section 2(b) of the Act of 1946, which in the case of the Employers would be the State Government. It has also been brought to the notice of this Court that there are Certified Standing Orders approved for the Employers by the Certifying Officer for Standing Orders and the Additional Labour Commissioner, Ghaziabad Region, Ghaziabad, certified on 16th August, 1993, where after an amendment directed in

Clause 41 of the Certified Standing Orders governing the Employers' establishment, their workmen can be transferred to any place or any unit of theirs, but within NOIDA or Greater NOIDA.

38. It may be true or otherwise that under the Certified Standing Orders, the Employers have power to transfer the workman away to the unit at Mumbai. The Model Standing Orders, 1991, if they apply in preference to the Certified Standing Orders, may or may not permit a transfer for the workman outside the State without his consent. This Court, however, would refrain from expressing any opinion about the issue. The reason is that the Labour Court is a Court of referred jurisdiction and a creature of the statute. Its jurisdiction is limited to answering questions that are expressly referred to it under Section 2-K of the Act. It may, however, go into incidental questions while answering the reference.

39. The very persuasive submission of Sri Shekhar Srivastava urging this Court to take the view that the order of transfer, dated 10.06.1996 is in fact an order of termination, that is camouflaged as a transfer order, cannot be regarded as an incidental issue to the reference made. The reference is express in its terms and speaks about an order of termination dated 10.02.1996. It does not speak about the validity of the transfer order, dated 10.02.1996. In fact, there is no order of termination from service passed on 10.02.1996. Even if the order of transfer were a camouflage to terminate the workman's services, and that too unlawful, consistent judicial opinion confines the Labour Court in its jurisdiction to answer whatever is referred to it by the appropriate Government. Unlike a Court of general jurisdiction or a Court of superior jurisdiction, it does not have authority to determine its own jurisdiction. Its jurisdiction flows from the terms of the order of reference, and in no way can the Labour Court travel beyond its terms. Incidental questions are quite different and these could be like the date from which wages are to be granted in the case of termination, that is declared unlawful, but would not include the rate of wages in a case where the reference is against the validity of an order of termination. Rate of wages can be decided if that is the subject matter of reference to the Labour Court; not otherwise. This would well illustrate the difference between incidental questions and those that are substantial, but not referred to adjudication. This principle is most eloquently expressed in the decision of their Lordships in **Tata Iron and Steel Company Limited** *(supra)* and also by this Court in **M/s Triveni Engineering and Industrial Ltd.** *(supra)*.

40. The decision of the Delhi High Court in **Tobu Enterprises Limited** *(supra)* relates to a cause of action where the workmen were transferred outside Delhi by the Employers when they shifted their units to Bhiwadi due to dwindling business prospects in Delhi. The workmen flouted the orders of transfer and were held by the Employers to have abandoned employment in terms of a certain Clause-C, under Head Note-I of the Standing Orders. The workmen' services were, therefore, terminated in terms of Clause-C under Head Note-I of those Standing Orders. In those circumstances, the following reference was made to the Industrial Adjudicator, under the Industrial Disputes Act, 1947 [quoted verbatim from the report of the judgment in **Tobu Enterprises Limited** *(supra)*]:

"Whether the transfer of Sarvshri Ranjit Kumar, Ram Asrey, Raj Kumar, Ramesh Kumar, Vinod Kumar, and Gupteshwar from Delhi to Bhiwadi by the management is illegal, and/ or unjustified, and if so, to what relief they are entitled and what directions are necessary in this respect."

41. It was in the context of the aforesaid reference, that the Delhi High Court held the award of the Industrial Adjudicator ordering reinstatement to be valid, when challenged by the Employers. Here, it would seen that what was referred for adjudication to the Industrial Adjudicator was the validity of the transfer order, of which termination was but a consequence. The termination was not referable to any other cause, act or misconduct, but the workmen' refusal to obey the order of transfer. The fact, therefore, that it was the transfer that was subject matter of reference to the Industrial Adjudicator, its validity was adjudged by the Court to be rightly held bad. In the present case, as already said, the reference is one thoughtlessly made, to say least. If anything had to be referred to the Labour Court for adjudication of its validity, it was the validity of the transfer order, the incidents of which, including abandonment of service, termination could then well have been gone into by the Labour Court. The decision in **Hamdard (Waqf) Laboratories** *(supra)* has little bearing on the facts of the case here. However, so far as the decision of their Lordships of the Supreme Court in **Kundan Sugar Mills** *(supra)* relied upon by the workmen to support the impugned award is concerned, it does show that for the violation of a transfer order from the sugar mill of the Employer at Kichha to a new sugar mill of the Employer at Bulandshahr, they were held guilty of misconduct and dismissed from service vide order dated 2nd February, 1955. It was in those circumstances, that a reference was made to the State Industrial Tribunal for U.P. at Allahabad in the following terms [quoted verbatim from the report of the judgment in **Kundan Sugar Mill** *(supra)*]:

"Whether the employers have wrongfully and/ or unjustifiably terminated the services of Sarva Shri Zia Uddin, Raisuddin, Shafiquddin and Ahmed Bux for refusal to obey the orders of transfer to M/s. Pannijee Sugar and General Mills Co. Bulandshahr. If so, to what relief are the workmen entitled."

42. This case is one where for the disobedience of a transfer order, the workman was dismissed from service and the validity of the dismissal for no other reason but disobedience to the transfer order was the subject matter of reference. It was in that context that their Lordships went into validity of the charge, that led to the workman's dismissal, and, that charge was whether the order of transfer was disobeyed unlawfully. The validity of the transfer order, therefore, that fell for consideration of the Supreme Court in **Kundan Sugar Mill** *(supra)* was both, a concomitant and an incident of the order of dismissal that was a subject matter of the reference. Unlike the case before their Lordships, here there was no order of termination from service, dated 10.02.1996, but a simple order of transfer that might have led to adverse consequences for the workman. Therefore, what was required to be referred by the State Government was the validity of the order of transfer dated 10.02.1996, with provision in the reference for incidental relief, that may flow from the transfer order being adjudged bad by the Labour Court, if that were so.

43. The decision of the Gauhati High Court in **Workman of Bijlibari** Tea Estate *(supra)* was also a case where the workman who was appointed to the aforesaid Tea

Estate as a Hazira Maharar was transferred by the Employers to another tea garden, located near a place known as Margherita, where they had set up a new venture. The workman disputed the order of transfer on ground that it was violative of his conditions of service, as well as the Standing Orders, applicable to the Employers. He was charge sheeted for disobeying the order of transfer and after a domestic inquiry, dismissed from service. The reference that was made by the State Government to the adjudication of the Labour Court was in the following terms [quoted verbatim from the report of the judgment in **Workman of Bijlibari Tea Estate** *(supra)*]:

"(a) Whether the management of Bijlibari T.E., Hoogrijan, PO-Hoogrijan, Dist. Dibrugarh is justified in dismissing Sri Sankar Dutta, Hazira, Mohurrer from service or not?

(b) It not, is he entitled to reinstatement with full back wages or any other relief in lieu thereof?"

44. Here also, not much is required to be pondered over, for this to be said that the validity of the dismissal order was referred to the adjudication of the Labour Court, the underlying basis of which was the validity of the transfer order. It was in those circumstances that the validity of the transfer order was gone into by the Court and held to be bad.

45. Unfortunately for the workman here, the reference in the terms made does not clothe the Labour Court with jurisdiction to look into the validity of the order of transfer, dated 10.02.1996. The industrial dispute here has been referred in most callously worded terms dubbing a transfer order as one of termination, rendering the entire exercise before the Labour Court a nullity, whatever be the merits of the parties' case. Here, the Authority empowered under Section 4-K of the Act has utterly failed to refer what on its plain terms was an industrial dispute, relating to the validity of the transfer order dated 10.02.1996. If the dispute that actually arose between the parties were referred, depending upon the finding of the Labour Court about the validity of the order of transfer, the logical incidents of it would flow, to whichever parties' gain or prejudice it might have been. About this reference, this Court has no hesitation to hold that it is without any basis, and on the date it was made or with reference to the Employers' order that it was made, there was no termination of services for the workman. The industrial dispute in the terms it was referred was completely non-existent. The Labour Court being a Court of referred jurisdiction, could not have gone beyond or behind the terms of reference in which the industrial dispute sent to it was cast.

46. A number of other submissions were advanced by learned Counsel for the parties in challenge to and defence of the impugned award. But, those are not required to be gone into, looking to the conclusion of this Court about the validity of the reference.

47. Considering the fact that the workman is after all neither educationally or financially equipped to litigate and for the present, whatever be the merits of his case has come to suffer for the fault in good part of the Authority making the reference, and also in some part, of the Employers, in not challenging the reference at the threshold, that would have set the wrong right without the loss of all these years, this Court is of opinion that the sum of

Rs.50,000/- paid to workman out of the sum of Rupees One Lakh deposited by the Employers with the Labour Court, U.P., NOIDA, District Gautam Budh Nagar, in compliance with the interim order dated 09.11.2017, shall not be recovered from the workman. However, the balance of Rs.50,000/- lying in deposit with the Labour Court ought to be refunded to the Employers forthwith.

48. In the result, the writ petition **succeeds** and is **allowed**. The impugned award dated 02.08.2017 (published on 04.10.2017) passed by the Presiding Officer, Labour Court, U.P., NOIDA, Gautam Budh Nagar in Adjudication Case no.35 of 2008 and the reference dated 08.07.1996 made by the Additional Labour Commissioner, Ghaziabad are hereby **quashed.** The State Government or such other Authority as may be competent in this behalf shall, however, make reference afresh appropriately framed, bearing in mind what has been said in this judgment, within a period of two months of the receipt of a certified copy of this judgment. It is further directed that out of the sum of Rupees One Lakh deposited by the Employers with the Labour Court, U.P., NOIDA, District Gautam Budh Nagar, in compliance with the interim order dated 09.11.2017, the sum of Rs.50,000/- already paid to the workman, shall not be recovered from him. However, the balance sum of Rs.50,000/- lying in deposit with the Labour Court, shall be refunded to the Employers forthwith.

49. There shall be no order as to costs.

(2020)06ILR A371

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 27.01.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ-C No. 69563 of 2009

Dr. Ruhul Amin Khan ...Petitioner
Versus
The Zonal Manager L.I.C. of India, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sikandar Raza, Sri Aijaz Ahmad Khan

Counsel for the Respondents:
Sri Somil Srivastava, Sri Jagdish Lal Srivastava

A. Manifest error of law and facts – view taken by Insurance Company suffers from manifest error of law and facts - both the impugned orders passed by the respondent authorities - deserve to be set aside - respondent Corporation directed to release the insurance amount in favour of the claimant - if he is able to establish his claim as successor/ nominee of the policy in accordance with law. (Para-19,21)

Insured in the present case - died on account of dengue fever only - no medical resume in the present case by the hospital where the insured had died - to arrive at a definite conclusion that insured suppressed material fact of her par ailment.(Para-17)

HELD:- Under the circumstances, therefore, in the absence of any material and substantial evidence to the contrary being available in the records, the findings returned in the order, therefore, cannot be sustained and it cannot be presumed that the insured suppressed any material fact - Since there is no evidence to the contrary and the Insurance Policy had been granted, it will be presumed that there was a correct disclosure that the insured was having good health conditions at the time of filling up the proposal form for the policy.(Para-18)

Petition allowed.(E-7)

List of cases cited:-

1.Sulbha Prakash Motegaonkar & ors. Vs L.I.C. (2015) Law Suit SC 1706

2.Mithoolal Nayak Vs L.I.C. AIR (1962) SC 814

3.L.I.C. Vs Manish Gupta AIR (2019) SC 2606

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

1. Heard Sri Aijaz Ahmad Khan, learned counsel for the petitioner, Sri Jagdish Lal Srivastava, learned counsel for the respondents and perused the record.

2. By means of this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 17th May, 2005, whereby the claim of the petitioner for the benefit of insurance policy with the dependent of the deceased has come to be repudiated on the ground that there has been deliberate statement withholding the correct material information regarding health of insured, as well as the order dated 16th December, 2005, whereby the review application of the petitioner has been rejected and the order passed by the authorities dated 17th May, 2005 has been upheld. The petitioner has also challenged the order dated 9th June, 2006, whereby an award of negative has been passed by the Insurance Company.

3. Assailing the order impugned it has been argued by the learned counsel for the petitioner that the deceased insured had died due to dengue fever as it has come to be reported in the medical certificate issued by the Hospital, namely, Priti Hospital, where the deceased was admitted on 20th October, 2004 and died on 25th October, 2004. The death certificate issued by the Hospital states that the death is due to cardiac respiratory arrest. However, the medical history of the insured (deceased) claims that she was suffering from Dengue fever and not for any other disease. Learned counsel for the petitioner has relied upon the judgment of the Apex Court in the case of **Sulbha Prakash Motegaonkar and others v. Life Insurance Corporation of India 2015 LawSuit (SC) 1706.**

4. *Per contra*, the argument advanced by the learned counsel for the respondent-Insurance Company is that the insured (deceased) insured had the problem of palpitation at the time of pregnancy in the year 2003 which has come to be admitted and since insurance policy was issued on 28th June, 2004 after May, 2003 when the deceased was pregnant, this should have been disclosed in the application for the policy and having not done so the policy was obtained on wrong information of medical history and, therefore, as per the terms and conditions of policy the dependent were not entitled benefit under claim. He has relied upon the judgment of the Apex Court in the case of **Mithoolal Nayak v. Life Insurance Corporation of India, AIR 1962 SC 814.**

5. Having heard learned counsel for the parties, their arguments advanced across the Bar and having gone through the documents brought on records, pleadings raised by the respective parties in their affidavits, we find that the controversy centres around the only issue whether the insured (deceased) had obtained the life insurance policy by concealing material facts. Under the order impugned dated 17th May, 2005 which has been confirmed in

appeal, the ground taken is that three questions that were raised to be answered by insured (deceased), were answered contrary to the facts of the health issues that the deceased person had in the past i.e. prior to his application for the policy. The three questions were as follows:-

11 (ka). Whether you have suffered from any such disease in the past five years that required you to undergo treatment for more than a week and did you consult any physician?

11 (gha). Whether you have been patient of any stomach, heart, lung, kidney, liver, brain disease or any disease relating to nerve system?

11 (jha). Whether your condition is generally good?

6. While two of the above questions 11(ka) and 11(gha) were answered in negative and third one 11 (jha) was answered in affirmative.

7. These three answers, it is claimed by Insurance Company, were found to be wrong declaration in the form for policy because it had come to be proved that the petitioner was suffering from disease of pain in bones and that he had consulted different physicians for the said purpose. The deceased had admittedly died on 25th October, 2004 whereas the policy was executed by the Corporation on three different dates. One is on 28th March, 2003 bearing Policy No.- 311757148 for a sum of Rs.5,00,000/- as sum assured whereas two policy on 28th March, 2004 and 28th May, 2004 bearing No.- 311854482 and 311854472 for a sum assured of Rs.2,50,000/- each. The issue of concealment of fact has arisen on account of one fact, as per the order impugned, that while the deceased was admitted to the hospital for past history, some ailment was stated, then the issue was, according to the respondents, got further confirmed in a written statement on 24th May, 2006 submitted by the husband of the deceased. It was clearly stated that the wife was suffering from body ache, joint pain and wrist pain and at different points of time she had suffered different type of attack and she had consulted physician also.

8. The issue of non-disclosure of these facts became crucial only on account of fact that the insured (deceased) died within four months of the issuance of the policy. Thus, the respondent held that the contract of insurance cover is based on good faith and, therefore, the insured is under obligation to make correct disclosure about the health. What we further notice on facts that the petitioner has been denied the insurance benefit only in respect of his wife as the insured had declared categorically that in respect of two diseases she had not made disclosure and had simply filled the form in negative.

9. Insofar as the question No. 11(ka) and 11 (gha) are concerned, we are of the opinion that these diseases are not related to the kind of disease mentioned in the statement of the husband of the deceased while submitting claim and it is also a fact that the deceased had died only on account of the dengue fever. One may realize the pain on a day and on the other day it may vanish. The respondents have no credential evidence to establish that there was statement of fact by the claimant that the deceased had, in fact, suffered from a particular disease of the kind referred to in question 11 (ka) and 11 (gha) and yet she had failed to disclose the same. The life insurance cover are generally granted to cover life risk unless a person is suffering from such a disease, which if it would have been disclosed, the life cover would not have been granted, but

there is no such discloser of disease with which it can be said that the insured was suffering and was fatal enough to deny the insurance cover.

10. In the case of **Mithoolal Nayak** *(supra)* relied upon by the learned counsel for the respondents we find that in the said case there was a clear report of the physician that the insured under the proposal was anemic, looked about 55 years old (though he was only 45 years old), had a dilated heart and his right lung showed indications of an old attack of pneumonia or pleurisy. The doctor further said that the general health was very much run down and he was totally physically wreck.

11. Thus, in that case the health of deceased was such that in normal circumstances he would not have been granted a risk cover at the age of 45 years because all these diseases are referable to Clause 11(ka) and 11(gha).

12. We further find that in that case there were two reports of the same Dr. B.D. Desai. One report was submitted through the agent, which was false report whereas the other report which was in a confidential cover and which was meant for the deceased, who was suffering from ailment and it is this second report was stated to be the correct report. So, in that backdrop of facts it was held that the petitioner suffered from disease and had a report in that regard and yet he concealed that material fact. The Apex Court, accordingly, held that the policy stood vitiated vide Sections16 and 19 of the Indian Contract Act, 1872.

13. We do not find any such case on facts in connection with the case in hand and, therefore, the said judgment is quite distinguishable.

14. There is yet another recent judgment in the case of **Life Insurance Corporation of India v. Manish Gupta, AIR 2019 SC 2606,** in which the Apex Court observed that it is a solemn duty of a person seeking health insurance policy to truthfully fill up the details required by the insurer in the proposal form or on the basis of which insurer takes a decision in regard to issuance of the policy. The Apex Court held that it is duty cast upon the insured to provide material particulars on health in case there is medical examination is not mandated and since in that case the past history of rheumatic heart disease since childhood was not disclosed, the Court found it to be an *ex facie* breach on the part of the insured and held that by such suppression of the material facts the insured who had obtained 'Health Plus' policy was not entitled for the benefit of the policy. In the said case the 'Health Plus' policy was for certain category of diseases to be covered under the policy and there was a specific query to be answered that the proposer had ever suffered from cardiovascular disease (palpitations, heart attack, stroke and chest pain). The proposer had such disease in the past since childhood days as it came to be discovered and was reported in the resume of history by the Department of Cardiovascular and Thoracic Surgery of the Fortis Hospital. So, it is in that background that the Court held non-disclosure was an *ex facie* breach on the part of the insured in suppressing the information.

15. In the present case, there is no such certificate of the hospital or otherwise any physician that the insured suffered from such disease. It was merely on the basis of the statement of the beneficiary that the insured had been under treatment for quite some time for palpitations etc. that the respondent- Insurance Company has proceeded to consider it to be a deliberate suppression of the material facts regarding health of the insured. Accordingly, in our considered opinion, the decision of the

Apex Court in a peculiar facts of that case would not be attracted in the present case and, therefore, on facts the judgment is distinguishable.

16. Insofar as the judgment in the case of **Sulbha Prakash Motegaonkar** *(supra)* relied upon by the learned counsel for the petitioner is concerned, in paragraphs 7 to 9 of the judgment it has been held as under:-

"7. It is not the case of the Insurance Company that the ailment that the deceased was suffering from was a life threatening disease which could or did cause the death of the insured. In fact, the clear case is that the deceased died due to ischaemic heart disease and also because of myocardial infarction. The concealment of lumbar spondylitis with PID with sciatica persuaded the respondent not to grant the insurance claim.

8. We are of the opinion that National Commission was in error in denying to the appellants the insurance claim and accepting the repudiation of the claim by the respondent. The death of the insured due to ischaemic heart disease and myocardial infarction had nothing to do with this lumbar spondylitis with PID with sciatica. In our considered opinion, since the alleged concealment was not of such a nature as would disentitle the deceased from getting his life insured, the repudiation of the claim was incorrect and not justified."

9. Accordingly, we set aside the order passed by the National Commission and allow the appeal. The respondent will accept the claim made by the appellants within a period of four weeks from today and make the due payment."

17. Further in the present case also we find that the respondents have gone only on this technical aspect of the matter that the fact that deceased was suffering from body pain was not disclosed, however, there is no disease which could be said to be fatal for the purposes of insurance cover nor, do we find that any such statement of fact has been discussed that the insured had died on account of any such disease. The insured in the present case in fact died on account of dengue fever only. There is no medical resume in the present case by the hospital where the insured had died, to arrive at a definite conclusion that insured suppressed material fact of her par ailment.

18. Under the circumstances, therefore, in the absence of any material and substantial evidence to the contrary being available in the records, the findings returned in the order, therefore, cannot be sustained and it cannot be presumed that the insured suppressed any material fact in so far as the question Nos. 11(ka) and 11(gha) are concerned. Since there is no evidence to the contrary and the Insurance Policy had been granted, it will be presumed that there was a correct disclosure regarding question No.11(jha) that the insured was having good health conditions at the time of filling up the proposal form for the policy.

19. The view taken by the Insurance Company, in our considered opinion, suffers from manifest error of law and facts and both the impugned orders passed by the respondent authorities, therefore, deserve to be set aside.

20. The writ petition, accordingly, succeeds and is allowed. The order dated 17th May, 2005, 16th December, 2005 and 9th June, 2006 are hereby quashed.

21. The respondent Corporation is directed to release the insurance amount in favour of the claimant if he is able to establish his claim as successor/ nominee of the policy in accordance with law, within a period of three months from the date of production of certified copy of this order.

(2020)06ILR A376
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-C No. 74265 of 2011

Brajpal Singh ...Petitioner
Versus
Kalyan Singh ...Respondent

Counsel for the Petitioner:
Y.S. Bohra

Counsel for the Respondents:
Sri Kapil Kumar, Sri Dinesh Pathak, Ms. Sandhya Singh

A. Civil Law - Code of Civil Procedure ,1908 - Order 9 Rule 13 – setting aside decree exparte against defendant - Order 43 Rule 1 (d) – First appeal from order under Rule 13 order 9 rejecting an application fom an order to set aside a decree passed exparte – Order5 Rule2 - copy of plaint annexed to summons - Limitation Act, 1963 - Section 5 – condonation of delay – Order 41 Rule 27 – Production of additional evidence in Appellate court - acceptability of the explanation is the only criteria to condone the delay *(N. Balakrishnan Vs. M. Krishnamurthy, 1998 (89) RD 607)* - ex-parte decree should not be set aside lightly - burden is upon the applicant to prove that the summons or notices was never served upon him and he got knowledge of the ex-parte decree on a particular date*(S.P. Srivastava Vs. Prem Lata AIR 1980 All 336)*- non enclosure of copy of plaint with summons is merely an irregularity (Raghubir Sahai Bhatnagar Vs. Bhakt Sajjan, AIR 1978 All 139). (Para – 30,32,36,38)

Respondent executed an agreement to sale in favour of petitioner - sale deed to be executed within one year – not executed – petitioner executed suit for execution - Trial Court proceeded ex-parte on 13.9.2005 - after 4 years - respondent filed application - under Order 9 Rule 13 CPC for setting aside the ex-parte order - under Section 5 of the Limitation Act, 1963 for condonation of delay – finding of Trial Court - cause shown not sufficient - application rejected - Appeal under Order 43 Rule 1 (d) of CPC - Appellate Court proceeded on the presumption - copy of the plaint not enclosed with the registered summons - mandatory as per order 5 Rule 2 CPC to enclose the copy of plaint with registered summons - Appellate Court further on the basis of affidavit filed by the respondent and report of Amin held that the possession of the land in dispute was delivered without beating drums by the Ardali of the Amin - application allowed under Section 5 of the Limitation Act, 1963 and under Order 9 Rule 13 CPC . (Para-3,4,5,8,9,10,,13,14,15,)

HELD:- Appellate Court has committed manifest illegality in allowing the appeal and setting aside the order dated order dated 26.2.2011 passed by the trial court rejecting the application of respondent to set aside ex-parte judgment and decree dated 13.9.2005.(Para – 41)

Petition allowed.(E-7)

List of cases cited:-

1.Raj Kumar Vs Jai Prakash (1987) ARC 234

2.Balwant Singh (dead) Vs Jagdish Singh & ors. AIR (2010) SC 3043

3.Pradeep Kumar Vs Kamal Kant & ors. Writ Petition (M/S) No. 2444 of 2019

4.Balwant Singh (dead) Vs Jagdish Singh & ors. AIR (2010) SC 3043

5.N. Balakrishnan Vs M. Krishnamurthy (1998) 89 RD 607

6.S.P. Srivastava Vs Prem Lata AIR (1980) All 336

7.Raghubir Sahai Bhatnagar Vs Bhakt Sajjan AIR (1978) All 139

8.Commissioner of Income Tax Vs Hindustan Bulk Carriers AIR (2003) SC 3942

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Y.S. Bohra, learned counsel for the petitioner and Sri Dinesh Pathak and Ms. Sandhya Singh, learned counsel for the respondent.

2. The petitioner by means of the present writ petition has assailed the order dated 8.11.2011 passed by Additional District & Sessions Judge, Court No. 3, Bulandshahr in Misc. Appeal No. 26 of 2011 (Kalyan Singh Vs. Brajpal) whereby the Appellate Court has condoned the delay in filing the application under Order 9 Rule 13 of Civil Procedure Code, 1908 (hereinafter referred to as 'CPC') of the respondent and further allowed the application under Order 9 Rule 13 of CPC and set aside the ex-parte judgement dated 13.9.2005.

3. Brief facts giving rise to the present writ petition are that the respondent-Kalyan Singh executed an agreement to sale in favour of Brajpal Singh-petitioner in respect of 1/4th share of Plot No. 329 total area 1.564 situated at Village Khanauda, Pargana and Tehsil Anupshahr, District Bulandshahr for a sale consideration of Rs. 1,50,000/-. The petitioner paid Rs. 1,25,000/- in advance on 1.7.2002 to Kalyan Singh . As per terms and conditions of the agreement to sale, the sale deed was to be executed within one year from the date of agreement to sale i.e. on or before 30.6.2003.

4. As the sale deed was to be executed on or before 30.6.2003, the petitioner gave a notice dated 2.6.2003 through Advocate to the respondent asking him to execute the sale deed within 15 days from the date of receiving of registered notice. By the said notice, the petitioner also requested the respondent to inform the date on which the sale deed is to be executed so that he may remain present in the registry office for the execution of sale deed. The respondent did not reply to the notice dated 2.6.2003. However, the petitioner was present in the registry office with the balance sale consideration of Rs. 25,000/- and other incidental expenses for the purpose of execution of sale deed. The respondents did not turn up for execution of sale deed. When the respondent did not execute the sale deed despite the request by petitioner several times, the petitioner gave another notice dated 25.4.2004 asking the respondent for execution of sale deed. The respondent despite service of notice dated 25.4.2004 did not execute the sale deed.

5. In the aforesaid factual backdrop, the petitioner instituted an Original Suit No. 479 of 2004 before the Court of Civil Judge (Senior Division), Bulandshahr praying for a decree of specific performance of contract for execution of sale deed in respect of the aforesaid property.

6. In the suit, summons were issued to the respondent. The summons were sent to the respondent trough process server as well as by registered post. The summons sent by the registered post was refused by the respondent on 18.10.2004. The postal department returned the summons with endorsement " लेने से मना किया ".

7. The wife of the respondent refused to accept the summons sought to be served through process server and also refused to tell the address of her husband. The process server submitted a report on the back side of the summon which contained signature of two witnesses namely (1) Brajpal Singh s/o Arjun Singh and (2) Om Prakash Raghav s/o Kuwarpal Singh Raghav. The report of process server stated that the wife of the respondent Kalyan Singh refused to receive the summon and also refused to tell the address of Kalyan Singh, therefore, the summon was affixed on the door of the house. In view of the aforesaid fact, the Trial Court found service of summons upon the respondent sufficient, and consequently, it passed an order dated 20.4.2005 to proceed ex-parte in the suit. The order of the court below dated 20.4.2005 reads as under:-

"20-04-2005

वाद पुकारा गया। वादी मय विद्वान अधिवक्ता उपस्थित। पत्रावली का परिशीलन किया गया। कागज संख्या – 11 ए रजिस्ट्री को प्रतिवादी द्वारा लेने से इन्कार के सम्बन्ध मे प्रविष्टि की गयी है। इन्कारी से तामील पर्याप्त है। प्रतिवादी अनुपस्थित है। पत्रावली वास्ते प्रतिवाद पत्र एवं संरचना विवाधक नियत है। प्रतिवादी पर तामील पर्याप्त है। प्रतिवादी की अनुपस्थिति के कारण वाद प्रतिवादी के विरुद्ध एक पक्षीय श्रवण किया जायेगा। पत्रावली वास्ते एक पक्ष साक्ष्य दिनांक 28.04.2005 को पेश हो।

(शंकर लाल)
अपर सिविल जज (प्रवर खण्ड)
न्याय कक्ष संख्या – 3, बुलन्दशहर।""

8. Thereafter, the Trial Court proceeded ex-parte and decreed the suit by judgement and order dated 13.9.2005. The petitioners, thereafter, filed Execution Case No. 30 of 2005 for execution of the decree in which the notices were sent to the judgement-debtor i.e. respondent. The respondent refused to accept the notice. Consequently, the Executing Court on 1.4.2006 passed an order to proceed ex-parte as the service of summon upon the respondent is sufficient. The order dated 1.4.2006 passed in Execution Case No. 30 of 2005, is extracted herein below:-

1-4-06 पत्रावली प्रस्तुत हुई।

पुकार कराई गई। पुकार पर डिक्रीदार मय विद्वान अधिवक्ता न्यायालय में उपस्थित है। निर्णीत ऋणी पर तामील जरिये इंकारी पर्याप्त है। निर्णीत ऋणी की ओर से न्यायालय में कोई उपस्थित नही हुआ है। आज्ञप्ति धारक द्वारा मसौदा बैनामा पत्रावली पर उपलब्ध कराया गया है। कार्यालय आख्या के अनुसार मसौदा बैनामा डिक्री के अनुसार सही है। ऐसी स्थिति मे आज्ञप्ति धारक द्वारा प्रस्तुत मसौदा बैनामा अनुमोदित किया जाता है। आज्ञप्ति धारक को निर्देशित किया जाता है कि वह विक्रय विलेख रजिस्ट्रीकरण के लिये वांछित यथोचित न्यायशुल्क पत्रावली पर उपलब्ध कराये। इस सम्बन्ध में आवश्यक उपक्रम अविलम्ब करें। पत्रावली वास्ते अग्रिम आदेश 21/4/06 को प्रस्तुत की जाये।

ह0 अपठित
अपर सिविल जज (व0 स0) क0 सं0 – 1, बुलन्दशहर"

9. By the said order, the Executing Court also directed the decree holder i.e. the petitioner to produce draft sale deed and also deposit the expenses. The petitioner in compliance of court's order produced draft sale deed before the Executing Court. On depositing the balance sale consideration of Rs. 25,000/-, the Executing Court sent the sale deed for registration to the Sub Registrar by order dated 18.4.2006. The sale deed was registered on 1.5.2006 in the Office of Sub Registrar, Anupshahr, District Bulandshahr. The Executing Court after receiving the sale deed passed an order on 2.12.2006 for delivery of possession of the aforesaid plot to the petitioner through Court Amin. The Court Amin executed the

delivery of possession on 22.2.2007 after completing all the formalities in the presence of witnesses and submitted report and possession memo to the Executing Court. It appears that subsequent to the execution of the sale deed, the name of the petitioner was mutated in the revenue record.

10. The respondent after about four years from the date of ex-parte judgement and decree dated 13.9.2005 filed application under Order 9 Rule 13 CPC for setting aside the ex-parte judgement and order dated 13.9.2005 which was numbered as Misc. Case No. 14 of 2009. The respondent also filed an application under Section 5 of the Limitation Act, 1963 praying for condonation of delay in filing the application under Order 9 Rule 13 CPC.

11. In the affidavit in the delay condonation application, the respondent stated that the respondent had not refused to receive any summon sent by registered post or through process server, and the refusal has been endorsed on the registry by postman in collusion with the petitioner. He further stated that the respondent came to know about the execution of sale deed for the first time on 16.2.2009 when he visited the Lekhpal of the village to obtain khasara and khatauni of the property, and he was told by the Lekhpal about the mutation of the name of the petitioner in the revenue records. The respondent, thereafter, contacted his counsel on 18.2.2009, and after inspection of record, he found that ex-parte judgment has been passed by the Court treating the service of summons sufficient on account of refusal by the respondent to accept summons sent through registered post. The respondent immediately filed an application for setting aside the ex-parte decree. The respondent has prayed for condonation of delay on the basis of averments made in the delay condonation application detailed above.

12. The aforesaid application was contested by the petitioner by filing reply to the delay condonation application as well as application under Order 9 Rule 13 CPC. The petitioner in his reply to the delay condonation application stated that the respondent has falsely stated that he came to know about the ex-parte order on 16.2.2009. It was further stated that the judgement-debtor i.e. respondent had full knowledge about the decree and delivery of possession of the property to the petitioner in execution of the said decree. He denied the fact that there was any collusion with the postman in obtaining the endorsement of refusal. The petitioner had further stated that there was inordinate delay in filing the application under Order 9 Rule 13 CPC; and the respondent had failed to establish that the delay in filing the application under Order 9 Rule 13 CPC was bonafide. It was also stated that the respondent had failed to make out any case for setting aside the ex-parte judgment and decree dated 13.9.2005. Accordingly, he prayed that the delay condonation application as well as application under Order 9 Rule 13 CPC is liable to be dismissed.

13. The Trial Court vide judgement and order dated 26.2.2011 rejected the delay condonation application, and consequently, dismissed the application of respondent under Order 9 Rule 13 CPC. The Trial Court recorded specific finding that the petitioner had denied the fact that the respondent came to know about the ex-parte judgement on 16.2.2009 when he visited the Lekhpal to obtain the khasara and khatauni of the aforesaid property and he (petitioner) had colluded with the

postman to put endorsement of refusal on the registered notice, hence, the burden was upon the respondent to prove that the endorsement of refusal was obtained by fraud, but the respondent failed to discharge the said burden as he did not lead any evidence to establish that there was any collusion between the petitioner and the postman. The Trial Court further noticed the fact that the order to proceed ex-parte was passed prior to transfer of case to the Court of Additional Civil Judge as stated by the respondent in paragraph No. 7 of the rejoinder affidavit, therefore, there was no occasion to issue fresh notice to the respondent. The Trial Court found that the cause shown by the respondent for delay in not filing the application under Order 9 Rule 13 CPC within time was not sufficient, accordingly, it rejected the application under Section 5 of The Limitation Act, and also the application under Order 9 Rule 13 CPC.

14. Feeling aggrieved by the order dated 26.2.2011 passed by the Additional Civil Judge, Pravar Khand, Court No. 3, Bulandshahr dismissing the Misc. Case No. 14 of 2009, the respondent preferred First Appeal From Order under Order 43 Rule 1 (d) of CPC which was numbered as Misc. Civil Appeal No. 26 of 2011. The Appellate Court by the judgement and order dated 8.11.2011 allowed the delay condonation application of respondent as well as the application under Order 9 Rule 13 CPC and set aside the ex-parte judgement and decree dated 13.9.2005 on payment of cost of Rs. 500/- and restored the Original Suit No. 479 of 2004 to its original number.

15. The Appellate Court proceeded on the presumption that the copy of the plaint was not enclosed with the registered summons whereas as per order 5 Rule 2 CPC, it is mandatory to enclose the copy of plaint with registered summons. The Appellate Court further on the basis of affidavit filed by the respondent and report of Amin held that the possession of the land in dispute was delivered without beating drums by the Ardali of the Amin on the ground that the name of Ardali, who was assigned the duty of beating drums, was not recorded in the Amin's report. The Appellate Court further relied upon the affidavit of some persons filed by the respondent on the ground that all affidavits were of the person who were resident of Village Khanauda where the property in dispute was situated whereas the affidavit filed by the petitioner in support of his case were of persons who were not the resident of Village Khanauda. The Appellate Court was of the view that as the respondent has filed application under Order 9 Rule 13 CPC within time from the date of knowledge of ex-parte decree, hence, the cause shown by the respondent for delay in filing the application under O9R13 C.P.C. is sufficient. Accordingly, it allowed the delay condonation application and also the application under Order 9 Rule 13 CPC.

16. Learned counsel for the petitioner challenging the aforesaid order contended that the Appellate Court while allowing the appeal has carved out a new case inasmuch as neither in the application under Order 9 Rule 13 CPC nor in the delay condonation application under Section 5 of The Limitation Act, the respondent has stated that the registered summon did not contain the copy of the plaint. He submits that there is a presumption that the officials act are deemed to have been done regularly, and thus, finding of the Appellate Court that copy of plaint was not enclosed with the registered summons is illegal and based upon no evidence on record. In support of the said submission he has placed reliance upon the judgement of this

Court in the case of **Raj Kumar Vs. Jai Prakash, 1987 ARC 234.**

17. He further submits that there is no pleading in the application of the respondent under Section 5 of The Limitation Act, 1963 and Order 9 Rule 13 CPC to the effect that there was no beating of drum by the 'Ardali' of the Amin at the time of delivery of possession nor the report of the Amin was challenged by the appellant on the ground that it did not state the name of Ardali of the Amin who was assigned with the duty of beating drums in the aforesaid two applications of the respondents. Thus, the submission is that the Appellate Court has committed manifest error of law apparent on the face of record in allowing the application of the respondent under Section 5 of The Limitation Act as well as under Order 9 Rule 13 CPC by carving out a new case which was not pleaded by the respondent. He submits that in the present case, a valuable right has accrued to the petitioner, and the Appellate Court had failed to consider this aspect of the matter while allowing the delay condonation application. He has placed reliance upon the judgement of Apex Court in the case of **Balwant Singh (dead) Vs. Jagdish Singh and others, AIR 2010 SC 3043.**

18. He further submits that the Appellate Court has acted illegally in relying upon the additional evidence filed by the respondent in the form of affidavit in appeal in the absence of any order passed by the Appellate Court to admit the additional evidence at the appellate stage.

19. Per contra, learned counsel for the respondent contends that the Appellate Court has not committed any jurisdictional error in allowing the application under Order 9 Rule 13 CPC, therefore, this Court should refrain from exercising its power under Article 226 of the Constitution of India. In support of his submission, he has placed reliance on the judgement of **Uttarakhand High Court at Nainital in the case of Pradeep Kumar Vs. Kamal Kant and others in Writ Petition (M/S) No. 2444 of 2019** decided on 2.9.2019. He further submits that the Court should adopt liberal approach to consider sufficient cause in condoning the delay in order to do substantial justice. Learned counsel for the respondent further contends that the summons have not been properly served and the procedure of service of notice has not been followed and this aspect has not been considered by the Trial Court while rejecting the application under Order 9 Rule 13 CPC.

20. I have heard rival submissions of learned counsel for the parties and perused the record.

21. The moot question which arise for consideration is as to whether the Appellate Court was justified in condoning the inordinate delay of about 4 years in filing the application under Order 9 Rule 13 CPC of the respondent.

22. It transpires from the record that the Trial Court after having been satisfied with the sufficiency of service of summons upon the respondent passed an order on 20.4.2005 to proceed ex-parte. The Trial Court, thereafter, proceeded to hear the suit and passed the ex-parte judgment and decree on 13.9.2005.

23. Thereafter, the petitioner preferred Execution Case No. 30 of 2005 in which Executing Court after being satisfied with

the service of notice upon the respondent passed an order on 1.4.2006 to proceed ex-parte and directed the petitioner to produce the draft sale deed and also deposit the required expenses. Pursuant to the order dated 1.4.2006 passed by the Executing Court, the petitioner deposited expenses and filed draft sale deed which was registered on 1.5.2006. The Executing Court passed an order on 2.12.2006 for delivery of possession which was given to the petitioner through Amin on 22.2.2007.

24. In the facts of the present case, it would be appropriate at this stage to refer the averments made by respondent in application dated 19.2.2009 under Order 9 Rule 13 CPC which are extracted herein below:-

प्रार्थनापत्र नम्बर साबिक अन्तर्गत आदेश 9 नियम 13 सपठित धारा 151 सी0 पी0 सी0 विरुद्ध न्यायालय सि0 जज (सि0 डिवी0) बुलन्दशहर मूल वाद सं0 – 479/ 2004 ब्रजपाल सिंह प्रति कल्यान सिंह में पारित आदेश व डिक्री

दिनांक 13–9–2005 में निम्न आधारों पर प्रस्तुत है –

1. यह कि आदेश दिनांक 13.9.05 एक पक्षीय रुप से प्रार्थी के खिलाफ गलत तथ्यों पर पारित कर दिया गया है।

2. यह कि मूल वाद में सम्बन्धित समन द्वारा रजिस्ट्री जिसमें प्रार्थी द्वारा लेने से इंकार वाली बात लिखी गयी है बिल्कुल असत्य एवं निराधार है, प्रार्थी के पास कभी न्यायालय का समन व रजिस्ट्री कभी कोई कर्मचारी लेकन नही पहुंचा है।

3. यह कि विपक्षी/ वादी द्वारा प्रार्थी को नुकसान पहुंचाने एवं खुद को फायदा पहुंचाने की नियत से रजिस्ट्री पर साजिश के तहत प्रार्थी के इसे लेने से इंकार की बात बिल्कुल झूठी लिखायी गयी है।

4. यह कि प्रार्थी/ प्रतिवादी द्वारा अपने आवश्यक कार्य हेतु लेखपाल से अपने खेत की नकल खसरा व खतौनी मांगने पर दिनांक 16.2. 2009 को प्रार्थी के नाम की जगह विपक्षी/ प्रतिवादी का नाम दर्ज होने की जानकारी मिली जिस पर प्रार्थी को अदालत द्वारा वादी के हक में बैनामे करने की पता लगने पर प्रार्थी ने अपने अधिवक्ता से मूल पत्रावली की जानकारी कराकर दिनांक 18.2.2009 को मुआयना कराया। जिससे समस्त जानकारी प्राप्त हुई।

5. यह कि ऐसा कोई कारण नही था जिससे प्रार्थी को रजिस्ट्री ना लेने से कोई फायदा पहुंचा रहा होता जिसकी वजह से प्रार्थी ने रजिस्ट्री लेने से मना कर देता।

6– यह कि विपक्षी/ वादी द्वारा प्रार्थी/ प्रतिवादी के रजिस्ट्री के लेने से इंकार लिखाने पर वादी ने अदालत को गुमराह कर जान बूझकर नाजायज फायदा उठाया है।

7– यह कि न्यायालय द्वारा पारित एकपक्षीय आदेश दिनांक 13.9.05 के बने रहने से प्रार्थी/ प्रतिवादी की सख्त हकतलफी है।

8– यह कि न्यायहित में एक पक्षीय आदेश दिनांक 13.9.05 को समाप्त कर उक्त वाद को गुण दोष के आधार पर तय करने के लिये नम्बर साबिक पर लिया जाना अति आवश्यक है।

अतः श्रीमान जी से प्रार्थना है कि प्रार्थी का नम्बर साबिक प्रार्थना पत्र स्वीकार कर न्यायालय द्वारा पारित एकपक्षीय आदेश दिनांक 13. 9.2005 को निरस्त कर प्रार्थी/ प्रतिवादी को उसके सबूत का अवसर प्रदान कर वाद को गुण दोष के आधार पर तय किया जावे, कृपा होगी।

दिनांक 19.2.09
प्रार्थी/ प्रतिवादी
कल्यान सिंह पुत्र श्री रामस्वरुप
निवासी ग्राम – खनौदा परगना
तहसील अनूपशहर जिला बुलन्दशहर"

25. The respondent also filed delay condonation application stating therein that he had never received notice served through registered post or summon alleged to have been served upon him, and the endorsement of refusal made on the registered summon by the postman was an act of fraud of petitioner in collusion with the postman. He further averred that when he visited the Lekhpal to obtain khasara and khatauni of the aforesaid property on 16.2.2009, he came to know about the

execution of the sale deed and mutation of name of respondent in the revenue record in respect of the aforesaid property. Thereafter, he inspected the record of the Trial Court on 18.2.2009 and immediately filed an application on 19.2.2009 for recall of the ex-parte judgment and decree. On the basis the of the aforesaid averments, he prayed for condonation of inordinate delay in filing the application under Order 9 Rule 13 CPC of about four years.

26. It would be apposite to refer the judgment of the Apex Court in the case of **Balwant Singh (dead) Vs. Jagdish Singh and others, AIR 2010 SC 3043** wherein the Apex Court has refused to condone the inordinate delay of 778 days in filing the substitution application by the heirs of the appellant who died on 28.11.2007. The Apex Court held that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. Paragraph Nos. 13 and 16 of the **Balwant Singh (dead) (supra)** reads as under:-

"13. As held by this Court in the case of Mithailal Dalsangar Singh (supra), the abatement results in the denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be construed liberally. We may state that even if the term `sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of `reasonableness' as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party. In the case of State of Bihar v. Kameshwar Prasad Singh [(2000) 9 SCC 94], this Court had taken a liberal approach for condoning the delay in cases of the

Government, to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. In the case of Ramlal and others v. Rewa Coalfields Ltd., [AIR 1962 SC 361] this Court took the view:

"7. In construing Section 5 is relevant to bear in mind two important considerations.

The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chathappan, ILR 13 Mad 269.

It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;...

16. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger benches as well as equi-benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications."

27. In the light of parameters laid down by the Apex Court in the aforesaid judgment, now the Court proceeds to examine as to whether the explanation tendered by the respondent in delay condonation application is sufficient to condone the inordinate delay of four years in filing the application under O9R13 C.P.C.

28. In the case in hand, the respondent has denied the fact that he had ever refused to accept the notice or summons of suit through process server or by registered post, and he came to know about the ex-parte judgment as well as execution of the sale deed on 16.2.2009 when he visited the Lekhpal to obtain copy of khasara and khatauni. At this stage, it is relevant to point out that neither the delay condonation application nor the application under Order 9 Rule 13 CPC disputes the correctness of the finding recorded by the Executing Court in order dt. 1.4.2006 in Execution Case No. 30 of 2005 regarding the sufficiency of service of notice of execution case upon the respondent-judgement debtor. It is also important to note that the aforesaid two applications do not contain any averment that the Ardali of the Amin did not beat the drums at the time of delivery of possession nor theses two applications doubted the correctness of the report of the Amin. In this view of the fact, it is highly improbable that the delivery of possession of the property could have been effected by the Amin to the petitioner without knowledge of the respondent.

29. Thus, the aforesaid facts clearly indicates that the respondent had knowledge about the ex-parte judgment and decree much before the filing of application under Order 9 Rule 13 CPC and delay in filing the application under O9 R13 C.P.C. was not sufficiently explained.

30. The Apex Court in the case of **N. Balakrishnan Vs. M. Krishnamurthy, 1998 (89) RD 607** has held that the acceptability of the explanation is the only criteria to condone the delay; sometimes delay of very short period is not condonable for want of unacceptable explanation. The relevant portion of the said judgement is extracted hereinbelow:-

"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. "

31. The judgment of **N.Balakrishnan (supra)** is of no help to respondent inasmuch as the respondent has not tendered plausible and cogent explanation which can be said to be sufficient and acceptable for condoning the inordinate delay of four years in filing the application under O9R13 C.P.C.

32. Further, though a bald averment has been made by the respondent in both the applications that he had not refused to accept the service of summons but this fact was denied by the petitioner. In such an event, the burden of proof was on the

respondent to establish by leading evidence that the endorsement of refusal on registered notice was an act of fraud of the petitioner in collusion with the postman. The respondent did not lead any evidence to establish the aforesaid facts, and in this view of the fact, the Trial Court rightly recorded finding that the respondent had failed to discharge burden to prove that the endorsement of refusal was obtained by fraud on the registered notice. The aforesaid finding of the Trial Court is supported by the judgement of this Court in the case of **S.P. Srivastava Vs. Prem Lata AIR 1980 All 336** wherein it has been held that an ex-parte decree should not be set aside lightly, and the burden is upon the applicant to prove that the summons or notices was never served upon him and he got knowledge of the ex-parte decree on a particular date. Relevant extract of paragraph 6 of the judgment is reproduced herein:

"6. The first point raises a question of fact. When did the wife first come to know of the ex parte decree? She stated that she came to know of the ex parte decree on the 15th April, 1976 after inspection of the relevant papers. On the 13th April, 1976 she had come to know of a proceeding of divorce instituted by the husband. The ex parte decree was passed on the 2nd June, 1973. Her knowledge was, therefore after 34 months. It is obvious that she was not living with the husband during this period. The question whether she had knowledge of the suit would not depend on what she stated, for her statement remained wholly uncorroborated. On the question whether there was a service of the summons of the the suit on her, there was a bare denial. The positive evidence that could be led in the case had been led by the husband. Firstly, the process server was examined and also a witness of the service. The process server had been disbelieved for the following reasons; The process server is said to nave served the summons on the 22nd April, 1973. It was a Sunday. It was stated by the process server that the husband had come to the Nazarat to enquire as to who would be taking the summons to the opposite party. The court below opined that it was amazing that the office of Nazarat would remain open on a Sunday. The court below also relied on the circumstance that there was no compliance with the Order 5, Rule 17 by the process server, inasmuch as the summons had not been pasted on the outer door of the house. Thus, the court below came to the conclusion that there was no service of the summons on the wife. The finding of the court below that she came to know of the ex parte decree only on the 15th April, 1976 was based on no other consideration than believing her. She had also to lead sufficient evidence to show that she had no knowledge whatsoever of the ex parte decree. It is a relevant circumstance to be considered when the application for setting aside the ex parte decree was being moved after 34 months. What was she doing all this time? If there was a separation and she was not living with her husband, what prompted her to visit her husband's place on the 14th April, 1976. In any event, there is neither any consideration nor any finding as to whether she had visited her husband's place on the 14th April, 1976. If she did not visit her husband's place on the 14th April, 1976, what made her to see the record on the 15th April, 1976? The court below has not considered any of these matters and has set aside the ex parte decree without considering the relevant and material circumstance. An ex parte decree is not to be set aside lightly. The wife seeking to set aside the ex parte decree has

got to prove to the entire satisfaction of the court that the summons or notice was never served on her and secondly that she got the knowledge of the suit or proceeding on a particular date. The burden is still more heavy when the application for setting aside the ex parte decree is made after the period of limitation provided for moving the said application. The applicant must satisfy the court with cogent and reliable evidence, the reasons which prevented him or her from making the application within time."

33. Now, the court proceed to analyze as to whether the reasons recorded by the Appellate Court in allowing delay condonation application as well as application under O9R13 C.P.C. are sustainable in law.

34. It is evident from the order of the Appellate Court that it had carved out a new case in allowing the application of respondent under Section 5 of The Limitation Act inasmuch as no foundation had been laid by the respondent in application under Section 5 of The Limitation Act, 1963 or in the application under Order 9 Rule 13 C.P.C. alleging that the Ardali of the Amin did not beat the drum at the time of delivery of possession nor the respondent had disputed the correctness of report of Amin in the aforesaid two applications.

35. Further, the finding of the Appellate Court that the copy of the plaint was not enclosed with the registered summons, therefore, the procedure prescribed under Order 5 Rule 2 was not followed is also not sustainable for two reasons, firstly, there is no such case of the respondent either in application under Section 5 of Limitation Act or in the application under Order 9 Rule 13 CPC that the plaint was not enclosed with the registered summons. In the absence of any pleading that the plaint was not enclosed with the registered notice, the presumption lay that the plaint was enclosed with the summons as the official acts are done regularly unless proved otherwise. It would be apposite to refer the case of **Raj Kumar (supra)** wherein it has been held in paragraph No. 7 that when the defendant had refused to accept the summons, he had also refused to accept service of the plaint, hence he can make no legitimate grievance of the fact that he was not supplied with a copy of the plaint.

36. Secondly, non enclosure of copy of plaint with summons is merely an irregularity. At this stage, it is worth to refer the case of **Raghubir Sahai Bhatnagar Vs. Bhakt Sajjan, AIR 1978 All 139** wherein this Court has held that the expression "irregularity in the service of summons" occurring in the proviso appended to O9R13 of C.P.C. would mean defect in following the procedure for the service of summons. Paragraph No. 6 & 7 of the judgement in **Raghubir Sahai Bhatnagar (supra)** is extracted herein :

"6. It is true that the process server did not make any effort to affix the copy of the summons at the outer door of the defendant's place of residence on his refusal to accept the same. In our opinion, this defect was not substantial enough to vitiate the service of summons. The purpose of issuing summons is to give intimation to the defendant of the suit, the court, and the date fixed for his appearance and in order to achieve that purpose the legislature has laid down detailed procedure for service of summons on the defendant. Where ex parte

decree is passed in the defendant's absence, he is entitled to get the decree set aside under Order 9 Rule 13 if he satisfies the court that the summons was not duly served on him and he had sufficient cause for his absence. But in view of the proviso added by the Allahabad High Court to Order 9 Rule 13 an ex parte decree cannot be set aside on the ground of any irregularity in the service of summons, if the court is satisfied that the defendant had knowledge, but for his wilful conduct he had sufficient time to appear and answer the plaintiff's claim. The proviso added by this Court has now been ingrafted in Rule 13 itself by Parliament by the Amending Act No. 104 of 1976. Admittedly, at the relevant period when the question arose before the courts below the proviso as added by this Court ?was in force. Both the courts held that the process server's failure to affix the summons at the outer door of the defendant-applicant's place of residence was a mere irregularity and since the defendant-applicant had knowledge of the date of hearing, he had no sufficient cause for his absence. We. are of the opinion that the courts below have rightly held that the defect, if any, in the service of summons was a mere irregularity and since the defendant-applicant had knowledge of the date of hearing he had no sufficient cause for his absence and as such the ex parte decree could not be set aside.

7. Sri K. C. Saksena contended that failure to affix the summons at the outer door of the defendant's place of residence or business was not an irregularity, instead it was an illegality, as such the proviso to Order IX Rule 13 C. P. C. was not applicable. We find no merit in the contention. As noted earlier, the primary purpose of prescribing procedure for service of summons is to ensure that the defendant receives information and knowledge of the plaintiffs suit and the date of hearing. If the procedure prescribed under Order V Rule 17 is not strictly followed and if it is established that the defendant had knowledge of the plaintiff's claim as also of the date of hearing the proviso to Order IX Rule 13 would be attracted and the ex parte decree cannot be set aside. The proviso comes into play when some irregularity occurs in the service of summons. There is difference in illegality and irregularity. Irregularity contemplates defect in procedure and non-compliance of the prescribed formality which may not be of substantial nature. Illegality, on the other hand, connotes contravention of statute which may in some cases make the action void. Illegality contemplates an action forbidden by law while irregularity is mere defect in procedure. If this basic difference in the two expressions is kept in mind, the expression 'irregularity' in the service of summons occurring in the proviso added to Order IX Rule 13 would mean defect in following the procedure prescribed for the service of summons. Not doubt. Order V Rule 17 requires that on defendant's refusal to accept the summons the process server should affix the same on the outer door of the defendant's place of residence or business, but failure of the process server to go through the prescribed formality of affixing the summons at the outer door is a technical fault amounting to an irregularity."

37. At this stage, it would also be appropriate to refer judgment of apex court in the case of **Commissioner of Income Tax Vs. Hindustan Bulk Carriers AIR 2003 SC 3942** wherein apex court has held that a construction which reduces the statute or any provision to a futility has to be avoided. Paragraph 23 to 27 of the judgment is extracted below:

"23. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.

24. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable.

25. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.

26. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

27. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute."

38. O5R2 of C.P.C., requires that every summon shall be accompanied by a coy of plaint. The purpose of summons is to inform the defendant in the suit to appear and answer the claim and file written statement. Once the service of summon is proved, it means that the defendant has knowledge about institution of suit for certain claim against him. If the copy of the plaint is not enclosed with the summon, he can demand copy of plaint and other documents to enable him to answer plaintiff's claim. Non enclosure of copy of plaint with summons is only a defect in procedure, and if it is not considered as an irregularity, it would render proviso appended to O9R13 of C.P.C. otiose.

39. Now, coming to the question as to whether the Appellate Court correctly relied upon affidavits filed by the respondent in appeal, the order-sheet of appeal enclosed with the writ petition reveals that there is no order of the Appellate Court accepting and admitting those affidavit in the appeal as evidence. Therefore, this Court is of the opinion that the Appellate Court has acted illegally in relying upon the affidavits filed by the respondent in appeal inasmuch as those affidavits could have been relied upon in appeal only if the Appellate Court had passed an order on the touchstone of O41R27 of C.P.C. accepting those affidavits as evidence in appeal.

40. Learned counsel for the respondent has also urged that the Rule 138, 139 and 140 of General Rules (Civil), 1957 have not been followed while serving summons upon the respondent. The said contention is also not sustainable for the reason that no such pleading has been made by the respondent in the application under Order 9 Rule 13 CPC or in the appeal, therefore, the said contention cannot be allowed to advance for the first time in the writ petition.

41. Thus, for the reasons delineated above, the Appellate Court has committed

manifest illegality in allowing the appeal and setting aside the order dated order dated 26.2.2011 passed by the trial court rejecting the application of respondent to set aside ex-parte judgment and decree dated 13.9.2005. Accordingly, judgement of Uttarakhand High Court at Nainital in the case of Pradeep Kumar (supra) does not come to the aid of the respondent.

42. Thus, for the reasons given above, the order of the Appellate Court dated 8.11.2011 passed in Misc. Appeal No. 26 of 2011 (Kalyan Singh Vs. Brajpal) is set aside. The writ petition is **allowed**. There shall be no order as to costs.

(2020)06ILR A390
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.04.2020

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 733 of 2013

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

Counsel for the Appellant:
Sri Meraj Ahmad Khan, Sri Arvind K. Pandey, Sri Jai Prakash Prasad, Sri Manish Kumar Pandey, Sri Mirza Ali Zulfaqar, Sri Vichitra Kumar Chandel, Sri Rajesh Kumar Yadav

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

A. Criminal Law - The Narcotics Drugs And Psychotropic Substances Act, 1985- Section 42, Section 51- Indian Evidence Act- Section 3- Seizure and Recovery- Witnesses only Police Officers- The law with regards to recovery not supported by public witness or non-availability of public witness has been clarified time and again by the Supreme Court and it has been held that the statement of police witness cannot be discarded only because of his being a police and if his statement is trustworthy, conviction can be based.

Recovery by police officers and absence of independent witnesses of the same would not vitiate the recovery if the statements of the Police Officers are trustworthy, credible and reliable.

The Narcotics Drugs And Psychotropic Substances Act, 1985- Section 50- Compliance- No personal search- Since, personal search of accused has not been conducted nor there is any evidence to that effect, this case is not covered under section 50 of NDPS Act.

There is no requirement of complying with the provisions of Section 50 of the Act where the illegal contraband is not recovered from the personal search of the accused.

Criminal Law - The Narcotics Drugs And Psychotropic Substances Act, 1985- Section 293 (4)- Code of Criminal Procedure- Report of Chemical Analyst- Because, both brown sugar and heroine are illegal contraband, it makes no difference if the recovered article was mentioned as brown sugar.

Even if the Substance reported by the Chemical Examiner may be different from the one said to be recovered, the same would make no difference since the recovered and reported Substances, though different, are both contraband.

Criminal Law - The Narcotics Drugs And Psychotropic Substances Act, 1985- Section 42- Recovery Memo- The recovery was made from the house of appellant in the midnight without obtaining warrant. The legal procedure is that the recovery memo so prepared should be read over and explained to the accused and his signature should be obtained on the memo. Section 42(2) requires that where an officer takes down information in writing under sub-Section (1) he shall send a copy thereof to his immediate officer senior who is Circle Officer. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or

Sub-section (2) of Section 42 was ever recorded. Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. In a case based on recovery of illegal drug, recovery memo forms the basis of prosecution and if same has not been prepared according to legal procedure, it amounts to serious infirmity.

A search of a private place between sunset and sunrise without a warrant and without recording the grounds of belief of such an Officer, would vitiate the search and if the recovery memo of the contraband is not prepared in a legal manner then the recovery would result in a serious infirmity. The provisions of Section 42 of the Act are mandatory and absolute non-compliance of the said provisions cannot be countenanced.

Criminal Law - The Narcotics Drugs And Psychotropic Substances Act, 1985- Sections 42, 50 and 57- The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. In a crime based on recovery of illegal drugs for which stringent provision in terms of procedure and punishment has been provided in the NDPS Act, it is necessary to ensure free and fair investigation without any objectionable features and infirmities. Fairness and purity in investigation is so necessary for criminal justice administration that without it fair trial will become a mockery and will result in miscarriage of justice.

The compliance of the provisions of Sections 42, 50 and 57 of the Act is mandatory and have been provided by the Legislature to afford safeguards and ensure fair investigation and trial.

The search team did not comply with the mandatory provision of section 42 of NDPS Act; the recovered drug was not weighted and on the basis of guess work the quantity was mentioned; the recovery was made from the house of appellant in the midnight without obtaining warrant from the magistrate and without recording grounds of belief as required under the Proviso of section 42 and the legal procedure in preparing the recovery memo was not followed and the signature of the accused was not obtained after preparing the same. The learned trial court has ignored the shortcomings and lapse in the prosecution version, recovery process and evidence and the finding of the learned trial court is perverse and illegal. The impugned judgement convicting and sentencing the accused is not sustainable under law and is liable to be set aside. (Para 11, 12,14, 17, 18, 21, 25, 27, 32, 33, 34)

Appeal allowed. (E-3)

Case law relied upon/discussed:-

1. Jarnail Singh Vs St. of Punj., (2011) CRLJ 1738 SC,

2. Ajmer Singh Vs St. of Har., (2010) 3 SCC 746,

3. St. of Punj. Vs Makhan Chand, AIR (2004) SC 306

4. Dharam Pal Singh Vs St. of Punj., (2010) 71 ACC 548 SC

5. Gian Chand Vs St. of Har., AIR (2013) SC 3395

6. Krishna Kunwar Vs St. of Raj., (2004) 2 SCC 608

7. Sekhar Suman Verma Vs N.C.B., (2016) 11 SCC 1

8. Dire. of Rev. Vs Mohd. Nisar Halia, (2008) 2 SCC 370

9. K.S. Puttaswamy Vs U.O.I, (2017) 10 SCC 1

10. St. of Punj. Vs Balbir Singh, (1994) 3 SCC 299

11. Karnail Singh Vs St. of Har. (2009)8 SCC 539

12. Saiyad Mohd. Saiyad Umar Saiyed Vs St. of Guj., (1995) 3 SCC 610

13. Mohan Lal Vs St. of Raj., (2015) CRLJ 2811 SC

14. Abdul Rashid Ibrahim Mansuri Vs St. of Guj. (2000) 2 SCC 513

15. Sajan Abraham Vs St. of Ker. (2001) 6 SCC 692

16. Rajinder Singh Vs St. of Har. (2011) 8 SCC 130

17. Kishan Chand Vs St. of Har. (2013) 2 SCC 502

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

1. Heard Sri Jai Prakash Prasad, Advocate learned counsel for the appellant and Sri Ravi Kant Kushwaha, learned AGA for the State.

2. This criminal appeal has been filed against the impugned judgement dated 16.1.2013 passed by Additional Sessions Judge, Court No.3, Jyotibha Phule Nagar in ST No.256 of 2002, Crime No. 62 of 2002, Police Station Amroha Nagar, District J.P. Nagar, by which the accused-appellant Ram Charan Jatav has been convicted and sentenced under Section 18/20 of NDPS Act for 10 years RI and Rs. 1,00,000/- fine and in default for additional one year imprisonment.

3. The brief prosecution case is that on 1.2.2002 Sub Inspector K.P. Sharma (Incharge SOG), J.P. Nagar with constable Rajendra Singh, constable Jai Prakash, constable Abhimanyu, constable Laxman Singh and constable driver Harender Singh, on the basis of information received from arrested accused Ram Kunwar Verma from Gandhi Murti Tiraha with brown sugar and on his information expecting recovery of brown sugar from the house of Ram Charan Jatav resident of Jai Om Nagar, Amroha went near Madho Cinema. There, In-charge Inspector Ram Bachan Singh, SI Jitendra Singh, constable Gul Haider Jaidi, constable Paramjeet Singh with constable driver Sabban Khan met on their Government jeep. The police party tried to search out some public witness but it was night and no witness could be traced. The police party conducted search of each other to ensure that they are not carrying any illegal narcotics substance. They tried to inform the Gazetted Officer, but, they could not contact him. Along with accused Ram Kunwar, the police party reached the house of Ram Charan Jatav at about 12:30 in the mid night, Accused Ram Kunwar knocked the door and the door was opened by a person. Accused Ram Kunwar said that he is Ram Charan Jatav from whom he purchased brown sugar. On being asked, the person disclosed his name to be Ram Charan Jatav son of Sukhi Singh resident of Jai Om, Police Station Amroha Nagar. On being asked he said that he had given 100 gram brown sugar for selling the same and he is having about half kg of brown sugar in his possession. He was asked whether he would like to be searched before any Gazetted Officer or the Magistrate whereupon he responded that he believed on the police party and permitted search. Instead, he said that he would himself give the brown sugar and he picked out about 500 gm brown sugar packed in a polythene from a black colour bag, which was hanging on the wall. The police personnel opened the same and smelled the same and found it to be brown sugar and the same was taken into possession by the police. In the light of torch, 50 gm of brown sugar was picked out from the recovered brown sugar as sample and was kept in polythene packet. The samples and remaining brown sugar was separately kept in a plastic packet and was sealed in white cloth and samples seal was pasted. Accused Ram Charan Jatav was asked about the person he obtained brown sugar and he informed that he obtained brown sugar from Tika Ram,

resident of Jabdi and Rehan resident of Katkui, Amroha. He also told that they are still in possession of more brown sugar which they have kept in their house. He offered that he can show their house. The accused Ram Charan Jatav was informed about the offence he committed and was taken into custody. The recovery memo was prepared in the light of torch and after reading and hearing the same, the signature of the police personnel was obtained and a copy thereof was given to the accused. On the basis of the recovery memo, on 1.2.2002 at 3:30 AM, offence against accused Ram Charan Jatav was registered under the aforesaid section, chik was prepared and entry thereof was made in the GD. The offence was investigated by the police and Investigating Officer M.P. Tyagi recorded the statements of the witnesses, prepared site plan of place of recovery and after obtaining the report from the Forensic Science Laboratory, on the basis of evidence collected by him, he filed a charge sheet against the accused under Section 18/20 of NDPS Act. The charge was framed against the accused who denied the charge and claimed trial.

4. The prosecution examined as many as three witnesses. The statement of accused Ram Charan Jatav was recorded under Section 313 CrPC, who put forward the case of denial and stated that the prosecution case is false and he has been implicated on the basis of enmity and the police has filed a wrong charge sheet against him. He is innocent.

5. After hearing prosecution and defence and perusing the evidence on record, the learned trial court passed the impugned judgement and convicted and sentenced the accused-appellant.

6. Aggrieved by the impugned judgement, the accused appellant filed this appeal and has challenged the impugned judgment on the ground that the mandatory requirement under Sections 50 and 57 of the NDPS Act was not complied with and the recovered contraband was not weighted at the time of recovery. The recovered contraband was alleged to be brown sugar but in chemical examination the same has been reported to be heroine, the recovery memo was not signed by the accused-appellant and the same is false and fabricated. The information of his arrest was not given to his wife although the contraband was recovered from his house. No independent witness or public witness of recovery was present at the time of recovery and the police party did not comply the provision of Section 100 of the Criminal Procedure Code and section 42, 50 and 57 of NDPS Act and no information of arrest of accused was given to superior officer. The conviction of the accused-appellant is against the weight of evidence on record and is against law and the sentence awarded is too severe. Therefore, the appeal is liable to be allowed and the accused-appellant is entitled for acquittal.

7. Learned AGA submits that the accused-appellant was found to be in possession of contraband in commercial quantity and on the basis of evidence on record, the learned trial court has rightly convicted and sentenced the accused-appellant.

8. In view of the rival argument of both the sides, the evidence given by the prosecution is required to be analysed to examine the legality of the impugned judgement.

9. PW-1 SI K.P. Sharma and PW-2 SI Bachchan Singh have been examined as witness of recovery and they have proved the recovery memo and recovered contraband as Ext. Ka-2, Ext. Ka-3, Ext. Ka-4, Ext. Ka-5, Ext. Ka-6, Ext. Ka-8, Ext. Ka-9, Ext. Ka-10, Ext. Ka-11 and Ext. Ka-12. PW-3 SI Madan Pal (Investigating Officer) is the formal witness and he has proved the police papers such as site plan Ext. Ka-16, charge-sheet Ext. Ka-17, FSL report Ext. Ka-18, chik FIR Ext. Ka-18A, GD report Ext. Ka-19.

10. The submission of the learned counsel for the accused-appellant is that despite the presence of Gazetted Officer and the Magistrate near the place of recovery, the police party did not inform the accused about his legal right and just to complete formality, it was written in the memo that the accused said that he believes on police party and does not want to be searched before any superior officer and the police party may take his search. Further submission is that the recovery team did not ensure compliance of Section 50 of NDPS Act, which is mandatory. It has been further submitted that 500 gram of brown sugar was said to have been recovered from the accused-appellant but the same was found to be heroine by Forensic Science Laboratory. Further submission is that the police was well informed that the accused-appellant is in possession of contraband but no effort was made for his search before Gazetted Officer or the Magistrate. The information was neither reduced in writing nor communicated to immediate superior and as such, the requirement of section 42 (2) and 50 was not complied. Within 48 hours from the recovery, the superior officers were not informed and as such Section 57 of NDPS Act was not complied with. The wife of the accused-appellant was also not informed. No signature of the accused-appellant was obtained on recovery memo.

11. From the reading of the statement of the recovery officer PW-1 SI K.P. Sharma and other witness of recovery PW-2 SI Ram Bachan Singh, it is clear that they have proved the version of recovery memo and FIR. The recovery was made in the midnight and despite the efforts made, no public witness could be traced. The law with regards to recovery not supported by public witness or non-availability of public witness has been clarified time and again by the Supreme Court and it has been held that the statement of police witness cannot be discarded only because of his being a police and if his statement is trustworthy, conviction can be based. Thus, in **Jarnail Singh v State of Punjab, 2011 CRLJ 1738(SC), Ajmer Singh v State of Haryana, (2010) 3 SCC 746, State of Punjab v Makhan Chand, AIR 2004 SC 306 and Dharam Pal Singh Vs. State of Punjab, 2010(71) ACC 548 (SC)**, it has been held by the Supreme Court that the obligation to take public witnesses(independent witness) is not absolute. If after making efforts which the court considers in the circumstances of the case reasonable the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer is believable after taking due care and caution in evaluating their evidence.

12. Again, in **Gian Chand v State of Haryana, AIR 2013 SC 3395**, it was held that mere non-joining of an independent

witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditable and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. The legal maxim *omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed. In view of the above, on facts and circumstances of this case, I do not find any force in the contention of defence regarding non-availability of public witness.

13. I find that during cross-examination PW-1 S.I. K.P. Sharma has stated that there was no recovery from accused Ram Charan Jatav from his cloths and the recovery was made from the bag, which was hanging on the wall. PW-2 SI Ram Bachan Singh has also stated that on the voice raised by Ram Kunwar, accused Ram Charan opened the door and the moment the door was opened, he was caught. It also appears from the reading of the statement of PW-1 and PW-2 that after Ram Charan Jatav was caught, he was informed that Ram Kunwar has said that he used to take brown sugar from him and before personal search the accused Ram Charan Jatav told that he was having brown sugar. The brown sugar was not recovered from personal search but was recovered from the bag, which was hanging on the wall. Prior to that there was no recovery from him. Since, personal search of accused has not been conducted nor there is any evidence to that effect, this case is not covered under section 50 of NDPS Act. Therefore, the plea of appellant regarding non-compliance of section 50 NDPS Act has no force.

14. PW-1 has admitted that he has not written the colour of the contraband so recovered. It has been submitted that the case of prosecution was about recovery of brown sugar and on chemical examination the same was found to be heroine. It makes the recovery doubtful. Because, both brown sugar and heroine are illegal contraband, it makes no difference if the recovered article was mentioned as brown sugar. However, I am of the view that merely because the witness has admitted that the heroine, smack and brown sugar are different kind of narcotic substance, it cannot be said the recovery of contraband was suspected and it also falsified the whole prosecution case.

15. The bag from which the contraband was recovered was 8 to 10 steps away from the main door and the door in between was open and the wife of the accused was in the house. The submission of the learned counsel to the appellant is that no information was given to the wife. I however find that Ext. Ka-4 is on record from the perusal of which it is clear that the information was prepared in writing and a copy thereof was given to the wife of accused.

16. It has been submitted by learned counsel for the appellant that the chik FIR has not been proved by the scriber and it has been proved by PW-2 as secondary witness, which is not admissible in evidence. A close reading of the evidence shows that PW-2 has stated that the chick was prepared by HM Indradeo Shukla who had been posted with him and he had seen him writing and is acquainted with his writing and signature. Therefore, the

subission on the admissibility of chick does not appear to be sound.

17. It has been submitted by the learned counsel to the appellant that the signature of the accused was not obtained on the recovery memo and the same is a tainted document. I find that PW-1 has also admitted that after preparation of memo and before supplying the copy thereof to the accused-appellant, his signature was not obtained and the signature was obtained only after providing the copy. The legal procedure is that the recovery memo so prepared should be read over and explained to the accused and his signature should be obtained on the memo. In a case based on recovery of illegal drug, recovery memo forms the basis of prosecution and if same has not been prepared according to legal procedure, it amounts to serious infirmity.

18. it has been also submitted that the recovered drug was not weighted and weight of the recovered drug is essentially required to ascertain whether the recovery was of commercial quantity or otherwise. In the recovery memo it has not been mentioned that the recovered drug was weighted. PW-1 who led the search team has not said in his examination-in-chief even that the recovered drug was weighted whereas PW-2 has stated that the recovered charas was not measured and the quantity has been written by way of guess work. In the cross-examination, PW-1 has said that the recovered drug was weighted by weighing machine which was kept in the police-jeep. No such statement has been given by him to the IO. It appears to be an improvement in his statement to cover the lapse and which is clear from the statement of PW-2 who has categorically stated that the weight of the recovered drug was just a guess work and the same was not weighted.

19. It has been argued that the search has been conducted in violation of the provision of section 42 NDPS Act and the search has been conducted in the midnight without any search warrant. Under Section 41 of the Act, the Magistrate has been authorized to issue warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under the Act, for the search, irrespective of time, of any building conveyance, place. In terms of Section 41(2) of the Act, some sort of relaxation is found with regard to status of the officers being that of gazetted one. Section 42 the NDPS Act is as under:

"42. Power of entry, search, seizure and arrest without warrant or authorisation. (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of

holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:"

20. Thus, section 42 provides that the officer of designated rank may enter in a building, conveyance or place and conduct search of a illegal drug etc and seize the same and in case of resistance, may break open the door etc and may also detain or arrest any person who might have committed or suspected to have committed any offence under the Act. The second proviso to section 42(1), however, provides as follows:

"provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

Section 42 (2) further provides:

"Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

21. Section 42 is a mandatory provision as held in **Krishna Kunwar v State of Rajasthan, (2004) 2 SCC 608** and it has two components. One relates to the basis of information, from personal knowledge and information given by a person and taken down in writing. Secondly, the information must relate to commission of an offence punishable under Chapter IV of the Act and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Section 42 is applicable only when search is made by a police officer or authority concerned. It has been held in **Sekhar Suman Verma v Narcotics Control Bureau, (2016) 11 SCC 1** that compliance of section 42 is not necessary where search and seizure has been conducted by a gazetted officer himself acting under section 41.

22. Section 42 is not applicable in case of search of public place. Public place, as mentioned in Explanation to section 43, includes 'public conveyance, hotel, shop or other place intended for use by, or accessible to, the public'. It has been held in **Directorate of Revenue v Mohd. Nisar Halia, (2008) 2 SCC 370** that a room in a

hotel is a public place but occupied by a guest may not be so in view of the right of privacy available to such person and the authority has restricted power to infringe the right of privacy. In **K.S. Puttaswamy v Union of India, (2017) 10 SCC 1**, it has been remarked that right to privacy is a fundamental right and is not lost in public places, but attaches to the person.

23. In **State of Punjab v Balbir Singh, (1994) 3 SCC 299**, referring to the provision of section 42 (1) and (2), the Supreme Court has laid down that the arrest and seizure may be carried out between sunrise and sunset and for that there is no need of warrant. But, if the search is to be conducted in between sunset to sunrise, a warrant is required. But the exception is that if the officer conducting search has reason to believe that a warrant cannot be obtained without affording an opportunity of concealment or escape to the offender and he must record in writing his reason for such belief. The warrant is also not needed if the arrest and search is being affected by a gazetted officer as held in **Sekhar Suman Verma v NCB, (2016) 11 SCC 368.**

24. The question of effect of non-compliance or delayed compliance of section 42 has been considered by the Supreme Court in several cases. Thus, in **Karnail Singh vs. State of Haryana (2009)8 SCC 539** held that total non-compliance requirements of Sub-section 1 and 2 of Section 42 of the Act is impermissible, however, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42 of the Act. From the evidence, it is evident that none of the prosecution witnesses, more particularly PW-1 and PW-2, who played a vital role, spoke regarding compliance of the Section 42(2) of the NDPS Act.

25. The NDPS Act happens to be a Special Act providing severe punishment and on account thereof, there happens to be consistent view that all the requirements, so prescribed thereunder, is to be strictly followed. In case of failure on the part of prosecution, the same is bound to give adverse impact irrespective of nature of evidence having produced in order to substantiate its case. From perusal of the case record, it is apparent that there happens to be serious lapses on the part of the prosecution in complying with the mandatory provisions of the law and that being so, the order impugned would not survive. In this case, none of the police personnel conducting search and arrest have claimed themselves to be a Gazetted Officer. Therefore, the case has to be examined keeping in view whether the recovery officer has recorded reason in writing for his belief that obtaining warrant will afford the accused opportunity to conceal the contraband and to escape in view of proviso to section 42(1) of the NDPS Act and the matter was reported to the superior officer within 72 hours in terms of section 42(2).

26. In **State Of Punjab vs. Balbir Singh, 1994 (3) SCC 299**, the Supreme Court has made the following observations:

"The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed

strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial."

To the similar effect are the observations of this Court in **Saiyad Mohd. Saiyad Umar Saiyed vs. The State of Gujarat, (1995) 3 SCC 610.**

27. What Section 42(2) requires is that where an officer takes down information in writing under sub-Section (1) he shall send a copy thereof to his immediate officer senior who is Circle Officer. There appears to be no evidence on record that the information taken from accused Ram Kunwar was reduced in writing. It is not disputed that the search was conducted after sunset and before sunrise. Prior to conducting search in such situation, it is provided that the officer conducting search should record in writing the grounds for belief and within 72 hours, the same should be communicated to the immediate superior. The scheme indicates that in event the search has to be made between sun set and sun rise, the warrant would be necessary unless officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of offender which grounds of his belief has to be recorded. In the present case, there is no case that any ground for belief as contemplated by proviso to sub-section (1) of Section 42 or Sub-section (2) of Section 42 was ever recorded by PW-1. He simply incorporated in the recovery memo that there is possibility of concealment and escape. He has also not stated any such facts in his statements that he has conducted any proceedings in regard to compliance of proviso of Section 42(1). Since reasons to believe have not been recorded, therefore, under Section 42(2) it is not found on record that copy thereof has been sent to the senior officials. In the statement, he has said that he did not inform to the Kotwali, Amroha. He has stated that on his information to Kotwali, Amroha Incharge SI Bacan Singh came. Bachan Singh has been examined as PW-2, but he has also not stated about any such communication and moreover he is also equally ranked.

28. In **Mohan Lal v State of Rajasthan, 2015 CRLJ 2811 (SC)**, the court referred to the decision in **Karnail Singh v. State of Haryana (2009) 8 SCC 539**, wherein the issue emerged for consideration is whether Section 42 of the NDPS Act is mandatory and failure to take down the information in writing and forthwith sending a report to his immediate officer superior would cause prejudice to the accused. The Court was required to reconcile the decisions in **Abdul Rashid Ibrahim Mansuri v. State of Gujarat (2000)2 SCC 513** and **Sajan Abraham v. State of Kerala (2001) 6 SCC 692**. The Constitution Bench explaining the position opined that **Abdul Rashid** (supra) did not require about literal compliance with the requirements of Section 42(1) and 42(2) nor did **Sajan Abraham** (supra) held that requirement of Section 42(1) and 42(2) need not be fulfilled at all. The larger Bench summarized the effect of two decisions which the Court reproduced as below:

"(a) The officer on receiving the information of the nature referred to in

sub-section (1) of Section 42 from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Section 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

29. Earlier, in **Rajinder Singh v. State of Haryana (2011) 8 SCC 130**, placing reliance on the Constitution Bench, it has been opined that total non-compliance with the provisions of sub-sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with satisfactory explanation for the delay can, however, be countenanced.

30. Learned counsel for the appellant has also contended that there has been non-compliance of Section 57 of the NDPS Act, which reads as follows:

"Report of arrest and seizure - Whenever any person makes any arrest or seizure under this Act, he shall, within fortyeight 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."

31. I find that in **Sajan Abraham (supra)**, placing reliance on **State of Punjab v. Balbir Singh (1994)3 SCC 299**, it has been held that Section 57 is not mandatory in nature and when substantial compliance is made, it would not vitiate the prosecution case. In **Kishan Chand v. State of Haryana (2013) 2 SCC 502**, the Court while dealing with the compliance of Sections 42, 50 and 57, has opined thus:

"When there is total and definite non- compliance with such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance."

32. It is pertinent to mention that the purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance with these provisions in their entirety, the court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevance.

33. In a crime based on recovery of illegal drugs for which stringent provision in terms of procedure and punishment has been provided in the NDPS Act, it is necessary to ensure free and fair investigation without any objectionable features and infirmities. Presumption against innocence based on possession of illegal drug and shifting the burden of proof on accused requires fair and untainted investigation without any glimpse of malice, mischief, doubt, falsity, fabrication and prejudice to the accused. Fairness and purity in investigation is so necessary for criminal justice administration that without it fair trial will become a mockery and will result in miscarriage of justice.

34. From the above discussion, it is clear that the search team did not comply with the mandatory provision of section 42 of NDPS Act; the recovered drug was not weighted and on the basis of guess work the quantity was mentioned; the recovery was made from the house of appellant in the midnight without obtaining warrant from the magistrate and without recording grounds of belief as required under the Proviso of section 42 and the legal procedure in preparing the recovery memo was not followed and the signature of the accused was not obtained after preparing the same. The learned trial court has ignored the shortcomings and lapse in the prosecution version, recovery process and evidence and the finding of the learned trial court is perverse and illegal. The impugned judgement convicting and sentencing the accused is not sustainable under law and is liable to be set aside.

35. The appeal is therefore **allowed**. The impugned judgement dated 16.1.2013 passed by Additional Sessions Judge, Court no.3, in Sessions Trial No. 256 of 2002 is set aside and accused-appellant **Ram Charan Jatav** is **acquitted** from the charge under sections 18/20 of the NDPS Act. If he is in jail, he be released forthwith.

36. Office is directed to transmit the lower court record along with copy of this judgement to the learned court below for information and necessary compliance.

(2020)06ILR A402
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2017

BEFORE

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

Criminal Appeal No. 813 of 1991

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

Counsel for the Appellants:
Sri V.C. Katiyar, Sri Pradeep Kumar, Sri Raghuvansh Mishra, Sri Rahul Mishra

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

A. Criminal Law - Code of Criminal Procedure, 1973, Section 157- Ante-Timed F.I.R- Upon going through the evidence of P.W4 S.I. Chandra Shekhar Gupta, we find that the time at which the special report was dispatched to the higher authority in Badaun has been deliberately suppressed by him and hence, an adverse inference can safely be drawn against the prosecution from the fact that the police constable who had gone to Badaun to deliver the special report to the higher authorities, had returned at 8 P.M. on 30.07.1989 that there was an inordinate delay on the part of the prosecution in dispatching the special report to the higher authority which indicates that the F.I.R. of the incident is ante-timed and it was not lodged at the time mentioned in the check F.I.R.

Deliberate suppression of the Special Report and inordinate delay in sending the same to the Magistrate is indicative of the F.I.R being ante-timed.

The absence of any blood under the cot of the deceased although each of the accused-appellants had fired at him, gives rise to a very strong suspicion that the incident had not taken place at the place alleged by the prosecution and P.W.1 by deposing that a lot of blood was found spilled on the ground, had spoken a lie before the trial court**.**

The testimony of a witness, unsupported and contradicted by other evidence (Blood marks), renders the case of the prosecution suspicious and unreliable.

B. Evidence Law - Indian Evidence Act, 1872 – Section 3- Testimony of Related Witnesses- Reliability- In a case where the occurrence takes place partly inside the house and partly outside the family members and the close relatives are bound to be the natural witnesses and they cannot be said to be the chance witnesses. The mere fact that the witnesses are related to the deceased cannot be ground to discard their evidence. Both the natural witnesses and the chance witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with law.

Relatives of the deceased who are present in the house at the time of the commission of the offence are natural witnesses and relationship of the witnesses cannot be a factor to discard their evidence, provided the same is legally admissible and trustworthy.

C. Evidence Law - Indian Evidence Act, 1872- Section 114 (g)- Withholding evidence- Adverse Inference by the Court- Jagan, in whose chaupal murder of Dhanpal was committed would have been the best witness to prove the prosecution's claim that the deceased along with his father and cousin brother, had slept in his chaupal on the night of the incident, was strangely not produced as witness by the prosecution during the trial. Since no reason is forthcoming for non-production of Jagan as a witness during the trial, we have no option but to draw an adverse inference that in case he was examined as a witness, he would not have supported the prosecution case.

Where the prosecution withholds the best evidence deliberately, then the Court may draw an adverse inference that if produced, the said

witness would not have supported the case of the prosecution.

D. Evidence Law - Indian Evidence Act, 1872 – Section 155- Credibility of witness- Contradiction between ocular and oral evidence- The inconsistency in the medical and ocular evidence goes to show that the incident had not taken place in the manner alleged and also that the two witnesses produced by the prosecution were actually not present on the spot.
Where the medical evidence contradicts the ocular version, then the same leads to the conclusion that the witnesses are untrustworthy and their presence on the spot is doubtful. (Para 21,22,25,27,33)

Criminal Appeal Allowed. (E-3)

Case law relied upon/ discussed:-

1. Waman & ors. Vs St. of Maha. (2011) Crl. L.J. 4827

2. Balraje @ Trimbak Vs St. of Maha, (2010) 70 ACC 12 SC, (2010) 90 AIC 32

3. St. of U.P. Vs Naresh & ors, (2011) 75 ACC 215 SC, (2011) 106 AIC 76 SC.

4. Thoti Manohar Vs St. of A.P., (2012) 78 ACC 511 SC

5. Mano Dutt & anr. Vs St. of U.P., (2012) 77 ACC 209

6. Namdeo Vs St. of Maha.,(2007) 58 ACC 414 (52) , (2007) 54 AIC 162

(Delivered by Hon'ble Bala Krishna Narayana, J. &
Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Rahul Mishra and Sri Pradeep Kumar, learned counsel for the appellants and Smt. Manju Thakur, State Law Officer for the State.

2. This appeal has been preferred by the appellants against the judgement and order dated 19.04.1991 passed by Ist Additional Session Judge, Badaun in S.T. No.17 of 1990, State Vs. Nathoo and others, by which the appellants have been convicted and sentenced to imprisonment for life under Section 302 read with Section 34 I.P.C.

3. Briefly stated the facts of this case are that deceased Dhanpal was on friendly terms with accused Nathoo (A1) and used to visit the latter's house. Accused Prem Pal (A2) and Jai Lal (A3) were the friends of Nathoo (A1). The deceased developed intimate relations with Smt. Sushila, wife of Nathoo (A1). About 10 days before the incident, Smt. Sushila eloped and Nathoo (A1) held the deceased responsible for it and started bearing enmity against him. On 29.07.1989, informant Balak Ram, deceased Dhanpal and Raja Ram, nephew of the informant were sleeping in the chaupal of Jagan. A lit lantern was hanging on the wall-peg. Balak Ram and Raja Ram also had torches with them. At about 11.30 P.M., the informant was awakened by some noise and he flashed the torch. He saw the three accused-appellants, all armed with pistols. Nathoo (A1) then said that Dhanpal had eloped with his wife, he will kill him. Thereafter, each of the three accused fired a shot at Dhanpal and he died on the spot. The informant and Raja Ram raised an alarm but none came to the spot. The accused-appellants then ran away towards east.

4. On 30.07.1989, the informant went to the police station with the village chaukidar, and gave a written report of the occurrence (Ext.Ka.1) at P.S.- Binawar, District- Badaun at 6.30 A.M., scribed by one Shiv Kumar Sharma. On the basis of the written report (Ext.Ka.1), check F.I.R. (Ext.Ka.13) and G.D. Entry (Ext.Ka.14)

were prepared and a case, namely, Crime No. 341/89 u/s 302 I.P.C. was registered against the accused-appellants.

5. P.W.4 S.I. Chandra Shekhar Gupta was entrusted with the investigation of the case, who recorded the statements of the informant and the Head Moharrir at the police station and then reached the place of occurrence. He inspected the place of the occurrence on the pointing out of the P.W.1 informant Balak Ram and P.W.2 Raja Ram, and prepared its site plan (Ext.Ka.4). He then prepared the inquest report (Ext.Ka.5) and other related papers (Exts.Ka.6 to Ka.10). He got the dead body of the deceased sealed and dispatched for postmortem through Constable Ganga Saran and village chowkidar Om Prakash. On the same day, he interrogated P.W.2 Raja Ram and took blood-stained 'baan' of the cot and mattress from the place of occurrence and sealed them separately vide memo (Ext.Ka.11). He inspected the lantern which was said to be burning on the spot at the relevant time and also the torches of the complainant and Raja Ram and gave them back in their supurdagi, vide memo (Ext.Ka.2).

6. P.W.3 Dr. S.P. Behal, the then Emergency Medical Officer, District Hospital- Badaun, conducted the postmortem on the dead body of the deceased on 30.07.1989 at 4 P.M. According to his opinion, the deceased was aged about 22 years and had died about 3/4 day ago. The deceased was of average built. Rigor mortis was present in upper and lower limbs but had passed off from the neck. The doctor found the following antemortem injuries on the person of the deceased :-

(1) A firearm injury on the right side of abdomen 9 cm away from umblicus at 10 o'clock position size 2 cm x 2 cm x cavity deep. Direction medially and backwards. Surrounded by blackening and tattooing in an area of 6 cm circular. Margins charred and inverted.

(2) A firearm injury on the left side of skull at parietal bone 10 cm above the left ear, size 2 cm x 2 cm x skull deep. Margins inverted. Blackening and tattooing present.

(3) An abraded firearm wound on the right side of chest 9.5 cm above the nipple at 10 o'clock position, size 1.5 cm x 1 cm x skin deep. Tattoing present at margins.

(4) Multiple small puncted firearm abrasions on the right side of chest at and around clavicular area front of chest and right side of chin and face in an area of 18 cm x 10 cm. Tattooing of skin present.

7. On internal examination, the doctor found that in the antemortem injury of skull, there was a circular fracture in left parietal bone and its size was 2 cm x 2 cm. A long bullet was recovered from the brain matter. Membranes of the brain were lacerated and they corresponded to the skull injury. There was blood clot about 100 gms, in the left side of brain. Peritoneum was lacerated in the abdomen. Blood clot, weighing about 200 gms, was present in the abdominal cavity. Intestines were lacerated at places and 9 small pellets and two wadding pieces were recovered from the abdominal cavity. Indigested food was present in small intestine. Some faecal matter and gases were present in large intestine. According to P.W.3 Dr. S.P. Behal, the death of the deceased had been caused due to shock and haemorrhage as a result of antemortem injuries on the skull and stomach. The doctor prepared the postmortem report and proved the same as (Ext.Ka.3). The doctor sealed the bullet, pellets and wadding pieces which were

recovered from the dead body and handed them over to the constable along with one vest, one underwear and one amulet which were worn by the deceased.

8. The Investigating Officer, after completing the investigation, submitted charge-sheet (Ext.Ka.12) against all the accused-appellants u/s 302 I.P.C. before Chief Judicial Magistrate, Badaun. Since the offence mentioned in the charge sheet was triable exclusively by the Court of Sessions, Chief Judicial Magistrate, Badaun committed the the accused-appellants for trial to the Court of Sessions Judge, Badaun where the case was registered as S.T. No.17 of 1990, State Vs. Nathoo and others and made over for trial from there to the Court of Ist Additional Sessions Judge, Badaun, who on the basis of material collected during investigation and after hearing the prosecution as well as accused-appellants on the point of charge, framed charge u/s 302/34 I.P.C. against the accused-appellants. The accused-appellants abjured the charge and claimed trial.

9. The prosecution in order to prove its case examined as many as four witnesses of whom P.W.1 informant Balak Ram, father of the deceased and P.W.2 Raja Ram, nephew of the informant were examined as witnesses of fact while P.W.3 Dr. S.P. Behal, the medical officer who had conducted the postmortem on the dead body of the deceased and P.W.4 S.I. Chandra Shekhar Gupta, the Investigating Officer of the case were produced as formal witnesses.

10. The accused-appellants in their statements recorded under Section 313 Cr.P.C. alleged false implication in the case due to enmity and village partibandi. Accused-appellant no.2, Prem Pal further stated that he and the other accused-appellants were real brothers.

11. The accused-appellants examined D.W.1 Sri Arvind Kumar, Advocate Oath Commissioner and D.W.2 Sri Gyanendra Nath Gupta, Advocate Oath Commissioner to show that P.W.2 Raja Ram had twice on 07.03.1990 and 14.03.1990, sworn two affidavits (Exts.Kha.4 and Kha.3) in which he had mentioned that in the night of 29.07.1989 at about 11.30 P.M. he was sleeping in his field and that he had not seen the incident and that he had falsely been made an eye witness of the incident by Balak Ram.

12. Learned Ist Additional Sessions Judge, Badaun, after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the entire evidence on record, both oral as well as documentary, convicted the accused-appellants u/s 302/34 I.P.C. and sentenced them to imprisonment for life.

13. Hence, this appeal.

14. It has been submitted by the learned counsel for the appellants that the F.I.R. in this case which is highly belated was scribed after due deliberations and consultations with the police after the dead body of the deceased was discovered falsely implicating the appellants and is ante-timed. The prosecution has miserably failed to prove the motive spelt out in the F.I.R. for the accused-appellants to commit the murder of the deceased. Learned trial Judge committed a patent error of law in placing reliance on the so-called eye-account of P.W.1 informant Balak Ram and P.W.2 Raja Ram who are father and cousin brother of the deceased and hence, highly

interested in seeing the accused-appellants convicted for the murder of deceased on account of admitted previous enmity and whose presence at the time and place of occurrence is wholly unnatural and doubtful. The medical evidence on record neither corroborates the time of occurrence nor the manner in which the murder of the deceased was allegedly committed by the accused-appellants, as narrated in the F.I.R. Absence of any blood at the place of occurrence clearly indicated that the deceased had not been murdered at the place mentioned in the F.I.R. and after he was found dead, his body was brought from the place of actual occurrence to the chaupal of Jagan and kept there. Neither the recorded conviction of the accused-appellants nor the sentences awarded to them can be sustained and are liable to be set-aside.

15. Per contra Smt. Manju Thakur, State Law Officer appearing for the State advanced her submissions in support of the impugned judgement and order. She submitted that it is fully proved from the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram that the deceased Dhanpal was murdered by the accused-appellants while he was sleeping in the chaupal of Jagan with P.W.1 and P.W.2 at about 11.30 P.M. on 29.07.1989. There is no material discrepancy in the medical evidence vis-a-vis the eye witness account. It was proved beyond all reasonable doubts from the eye witness account of P.W.1 informant Balak Ram and P.W.2 Raja Ram and other evidence on record that deceased Dhanpal was shot dead by the accused-appellants while he was sleeping on a cot in the chaupal of Jagan. Absence of blood below the cot on which he was sleeping at the place of occurrence is not sufficient to disbelieve the prosecution claim that the deceased Dhanpal was shot dead at the place mentioned in the F.I.R. The motive as well as the time, place and manner of attack as well as the identity of the perpetrators of crime stood fully proved from the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram. The conviction of the accused-appellants recorded by the trial court is based on cogent reasons and the sentence awarded to them is supported by relevant considerations. The impugned judgement and order do not suffer from any illegality or legal infirmity and do not require any interference by this Court. This appeal lacks merit and is liable to be dismissed.

16. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not ?

17. The first ground on which the learned counsel for the appellants have challenged the appellants conviction is that the F.I.R. in this case is ante-timed. There is an inordinate and unexplained delay of seven hours in lodging the same and upon perusal of the facts deposed by P.W.2 Raja Ram in the last paragraph of his examination-in-chief, it transpires that the same was prepared after due deliberations and consultations with the police and after the police had seen the deceased's body and inspected the crime scene, falsely implicating the accused-appellants on account of which the very foundation of the prosecution case is shattered and the entire case becomes suspicious and doubtful. Record of this case shows that the incident had taken place at about 11.30 P.M. on 29.07.1989 in the chaupal of Jagan in village Bhooripur, P.S.- Binawar, District- Badaun. The distance between the place of occurrence and P.S.- Binawar where the written report of the incident (Ext.Ka.1) was given by P.W.1 informant Balak Ram as mentioned in the

check F.I.R. is about 8 km. The check F.I.R. (Ext.Ka.13) shows that the case was registered on 30.07.1989 at 6.30 A.M. As far as the question of delay in lodging the F.I.R. of the occurrence is concerned, in our opinion the same was satisfactorily explained by P.W.1 informant Balak Ram by deposing in his examination-in-chief on page 20 of the paper book that he had not gone to the police station immediately after the occurrence but had left for the police station in the early hours of the morning with the village chowkidar.

18. Now coming to the question whether the F.I.R. in this case was actually registered at 6.30 A.M. on 30.07.1989 or not, we have before us the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram, the two eye witnesses of the occurrence. Another issue which is interconnected with this issue is that whether the police had arrived at the place of occurrence before the F.I.R. was registered and had then returned to the police station with P.W.1 informant Balak Ram and the village chowkidar and then the F.I.R. of the incident was registered or the police had arrived at the place of occurrence after the F.I.R. of the incident had been lodged by P.W.1 informant Balak Ram at P.S.- Binawar, District- Badaun where he had gone with the village chowkidar early in the morning after the incident had taken place at about 11.30 P.M.

19. P.W.1 informant Balak Ram in his examination-in-chief on page 17 of the paper book has deposed that he had gone to P.S.- Binawar with the village chowkidar in the morning. He had got the written report of the incident scribed in front of the police station by a man and he had written whatever P.W.1 informant Balak Ram had dictated and after the contents of the written report were read over to him, he had put his thumb impression thereon. He proved the written report of the incident as (Ext.Ka.1). On the same page, he further deposed that the police had reached the village at about 10 A.M. However, P.W.2 Raja Ram in paragraph 27 of his cross-examination on page 41 of the paper book deposed that when the police had come to the village, thereafter P.W.1 informant Balak Ram had returned with the police to the police station and he had heard the police personnel telling P.W.1 informant Balak Ram that he should lodge the F.I.R. of the incident on which P.W.1 informant Balak Ram had gone to the police station with the police personnel. The aforesaid discrepancy in the testimonies of P.W.1 informant Balak Ram and P.W.2 Raja Ram on the point whether the F.I.R. of the incident was lodged before the police had arrived at the place of occurrence or the police on receiving information about the incident from some other source, had reached the place of occurrence and thereafter, returned with P.W.1 informant Balak Ram to the police station and then the F.I.R. of the incident was then lodged, gives rise to a very strong doubt that the F.I.R. of the incident is a product of police interference. It is significant to note that the learned D.G.C. (Criminal) did not recall P.W.2 Raja Ram for getting the facts deposed by him in paragraph 27 of his cross-examination clarified. Although, the prosecution case is that the F.I.R. was lodged at 6.30 A.M. on 30.07.1989 but the facts of the case and the evidence of the witnesses show that the F.I.R. could not have been lodged at 6.30 A.M. The distance between the place of occurrence and the place of incident is about 8 km. P.W.4 S.I. Chandra Shekhar Gupta, the Investigating Officer of this case, on page 56 of the paper book in his statement

recorded before the trial court, has stated that it takes about four hours on foot to reach the police station from the village where the incident had taken place. P.W.1 informant Balak Ram in his examination-in-chief on page 17 of the paper book to which we have already referred to hereinabove, has stated that he had left for P.S.- Binawar with the village chowkidar early in the morning. Although he has not disclosed the exact time but we can safely presume that he had left for the police station between 4.30 and 5 A.M. by which time some light is visible in that part of the year in which the incident had taken place. P.W.1 informant Balak Ram in his statement has not deposed that he had gone to the police station by a vehicle. Therefore, we can safely infer that he had gone to the police station with the village chowkidar on foot and in that case, it was not possible for him to have reached the police station and lodge the F.I.R. at 6.30 A.M. after getting the same scribed in front of the police station and he could not have reached the police station before 8.30 A.M.

20. Another very clinching circumstance which supports the argument of the learned counsel for the appellants that the F.I.R. in this case is ante-timed is that the police had arrived at the place of incident by jeep as deposed by P.W.4 S.I. Chandra Shekhar Gupta in his cross-examination on page 57 of the paper book around 11 A.M. which is the time at which the inquest had commenced as is evident from the perusal of the inquest report (Ext.Ka.5). Now the question which arises for our consideration is that if the F.I.R. in this case was lodged at 6.30 A.M., why it took more than four hours for the police to reach the place of incident. P.W.4 S.I. Chandra Shekhar Gupta, the Investigating Officer of this case, in his examination-in-chief on page 48 of the paper book has categorically deposed that the case was registered on 30.07.1989 at about 6.30 A.M. at P.S.- Binawar, District- Badaun in his presence and he had taken up the investigation of the case. There is no whisper of any explanation in his evidence for his failure to reach the place of occurrence promptly or atleast within a reasonable time. No prudent man can presume that it will take three or four hours for a police jeep to cover a distance of 8 kms.

21. There is another very significant aspect of the matter which was brought to our notice by the learned counsel for the appellants by referring to paragraph 16 of the statement of P.W.4 S.I. Chandra Shekhar Gupta, in which he had stated that the constable who had gone to Badaun to deliver the special report to the higher authorities had returned to the police station at 8 P.M. Placing reliance on the aforesaid extract of the statement of P.W.4 S.I. Chandra Shekhar Gupta, the learned counsel for the appellants has submitted that the aforesaid fact shows that the F.I.R. was written much later and was ante-timed and its special report was dispatched sometime in the afternoon on 30.07.1989. Upon going through the evidence of P.W4 S.I. Chandra Shekhar Gupta, we find that the time at which the special report was dispatched to the higher authority in Badaun has been deliberately suppressed by him and hence, an adverse inference can safely be drawn against the prosecution from the fact that the police constable who had gone to Badaun to deliver the special report to the higher authorities, had returned at 8 P.M. on 30.07.1989 that there was an inordinate delay on the part of the prosecution in dispatching the special report to the higher authority which

indicates that the F.I.R. of the incident is ante-timed and it was not lodged at the time mentioned in the check F.I.R.

22. The next ground on which the learned counsel for the appellants has assailed the accused-appellants conviction is that the prosecution has miserably failed to prove the place of occurrence by any cogent and reliable evidence. As per the prosecution case, the deceased Dhanpal was shot dead by the accused-appellants while he was sleeping on a cot in the chaupal of Jagan along with P.W.1 informant Balak Ram and P.W.2 Raja Ram who were also sleeping on adjacent cots. Both P.W.1 and P.W.2 in their statements recorded before the trial court have deposed that the deceased was shot dead by the accused-appellants while he was sleeping in the chaupal of Jagan. P.W.1 informant Balak Ram in his cross-examination on page 23 of the paper book had further deposed that blood was spilled over an area of about 1 and ½ ft. on the ground and the Investigating Officer had collected plain and blood-stained earth from the place of occurrence. However, P.W.4 S.I. Chandra Shekhar Gupta, in paragraph 21 of his statement on page 25 of the paper book, has categorically deposed that he had neither found any blood under the cot of the deceased nor any pellet. The absence of any blood under the cot of the deceased although each of the accused-appellants had fired at him, gives rise to a very strong suspicion that the incident had not taken place at the place alleged by the prosecution and P.W.1 by deposing that a lot of blood was found spilled on the ground, had spoken a lie before the trial court.

23. The third ground on which the learned counsel for the appellants has castigated the accused-appellants conviction is that the prosecution has failed to prove the motive, as disclosed by the informant in the F.I.R., for the appellants to commit the murder of the deceased. It appears from the perusal of the F.I.R. and the evidence of the two witnesses of fact, P.W.1 informant Balak Ram and P.W.2 Raja Ram that Smt. Sushila, wife of Nathoo (A1) had eloped and Nathoo (A1) suspected that his wife had eloped with deceased Dhanpal and on account of aforesaid suspicion about 10 days before the occurrence, a quarrel had taken place between Nathoo (A1) and the deceased whereafter Nathoo (A1) had threatened to kill him and the murder of the deceased was the outcome of the aforesaid animosity. It is significant to note that there is nothing in the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram which may indicate that either P.W.1 informant Balak Ram or P.W.2 Raja Ram had witnessed the alleged quarrel which had taken place between the deceased Dhanpal and Nathoo (A1) after which he had threatened to kill the deceased Dhanpal. No report regarding the alleged quarrel was lodged by the deceased with the police. There is also no direct evidence on record showing that the wife of Nathoo (A1) had actually eloped with the deceased and the theory of elopment is based primarily upon suspicion. Both the witnesses of fact had categorically deposed in their evidence that they had heard of Smt. Sushila, wife of Nathoo (A1) having an affair with deceased Dhanpal. The evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram on the point of motive is legally inadmissible being hearsay. Moreover, it has come in the evidence that Smt. Sushila had returned to her husband Nathoo (A1) and on the date of the occurrence, she was living with him. Thus,

in the absence of any direct evidence of the incident involving the quarrel between the deceased and Nathoo (A1) in which he had allegedly stated over the elopment of Smt. Sushila, wife of Nathoo (A1) with the deceased whereafter he had threatened to kill Dhanpal, we cannot presume that no such incident had taken place and the motive spelt out by the prosecution in the F.I.R. and as later testified by the prosecution witnesses in fact appears to have been concocted for the purpose of the case. Thus, we hold that the prosecution has failed to prove the motive for the accused-appellants to commit the offence.

24. The fourth ground on which the learned counsel for the appellants has challenged the appellants' conviction is that the trial court had committed a patent error of law in placing reliance upon the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram who claimed themselves to be the eye witnesses of the occurrence for the purpose of convicting the accused-appellants. In this regard, it has been canvassed that both P.W.1 informant Balak Ram and P.W.2 Raja Ram are closely related to the deceased Dhanpal. P.W.1 informant Balak Ram being his father and P.W.2 Raja Ram his cousin brother and hence, both were partisan and inimical towards the accused-appellants and highly interested in getting them convicted. Moreover, their presence as well as the presence of the deceased at the time and place of occurrence is absolutely unnatural. No reason has been given by P.W.1 informant Balak Ram for not sleeping in his own house. He has merely stated that on the date of the incident, his four sons, three daughters and his wife were sleeping in the house. He has nowhere deposed that no space was left for him and his son deceased Dhanpal to sleep in his house. The reason given by P.W.2 Raja Ram for P.W.1 informant Balak Ram sleeping along with the deceased Dhanpal in the chaupal of Jagan despite having their own separate fairly huge house in the village, does not inspire confidence. Moreover P.W.2 Raja Ram has failed to furnish any reason for his sleeping in the chaupal along with the deceased and P.W.1 informant Balak Ram, leaving the comfort of his own house. Before proceeding to examine the sustainability of the aforesaid ground of challenge to the accused-appellants conviction, we consider it proper to first have a glance at the law on the issue :-

The Apex Court in ***Waman and others v. State of Maharashtra*** *reported in* ***2011 Crl. L.J. 4827*** *has observed in paragraph no.9 which reads as follows :*

"In ***Balraje @ Trimbak v. State of Maharashtra, 2010 (70) ACC 12 (SC) = 2010 (90) AIC 32***, this Court held that mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eye witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed toward the accused. After saying so, this Court held that if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same."

It has been further observed in ***Waman (supra)*** *that relationship cannot be*

a factor to affect the credibility of a witness. The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence, has to lay foundation if plea of false implication is made and the Court has to analyse evidence of related witnesses carefully to find out whether it is cogent and credible. The same view has been reiterated in ***State of U.P. v. Naresh and others****, reported in* ***2011 (75) ACC 215 (SC) = 2011 (106) AIC 76 (SC).***

In ***Thoti Manohar v. State of A.P.****, reported in* ***2012 (78) ACC 511 (SC),*** *it has recently been observed by Hon'ble Supreme Court that in case the occurrence partly takes place inside the house and partly outside it, the family members and the close relatives are bound to be the natural witnesses. They cannot be said to be chance witnesses but they are most natural witnesses. Further it has also been observed that the minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution.*

Regarding evidentiary value of testimony of the interested or relatives witnesses, Hon'ble Supreme Court in ***Mano Dutt and another*** *v.* ***State of U.P.****, reported in* ***2012 (77) ACC 209****, has observed in paragraph no.19 referring to the case of* ***Namdeo*** *v.* ***State of Maharashtra****, reported in* ***2007 (58) ACC 414 (52) = 2007 (54) AIC 162,*** *that this Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with law.*

25. Thus, what follows from the reading of the aforesaid authorities is that in a case where the occurrence takes place partly inside the house and partly outside the family members and the close relatives are bound to be the natural witnesses and they cannot be said to be the chance witnesses. The mere fact that the witnesses are related to the deceased cannot be ground to discard their evidence. Both the natural witnesses and the chance witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with law.

26. We now propose to evaluate the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram on the touchstone of the principles enunciated by the Apex Court hereinabove.

27. The occurrence in this case had neither taken place partly inside the deceased's house nor partly outside it. Thus, the two eye witnesses, P.W.1 informant Balak Ram and P.W.2 Raja Ram cannot be said to be the natural witnesses. Both the witnesses admittedly have their own houses in the village which were at some distance from the place of occurrence. Both the witnesses have deposed that on the night of the occurrence, they along with the deceased had gone to sleep in the chaupal of Jagan. We have very carefully gone through the statements of both the eye witnesses and we have found that P.W.1 informant Balak Ram has failed to come up with any reason in his examination-in-chief for the deceased and himself not sleeping in their house. Similarly, P.W.2 Raja Ram has in his examination-in-chief deposed that P.W.1 informant Balak Ram and deceased had slept in the chaupal of Jagan due to paucity of place in their house but he has failed to

come up with any reason for his sleeping along with P.W.1 informant Balak Ram and the deceased in the chaupal of Jagan. P.W.1 has not stated anywhere in his evidence that on the night of the occurrence, he was forced to sleep along with the deceased Dhanpal in the chaupal of Jagan due to scarcity of space in his house. Moreover, there is a material discrepancy in the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram which creates a doubt about the genuineness of their claim of being the eye witnesses of the occurrence. P.W.1 informant Balak Ram in his cross-examination on page 20 of the paper book has submitted that the appellants had shot Dhanpal while he was sleeping and he had died instantaneously. However, P.W.2 Raja Ram in his cross-examination on page 38 of the paper book has stated that after Dhanpal had received injury, he had got up and sat on the bed and then he had fallen back on the bed. While getting up, he had made a distress call *"ki dadaa chalo"*. But neither he nor P.W.1 informant Balak Ram assured him that they were coming. The aforesaid discrepancy in the statements of P.W.1 informant Balak Ram and P.W.2 Raja Ram gives rise to an irresistible conclusion that neither P.W.1 nor P.W.2 had witnessed the occurrence. The prosecution having failed to come up with any feasible explanation for the deceased, his father P.W.1 informant Balak Ram and his cousin P.W.2 Raja Ram choosing to sleep in the chaupal of Jagan, instead of sleeping in their own houses coupled with the absence of blood on the ground below the cot of the deceased evinces that neither the incident had taken place at the place mentioned in the F.I.R., as already held by us hereinabove nor any of the two eye witnesses had witnessed the same. Jagan, in whose chaupal murder of Dhanpal was committed would have been the best witness to prove the prosecution's claim that the deceased along with his father and cousin brother, had slept in his chaupal on the night of the incident, was strangely not produced as witness by the prosecution during the trial. Since no reason is forthcoming for non-production of Jagan as a witness during the trial, we have no option but to draw an adverse inference that in case he was examined as a witness, he would not have supported the prosecution case that the deceased Dhanpal and P.W.1 informant Balak Ram and P.W.2 Raja Ram had slept in his chaupal on the night of occurrence.

28. Thus, after a careful analysis of the evidence of P.W.1 informant Balak Ram and P.W.2 Raja Ram, we are of the view that the entire prosecution story which has been woven around the testimony of P.W.1 informant Balak Ram and P.W.2 Raja Ram that the deceased was shot dead by the accused-appellants at about 11.30 A.M. on the date of the incident while they were sleeping in the chaupal of Jagan, does not inspire confidence.

29. The final ground on which the learned counsel for the appellants has challenged the accused-appellants conviction is that the medical evidence on record does not corroborate the ocular evidence vis-a-vis the manner of incident. It is contended by the learned counsel for the appellants that the injuries found on the body of the deceased Dhanpal could not have been inflicted on him in case the shots were fired at him by the accused-appellants if he was sleeping on the cot with his head towards west and his legs towards east. P.W.1 informant Balak Ram in paragraph 10 of his statement has stated that the deceased was shot at while he was lying

down on the cot. His head was towards east. The accused-appellants were at a distance of about 1 and ½ pace and Nathoo (A1) was facing westwards. The postmortem report of the deceased shows that the antemortem injury nos.1, 3 and 4 noted on the body of the deceased were on the right side of his body while antemortem injury no.2 was on the left side of the corpse.

30. It is contended that the aforesaid injuries could not have been caused while the deceased was sleeping if the shots were fired by the accused-appellants while standing at the feet of the deceased, as shown in the site plan (Ext.Ka.4). The direction of these injuries should have been upwards and thus the inconsistency in the medical and ocular evidence goes to show that the incident had not taken place in the manner alleged and also that the two witnesses produced by the prosecution had not witnessed the incident. In this regard, it would be useful to refer to the evidence of P.W.3 Dr. S.P. Behal, who had conducted postmortem on the body of the deceased. P.W.3 in his cross-examination on page 46 of the paper book has deposed that the antemortem injury no.1 found on the deceased's body could be caused only if he was shot from the right side. But if the deceased was standing, then the injury could be caused even if the shot fired by the assailant was from the front or from the right side. As regards antemortem injury no.2, he opined that the same could be inflicted only if the shot was fired by the assailant in a standing posture from the left side at the head. Qua antemortem injury no.3 , he stated that the same could be caused if the shot was fired from the right side and injury nos.3 and 4 could be caused by a single shot. The direction of none of the injuries was upward.

31. A perusal of the site plan of the incident (Ext.Ka.4) indicates that the three cots on which the deceased, P.W.1 informant Balak Ram and P.W.2 Raja Ram had slept, were laid in east-west direction. The deceased was in the middle. In the site plan (Ext.Ka.4), the position of the accused-appellants has been denoted by the letter "C" which is towards south-east of the cot of the deceased. The distance has been given as one pace. The accused-appellants were standing towards the feet of the deceased as both P.W.1 informant Balak Ram and P.W.2 Raja Ram have deposed that they had slept with their head towards west and legs towards east. In view of the evidence of P.W.3 Dr. S.P. Behal, if the shots were fired at the deceased from the point "C", which was from the right side of the deceased's bed while he was lying, in that case it was possible for the deceased to have received antemortem injury nos. 1, 3 and 4 which were described as firearm wound :-

1) on the right side of abdomen 9 cm away from umblicus at 10 o'clock position size 2 cm x 2 cm x cavity deep. Direction medially and backwards. Surrounded by blackening and tattooing in an area of 6 cm circular. Margins charred and inverted.

3) on the right side of chest 9.5 cm above the nipple at 10 o'clock position, size 1.5 cm x 1 cm x skin deep. Tattooing present at margins.

4) on the right side of chest at and around clavicular area front of chest and right side of chin and face in an area of 18 cm x 10 cm. Tattooing of skin present.

32. No explanation is forthcoming from the prosecution's side as to how the antemortem injury no.2 was caused if the shots were fired by the accused-appellants

from the right side of the cot on which the deceased was sleeping with his head towards west and legs towards east while accused-appellants were standing in the south-east of the deceased's cot.

33. Thus, the inconsistency in the medical and ocular evidence goes to show that the incident had not taken place in the manner alleged and also that the two witnesses produced by the prosecution were actually not present on the spot.

34. Thus, after a meticulous marshalling of the facts of the case and a threadbare scrutiny of the evidence on record, we have no hesitation in holding that the prosecution failed to prove its case beyond all reasonable doubts. Neither the recorded conviction of the accused-appellants nor the sentences awarded to them can be sustained and are liable to be set-aside.

35. Thus, in view of the above, this appeal is accordingly **allowed**.

36. The impugned judgement and order is hereby set-aside.

37. The accused-appellants are acquitted of all the charges. They are on bail. They need not surrender. Their personal bonds are cancelled and their sureties discharged. However, the accused-appellants shall comply with the provisions of Section 437A of Cr.P.C.

(2020)06ILR A414
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.03.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Appeal No. 902 of 2013

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

Counsel for the Appellant:
Sri Santosh Shukla, Sri Ashutosh Yadav, Sri Manoj Kumar Srivastava, Sri Saurabh Gour, Sri Shyam Lal, Mrs. Abhilasha Singh

Counsel for the Opposite Party:
A.G.A., Sri Sanjay Kumar Dubey

A. Evidence Law - Indian Evidence Act, 1872- Section 118- Evidence of Child Witness- Sole witness- Reliability of- No serious effort was made by the learned trial Judge to satisfy himself whether P. W. 3 Ritik Yadav who was aged about six years old on the date of the incident and eight years on the date of recording of his statement was fit for deposition. His evidence came after eleven days of the incident and during this period, he had remained with his maternal grand parents. Considering his tender age on the date of occurrence, the possibility of his being tutored and influenced by his maternal grand father, cannot be ruled out. The unusual conduct of P. W. 3 Ritik Yadav immediately after alleged murder by his father, is another circumstance, which creates a doubt about the credibility of his evidence.

It is incumbent upon the trial court to make a serious effort to determine the intellectual capacity of a child witness and satisfy itself that the child is a competent witness and has not been tutored while staying for a long period with the prosecution witnesses.

B.Evidence Law - Indian Evidence Act, 1872- Section 118- Evidence of Child Witness- Sole witness- Reliability of - The trial Judge erred in law in convicting the appellant on the sole testimony of the child witness, son of the appellant without seeking corroboration from any other evidence. It has been repeatedly held that the evidence of a child witness is

always risky and dangerous unless it is available immediately after the occurrence and before there is any possibility of coaching and tutoring.
It is risky to place reliance upon the evidence of a Child Witness unless it is available immediately after the occurrence and is not tutored, and recording the conviction of the accused without seeking corroboration of the sole testimony of the child witness from other evidence would be an illegality.

C. Evidence Law - Indian Evidence Act, 1872- Section 65 –B (4)- Admissibility of Electronic Records- C.D.R. of the appellant's cell phone brought on record by the prosecution to prove that the appellant was present in Vrindawan are wholly inadmissible in evidence on account of the fact that the same were not accompanied with necessary certificate as required under Section 65 B (4) of the Indian Evidence Act.
Where the Call Detail Records obtained by the prosecution are not accompanied with the necessary Certificate as mandated by Section 65 B (4) of the Evidence Act, then the same are wholly inadmissible in evidence. (Para 21,22,25,27,30,31)

Criminal Appeal Allowed. (E-3)

Case Law relied upon/ Discussed:-

1. Bhagwan Singh & ors.Vs St. of M. P. (2003) 3 SCC 21

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

1. Heard Sri Shyam Lal, learned counsel for the appellant, assisted by Mrs. Abhilasha Singh and Sri J. K. Upadhyay, learned A. G. A. assisted by Sri Abhijeet Mukherjee, learned State Law Officer for the State.

2. This criminal appeal has been preferred by appellant, Raj Kumar against the judgement and order dated 7.2.2013 passed by the Additional Sessions Judge, Court No. 1, Hathras in S. T. No. 90/2011; State Versus Raj Kumar by which the appellant has been convicted under Section 302 I. P. C. and sentenced to imprisonment for life together with fine of Rs. 10,000/- and in case of default in payment of fine, one year's additional imprisonment.

3. The charge against the appellant Raj Kumar is that he had committed the murder of his wife Manju Devi on 20.7.2010 in his house in Mohalla-Jatan Kailash Nagar, district-Hathras by inflicting incised wounds on her neck with a knife.

4. It is interesting to note that the written report of the incident (Ext. Ka 11) was lodged by the accused-appellant himself at P. S.-Hathras, district-Hathras on 20.7.2010 at about 11.00 hrs. with regard to the incident which had taken place in the intervening night of 19/20.07.2010. In the written report it was stated by the accused-appellant that he had gone for Gowardhan Parikrama. On that night, his son Ritik had called him on phone asking him to return immediately and when he inquired about his wife, he told him that she was sleeping but he should come back to home immediately, on which, he became suspicious and came back to his home on motorcycle and on reaching there, he saw his wife, Manju Devi lying dead on the floor and blood was oozing out from her neck. Some un-known person had killed his wife by slitting her throat.

5. On the basis of the written report, Ext. Ka 11, chek F. I. R. (Ext. Ka 12) and the relevant G. D. entries were prepared vide nakal rapat No. 20, time 11.00 A. M.

6. The investigation of the case was entrusted to P. W. 8 S. I. Maan Pal Singh,

who immediately after registration of the case recorded the statement of the scribe of the chek F. I. R. and the informant/accused-applicant, reached the place of occurrence and held inquest on the dead body of the deceased and prepared the inquest report (Ext. Ka 1) and other connected documents and then inspected the place of occurrence and prepared its site plan (Ext. Ka 10). He recovered the bangles of Manju Devi, plain and blood stained earth from the place of occurrence and sealed the same on the spot and prepared the recovery memo of the aforesaid articles (Ext. Ka 3). He sealed the dead body of the deceased and dispatched the same to the mortuary where post mortem on the dead body of Manju Devi was conducted by P. W. 5 Dr. Navneet Kumar Arora on 20.7.2010 who also prepared and proved her post mortem report as (Ext. Ka 4). The post mortem report of the deceased indicates the following ante mortem injuries on the deceased's body :-

1) An abraded contusion on ant. aspect of neck 10 cm x 0.5 cm.

2) An incised wound on ant. aspect of neck 9 cm x 1 cm.

3) 3 stab wound on ant. aspect of neck 1 cm x 0.3 cm; 2 cm x 0.5 cm; 1 cm x 0.3 cm trachea cavity deep.

7. The cause of death was opined to be Asphyxia as a result of strangulation due to ante mortem chop injury over throat.

8. The investigation of the case was transferred on 20.7.2010 to P. W. 6 S.I. Ashok Vikrant at about 17.36 hrs. and thereafter to P. W. 8 S. I. Maan Pal Singh. On 24.7.2010 P. W. 2 Bhagwan Das Yadav, the father of the deceased, Manju Devi filed an application before the Circle Officer (City), Hathras stating therein that the murder of his daughter, Manju Devi had been committed by the appellant and his friend Vinod and in the said application the appellant's son Ritik Yadav was cited as eye-witness of the occurrence. The investigating officer recorded the statement of P. W. 2 Bhagwan Das Yadav and P. W. 3 Ritik Yadav, son of the appellant Raj Kumar on 31.7.2010. On 01.08.2010 the Investigating Officer arrested the appellant, Raj Kumar and co-accused Vinod made a confession before the police after his arrest that he had committed the murder of Manju Devi with the aid of the appellant, Raj Kumar and on his alleged pointing out the knife allegedly used in committing the deceased's murder was recovered on 01.08.2010 at about 1.00 P. M. The knife was seized and its' seizure memo (Ext. Ka 6) was prepared on the spot. The appellant, Raj Kumar in his statement recorded during the investigation pleaded not guilty and claimed trial. The Investigating Officer after completing the investigation submitted charge-sheet (Ext. Ka 6) against the appellant and the co-accused Vinod before the C. J. M., Hathras.

9. Since the offence mentioned in the charge-sheet was triable exclusively by the Court of Sessions, C. J. M., Hathras committed the case for the trial of the accused to the Court of Sessions Judge, Hathras where it was registered as S. T. No. 90 of 2011; State Versus Raj Kumar and made over for trial from there to the Court of Additional Sessions Judge, Court No. 1, Hathras who on the basis of the material on record and after giving an opportunity of hearing to the prosecution as well as the defence, framed charge against the accused under Section-302 I. P. C. Since co-accused Vinod was absconding, his trial was separated from the appellant, Raj Kumar. The accused-appellant Raj Kumar abjured the charge and claimed trial.

10. The prosecution in order to prove its case against the appellant examined as many as ten witnesses, out of whom P. W. 1 Shyam Babu witness of Panchayatnama, P. W. 2 Bhagwan Das Yadav, father of the deceased, P. W. 3 Ritik Yadav, who is the son of the appellant and deceased Manju Devi and eye-witness of the incident P. W. 4 Suresh, witness of recoveries and P. W. 9 Ram Babu Singh, the scribe of the written report of the incident (Ext. Ka 11) were examined as witnesses of fact, while P. W. 5 Dr. Navneet Arora who had conducted the post mortem and P. W. 6 S. I. Ashok Vikrant, the second investigating officer of the case, who had completed the investigation and filed charge-sheet (Ext. Ka 7), P. W. 7 Bhupendra Singh, witness of arrest of accused-appellant Raj Kumar, P. W. 8 S. I. Maan Pal Singh, the first investigating officer of the case who had conducted the inquest and proved the other related documents, site plan of the place of occurrence, recovery memo of the deceased's bangles and blood stained earth and P.W.10 Constable Anand Prakash who had registered the chek F. I. R. (Ext. Ka 12) and the relevant G.D. Entry of Case Crime No. 528 of 2010, were examined as formal witnesses.

11. The accused-appellant in his statement recorded under Section 313 Cr. P. C. denied the prosecution case as false and alleged false implication. He further stated that his son P. W. 3 Ritik Yadav had given evidence against him under the influence of his maternal-grand father (Nana) and he was a totally tutored witness.

12. The Additional Sessions Judge, Court No. 1, Hathras after considering the submissions advanced before him by learned counsel for the parties and scrutinizing the evidence on record convicted the appellant under Section 302 I. P. C. and awarded aforesaid sentence of life imprisonment to him by the impugned judgement and order.

13. Hence this appeal.

14. Sri S. Lal, learned counsel for the appellant has submitted that the appellant's wife had been murdered by some un-known person while he had gone to Gowardhan for orbiting Gowardhan Parwat and when he received a phone call from his son Ritik Yadav frantically asking him to come back and on reaching his home, he found his wife lying dead on the floor and blood was oozing out from his neck. He had promptly lodged the F. I. R. of the incident and since after the death of his wife Manju Devi, his son had gone to live with his maternal grand parents, it appears that they influenced and prevailed upon him by taking advantage of his tender age and his having remained in their custody for more than ten days after the death of his murder, he gave a tutored statement before the police falsely implicating him in the murder of his wife at the behest of maternal grand father. He has next submitted that there being evidence on record that immediately after the occurrence the maternal aunt of P. W. 3 and his maternal grand parents had arrived at the scene of occurrence but P. W. 3 Ritik Yadav had not told them anything indicating at the complicity of the accused-appellant in the murder of his wife, it is established that the statement of P. W. 3, which saw the light of the day after twenty one days of the incident was clearly manipulated and tutored and as such no reliance could have been placed by the learned trial Judge on his statement for the purpose of convicting the accused-appellant. He has further submitted that the trial Judge erred in law

in convicting the appellant for the murder of his wife on the solitary evidence of his son, P. W. 3, Ritik Yadav, who on the date of the incident was hardly six year's old young lad without seeking corroboration from any other evidence. C. D. R. (call detail record) pertaining to appellant's cell phone brought on record by the prosecution and proved by P. W. 3 for proving that appellant was not present at the place disclosed, were inadmissible in the absence of the recovery certificate as required under Section 65B (4) of the Indian Evidence Act, 1872. He has lastly submitted that such being the state of the evidence, neither the recorded conviction of the appellant nor the punishment awarded to him can be sustained and are liable to be set aside.

15. Per contra, Sri J. K. Upadhyay, learned A. G. A. has submitted that the child witness in this case P. W. 3, Ritik Yadav has given a vivid and cogent description of the occurrence and hence the trial judge did not commit any illegality or infirmity in convicting the appellant on the basis of his evidence. There is no material on record indicating any possibility of his tutoring and the delay in recording the statement of P. W. 3 Ritik Yadav by the police does not, in any manner, render his testimony un-reliable. This appeal lacks merit and is liable to be dismissed.

16. The only question which arises for our consideration in this appeal is whether the prosecution has been able to prove its' case against the appellant beyond all reasonable doubts or not ?

17. It is proved from the evidence of P. W. 5 Dr Navneet Kumar Arora, who had conducted autopsy on the body of the deceased and the post mortem report of the deceased (Ext. Ka 4) that the death of the deceased was homicidal. The issue which requires determination is whether the appellant is the author of the ante mortem injuries found on the dead body of Manju Devi ?

18. The main evidence led by the prosecution against the accused-appellant is the sole testimony of alleged child witness P. W. 3 Ritik Yadav, son of the appellant who was aged about six years' old at the relevant time of the incident. The corroborating evidence relied upon by the prosecution are that on the night of the incident, he had left his house with Vinod Yadav for relevant place with the object of orbiting Gowardhan Parwat is C. D. R. (Call Detail Record) of the appellant and Vinod which indicated that their cell phones location in the date of the incident was not in place disclosed by him, which were proved by P. W. 6 S. I. Ashok Vikrant, the second investigating officer of the case. Record shows that, it is not in dispute that at the time of the occurrence P. W. 3 Ritik Yadav was not alone in his house. It has come in his evidence that after the appellant had committed the murder of his mother, he started weeping, on which his father threatened to kill him also in case, he narrated the episode to anyone and thereafter his father took him to one Rinkoo Bhaiyya who lived in another room of his house and asked him to sleep with him. Thereafter, Rinkoo made him asleep. He had not told anything to Rinkoo Bhaiyya about the occurrence. It has also come in his evidence that one servant also used to sleep in his house and on the date of occurrence the servant whose name was Chhotu, was sleeping in the house.

19. Record further shows that although the incident had taken place on 20.7.2010, the prosecution version implicating the appellant and the co-

accused Vinod saw the light of the day on 24.7.2010, which was in the form of an application given to the Circle Officer (City), Hathras by the father-in-law of the appellant, P. W. 2 Bhagwan Das yadav and maternal grand father of P. W. 3 Ritik Yadav. Record also shows that the statement of P. W. 3 was not recorded by the Investigating Officer till 31.7.2010 whereafter the prosecution claims the appellant and the co-accused Vinod Yadav were arrested and on the pointing out of Vinod Yadav, crime weapon was recovered on 1.8.2010. Prosecution has failed to furnish any explanation for the inordinate delay on the part of the Investigating Officer in recording the statement of P. W. 3 Rinkoo Yadav.

20. It is not the case of the prosecution that any incriminating article was recovered either from the appellant or on his pointing out pursuant to any disclosure statement made by him before the police after his arrest.

21. From the perusal of the statement of P. W. 3 firstly, it transpires that no serious effort was made by the learned trial Judge to satisfy himself whether P. W. 3 Ritik Yadav who was aged about six years old on the date of the incident and eight years on the date of recording of his statement was fit for deposition. He simply asked him about the class in which he was studying, to which, he replied that he was studying in Class-II. He has further stated that it was not right to lie and it was good to serve one's parents.

22. We have very carefully gone through the statement of P. W. 3 and we cannot hold ourselves from expressing our surprise at the precision and vividness with which a young boy of six years had given his evidence before the trial Court. He seems to be remembering the minutest detail of the incident which took place in the night of the occurrence. He had gone to live with his maternal-grand parents on 20.7.2010 immediately after the incident and his statement under Section 161 Cr. P. C. was recorded by the Investigating Officer on eleventh day of the occurrence, i. e. 31.7.2010, during which period, he had remained in the exclusive custody of his maternal-grand parents and who since the date of the incident, as deposed by P. W. 3 were bearing the expenses of his studies, the possibility of his being under the influence of his maternal-grand parents cannot be ruled out. P. W. 3 Ritik Yadav in his examination-in-chief deposed that about two years back, his father, whose name is Raj Kumar Yadav and who is present in the Court had on the pretext of going to Gorwardan Parwat with the object of orbiting it, had left his house at about 8.00 P. M. accompanied by one Vinod Yadav. His father returned at about 12.00 hrs. in the midnight with Vinod Yadav whose house is behind Ram Mandir. His other house is in Vijay Nagar. They came at about 12.00 hrs. in the midnight. Vinod knocked at the door. His mother, whose name was Manju Yadav, opened the door and on seeing his father, she said that he had gone to Gowardhan Parwat with the object of orbiting it, then how he had returned so early on which his father replied that since he was not feeling well, he returned. Vinod strangulated his mother with a wire while his father stabbed her on the neck. Thereafter his mother died and then he started weeping, on which his father told him not to weep. He also told him that in case he told anyone about the incident, he would kill him also. Thereafter his

father had taken him to Rinkoo Bhaiyya and asked Rinkoo Bhaiyya to make him asleep, on which Rinkoo asked his father why cannot he sleep in his room. Then Rinkoo Bhaiyya made him asleep. His father had asked him to call him on phone after sometime. Thereafter Vinod and his father went somewhere. In the morning, he called his father from the phone of Rinkoo Bhaiyya.

23. Yet another aspect of the issue is, it is quite unnatural and highly improbable, that appellant and Vinod would slaughter the deceased right in front of his son, P. W. 3. This is explicitly self destructive conduct, while creating an eye-witness of the entire incident. No sane person would commit hara-kiri by creating an eye-witness.

24. Now, from the evidence of P. W. 3 Ritik Yadav, it transpires that despite his mother being murdered in his presence, he went back to sleep with Rinkoo bhaiyya.

25. The unusual conduct of P. W. 3 Ritik Yadav taken into consideration, having regard to child psychology coupled with the fact that his statement was not recorded by the police immediately after the occurrence but it was recorded after eleven days, the possibility of his having not seen the incident and his version being tutored, cannot be ruled out and hence his testimony does not appear to be reliable. Moreover, no explanation is coming forth from the side of the prosecution as to why Rinkoo and and the servant Chhotu, who as per the evidence of P. W. 3, were also present in the house, were not examined.

26. There is yet another very unusual aspect of the evidence of P. W. 3 that he in his cross examination stated that he had not stated anything about his mother being murdered by her father and co-accused Vinod either to Rinkoo, who was present in the house and the time of incident or the policeman who had come to his house in the morning. He had also deposed that when he had gone to his village, he had not told anything about the occurrence either to his Tau, Tai or Bua. He had not narrated anything to the police when it had come to his house in the morning about the occurrence. He further deposed in his cross-examination (on page 30 of the paper-book) that in the morning of the occurrence he had gone to the house of his aunt but he did not tell her anything about the occurrence.

27. Thus, in view of the foregoing analysis and evaluation of evidence of P. W. 3 Ritik Yadav, we are of the view that the trial Judge erred in law in convicting the appellant on the sole testimony of the child witness, son of the appellant without seeking corroboration from any other evidence. It has been repeatedly held that the evidence of a child witness is always risky and dangerous unless it is available immediately after the occurrence and before there is any possibility of coaching and tutoring.

28. A bare perusal of the deposition of P. W. 3 Ritik Yadav convinces us that whatever he had deposed before the trial Court was as a result of tutoring by his maternal-grand parents. Moreover, the evidence of a child in this case, which saw the light of the day after eleven days, his failure to disclose the occurrence either to the police which reached the place of occurrence immediately after lodging of the F. I. R. or to Rinkoo with whom he had allegedly slept or to his maternal aunt or to his maternal grand parents who had arrived at the place of occurrence in the morning immediately after learning about the murder of his mother.

29. The Apex Court in the case of ***Bhagwan Singh and others Versus State of M. P. (2003) 3 SCC 21*** while dealing with the issue of feasibility of recording the conviction on the basis of sole evidence of child witness without any corroborative evidence has observed as hereunder:

"20. In the case before us, the trial Judge has recorded demeanour of the child. The child was vacillating in the course of his deposition. From a child of six years of age, absolute consistency in deposition cannot be expected but if it appears that there was a possibility of his being tutored the court should be careful in relying on his evidence. We have already noted above that Agyaram, maternal uncle of the child, who first met him after the incident and took him along with his younger brothers to his father's village, has not been produced by the prosecution as witness in the court. It was most likely that if the child had seen the incident and identified the three accused, he would not have narrated it to Agyaram as the latter would have naturally inquired about the same. The conduct of his father Radheshyam who was produced as a witness by the prosecution is also unnatural that before recording the statement of the child by the police, he made no enquiries from the child.

21. We find some force in the submissions made by the learned counsel appearing for the State of Madhya Pradesh that looking to the age of child and his two younger brothers, it was most likely that they were with the mother and sleeping with her when she had gone to stay with her deceased father Mata Prasad. But the other possibility of the children being fast asleep when the elders of the house were attacked and killed cannot be ruled out as the incident is alleged to have happened in the midnight. Mere presence of the children in the house at the time of the incident is no assurance to the case of the prosecution that the eldest child got up on hearing hue and cries and had not only seen the incident but also identified the accused. Taking into consideration the child psychology a lad of six years having seen his mother being assaulted would have raised a cry; but he says that he quietly went back to sleep. It is also most unnatural even for a child that after witnessing his mother being assaulted by known persons he would go back to sleep to wake up late in the morning only when his maternal uncle Agyaram came to fetch him and his younger brothers to his father's village Alampur.

22. It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him. (See : Paras 14 15 of State of Assam vs. Mafizuddin Ahmed (1983) 2 SCC 14. In that case evidence of child witness is appreciated and held unreliable thus :

"14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its Judgment :-

.. the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring.

15. A bare perusal of the deposition of PW-7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his Nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition it is evident that he was not a

free agent and has been tutored at all stages by someone or the other".

30. Thus, upon a careful appraisal and appreciation of the evidence of P. W. 3 Ritik Yadav, child witness in this case, we find that his evidence came after eleven days of the incident and during this period, he had remained with his maternal grand parents. Considering his tender age on the date of occurrence, the possibility of his being tutored and influenced by his maternal grand father, cannot be ruled out. The unusual conduct of P. W. 3 Ritik Yadav immediately after alleged murder by his father, is another circumstance, which creates a doubt about the credibility of his evidence.

31. C. D. R. of the appellant's cell phone brought on record by the prosecution to prove that the appellant was present in Vrindawan are wholly inadmissible in evidence on account of the fact that the same were not accompanied with necessary certificate as required under Section 65 B (4) of the Indian Evidence Act.

32. Upon a wholesome consideration of the facts of the case, attending circumstances and the evidence on record, we are of the view that neither the recoded conviction of the appellant nor the sentence awarded to him, can be sustained and is liable to be set aside.

33. Thus, the appeal succeeds and is allowed and the impugned judgement and order dated 7.2.2013 passed by the Additional Sessions Judge, Court No. 1, Hathras is set-aside and the appellant is acquitted of all the charges framed against him. Since he is in jail, he shall be released forthwith unless he is wanted in some other case subject to his complying with the mandatory requirement of Section 437-A Cr. P. C.

(2020)06ILR A422
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.03.2018

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE IRSHAD ALI, J.

Criminal Appeal No. 1263 of 2015
connected with
Criminal Appeal No. 745 of 2015

Mohd. Azam ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Hemant Kumar, Sri Anoop Trivedi, Sri Dileep Kumar, Sri Kamal Krishna, Sri Rajrshi Gupta, Sri Vivek Prakash Mishra

Counsel for the Opposite Party:
A.G.A., Sri Vijay Kumar Pandey

A. Criminal Law - Code of Criminal Procedure, 1973- Section 154- Ante-Timed First Information Report-Two written reports of the incident were given at the police station one by P. W. 1 and the other by P. W. 2 , which was given at the police station after the inquest proceedings had concluded- Strangely instead of registering the case on the basis of the written report given by P. W. 1 at the police station, the case was registered on the written report of the occurrence allegedly given by P. W. 2- The fact that the FIR of the incident which had taken place on 28.12.1995 at 10:00 A.M. was registered on the same day at the same time is in itself an impossible feat-The inquest report does not mention the number of the case crime and that the name of the person on whose information the inquest proceedings had commenced has been shown as P. W. 1 and

not P. W. 2. Since the FIR in this case itself appears to be a devious, bogus and fictitious document, hence no reliance on the prosecution story as spelt out therein can be placed.
Where the First Information Report is apparently a suspicious document and finds no corroboration from the Inquest report, then no reliance can be placed on the story of the prosecution as alleged therein.

B. Evidence Law - Indian Evidence Act, 1872- Section 114(g) - Adverse Inference against the prosecution-The Head Constable / Head Moharrir who had prepared the chek FIR was deliberately not examined by the prosecution with oblique motive. He having not been produced as a witness, the defence was deprived of the opportunity to cross-examine him.
Where the First Information Report is questionable and doubtful, the withholding of the Head Constable / Head Moharrir by the prosecution would lead the Court to take an adverse inference against the case of the Prosecution.

C. Evidence Law - Indian Evidence Act, 1872- Section 45- Forensic Evidence-Insufficiency of- Admittedly the firearm weapons which were allegedly used by the accused-appellants for committing the murder of the deceased were never recovered during investigation. We are absolutely in the dark about the kind of weapons which were used by the culprits. The report of forensic expert vis-a-vis the bullet and the pellet which were recovered from the body of the deceased, Imamuddin @ Buggu, plain and bloodstained earth recovered from the place of occurrence and the clothes of the deceased Ext. Ka12 merely states that the blood was found on the bloodstained earth and other articles sent for forensic examination but the same were either totally disintegrated or not capable of classification. We are afraid that the forensic evidence on record is not at all sufficient to link the appellants with the offence for which they have been convicted.
The absence of recovery of any fire arms from the accused coupled with the fact that the blood stains were either totally disintegrated or not capable of any classification in the report of the serologist would render the forensic evidence insufficient to link the accused with the commission of the alleged offence.

D. Evidence Law - Indian Evidence Act, 1872- Section 3- Conflict between ocular and medical evidence – It is the duty of the Court to separate the chaff from the grain- The manner of assault as described in the FIR and later testified by the three witnesses of fact produced during the trial by the prosecution does not find corroboration from the medical evidence on record which puts a big question mark against their claim of being eye-witnesses of the occurrence. Considering the material contradictions in their testimonies inter alia on the point of time and the identity of the person who had lodged the FIR of the occurrence and the irreconcilable conflict between the ocular version and the medical evidence with regard to the number of shots fired at the deceased by the accused-appellants, it cannot be said that the three witnesses of fact have given cogent and correct description of the occurrence and that their evidence is wholly reliable and trustworthy.
The irreconcilable conflict between the ocular and medical evidence as well as the material contradictions in the testimonies of the eye witnesses would render the testimonies of the witnesses unreliable and untrustworthy.
The prosecution has miserably failed to prove its case against the appellants beyond all reasonable doubts. Hence neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set aside. (Para 17,18,19,22,24)

Criminal Appeal Allowed. (E-3)

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

1. These two connected appeals were heard by us on 29.3.2018 on which date we had passed the following order :

"Heard Sri Dileep Kumar, Advocate assisted by Sri Rajrshi Gupta, learned counsel appearing on behalf of the appellant, Sri Vijay Kumar Pandey,

learned counsel for the complainant and Sri J.K. Upadhyay, learned AGA for the State.

We will give reasons later. But we are making the operative order here and now.

Since both the aforesaid appeals arise out of one and the same judgment and order dated 18.02.2005 passed by learned Additional Sessions Judge, Court No. 8, Azamgarh, therefore, both the appeals are being decided of by way of a common judgment.

Both the criminal appeals are allowed. The impugned judgment and order dated 18.02.2015 passed by learned Additional Sessions Judge, Court No. 8, Azamgarh in S.T. No. 341 of 1996 (State Versus Mohd. Azam and others) by which the appellant-Mohd. Azam in Criminal Appeal No. 1263 of 2015 has been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- under Section 302 IPC and in default of payment of fine six months additional rigorous imprisonment while appellants-Liaqat and Alauddin in Criminal Appeal No. 745 of 2015 have been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/-each and in default of payment of fine six months additional rigorous imprisonment each, are hereby set aside.

The appellants in both the aforesaid appeals are acquitted of all the charges framed against them. Appellant-Mohd. Azam in Criminal Appeal No. 1263 of 2015 is in jail. He shall be released forthwith unless he is wanted in any other criminal case while appellants-Liaqat and Alauddin in Criminal Appeal No. 745 of 2015 are on bail. They need not surrender. Their bail bonds are cancelled and the sureties are discharged. The appellants shall comply with Section 437A of Cr.P.C. within three weeks."

We are now giving reasons :

1. These two criminal appeals namely, criminal appeal nos. 1263 of 2015 and 745 of 2015 have been preferred by Mohd. Azam, appellant in criminal appeal no. 1263 of 2015 and Liaqat and Alauddin, appellants in criminal appeal no. 745 of 2015 against the judgment and order dated 18.2.2015 passed by Additional District and Sessions Judge, Court No. 8, Azamgarh in S.T. No. 341 of 1996 (State Versus Mohd. Azam and others) by which the appellant-Mohd. Azam in Criminal Appeal No. 1263 of 2015 has been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- under Section 302 IPC and in default of payment of fine six months additional rigorous imprisonment while appellants-Liaqat and Alauddin in Criminal Appeal No. 745 of 2015 have been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- each and in default of payment of fine six months additional rigorous imprisonment each u/s 302 IPC.

2. Briefly stated the facts of this case are that P. W. 2 Ashahad gave a written report Ext. Ka1 at Police Station Devgaon, District Azamgarh on 28.12.1995 stating therein that he is a resident of Katauli Khurd, Police Station Devgaon, Distrcit Azamgarh. On 28.12.1995 while Imamuddin @ Buggu was coming to him to bring the key of his vehicle he met accused, Azam son of Ali Hasan, Liaqat son of Haji Tauheed, Alauddin son of Rauf and Ajaz son of Mannan in the lane and on seeing them, they taunted him for filing a case against them and started chasing them on which they ran towards the east of the lane, Azam shot at Imamuddin @ Buggu with his firearm. Thereafter, Ajaz (non-appellant) also shot Imamuddin @ Buggu

who died on the spot and on hearing the sounds of gun shots Javed Khan son of Aslam Khan and Abdul Kalam son of Ayyub also reached the place of occurrence and witnessed the incident which had taken place at about 10 A.M.

3. On the basis of the aforesaid written report Ext. Ka1, case crime no. 295 of 1995, under Section 302 IPC was registered against the appellants and one Ajza Ahmad, chek FIR Ext. Ka13 and corresponding G.D. entry Ext. Ka14 were prepared by P. W. 4 Asharafi Lal.

4. The investigation of the case was taken over by P. W. 4 Asharfi Lal who at the relevant point of time was posted at Police Station Devgaon, District Azamgarh. He after receiving the information tendered to him by P. W. 1 Abdul Kalam son of Ayyub who was accompanied with 4 to 5 persons, at Police Station Devgaon, District Azamgarh on 28.12.1995 at 10 A.M. that Imamuddin @ Buggu resident of village Katauli Khurd had been shot dead, reached the place of incident and after nominating the inquest witnesses, he conducted the inquest proceedings on the body of the deceased at 11:00 A.M. and after completing the inquest, prepared the inquest report of the deceased along with other related papers namely police form no. 13, photo nash, report addressed to R.I. Ext. Ka4 to Ext. Ka7 and report addressed to C.M.O. Ext. Ka8. Thereafter, he got the dead body of the deceased, Imamuddin @ Guggu sealed and dispatched to the District Hospital Azamgarh for conducting postmortem. The postmortem on the body of the deceased was conducted by late Dr. J.S. Govind on 29.12.1995 at about 12:15 P.M. which was proved by P. W. 3 Dr. Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh. The postmortem report Ext. Ka3 indicated following ante mortem injuries on the deceased's body :

(i) Firearm wound of entry 1 cm x 1 cm bone deep on the left side face over left ear triangular margins lacerated invented under laying bone fracture.

(ii) Firearm wound of exit 2.50 cm x 2 cm x bone deep and communication to injury no. 1 margin lacerated invented under laying bone fracture.

(iii) Firearm wound of entry 2 cm x 2.50 cm x muscle deep on the outer aspect of right upper arm 16 cm below right shoulder joint margin invent.

(iv) Firearm wound of exit 3 cm x 2.50 cm x muscle deep on right upper arm inner aspect 18 cm below right shoulder and it is communicating with injury no. 3.

(v) Firearm wound of entry 3 cm x 2.50 cm x chest cavity deep on the right side of chest 6 cm from axilla margin invented and irregular.

(vi) Firearm wound exit 4 cm x 2.75 cm x abdomin and chest cavity deep on left side abdomin upper part near right side with axillary line margin invented lacerated injury is communicating to injury no. 5 recovered one plastic piece and corte.

According to the postmortem report of the deceased, cause of death was shock and hemorrhage due to ante mortem injuries.

5. P. W. 4 Asharfi Lal, the Investigating Officer of the case after completing the investigation filed charge-sheet against all the accused including the appellants under Section 302 IPC before C.J.M. Azamgarh who by his committal order order dated 24.7.1996 committed the accused for trial to the Court of Sessions Judge, Azamgarh where the case was registered as S.T. No. 341 of 1996 and

made over from there for trial to the Court of Additional District and Sessions Judge, Court No. 8, Azamgarh who on the basis of the material collected during investigation and after hearing the prosecution as well as the accused on the point of charge, framed charge on 8.1.1999 under Section 302 IPC against accused-appellant, Mohd. Azam and under Section 302/34 IPC against the other accused-appellants Liaqat and Alauddin. The accused-appellants abjured the charge and claimed trial.

6. The prosecution in order to prove its case examined as many as five witnesses of whom P. W. 1 Abdul Kalam, P. W. 2, informant, Ashahad and P. W. 5 Javed Khan were produced as witnesses of fact while P. W. 3 Dr. Rajendra Prasad, Chief Pharmacist who proved the photo stat copy of the postmortem report of the deceased as Ext. Ka2. P. W. 4 S.I. Asharfi Lal, Investigating Officer of the case who had prepared and proved the inquest report Ext. Ka4, police form no. 13 Ext. Ka5, photo nash Ext. Ka6, R.I. report Ext. Ka7, C.M.O. report Ext. Ka8, site plan of the incident Ext. Ka9, recovery memo of bloodstained and simple earth from the place of occurrence Ext. Ka10, charge-sheet Ext. Ka11, report of the forensic expert of the bullet recovered from the dead body of the deceased Ext. Ka12, chek FIR Ext. Ka13 and carbon copy of the corresponding G.D. entry Ext. Ka14, were produced as formal witnesses.

7. The accused-appellants in their examinations under Section 313 Cr.P.C. denied the prosecution case as false and claimed themselves to be innocent and examined D.W. 1 Mohd. Ikhlaq as defence witness.

8. The learned Trial Judge after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, both oral as well as documentary, convicted the appellants under the aforesaid sections and sentenced them to life imprisonment together with fine.

9. Hence this appeal.

10. Sri Dileep Kumar, learned counsel appearing for the appellants has submitted that the FIR in this case is ante-timed. The written report of the incident which was signed and given by P. W. 2 Ashahad at Police Station Devgaon, District Azamgarh was suppressed and the same did not see the light of the day and the report which was signed and given by P. W. 1 Abdul Kalam at the police station as is evident from the perusal of the chek FIR and the corresponding G.D. entry Ext. Ka13 and Ext. Ka14 was not the first information report of the incident but the same was prepared on the advice of the police personnel as is evident from the evidence of P. W. 4 Asharfi Lal, the Investigating Officer of the case itself. He next submitted that none of the so called eye witnesses had seen the occurrence. This fact is self evident in view of the irreconcilable conflicts vis-a-vis the ocular version and the medical evidence on record. The prosecution case as spelt out in the FIR which was lodged by P. W. 1 Abdul Kalam claiming himself to be an eye witness of the occurrence was that the deceased had received one gun shot each from the appellant, Mohd. Azam and non-appellant, Ajaz whereas the postmortem report of the deceased Ext. Ka3 indicated as many as three firearm wounds of entry with corresponding firearm wounds of exit. The eye witness account in this case does not inspire confidence and false implication of the appellants in the present case is writ

large on the face of the record. Neither the recorded conviction of the appellants nor the sentence of life imprisonment awarded to them can be sustained and the same are liable to be set aside.

11. Per contra Sri J.K. Upadhyay, learned counsel appearing for the State submitted that the prosecution having succeeded in establishing the charge framed against the appellants by leading cogent and reliable evidence, the recorded conviction of the appellants by the trial court is not liable to be interfered with on account of there being some minor inconsistencies vis-a-vis the medical evidence and the ocular version. The FIR in this case is not ante-timed. The three witnesses of fact examined by the prosecution during the trial to prove the charge framed against the appellants have consistently supported the prosecution case on all material aspects of the incident and their evidence is not liable to be discarded merely on account of there being some minor contradictions in their evidence which are wholly immaterial and do not affect the core of the prosecution case. This appeal lacks merit and is liable to be dismissed.

12. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not.

13. Record shows that the incident had taken place at about 10 A.M. on 28.12.1995 within the limits of village Katauli Khurd, District Azamgarh. The written report of the incident Ext. Ka1 is said to have been given by P. W. 2 Ashahad, brother of the deceased at Police Station Devgaon, District Azamgarh on the same day at about 10 A.M. as deposed by P. W. 4 Asharfi Lal, the Investigating Officer of the case in his examination-in-chief on page 32 of the paper book. The distance between the police station and the place of occurrence as mentioned in the chek FIR Ext. Ka13 is about 3 km. P. W. 1 Abdul Kalam, the real brother of the deceased on page 17 and 18 of the paper book in his cross-examination twice deposed that the report of the incident was lodged by him, although on page 19 of the paper book he corrected himself by saying that the FIR was lodged by his brother Ashahad P. W. 2 and he and Javed had accompanied him to the police station and on the same page he stated that they had gone to the police station on their motorcycle and had reached the police station some time between 3 P.M. to 4 P.M. The FIR was scribed at the police station and given to Daroga Ji of Police Station Devgaon.

14. P. W. 2 Ashahad on page 26 of the paper book in his examination-in-chief deposed that he and his maternal grandfather, Mohd. Zakariya had gone to the police station along with Atahar to lodge the FIR of the incident on one motorcycle along with Javed Khan P. W. 5 who was on another motorcycle and the FIR was scribed on the paper which was brought by P. W. 5 Javed Khan from the market, he had signed the report after the same had been read over to him. He proved the written report which was given by him at Police Station Devgaon. He further deposed on page 27 of the paper book that he along with his maternal grand-father (Nana) who accompanied with Atahar had gone to the police station and given Ext. Ka1 at the Police Station Devgaon. He was given a copy of the report and thereafter,

they along with the Daroga Ji had returned to the place of occurrence where his statement was recorded after the completion of inquest proceedings. On page 29 of the paper book, he in his cross-examination denied the suggestions given to him that on the date and at the time of the incident he was not present in Azamgarh and he had reached the crime scene after the completion of inquest proceedings. On the same page where it was suggested to him by the defence counsel that his brother Abdul Kalam had given a written report against the Jaipuriya people on the basis of which inquest was conducted, he did not specifically deny the same and feigned ignorance.

15. P. W. 2 Ashahad has neither disclosed the time at which he had left the place of occurrence for the police station nor the time at which he reached thereon.

16. P. W. 5 Javed Khan also has not disclosed in his evidence the time at which he and the informant P. W. 2 Ashahad and the other persons accompanying them had reached the police station. He denied the suggestion given to him that the first information report of the incident was given at the police station against unknown persons and on the basis of which inquest proceedings were conducted.

17. We now proceed to evaluate the evidence of P. W. 4 Asharfi Lal on the aforesaid aspect of the matter. P. W. 4 Asharfi Lal in his examination-in-chief on page 32 of the paper book has deposed that he was posted as Officer-In-Charge of Police Station Devgaon on 28.12.1995. On that day at about 10 A.M., P. W. 1 Abdul Kalam son of Mohd. Islam along with his 4 or 5 companions had come to the police station at about 10 A.M. On the information given to him by P. W. 1 Abdul Kalam that one Imamuddin @ Buggu resident of Village Katauli Khurd had been shot dead, he after issuing the necessary directions to register the case, reached the place of occurrence along with his force in a government jeep in village katauli Khurd and on reaching there he saw a dead body lying on cot. He after nominating the inquest witnesses commenced the inquest proceedings at 11 A.M. The inquest report which is on record as Ext. Ka4 also indicates that inquest proceedings had commenced pursuant to the information given at the police station by Abdul Kalam son of Mohd. Islam that Imamuddin @ Buggu had been shot dead. The inquest report Ext. Ka4 neither mentions the case crime number nor the names of the accused. P. W. 4 Asharfi Lal was re-examined and he in his re-examination on page 37 of the paper book deposed that the FIR of the incident which was on the record of the case was prepared on the basis of the written complaint given by Mohd. Ashahad son of Ayyub Ahmad on 28.12.1995 which is on record as Ext. Ka1. He further deposed before the Court that he was not aware about the fact whether there was any other person in village Katauli Khurd called Abdul Kalam son of Islam or not. He was also not aware whether the name of the father of Abdul Kalam is Ayyub or not. Chek FIR was not prepared on the basis of the written report given to him at the place of occurrence at the time when he had gone there to conduct inquest proceedings. He had received the written report of the occurrence when he had returned to the police station after completing the inquest proceedings which was signed by P. W. 2 Ashahad. The written report signed by Ashahad was received by him after 4 hours. He had scolded the Munshi for his having not prepared the chek FIR after receiving the written complaint of Abdul Kalam.

18. Thus, upon perusing the evidence of P. W. 1 Abdul Kalam, P. W. 2 Ashahad,

P. W. 5. Javed Khan, the eye-witnesses of the occurrence and P. W. 4 Asharfi Lal, investigating officer of the case, we have no hesitation in holding that the FIR in this case is ante-timed. It is proved from the evidence of P. W. 1, P. W. 2 and P. W. 4 that two written reports of the incident were given at the police station one by Abdul Kalam P. W. 1 and the other by P. W. 2 Ashahad, which was given at the police station after the inquest proceedings had concluded. The report given by P. W. 1 Abdul Kalam was anterior in point of time is proved from the evidence of P. W. 4 Asharfi Lal and also recitals contained in the inquest report which described the informant as Abdul Kalam P. W. 1 but strangely instead of registering the case on the basis of the written report given by P. W. 1 Abdul Kalam at the police station, the case was registered on the written report of the occurrence allegedly given by P. W. 2 Ashahad at Police Station Devgaon 4 to 5 hours after the occurrence which was apparently prepared after due deliberations and consultations falsely implicating the appellants due to admitted previous enmity between the parties. The Head Constable / Head Moharrir who had prepared the chek FIR was deliberately not examined by the prosecution with oblique motive. He having not been produced as a witness, the defence was deprived of the opportunity to cross-examine him. Moreover, the fact that the FIR of the incident which had taken place on 28.12.1995 at 10:00 A.M. was registered on the same day at the same time is in itself an impossible feat notwithstanding the fact that the distance between the police station and the place of occurrence is only 3 km and the informant's claim is that he had gone to the police station to lodge the FIR on a motorcycle, because as a normal human reaction after the incident, sometime must have been lost in grieving over the death of Imamuddin @ Buggu and procuring the piece of paper from the market on which written report was scribed by P. W. 5 Javed Khan on the dictation of P. W. 2 Ashahad. Moreover, there are other attendant circumstances which indicate that the FIR in this case is ante-timed and the information of the incident was not given by P. W. 2 Ashahad but P. W. 1 Abdul Kalam and the FIR of the incident which was lodged by P. W. 2 Ashahad was not in existence at the time of holding of the inquest, inter alia that the inquest report Ext. Ka4 does not mention the number of the case crime ; and that the name of the person on whose information the inquest proceedings had commenced has been shown as P. W. 1 Abdul Kalam and not P. W. 2 Ashahad.

19. Thus, the credibility of the FIR in this case stands totally shattered in view of the evidence on record. Since the FIR in this case itself appears to be a devious, bogus and fictitious document, hence no reliance on the prosecution story as spelt out therein can be placed.

20. The veracity of the evidence of the three eye-witnesses produced by the prosecution during the trial has been castigated by the learned counsel for the appellants on the ground that ocular testimony in this case is contrary to the medical evidence. It has been held by the Apex Court in a catena of decisions that where there is direct evidence on record minor variance between the direct evidence and the medical evidence or inconsistency in the direct evidence vis-a-vis medical evidence, it is the duty of the Court to remove the chaff from grain and ascertain the truth. In the instant case, the prosecution has come up with a categorical case that appellant, Mohd. Azam and non-

appellant, Ajaz had each fired a single shot at the deceased, Imamuddin @ Buggu. All the three witnesses of fact, P. W. 1 Abdul Kalam, P. W. 2 Ashahad as well as P. W. 5 Javed Khan have consistently deposed before the trial Court in the same voice. However, the postmortem report of the deceased which was prepared by Dr. J.S. Govind on 29.12.1995 at about 12:15 P.M. and proved by P. W. 3 Dr. Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh as Dr. J.S. Govind had unfortunately expired clearly indicates that the deceased had received three firearm wounds of entry namely (i) firearm wound of entry 1cm x 1cm bone deep on the left side face over left ear triangular margins lacerated invented under laying bone fracture, (ii) firearm wound of exit 2.50 cm x 2 cm x bone deep and communication to injury no. 1 margin lacerated invented under laying bone fracture, (iii) Firearm wound of entry 2 cm x 2.50 cm x muscle deep on the outer aspect of right upper arm 16 cm below right shoulder joint margin invent.

21. We have very carefully scanned the evidence of P. W. 3 Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh who was examined by the prosecution during the trial to prove the postmortem report of the deceased but we have not found anything in his evidence which may indicate that the three ante mortem firearm wounds of entry found on the dead body of Imamuddin @ Buggu could be result of two shots. Infact the testimony of P. W. 3 Dr. Rajendra Prasad is wholly silent on the aforesaid aspect of the matter.

22. Admittedly the firearm weapons which were allegedly used by the accused-appellants for committing the murder of the deceased were never recovered during investigation. We are absolutely in the dark about the kind of weapons which were used by the culprits. The report of forensic expert vis-a-vis the bullet and the pellet which were recovered from the body of the deceased, Imamuddin @ Buggu, plain and bloodstained earth recovered from the place of occurrence and the clothes of the deceased Ext. Ka12 merely states that the blood was found on the bloodstained earth and other articles sent for forensic examination but the same were either totally disintegrated or not capable of classification. We are afraid that the forensic evidence on record is not at all sufficient to link the appellants with the offence for which they have been convicted. Moreover, neither there is any evidence nor any suggestion which may indicate as to which out of two accused, Mohd. Azam and non-appellant, Ajaz had shot at the deceased with the double barrel gun. The three ante mortem injuries noted by P. W. 3 Dr. Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh on the body of the deceased, Imamuddin @ Buggu are on different parts of his dead body, although, the three witnesses of the occurrence have stated in unison that the two shots were fired by the appellants at the deceased.

23. In the instant case, the accused-appellants were neither apprehended on the spot nor any firearm was recovered from them or on their pointing out at any stage of the investigation.

24. Thus, in the present case, we find that the manner of assault as described in the FIR and later testified by the three witnesses of fact produced during the trial by the prosecution does not find corroboration from the medical evidence on

record which puts a big question mark against their claim of being eye-witnesses of the occurrence. Moreover, all the three witnesses of fact, two of them namely P. W. 1 Abdul Kalam and P. W. 2 Ashahad being the real brothers of the deceased while P. W. 5 Javed Khan his cousin brother, are highly interested witnesses. It is true that the evidence of a witness cannot be discarded merely on account of his being a relative of the deceased if upon a cautious appraisal of his evidence, the Court comes to the conclusion that he has given correct and cogent description of the incident but considering the material contradictions in their testimonies inter alia on the point of time and the identity of the person who had lodged the FIR of the occurrence and the irreconcilable conflict between the ocular version and the medical evidence with regard to the number of shots fired at the deceased by the accused-appellants, it cannot be said that the three witnesses of fact have given cogent and correct description of the occurrence and that their evidence is wholly reliable and trustworthy. The previous enmity between the parties could be a very strong reason for them to falsely implicate the appellants after the dead body of the deceased was found.

25. The motive for the accused-appellants to commit the murder of the deceased as spelt out in the FIR and as deposed by P. W. 1 Abdul Kalam and P. W. 2 Ashahad in their evidence tendered before the trial court is that on the date of occurrence while Zakariya, the maternal grand-father of the deceased was going to lodge the FIR with regard to an occurrence which had taken place one day before the date of occurrence in which two persons Naushad and Seraj had dealt a lathi blow to Zakariya, the accused had shot the deceased in reaction. There is no evidence on record showing that the appellants had also participated in the earlier incident or they were either relatives of Naushad and Seraj or they had committed the offence at their behest. No reason is forthcoming as to why the appellants would have shot the deceased Imamuddin @ Buggu instead of shooting Zakariya, the maternal grand-father of P. W. 1 Abdul Kalam and P. W. 2 Ashahd who according to the prosecution was going to lodge the FIR of the incident which had taken place on the date of occurrence at about 7 A.M. if they had acted at the behest of Naushad and Seraj.

26. The prosecution, in our opinion has totally failed to prove the motive for the appellants to commit the murder of the deceased.

27. Thus, upon a holistic view of the facts of the case and a careful appraisal and evaluation of the evidence on record, both oral as well as documentary, we find that the prosecution has miserably failed to prove its case against the appellants beyond all reasonable doubts. Hence neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set aside.

28. These are the reasons for which we had allowed this criminal appeal.

(2020)06ILR A431
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2019

BEFORE

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

Criminal Appeal No. 1427 of 1981

Vijai & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Krishna Capoor, Sri Bhuvnesh Kumar Singh, Sri Dileep Kumar, Sri Ghan Shyam Joshi, Sri Rajrshi Gupta

Counsel for the Respondent:
D.G.A.

Settled position of law that the testimony of a witness cannot be discarded in toto merely due to the presence of embellishments or exaggerations. The doctrine of falsus in uno falsus in omnibus has been held inapplicable in Indian scenario, where the tendency to exaggerate is common. It is the duty of the court to separate the chaff from the grain. Moreover, minor variations in the evidence will not affect the root of the matter, inasmuch as minor variations need not be given major importance and they would not materially alter the evidence/credibility of the eye-witness as a whole- The testimony of the eye-witnesses, though they are family members, does stand corroborated by the medical evidence and are also in consonance with the site plan which has been made by the investigating officer-It is not necessary that if an accused has been acquitted on particular evidence, the other co-accused also deserve to be acquitted on the same evidence-According to the correct position of law if abscondance of the appellants was the only ground for the trial court to hold them guilty by distinguishing their case from the other co-accused Genda Singh, the said evidence ought to have been clearly put to the accused appellants at the time of recording their statements under sections 313 Cr. P.C., hence that not being done would certainly make the finding in this regard of the lower court to be questionable, but simultaneously we are of the view that even if that piece of evidence be excluded, we find that there is sufficient evidence both ocular, supported by medical evidence and the circumstantial evidence to hold the appellants guilty.- Case in which prompt FIR has been lodged and the eye-witnesses of incident have actually seen the appellants along with co-accused Genda Singh assaulting the deceased by the weapons and the injuries received by the deceased are also corroborated by the post-mortem report of the deceased. The testimonies of the three eye-witnesses are found partly believable regarding their having seen the deceased being assaulted by the appellants as well as Genda Singh. It is also noteworthy that the Kotha in which the dead body of the deceased was found belonged to the co-accused Genda Singh, although the defence version was that the said house belonged to sister of Genda Singh, but the investigating officer had stated that the same belonged to Genda Singh. In view of this the burden also stood shifted to the accused to prove as to how the deceased was found dead in Kotha belonging to them which could not be discharged by them.

Evidence Law - Indian Evidence Act- Section 5-"falsus in uno, falsus in omnibus" (false in one thing, false in everything) - The doctrine of falsus in uno falsus in omnibus has been held inapplicable in Indian scenario, where the tendency to exaggerate is common - It is the duty of the court to separate the grain from the chaff but minor variations cannot be given much importance as the same do not materially alter the evidence of the witnesses taken as a whole.

Evidence Law - Indian Evidence Act, 1872 - Section 3- Interested/ Related witnesses- The testimony of the eye-witnesses, though they are family members, does stand corroborated by the medical evidence and are also in consonance with the site plan- Where the evidence of the witnesses is corroborated from the medical evidence and site plan then the same cannot be discarded only on the ground that the witnesses are related to the deceased.

Evidence Law - Indian Evidence Act, 1872 - Section 3- Appreciation of Evidence- It is not necessary that if an accused has been acquitted on particular evidence, the other co-accused also deserve to be acquitted on the same evidence- Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons.

Criminal Law - Code of Criminal Procedure, 1973- Section 313, Indian Evidence Act, 1872- Section 3 - If

abscondance of the appellants was the only ground for the trial court to hold them guilty by distinguishing their case from the other co-accused, the said evidence ought to have been clearly put to the accused appellants at the time of recording their statements under sections 313 Cr. P.C., hence that not being done would certainly make the finding in this regard of the lower court to be questionable, but simultaneously even if that piece of evidence be excluded ,there is sufficient evidence both ocular, supported by medical evidence and the circumstantial evidence to hold the appellants guilty.

Even if the question relating to the absconding of the Appellants was not put to them u/s 313 Cr.Pc, the Court can convict the accused on the basis of other evidence which is credible and trustworthy.

Evidence Law - Indian Evidence Act, 1872 - Section 106- Burden of proving the fact especially within the knowledge of the accused-the burden also stood shifted to the accused to prove as to how the deceased was found dead in Kotha belonging to them which could not be discharged by them**.**

Where the accused failed to discharge the burden as to how the body of the deceased was found in their home then a presumption is created against them for having committed the offence in question. (Para 63,67,69,76,79)

Criminal Appeal dismissed. (E-3)

Case law cited:-

1. Motiram Pandu Joshi & ors.Vs St. of Maha, (2018) 9 SCC 429

2. Criminal Appeal No. 1198 of 2006 Menoka Mallik & ors. Vs St. of W.B & ors.

3. Gangadhar Bahera & ors .Vs St. of Orissa Cr. Appeal No.1282 of 2001 decided on Oct.10.2002

4. Naushad @ Naura (2015) 2 SCC 513

5. Vadivelu Thevar Vs St.of Madras (1957) SCR 1981

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

1. Heard Sri Dileep Kumar, Advocate assisted by Sri Bhuvnesh Kumar Singh, learned counsel for the appellants and Sri Jai Narayan, learned AGA for the State and perused the record.

2. This criminal appeal has been preferred against the judgment and order dated 19.6.1981 passed in S.T. No.236 of 1979 State Vs. Genda and four others u/s 147, 148, 302 read with 149 IPC, Police Station Sheohara, district Bijnore whereby the appellant Vijay and Udai have been convicted and sentenced u/s 302 read with 34 IPC with life imprisonment each while rest of the accused have been acquitted.

3. In brief the prosecution case is that the informant Layak Singh (P.W.6) and his maternal uncle Genda Singh (accused) used to live in the same house separately and had a common *Sehan*. Till about four years ago, his uncle used to plough the whole land and also used to keep the crop and when he separated from him, he started causing harm due to enmity at several times. Yesterday the son of Genda Singh namely Vijay had taken away rassi (rope) regarding which at about 8 p.m., his son Veer Singh told him as to why he had taken away the rope without permission and why he had been causing harm to agriculture almost everyday and how long they should tolerate this. At this Vijay and Udai and their father Genda Singh (co-accused) (all the three accused) started abusing his son Veer Singh (deceased) and told him that they would certainly return the entire loss caused to him. Thereafter both the sides got into an altercation which was settled by the relative Bishan Kumar (Mama of the deceased) but Genda Lal told him that he

had rehabilitated him and he only would ruin him. Thereafter in the night informant Layak Singh, his wife Smt. Dulari, his daughter Smt. Kusum Kumari and their other small children were sleeping in the courtyard and his son Veer Singh was sleeping nearby on a separate cot under a Chappar in which a lantern was burning as usual. The accused Genda, his sons Vijay and Udai, his wife Smt. Shanti, wife of Vijay, Chandrakala and Munni were talking to each other and in their Kotha also lantern was burning. At about 1 a.m. in the night, his son Veer Singh raised alarm, hearing which he, his wife and daughter got up and they saw that Shanti wife of Genda Singh, Chandrakala wife of Vijay had caught hold of Veer Singh while Vijay, Udai and Genda Singh out of whom Vijay was armed with Barchi and Genda and Udai were armed with knife were assaulting his son and when they raised alarm, one Raj Kumar S/o Harswaroop Singh, Suresh S/o Maharaj Singh and Khem Singh, S/o Banwari Singh along with various other persons came there with their torches towards main door of their house. Right then Genda Singh and others after having seen the said persons coming there, had dragged away his son Veer Singh in their Kotha where he was murdered. None of them (complainant side) could have courage to come forward because the accused-appellant Vijay and Udai threatened them if anyone would try to intervene, he would have to face the same consequences and thereafter after having killed his son, the accused-appellant fled from there from the main door. The Chik FIR was prepared as Ext. Ka-2. The written report (Ext. Ka-6) (containing the above facts) having been given by the informant at police station Sheohara Case Crime No.126 of 1979 was registered u/s 147, 148, 302 IPC on 1.7.1979 at 7 a.m. against Vijay, S/o Genda Singh, Udai S/o Genda Singh, Genda Singh S/o Jhandu, Smt. Shanti wife of Genda Singh, Chandrakala wife of Vijay and entry of the case was made in G.D. at report no.8 at 7 a.m. on 1.7.79 which is marked as Ext. Ka-3.

4. The investigation was handed over to S.I. Vijai Pal Singh (P.W.8) in whose presence the case was registered at the police station. He recorded the statement of the informant Layak Singh at police station and also of Chaukidar Ameer Hussain and thereafter proceeded towards place of occurrence i.e. village Raini and reached the house of the informant where he found dead-body of Veer Singh in the Kotha of Genda Singh on the floor where lot of blood was spread. After having taken the dead-body into possession, he appointed the Panchas and got the inquest report prepared in his handwriting which is Ext. Ka-7. He prepared Chalan Lash, Photo Lash, Chitthi for post-mortem which were written in his handwriting which are marked as Ext. Ka-6, Ka-9 and Ka-10 respectively. After sealing the dead-body, the same was dispatched for post-mortem and handed over to Constable 78 Jagdish Chandra, Constable No.112 Govind Singh along with connected papers. He recorded the statements of Smt. Dulari wife of Layak Singh, Kusum Kumari daughter of Layak Singh and Khem Singh etc. on the spot and thereafter at the instance of informant made inspection of the place of occurrence and prepared site plan which is marked as Ext. Ka-11. One Sari was found tied around the neck of deceased Veer Singh which was blood-stained which was taken in his possession and was sealed on the spot and it's memorandum was prepared in his handwriting which is marked as Ext.Ka-12 and the said Sari is marked as material Ext.-1. From the cot of the deceased, the

blood-stained Khes (bed sheet) was also taken into possession which was lying on the floor and it's memo was also prepared and was sealed which is marked as Ext.Ka-13 and Khes is material Ext.-2.

5. In the Kotha of Genda Singh, a lantern was hanging by the latch of the door which was also taken in possession and memorandum was prepared which is marked as Ext.Ka-14 and the lantern as material Ext. 3. Another lantern was also taken from Osara of informant Layak Singh which was hanging by the peg on Southern wall and it's memorandum was prepared which is marked as Ext.Ka-15 and lantern was marked asmaterial Ext.-4. He had also found trail of the drops of blood from the Osara where the informant Layak Singh's son Veer Singh was sleeping up to the Kotha of Genda Singh where the cot of Veer Singh was placed. He had taken blood-stained and plain soil from the place of occurrence and sealed in separate containers and prepared it's memorandum which is marked as Ext.Ka-16 and both the containers containing blood-stained and plain soil are material Ext.5 and 6 respectively. The blood which was found on the ground near the dead-body in Kotha of Genda Singh, from there also the blood-stained as well as plain soil was taken and kept in two separate containers, the memorandum of which was prepared as Ext. Ka-17 and both containers were marked as material Ext. 7 and 8 respectively. Both the lantern which were marked as material Ext.-3 and 4 were found in running condition which were full of kerosene oil. The witness Raj Kumar, Suresh and Khem Singh also presented their batteries (torches) which were in running condition and were taken in the possession and thereafter were handed over in their supurdagi. The supurdaginama of the said torches is Ext. Ka.18. Thereafter he recorded the statements of witnesses of recovery and panchas. None of the accused were found in his house nor in the village and their search was made but could not be traced. Further it is stated by this witness in examination-in-chief that on the information given by the informer, accused Genda Singh, Chandrakala, Shanti were arrested on the road which was going from Nawada towards East to Hiranpura and after their arrest, their statements were recorded and they were brought back to the police station around 10 p.m. He also made entry about it at report no.32 in his handwriting and on 3.7.1979, 4.3.1979 he made search of other accused Vijay and Udai who could not be found, hence report u/s 82-83 Cr.P.C was submitted and thereafter on 11.7.1979 both Vijay and Udai appeared in Court and on 10.8.1979 he submitted charge sheet against them which is marked as Ext. Ka-19.

6. Against the accused-appellants and three other co-accused charges were framed u/s 147, 148, 302 read with 149 IPC on 21.12.1979 to which they pleaded not guilty and claimed to be tried.

7. Thereafter to prove the prosecution case, Smt. Kusum (P.W.1), Dr. R.P. Saxena (P.W.2), Smt. Dulari (P.W.3), Khem Singh (P.W.4), C.P. Ram Krishan Pandey (P.W.5), Layak Singh (P.W.6), H.C. Nadir Ali (P.W.7), S.I. Vijaipal Singh (P.W.8), C.P. Jagdish Chand (P.W.9) and C.P. Jagdish Saran (P.W.10), Abaran Singh (P.W.11), Gendan Lal (P.W.12) have been examined. Thereafter prosecution evidence was closed and statement of accused were recorded u/s 313 Cr.P.C.

8. The accused-appellant Udai admitted that the evidence on record was

correct to the effect that the informant Layak Singh was earlier resident of village Himayupur whose parents had died earlier leaving him behind and thereafter father of Genda Singh S/o Jhandu Singh had brought him to village Raini under police station Sheohara and had kept in his haweli and had given him one Kotha for his residential purpose and after the death of Jhandu Singh, Genda Singh had brought him up and got him married also. He denied the evidence that Genda Singh used to look after 150 bigha of land of Layak Singh and out of the income earned, he used to give him only some money which was sufficient for his survival. He also denied the evidence that the son of Layak Singh i.e. deceased Veer Singh when he got married and his expenses increased, pursuant to which he had taken the land back from Genda Singh and started cultivating the same because of which Genda Singh started harboring enmity towards him and time to time used to cause harm to his agricultural land. He also denied the evidence that on 30.6.1979, Vijay had taken the rope (Barahi) from his house in village Raini on which at about 7-8 p.m. Veer Singh had protested thereafter Genda Singh told him that he would be ruined and their whole loss would be made good. He further denied the evidence that at the time of quarrel with respect to Barahi, informant Layak Singh and his brother-in-law Bishan Kumar, wife of Layak Singh (Smt. Dulari) and his daughter were present and that Bishan Kumar had mediated the dispute. Further he denied the evidence that in the intervening night of 30.6.1979 and 1.7.1979, the deceased Veer Singh was sleeping on his cot in village Raini under the police station Sheohara in the Eastern Kotha in front of Osara where lantern was burning and informant Layak Singh, his wife Dulari, daughter Kusum etc. were lying on four cots in front of Osara in their Sehan. He further denied the evidence that on the date and time of the incident at about 1 a.m. in the night, informant Layak Singh, wife Dulari, daughter Kusum and others had woken up at the alarm raised by Veer Singh and had seen in the light of lantern that she along with other accused persons Smt. Shanti, Chandrakala had pinned down the deceased on his cot while accused-appellant Vijay armed with barchi and Udai and Genda Singh armed with knife were assaulting the deceased. Thereafter they raised alarm on which the accused-appellants dragged away the deceased from his cot towards their Kotha. He also denied the evidence that on the date and time of the incident on the alarm being raised by the informant and his family persons mentioned above, the witness Raj Kumar, Suresh and Khemi came there with torches from Eastern door of their house and had seen him along with co-accused dragging the deceased towards the Kotha of Genda Singh and when they tried to rescue him, he along with other co-accused had threatened that if anyone would come forward, he would also meet the same consequences and thereafter Veer Singh had been murdered in the same Kotha and when the witness challenged them, he along with co-accused had run away from the Northern door. He also denied the evidence that on the report of the informant, S.O of police station Sheohara Vijay Pal had visited the village Raini on 1.7.1979 on the place of incident at about 8.30 p.m. and found the dead-body of the deceased in the Kotha of Genda Singh where lot of blood was found and in Sehan drops of blood were found and on the cot on which the deceased was lying, the 'Khes' (bed-sheet) was also found blood-stained which were taken into possession. Further he denied the evidence that he had assaulted the deceased by knife

or barchi and stated that he was falsely implicated in the present case because of enmity. Further he stated that in the evening when the occurrence happened, he had gone to Sheohara hospital and stayed there only in the night because his bhabhi (sister-in-law) had suffered an attack and he abstained from saying anything with regard to blood which was found in the chemical examination report on the aforementioned clothes and soil.

9. The other appellant Vijay has also repeated the same reply as given by the co-appellant and nothing additional has been stated by him.

10. In defence, Bhoj Singh (D.W.1), Dr. A.P. Gupta (D.W.2), record keeper (D.W.3), Ashok Kumar Goyal (D.W.4), K.N. Verma medical practitioner (D.W.5) have been examined.

11. After having considered the entire evidence led by the prosecution and having heard the arguments of both the sides, learned trial court has held the accused-appellants guilty having believed the statements of the prosecution witnesses.

12. The learned counsel for the appellants before initiating his arguments had given pedigree of the family of accused so as to facilitate the appreciation of evidence on record and thereafter argued that the petty dispute with respect to rope (barhi) being taken away by the accused without permission, alleged by the prosecution to be reason which led to quarrel between the two sides was not believable because for such a petty dispute, murder could be committed. It was further argued that in fact the father of Genda Singh, Jhandu Singh was instrumental in rehabilitation of the father of the deceased, in the said village as he had got him married and thereafter also looked after his agricultural land. Therefore, he always wanted well being of the deceased and his father and there was no reason as to why he would murder the deceased for such a petty/frivolous dispute. The learned trial court has acquitted the co-accused Genda Singh who is the father of the appellant although he is alleged to be involved in the occurrence and has been assigned the role of assaulting the deceased with knife. The case of the appellants is at par with the case of co-accused Genda Singh. Hence the trial court ought to have acquitted the appellants also. It is further argued that after appreciation of evidence the co-accused Smt. Chandrakala, Smt. Shanti were acquitted because there was no possibility that these ladies would catch hold the deceased because all the other three accused were armed and were capable of assaulting the deceased. Hence it was held by the trial court that there was no occasion for these ladies to pin down the accused so that the other accused could assault them easily. It was further argued that a lot of improvement in the prosecution version was made because one sari was found tied around the neck of the deceased at the time of inquest as well as post-mortem. Therefore, to meet out the said fact, it was developed that the accused Chandrakala had taken off her sari and was reduced to be just in the petticoat and blouse and her sari was used for dragging the deceased from the place where he was sleeping to the Kotha where he was found dead. Further it is argued that three witnesses were named in the FIR namely, Raj Kumar, Suresh and Khem Singh out of whom Khem Singh has been examined as P.W.4. Other witness Raj Kumar and Suresh were not examined who were material witnesses. Further it was argued that Guddi and Vipin who were in

the house and are stated to have seen the incident, have also not been examined. It was also emphasized by learned counsel for the appellants during the argument that the accused were not in the house when the incident happened as Smt. Chandrakala had fallen sick and she was taken to the hospital in the night in question and none was present there and to substantiate the same four defence witnesses named above have been examined. Apart from this a large number of discrepancies have been pointed out to have been noticed in the statement of witnesses so as to emphasize that the said witnesses had not witnessed the incident and on that count, it was argued that the testimony of all of them so called eye-witnesses ought to be disbelieved. He further argued that even P.W.4 Khem Singh cannot be held to be wholly believable witness as was the case with other witnesses and that even his testimony deserves to be discarded. It was also argued emphatically that learned trial court has held the accused-appellant guilty solely on the ground that they were absconding after the incident for about 11-12 days and had against them warrants u/s 82 and 83 Cr.P.C issued and because of their such conduct, they were held guilty. It was further argued that the circumstance that they were absconding immediately after the incident, was not put to the accused-appellants u/s 313 Cr.P.C, hence on that count they could not have been convicted by the trial court. It was also argued that in all there were eight persons in the family of the accused, therefore, even if the principle as laid down u/s 106 of the Evidence Act be taken into consideration, by that yard-shick also only two appellants could not have been held guilty and lastly it was argued that it was not a case in which there was any eye-witnesses, in fact the dead-body was found of the deceased lying in Kotha of the accused Genda Singh which was actually the Kotha of sister of Genda Singh namely Swarupiya. It was only after having found dead-body of the deceased that the prosecution has tried to fabricate the entire false story implicating the accused. These points which have been raised by learned counsel for the appellant would be dealt with by us at the relevant time when we would discuss the evidence of the eye-witnesses and other witnesses.

13. On the other hand learned AGA vehemently argued that there was no infirmity in the impugned judgment because the same has been passed on the basis of credible evidence which comprises not only the statement of eye-witnesses namely Smt. Kusum Kumari (P.W.1), Smt. Dulari (P.W.3), Khem Singh (P.W.4), Layak Singh (P.W.6) who all have clearly stated that they had seen the incident and the same stands corroborated by the medical evidence as deceased was found to have suffered as many as nine injuries which included incised wound, punctured wound and other kind of injuries which could have easily been caused by the knife as well as barchi. He further argued that the present appeal deserves to be dismissed out-rightly.

14. Now we would consider the evidence of the witness one by one and proceed towards the evidence of P.W.1 Kusum.

15. The P.W.1 Smt. Kusum Kumari has stated in her examination-in-chief that Genda Singh (accused) son of Jhandu Singh is the father of accused-appellant Vijay and Udai. Smt. Shanti is the wife of accused Genda Singh and Smt. Chandrakala is the wife of accused Vijay. Her father Layak Singh was actually resident of village Himayunpur which was about 1 km. away from village Rainipur. Her father was brought by her maternal

grand-father Jhandu Singh to village Raini after nothing was left in village Himayunpur. After the death of Jhandu Singh, her father was being looked after by accused Genda Singh. Her father had 150 bigha of land in village Himayunpur which was being looked after by Genda Singh who got her father married also. The accused Genda Singh and his haveli had common sehan near which there was kotha, in front of which there was chappar. Genda Singh had two kotha which were towards North of her kotha and in front of them, there was also chappar. All the three kothas were towards East and in-front of them, there was sehan and the main door was towards East. Outside of this main door towards East, there was her gher as well as gher of Genda Singh and towards Southern side of the said gher, there was her baithak, the main door of which used to open in the Sehan. The baithak is towards North and it's door would open towards North in the osara of Genda Singh and towards North of osara, there was boundary-wall.

16. About four years prior to the incident, his brother had started cultivating the land and only 11 bigha of land was left with the accused to be taken back. Her brother had started cultivation because of feeling financial crunch and he had started doing very well and one year prior to that he had also purchased a tractor and all this progress was being disliked by Genda Singh who started harbouring enmity, as a result of which he started causing harm to him in various ways. About one year back at about 1 a.m. in the night, she, her sister and her parents were sleeping in the courtyard in front of kotha and her brother Veer Singh (deceased) was sleeping in the haveli under neath the chappar in osara towards South. There was a lantern burning, the light of which was extending towards the cot of her brother. She woke up at the alarm being raised by her brother. All of them had woken up because Vijay, Udai and Genda Singh were assaulting her brother Veer Singh. Vijay was armed with barchi, Udai and Genda Singh were armed with knife and Smt. Shanti and Smt. Chandrakala were also present there and had caught her brother pressing him. When all of them raised alarm, Suresh, Raj Kumar and Khem Singh came there with torches in their hands who also raised alarm, hearing which the accused persons started taking away Veer Singh to their kotha. All of them tried to get her brother freed from them but accused stated that if anyone intervened, then he would also be dealt in the same way as was Veer Singh and therefore because of fear, they did not proceed further, as a result of which the accused had dragged Veer Singh in their kotha where also lantern was burning and after taking him there, he was murdered. When the villagers raised alarm, the accused fled away from the door towards Northern side and thereafter when she along with others went inside the kotha, they saw her brother had died and lot of blood was lying around in kotha. The cot on which her brother was lying, there was khes (bed-sheet) on the same, which was also blood-stained. She further stated that when the accused had taken away Veer Singh from osara to kotha, a trail of blood drops was found between the two places i.e. from osara to kotha. She further stated that her father had gone to lodge report about the incident.

17. She has further stated that on the date of incident at about 9-10 a.m. accused Vijay had come to her house and took the rassi (rope) which he did not return because of which his brother had told him as to why he used to cause harm in this manner and

till when he would be tolerated like this, on which altercation had happened at 7-8 p.m. On this Vijay had told him that whatever damage was caused to him, all would be paid back and Genda Singh and Udai were also present and Genda Singh stated that he had rehabilitated him and he only would ruin him and 16-17 days prior to the incident, these people had put sugar in their tractor because of which tractor had become dis-functional. In cross-examination, this witness has stated that prior to this incident, Veer Singh, S/o Gori (not deceased) had received gunshot wound but she does not know whether the said Veer Singh had lodged any report against her brother and the two witnesses of this case i.e. Khem Singh and Raj Kumar. No case had been initiated against her brother. He has further stated that prior to this incident, a quarrel had happened between Shera and her brother but she has no knowledge whether Shera had lodged report against her brother or not. The police had not launched any case against him. She also denied that Shera had renounced his resolve to settle the said quarrel and she also denied that Shera got himself shaved only after the murder of her brother.

18. The above statement was pointed out by learned counsel for the appellant with a view to emphasizing that the deceased had enmity with others also and therefore it was possible that he may have been killed in some other manner by some other persons and not as alleged in the FIR.

19. In cross-examination she has stated that Genda Singh was the eldest in the family and it was wrong to say that when Veer Singh received fire-arm injury, then her brother was advised not to sit with Khem Singh, Raj Kumar and Hasveer Singh. She has further stated that since last about four years, her cultivation was being done separate from Genda Singh but she has no knowledge as to where her fields were located but there was a dispute with respect to 11 bigha of land about which her father told her. She has not seen that the land of younger brother of Genda Singh namely Chotey Singh was adjoining to the said land. The fact that accused were not returning 11 bigha of land used to be disliked by them. She had denied that on the said land, Genda Singh had built any wall. She has also denied that Genda Singh had taken debt about ten to eleven thousand for construction of the said wall but there was dispute between her father and Genda Singh with respect to this wall also but denied that Genda Singh used to claim that wall as his own. During chakbandi (consolidation proceedings), Genda Singh had got 40 bigha of land of his father in his name and it was promised by him that in-lieu of that he would be given share in his haveli, but instead of that since last two years, he had started saying that he should go away leaving haveli and thus 6-7 months after that her father had constructed another haveli and till the said haveli was constructed, she had lived at the house of Raj Kumar. There was no enmity between them for last two years except the incident which happened of lifting the rassi when the said rope was taken away by Vijay. She had seen with her own eyes the same being taken away by all of them but none of them had told anything to him because of fear and the said rope was not returned. At that time, there were only ladies in the house and her brother and father were not there, who had come after some time as they were in the jungle and when they returned at about 5-6 p.m in the evening and about one hour thereafter, they talked in respect of it. During that time, there was no one else there except the family members of both the sides, but also thereafter stated that her maternal uncle Bishan Kumar was also

there who had come there, who did not live at the place of Khem Singh, rather stayed there only and after quarrel, he had gone to Ameenabad which was about 1-1.5 miles away from her village. She denied that on the said date Bishan Kumar had stayed at the house of Khem Singh and returned next day in the morning at about 11 a.m. His maternal uncle continued to remain at home. She also denied that her maternal uncle immediately after the murder had gone to the house of Khem Singh. She further stated that at the time of incident, about 50 persons had assembled there but none of them told as to who had killed her brother. She had sent information for chaukidar who had come in the morning as he had gone to nearby village. Nobody had given advise that she should go for lodging the FIR after taking 10-15 persons to the police station rather everyone told her that she should call chaukidar who would inform the police. The said chaukidar came at about 5-6 a.m. in the morning. His father became unconscious. The police was called by her father and chaukidar. Her brother stayed in the house only, after Vijay had taken away the rope. She does not recollect as to who had taken meals at what time, although she used to cook the food at that time and used to also serve the same. In the said night, they had taken meals some time before the incident of quarrel. Veer Singh had not eaten anything. She does not recollect whether Veer Singh had eaten anything prior to the incident. In the said night she stayed at home. She had not seen the deceased having food after the incident. All of them had gone to their cots for sleeping at 10-11 p.m. and Veer Singh had gone to sleep at the same time. All of them slept after having taken meals.

20. Learned counsel for the appellants had drawn attention of this Court towards above piece of evidence and argued that in the post-mortem, stomach was found empty hence it was argued that it indicated that death did not take place at the time when it is being alleged to have happened by the prosecution side.

21. It is further stated that the cots of the accused were situated about 12-13 paces away from their cots and that there was a screen (parda) between the cot of the father-in-law and daughter-in-law, but when the S.I visited the spot he did not find the said screen (parda) hanging there nor any rope. She could not tell as to who had removed the rope and the said parda from the said place although she continued to remain at home till the I.O had reached there.

22. The learned counsel for the appellants had drawn the attention of the court towards the evidence and argued that the I.O did not find on the spot any cot of the accused side nor the same has been shown in site-plan which belies the statement of the said witness.

23. She further stated that there are three kothas in her haveli in the Eastern side. The real sister of Genda Singh namely Swarupiya is widow lady who is still alive. The Southern most kotha was in her possession. Swarupiya used to live at the place of her Samadhi since the time her son was married. It was wrong to say that in the Northern most, kotha Swarupiya used to live. Her marriage was performed 7-8 years ago but Eastern door of the haveli was in the middle and had doors in it. One door was opening towards East from the baithak and the same was opening in the Sehan in which there was no door. It is wrong to say that at the time of the incident, Northern wall of the sehan was broken. Rather in the said wall, there were doors and all these

three doors used to remain open in the night which used to be closed without any latch and would remain open throughout the night.

24. Learned counsel for the appellants further argued that the testimony of this witness is absolutely unbelievable as she has stated that the main door would be left open even during the night which is unusual.

25. She has further stated that she had woken up on the alarm raised by Veer Singh who was crying loudly *"marr diya bachao"*. She saw that accused were assaulting her brother with their weapons but she could not see as to where they were assaulting. The two persons were assaulting by knife and one was assaulting by barchi. The complainant side was also shouting loudly *"bhaiya ko maar diya bachao"*. The accused had taken away Veer Singh in the kotha even before the witnesses could reach there which was about 8-9 paces away from the chappar. At this stage, the court made inquiry from this witness to which she has stated that her statement was correct to the effect that at the time of alarm being raised by the witnesses, Veer Singh was being taken away and that she has not given this statement that before the witnesses reached there Veer Singh had been taken away.

26. She has further stated that when witnesses came there, the accused were in-front of the middle kotha and it was not that after seeing the witnesses coming, the accused had lifted her brother. She does not recollect whether she has given statement to the police to the effect that soon after the witnesses were coming, seeing them coming the accused had started dragging her brother from the cot towards their house. If the same has been written she could not tell it's reason. When her brother was being taken away forcibly her brother was crying loudly and thereafter as soon as he reached inside the kotha, his cry became silent. At the time when accused were taking her brother towards kotha all the four persons had assembled there but none of them made any effort to close the door of the room from outside front latch on it wherein the deceased had been taken. None had tried to chase the accused persons. When the accused had taken away the deceased from the cot, at that time, a saari was thrown around the neck of deceased belonging to Chandrakala who had taken off her saari and was left in petticoat and blouse. Though about this she had not stated to I.O as to from where the said saari had come. One question was put to her as to whether prior to the murder at 1 a.m. in the night accused were talking in low tone and she answered in the affirmative and further stated that by 1 a.m. murder had already been committed. Thereafter the court also cross-examined her in which she has stated that prior to murder she had not heard any accused talking to each other. At the time when she was sleeping, she had heard some talk going on between the accused at about 10-11 p.m. in a low tone but she could not comprehend as to what was being discussed among them. Further she has stated that it was wrong to say that her brother used to go often with Raj Kumar and on the date of incident in the night no drizzling had taken place at 3-4 a.m and it was wrong to say that when at about 3-4 a.m., she had woken up she found Veer Singh in dead condition in Northern courtyard and this case had been lodged against the accused persons in collusion with police. She has denied that Chandrakala had fallen sick in the night of incident and was taken to Syohara.

27. Dr. R.B. Saxena (P.W.2) has stated that on 1.7.1979 at about 2 p.m., he had conducted the post-mortem of Veer Singh, S/o Layak Singh (deceased), r/o Raini, P.S. Syohara who was brought by constable 74 Jagdish Chandra and constable 112 Govind Singh Sarav and found following injuries :-

(1) Incised would 2¼"x4/10"x1/10" from right To left at left lower jaw under surface and wound is 1¼" deep towards the outer and (left) side of jaw.

(2) Punctured incised wound margins clean cut 1/2"x2/10"x4/10" at middle and front of neck.

(3) Punctured incised wound one 3/4"x3/4"x2" (oblique right To left) i.e. from right side neck to middle of neck) on right side neck 1" outer to injury no.2.

(4) Punctured incised wound margins clean cut ¾"x4/10"x2" on right side neck 1/2" outer and below injury no.3.

(5) Punctured incised wound 1/2"x1"x1/2" at root and upper chest right side.

(6) Stab wound margins clear cut 1"x1½"x4/10" right abdomen lower side towards middle, depth of wound is oblique and upto fatty layer.

(7) Stab wound 1"x1½"x2" right lower abdomen 3½" outer to (6) depth superficial and horizontal up to muscular layer.

(8) Incised wound 1"x½"x1/10" between thumb and first finger right hand.

(9) Two incised wound 1½"x½"x1/10" each and 1/4" apart between left thumb and under finger on left hand.

28. He has further stated that the cause of death was hemorrhage, shock, asphyxia due to injury in the neck and the death of the deceased had taken place within one day of conducting the post-mortem report. He has proved the post-mortem report as Ext. Ka-1. In cross-examination, this witness has stated that there could be difference of three hours in death on either side. The injuries could have been caused to the deceased by some sharp-edged weapon like knife.

29. P.W.3 Dulari, W/o Layak Singh has stated in examination-in-chief on 8.7.1980 that about one year ago in the night at about 1 a.m., she along with her husband and her daughters was sleeping in-front of their kotha and accused were sleeping towards Northern side. Her son was sleeping in Osara where lantern was burning. When she woke up, hearing alarm raised by her son and other persons also had woken up, she saw that Genda Singh, Udai and Vijay were assaulting her son with knife and barchi and Chandrakala and Shanti were pressing him down. When she along with others raised alarm, the accused had taken away her son Veer Singh in their kotha from Sehan and right then witness Khemi, Raj Kumar and Suresh also came with their batteries (torches) and when they focused their torch and tried to set her son free from the clutches of the accused, the accused stated that if anyone came forward, they would have to face the same consequences and stopped them. Thereafter the accused after having taken her son inside the room killed him and when further alarm was raised by entire villagers including her and her family members, the accused fled away from the Northern door and thereafter they all went near her son Veer Singh and found him dead and lot of blood was found spread on kotha and the sehan and on the cot whereon khes (bed-sheet) was also full of blood. On the same night, at about 9 p.m., an altercation had taken place between her

son and accused with respect to rope which dispute was settled by her brother Bishan Kumar. In cross-examination this witness has stated that Bishan Kumar is her real brother and Chandrapal and Shiv Kumar are brothers of Bishan Kumar. The daughter of Genda Singh is married to Shiv Kumar. Since the time her son was killed, she (Urmila) was staying in her father's house on her own free-will and she was not turned out. Chandrapal was married with daughter of Banwari Singh resident of Buapur. Banwari the father-in-law of Chandrapal used to live with Chandrapal. She had never borrowed any money by pledging her jewelleries with Chandrapal. She also denied the knowledge of any case in respect of beating the son of Pokhar being taken away her brothers. Bishan Kumar was also known as Buddhu. One case regarding abduction of Brajraj and thereafter of murdering him was proceeding in Moradabad against Bishan Kumar in which his name was taken. Bishan Kumar was in her house one day before the incident of murder. The murder took place at about 8 p.m. and it was wrong to say that he stayed with witness Khemi and that he came to the place of occurrence next day in the morning after the murder had already taken place. Bishan Kumar used to come to her house and used to help in various works and she has sold ten bigha land for consideration of Rs.20,000/- but denied that for the execution of sale-deed, Bishan Kumar had gone. She further stated that a tractor was sold by her for Rs.50,000/- but not at the instance of Bishan Kumar. The Sheesham which was in her field was sold for Rs.4,000/- after the murder of her son and she had also sold her buffalo, but he denied that all these sale were made at the advice and after discussion with Bishan Kumar. She further denied that Bishan Kumar was in the village during the night when incident of murder happened and she was not concealing this fact. Bishan Kumar had not come today rather her brother Chandrapal had come because Bishan Kumar was having some ailment.

30. It was argued by learned counsel for the appellants that the accused-appellants have been falsely implicated in the present case. In fact Bishan Kumar who is the brother of mother of the deceased used to interfere in vital decisions such as sale of property and other things. He was instrumental in killing of the deceased and not the appellants. It was further argued that there was no enmity with the accused of the complainant side.

31. This witness further stated that in haveli there are three kotha facing the East and all these three have latch (sankal/bolt) at the top of the door and not at the bottom but what is the position of this latch, she does not know as six months have gone by since the incident. There were four cots for the complainant side to sleep and there were 5-6 cots of the accused side at a distance of about 12 paces towards North. Prior to the murder, she used to do parda from Genda Singh. There was no screen between the cots of complainant side as well as accused side. On the date of incident at about 3-4 a.m. in the night, there was no rainfall. At about 1 a.m. in the night incident happened and by 2 a.m., villagers had assembled there. On arrival of Inspector, he did not find any cot rather one cot was lying under the chappar on which deceased had slept. She heard the deceased crying *"maar diya, bachao"* and when she woke up, the accused were assaulting her son and thereafter she was also pleading the villagers to rush as her son was being killed and by the time, the villagers arrived there with their torches, the accused had thrown

a knot of sari in the neck of the deceased which was done by accused Vijay. After the accused had gone away from there and she went inside, then the face of the deceased was not covered by saari. The deceased was made to sit on the cot and sari was tied around him. Two persons had caught his one hand and the other two persons had caught his other hand and accused Vijay was giving him push. All of them had caught the deceased with their hands and made him stand up. Veer Singh was taken inside the kotha with his hands being held by the accused. When they were tightening the sari around the deceased, she and other witnesses did not make any effort to reach there because of threat given by the accused that they would also meet the same fate. Initially three people had come there and later on other persons had reached there. This witness has further stated that Kusum Kumari had taken the meals at about 10 a.m. Veer Singh had taken his meals in the evening after time of sun set.

32. Citing above statement, the learned counsel for the appellants has pointed out that the statement was not believable because it is self contradictory because on the one hand she has stated that after the accused had gone away from the place of occurrence and when she along with others went inside the kotha, she found that the deceased had died while on the other hand her statement shows that the deceased was being made to sit him on the cot by the accused, therefore the statement of this witness cannot be held to be trust-worthy.

33. On the other hand learned AGA stated that it is often seen that the witness over state because of anxiety so that the accused may not be allowed to go unpunished and therefore the statement of this witness cannot be discarded in totality and part of the statement which is found trustworthy requires to be relied upon discarding the remaining which is found to be untrustworthy, relying upon the established proposition of law of separating grain from the cheff and stated that her statement is believable at least to the extent that the accused Genda Singh, Vijay and Udai had assaulted the deceased when he was sleeping in osara and thereafter he was dragged towards the kotha where he was finally killed by them. Hence circumstances reveal that the testimony of this witness is partly believable to that extent and when accused had fled from kotha where the deceased was found dead.

34. Khem Singh who is the neighbour and is an independent witness has stated as P.W.4 in examination-in-chief on 8.7.1980 that about one year ago at about 1 a.m. in the night he had gone for taking paneer at the house of Raj Kumar, soon he heard commotion as a result of which he reached the house of Genda Singh which was at a distance of about 15 paces from there, with Raj Kumar and both of them were having batteries (torches) with them. He found Suresh coming from his house and he also had a battery and all of them reached near the Eastern door of the parties and lighted their torches, they saw that Genda Singh, Chandrakala, Shanti Devi, Vijay and Udai all were taking away Veer Singh towards their kotha. When they tried to set him free, the accused had threatened them. Vijay was armed with barchi and Genda and Udai were armed with knife. Veer Singh was bleeding and he was being dragged towards kotha and after having taken him there, he was assaulted and killed. On their making noise when other persons started coming, the accused fled from the Northern door

and thereafter they saw inside the room and found Veer Singh in dead condition and there was lot of blood in the kotha and sehan. The lantern was burning there and all five accused were present in the court.

35. In cross-examination, this witness has stated that Veer Singh, S/o Bholu had never lodged any report against him although marpit had also taken place between them. Veer Singh S/o Bholu had lodged report against Raj Kumar and Veer Singh S/o Layak Singh (deceased) in which police filed final report. He knows Bishan Kumar S/o Dhan Singh but denied the suggestion that on the date of incident he was sitting in his house and stated that he had come in the morning after the murder had already taken place. He has 20 bigha of land for agricultural purpose which belongs to Shyam Lal. He further stated that he used to sow Paneer (appears to be some kind of crop) in one bigha of land every year but his half crop had wasted in that year when incident happened. He started sowing munji and thereafter stated that he had already sown the said crop in 5-6 bigha of land. In 5-6 bigha of land, paneer had already been sown. He has no knowledge whether one day prior to the incident Raj Kumar had come in the village or not. On the date of incident, he had sown Munji till 4 p.m. in the evening and had come home and slept at about 12-1 a.m. in the night. He had not gone to the house of Raj Kumar at about 4 p.m., rather had gone in the night at about 10 p.m. After reaching his house, he came to know that he had gone to take paneer. Thereafter he had gone to the house of Raj Kumar at about 12 in the night. He was having roti and came out after about 10 minutes and after having talks about paneer, he was about to go from there when it was suggested that he should take beedi and thereafter both of them started talking to each other. He has further stated that he had stated to the I.O that about 10 p.m. in the night he had gone to the place of Raj Kumar to take paneer but had not told him about beedi being smoken by him. He was present on the place of incident when the I.O had visited there in the morning and he had recorded his statement after dispatching the dead-body. The main door of the haveli is 10-15 paces away from the door of gher. To go to the house of Raj Kumar one would have to travel about 40 paces from the gher. From the turn, his house is 10 paces. He had not got opened the doors of haveli as the doors were already open. He had heard the call "bachao maar diya" and that Raj Kumar and he, both had batteries and they forthwith proceeded towards the place of occurrence and Suresh had met at a distance of 10-12 paces from the gher of Genda Singh, but no talk happened with him and all of them were standing at a distance of 2-3 paces in the south from the main door of the haveli. At that time Veer Singh was sleeping on his cot at a distance of 2-4 paces away from the chappar outside. At that time, he had seen blood dripping from his body but could not tell as to from which part of body blood was dripping. He had stated to the I.O about this fact and also found that 'niwar' of the said cot was not stained with blood while the khes (bed-sheet) had stains of blood. Right from the place where the cot was there up-to kotha, there were blood spots which was forming a line of blood. Veer Singh was proceeding in standing position as he was being dragged and saari was held by Chandrakala from the right side and by the Shanti from the left side and he was being dragged forward. His left shoulder was held by Genda Singh and right shoulder was held by Udai Singh. His neck was tied around by saari. The ladies were holding

the palla of saari at a distance of one hand from Veer Singh. Barchi was fixed in the lathi and both the knife were in open condition. These people had caught hold by one hand and in another hand, they had weapons and were dragging the deceased. At that time, he was at a distance of 8-10 paces. Initially three persons were there and as soon as other persons started streaming in there, the accused fled from there. He had seen the cots of Genda Singh which were lying there without bedding but when I.O reached there, they were in horizontal position.

36. This witness has further stated that he had found the rope tied on the kotha of Genda Singh. This rope was used for screen but when accused had fled from there and many people reached there, the said screen was not found there. Nobody had tried to close the latch from outside the door of the kotha belonging to the accused nor any of them tried to catch the accused because of fear and he had gone inside kotha only after the accused had fled from there. He had seen one injury upon the neck of Veer Singh and one upon his abdomen and on hand. The saari was tied around his neck but not on his face and the same was found in that condition when the I.O had reached there. This witness has stated that the I.O had made recovery memo of torch next day in the morning at about 8-9 a.m. which was signed by him and Raj Kumar. The chaukidar had come in the morning though he was informed in the night but he was not found at home. The incident which happened inside the kotha was seen by him for the first time from a distance of 4-5 paces towards North and had also been shown to the I.O. when the accused had fled away from the North door, the said door remained open. The kotha in which Veer Singh was taken by the accused was about 7 paces in length towards North and South and 3-4 yard from East to West in width and was having one door in it and the dead-body was lying at a distance of one hand from the door inside the kotha.

37. The report was lodged at about 1-1/2 a.m. in the night by Jai Prakash which was dictated by Layak Singh at Chaupal, in the light of lantern. After the day break at about 5.30 a.m. Layak Singh and Chaukidar had gone for lodging the FIR at the police station on foot where he was not accompanying them. Layak Singh had told him at 3 O clock that he had lodged the report but he did not ask him as to who were made witnesses in the same nor who were the accused named therein because all this happened in-front of him, hence there was no need to inquire about the same. He has denied that Genda Singh used to tell him to leave the company of Veer Singh. It was not that since after the incident of Veer Singh S/o Bholu, Veer Singh was not sitting in his company. He (Veer Singh) also used to sit with him regularly and he used to sit regularly with Genda Singh and stated that Genda Singh and Veer Singh had good relationship but he had come to know later on, that some quarrel had happened with respect to rope after about 8 p.m. when it was being discussed in the village and has denied that he was giving false statement in the Court.

38. About the testimony of this witness, learned counsel for the appellants has stated that he is not trust-worthy witness because it is unusual that in the night he would go for taking paneer and on hearing such kind of noise he would go there and would see deceased being dragged to the kotha from the place where he was sleeping in osara i.e. in-front of chappar as alleged by the prosecution. He

has narrated the deceased being held by the accused persons also does not inspire confidence and therefore it was argued that his evidence requires to be discarded.

39. On the other hand learned AGA argued that the statement of P.W.4 is believable as he is an independent witness. He was present at the time of incident and has given the details as to how occurrence happened. Although he has admitted that the detailed version of the incident given in respect of accused committing offense inside the kotha appear to be exaggerated but again the same point was pressed that his statement must be believed by the Court to the extent that he has seen the accused assaulting the deceased when he was sleeping under the chappar. Thereafter he was dragged to the kotha where he was ultimately found dead.

40. Constable Ram Krishna Pandey (P.W.5) is the formal witness who has simply proved the Chik FIR as Ext. Ka-2 and G.D. as Ext. Ka-3 but nothing has been argued by either side about the statement of this witness. Hence we do not see it necessary to discuss the statement of this witness in detail.

41. Layak Singh (P.W.6) is the informant of this case who has stated that actually he is resident of village Himayupur which was about 1 mile away from village Raini. He had his agricultural land in the same mauja. His parents had died during his childhood. Thereafter nothing was left in the said mauja for him to survive and hence his maternal uncle Jhandu Singh had brought him to his village and had nurtured him and used to look after his land. After the death of his maternal grand father (Nana) he was looked after by son of his Nana namely Genda Singh (accused) present in court. Genda Singh (accused) had got him married and after his marriage, he had given him a kotha in his haveli for residential purpose. Genda Singh also used to give him some grains and some times he gave nothing. After his marriage, there were two sons and three daughters born to him and only two daughters are alive. His elder son was Veer Singh (deceased) and other son was younger in age. Veer Singh had also been married and on the date of incident, his wife was living in her matrimonial home. Four years prior to the murder of his son, he had started agricultural work separately from Genda Singh and he was flourishing as he had also purchased a tractor but this was not relished by the accused and they started causing harm to his agriculture also.

42. About one and a quarter year ago at about 11 p.m. in the night, he, his wife Dulari, daughters Kusum and Guddi were sleeping in sehan and son Veer Singh (deceased) was sleeping beneath the chappar in sehan where lantern was also burning, the accused Genda Singh, Vijay, Udai, Shanti and Chandrakala were also sleeping in the same sehan in-front of kotha. Veer Singh raised alarm whereon he had woken up along with his wife, children and saw that all the above named accused out of whom Genda Singh and Udai armed with knife and Vijay armed with barchi were assaulting the deceased while Shanti and Chandrakala were pressing down Veer Singh. Thereafter the statement of this witness has been recorded by the trial court in question-answer form in which he has stated that he had seen the accused assaulting the deceased and on the alarm raised by him and his family members Khemi, Raj Kumar and Suresh came there with their batteries from Eastern door inside the sehan. The accused told them

that they would meet same fate as Veer Singh if they tried to interfere. Genda Singh told him that he had rehabilitated him and he would only ruin him. All the five accused fled away through the Northern door. At the time when accused were assaulting Veer Singh, he was lying on the cot on which there was bed-sheet. When he raised alarm, all the five accused had taken away Veer Singh inside their kotha and there they had murdered him and when the accused had fled away, he and his witnesses remained in their house only near his son. When he reached near his son, he was found dead and lot of blood was found spread in kotha and also khes was found blood-stained from which blood was dripping. He had dictated the report to Jai who is son of Ganga Sharan and affixed his thumb impression which is Ext.Ka-6 and the same was given at the police station in the morning whereafter police had interrogated him and had accompanied the police. He has stated that in the night when the incident happened, on the said date, no quarrel had happened with accused and on the said day when he was in jungle, Vijay and Genda Singh had taken away his rope and when he returned in the evening, Veer Singh told Vijay, Udai and Genda Singh as to why they were causing harm whereon they stated that he would make good entire loss today and stated that they had rehabilitated them and would also ruin them.

43. In cross-examination this witness has stated that two days prior to the incident, he had gone to jungle and rassi (rope) was taken away by the accused on that day. There was no outsiders or any person of the village present when the quarrel with respect to rope had taken place. Except present report, he had not lodged any report against Genda Singh nor had he any kind of enmity towards him and he used to respect him just like his father and the accused also used to treat him like son.

44. Referring to the above statement, learned counsel for the appellants argued that this admission would go to show that there was no question of the accused eliminating the son of the informant as the Genda Singh used to treat the informant just like his son.

45. This witness has further stated that his statement given above that on the date of murder in the evening, quarrel had happened with respect to rope was wrong because the said quarrel had happened two days prior to the murder and that the said statement given above, was given by mistake because he was too much nervous due to the murder of his son. This witness has stated that on the date when occurrence took place, they used to take food by 6 p.m in the evening and would go to sleep and the work of cooking food was being done by Dulari. On the date of incident, Veer Singh had come from outside and had not taken his lunch till afternoon. Veer Singh had come to him after half hour of cooking of food at 7 p.m. on that date. He (P.W.6) was suffering fever for three days. At the time when his son had taken food, other family members had also taken food and had gone to sleep in sehan and both accused as well as complainant side had gone to sleep in their respective sehan. Four cots were in his sehan and 4-5 cots were there on the accused side. At about 3-4 a.m. in the night, when it started drizzling, the cots were drawn in when he saw inside, he found that murder had already happened.

46. Thereafter court cross-examined this witness and asked that he had given statement above that all of them had woken up on alarm being raised by his son and saw accused persons assaulting the deceased by kinfe and on their making noise, witnesses came and accused dragged

the deceased inside their kotha and murdered him and now he was saying that he woke up on drizzling he went inside and found the deceased dead which of his statement was correct, to which this witness has replied that his statement is correct that at 11 p.m., he had seen accused persons assaulting Veer Singh and he was taken in their kotha and from there, they fled away. It is wrong to say that at 4 a.m. it was drizzling and he got up and saw that his son was in dead condition. Subsequently given statement is wrong because many things crossed his mind but it is not so that he was so much purturbed that he could state anything.

47. He further stated that he had 150 bighas of land and had not sold any part of that land. After the murder of his son, he had not executed any sale-deed. His wife might have sold land which was in his name. Tractor would have been sold by his wife and about this writing work might have been done by her only. He had not put his thumb impression. The tractor was in Milak while he lives in village Raini.

48. In regard to the above statement, it was argued by learned counsel for the appellants that the statement of the witness is unbelievable because if any land belonging to him was alienated that was not possible without his consent and also hammered the point that he was dominated by his wife who sold the properties owned by him in collusion with his brother-in-law Bishan Singh who might have been involved in the murder of the deceased, because he wanted to grab the property of P.W.6.

49. Further this witness stated that in the night when murder had taken place, the rain had happened. Their cots were dragged in sehan where his son was sleeping on his cot. His son was not found in dead condition rather he was dragged in front of him from there by the accused in their kotha. The dazzling had happened around 3-4 a.m. in the night.

50. It is further recorded in his statement that drizzling had happened about 3-4 a.m. in the night, this statement was given by this witness on the suggestion/prompting of his counsel. Earlier he had stated that just prior to his getting up, it has drizzled. He has further stated that when he heard the noise, he got up and after 10-20 minutes it drizzled and thereafter he had not gone rather remained there only. It had drizzled then only when accused fled from there and thereafter stated that it drizzled 20 minutes after the accused had fled. The cots in the sehan were placed in horizontal condition. When this witness was asked whether he had taken cots of accused Genda Singh and others inside, he replied that he did not know where those cots were kept. Thereafter he has stated that just before it had started drizzling, Veer Singh was taken away by the accused and witnesses were standing where he was present but the court has recorded that whenever contradictory statement was confronted to him, he replied that it was not so that after the quarrel in respect of rope he had gone somewhere. He has further stated that the sale-deed of tractor and land were done by his wife without his consent and stated he did not know why they were sold by his wife although he lives in the same house with his wife and children. When murder was committed, his wife was doing all the work on her own. She could not tell whey she would not consult him in such matters. Again he stated that in the night of murder no drizzling happened and it drizzled for 8-

10 minutes and thereafter stopped. The incident happened at about 11 a.m. in the night. Again a question was put that there was lot of difference in 2.30 a.m. and 11 p.m., to which he responded that there is difference of only three hours and further he stated when he was confronted with difference of three hours, that he was only in the position to say whatever he has stated. The court cross-examined this witness on it's own and thereafter the defence again started cross-examination and he stated that he could not tell on whose advice or suggestion his wife had sold the aforesaid things. She might be doing so on the advice of her brother Khem Singh and others. Having seen dead-body of the deceased, he had become unconscious and became conscious when the I.O reached there. He denied that the inspector had got the report lodged by taking him and Jai Prakash to police station.

51. Head Constable Nadir Ali was examined as P.W.7 who is also a formal witness. He has simply proved that small containers along with blood-stained soil and plain soil etc. and other articles which were collected by the police during investigation. As he is a formal witness, nothing much has been argued about his statement by either side, hence we do not consider it necessary to discuss his statement at length.

52. S.I. V.P. Singh has been examined as P.W.8 who has investigated this case and has stated in his cross-examination that on 1.7.79 he was posted as S.O at police station Syohara and had been assigned investigation of this case and he has recorded the statement of informant Layak Singh and Chaukidar Ameer Hussain at the police station and thereafter after having received copies of FIR and G.D proceeded towards the place of occurrence in village Raini. On reaching the house of the informant he found the dead-body of Veer Singh in the kotha of Genda Singh lying on the floor where lot of blood was spread. After taking the dead-body in possession, Panchas were appointed and Panchayatnama Ext. Ka-7 was prepared in his handwriting. Photo lash, chalan lash and chitthi with respect to post-mortem were prepared in his handwriting which were marked as Ext.Ka-8, Ka-9 and Ka-10 respectively. The dead-body was sealed and was sent for post-mortem through constable Jagdish Chand and Govind Singh along with relevant papers and thereafter he recorded statements of Ram Dulari wife of Layak Singh and Km. Kusum, D/o Layak Singh and Khem Singh and others. At the instance of informant and witness, he inspected the place of incident and prepared the site-plan which was marked as Ext.Ka-11. He found the sari tied around the neck of deceased Veer Singh which was blood-stained and the same after having been taken off, was taken into police custody and sealed on the spot. It's memorandum was prepared in his handwriting which was marked as Ext.Ka-12 and Sari is material Ext.1. Blood-stained khes (bed-sheet) was also taken in possession. The recovery memo was prepared by him which is marked as Ext.Ka-13 and the Khes as material Ext.2. In the Kotha of Genda Singh, one lantern was also recovered which was marked as Ext. Ka-14 and lantern as material Ext.3. The said lantern was found hanging by the peg on the wall. It's recovery memo was prepared as Ext.Ka-15 and lantern as material Ext.4. He also found the drop of blood starting from osara of informant Layak Singh where the deceased had slept up to the Kotha of Genda Singh and there

was Sehan in between. From there also blood-stained and plain soil was taken by him and both were sealed in separate containers and it's recovery memo was prepared which is Ext.Ka-16 and the said containers were marked as material Ext.5 and 6 respectively. From near the place where dead-body was lying in the kotha of Genda Singh, from there also, blood-stained soil and plain soil was collected and recovery memo was prepared which was marked as Ext. Ka-17 and the said containers were marked as material Ext.7 and 8 respectively. Lanterns were marked as material Ext.3 and 4 which were found in running condition and oil was in it. The batteries collected from witnesses Raj Kumar, Suresh and Khem Singh were also in running condition and recovery memo was prepared which is Ext.Ka-18. Thereafter he recorded the statements of witnesses of recovery and panchnama and thereafter he made search for the accused who were not found in the village. The same day on the information of the mukhbir (informer) accused Genda Singh was arrested on the road towards Hiranpura towards Eastern side at about 8 p.m along with Chandrakala and Shanti Devi and thereafter statements were recorded. Thereafter he returned to police station along with all the case property and deposited them at the police station. In G.D. No.32 time 10 p.m., he made entry of his return and thereafter on 3.7.79, 4.7.79, 7.7.79, 10.7.79 he made search for the accused Vijay and Udai but they were not found and hence warrants u/s 82/83 Cr.P.C. were obtained. Thereafter on 17.7.79 they appeared before the court and on 10.8.79 he submitted charge sheet.

53. In cross-examination he has stated that he did not consider it necessary to write in the G.D as to where the accused were arrested and how they were arrested. He did not consider the importance to write in panchayatnama the weapon by which the said injuries were found to have been caused. The sister of Genda Singh namely Swarupiya Devi who is widow lady was also interrogated by him. In site-plan, the kotha shown in Northern most side was not that of Swarupiya Devi. He had not made any search of the kotha of Genda Singh where the dead-body of the deceased was found. He denied that he had wrongly shown the recovery of the dead-body from the said kotha deliberately. In sehan, he has shown place "G" from where witnesses had seen the occurrence which is 15 paces away from the main door towards North-West. From the cot up to the door, line of blood was found by him. In that night, there was no rain nor there was water in "Lautiyon". It is wrong to say that he has made false evidence of blood. There was no blood found beneath the cot on which Khes was spread. The Khes was found lying on the floor which was given to him by the informant after picking the same up. The witness Kusum (P.W.1) has given statement to him that she and her family members had raised alarm, hearing which Raj Kumar, Suresh and Khem and many other persons came there with their torches from the Eastern door to the place of occurrence. She has also stated that having seen her and other persons of the village these (accused persons) caught-hold of the cot, the same was started to be dragged towards their house. The witness Khem Singh (P.W.4) had not stated to have gone to take Paneer from Raj Kumar for two times rather he stated that he had gone once. He had taken statement of Bishan Kumar on 1.7.79. This witness has denied that he had lodged the report of this incident

falsely after consulting Khem Singh, Raj Kumar and Bishan Kumar and had made false investigation and prepared and submitted false report.

54. Constable Jagdish Chandra (P.W.9) is the formal witness. He had taken the dead-body of the deceased in a sealed condition for post-mortem.

55. Jagdish Saran (P.W.10) is the formal witness in-front of whom the case property was deposited in Malkhana.

56. Ahivaran Singh (P.W.11) is also formal witness who had also deposited the case property in Malkhana.

57. Constable Gendan Lal (P.W.12) is also formal witness who has also deposited some part of case property in Malkhana. All the above four statements are not discussed at length by learned counsel for the appellant, hence we do not find any relevance to discuss the statements here.

58. It is apparent from the details mentioned above that according to prosecution story, the accused-appellants along with accused Genda Singh, Shanti and Chandrakala who have been acquitted by the trial court had committed murder of the deceased Veer Singh on 1.7.79 in village Raini under the jurisdiction of police station Syohara, district Bijnore and the appellants and their father Genda Singh are stated to have assaulted the deceased. The accused-appellant Vijay was armed with Barchi and Genda and Udai armed with knife were assaulting the deceased while Chandrakala, W/o Vijay and Shanti, W/o Genda Singh caught-hold of the deceased by pressing the deceased. As per FIR this incident was given effect to by the accused side because of quarrel which had taken place a day before this incident between the complainant side and accused side when one of the appellants Vijay had taken away rope without permission of the complainant side and did not return the same, on which the deceased had protested and gone there to the accused stating that why they were causing harm to his property, at which Bishan Kumar (Mama) of the deceased had mediated the matter which was settled but this quarrel ultimately gave rise to present incident.

59. From the side of learned counsel for the appellants, it was vehemently argued that according to the admission of the informant, father of Genda Singh namely Jhandu Singh had brought him to village Raini and had rehabilitated him. hence there could be no reason why the accused would murder the son of the informant. It was further argued that the motive which has been stated by the prosecution is so petty that it could not be treated to be the reason for causing murder of the informant's son because it is stated that accused Vijay, son of co-accused Genda Singh had taken away a rope without permission from the house of the deceased which was protested from the side of the informant's son and in the night the present incident happened. The motive is also suggested by the prosecution that the father of Genda Singh had brought up the informant in village Raini as the informant Layak Singh had lost his parents at an early age. Thereafter Genda Singh used to look after 150 bigha of land of Layak Singh and out of the income earned, he used to give him only some money and some time did not give anything therefore, the said land was taken back by the informant from Genda Singh and informant had started doing agriculture on his own and maintained a tractor as well which the

accused did not like. Eleven bigha of land was still left to be taken from the accused, but nothing much was argued from the side of the appellants in this respect. It is the prosecution version that it was this enmity because of which this occurrence has happened. Now we have to see as to whether the prosecution has been able to prove its case beyond reasonable doubt against the accused appellants on the basis of evidence on record. Further, it would be pertinent to refer here the details of the site plan so that the statement of the prosecution's witnesses could be examined in the light of the site plan which would facilitate testing their veracity. The site-plan is as follows:-

By "A" has been shown the place where Layak Singh is shown to be sleeping on Cot.

By "B" is shown the place where Dulari wife of Layak Singh was sleeping on Cot.

By "C" is shown the place where the daughter of the informant Kusum Kumari was sleeping.

By "D" is shown the place where the Pappu and Guddi children of the informant were sleeping.

By "E" is shown Cot of deceased Veer Singh.

By "F" is shown the place wherein in kotha of Genda Singh the deceased Veer Singh was also stated to have assaulted and murdered and blood-stained and plain soil was collected from there also.

By "G" is shown the place from where informant, his son and witnesses have seen Veer Singh having been assaulted.

By "H" is shown the place where the witness Suresh was sleeping in his house and reached the place of incident.

By "I" is shown the place from where witness Raj Kumar came after hearing the noise to the place of occurrence.

By "J" is shown the passage from where accused fled away. Although it is difficult to read from the original site-plan but still it is being gathered from it that by "J" appears to have been shown the place from where the witness Raj Kumar and Suresh had entered the gher of Genda Singh and the informant.

By "K" is shown the place where the lantern was burning.

By "L" is shown the place where the lantern was burning in the kotha of Genda Singh.

The distance of A, B, C and D from the place is shown by E is mentioned meaning thereby the informant and his family members were sleeping about 12 paces away in-front of chappar. The distance of F is shown about 20 paces which would indicate that the place where the deceased was sleeping and from where he was stated to have been dragged by the accused persons towards their kotha. The distance of 'F' and 'G' is nine paces. This would indicate the distance from which the witnesses have seen the incident which was being committed inside the kotha. The width of that kotha is 5 paces and length is 4 paces. From 'E' to 'F' dots are shown by which it is indicated that on the entire place blood was found. From 'H', the house of informant is 25 paces and from 'I' house of the informant is shown 55 yards.

60. It is argued by learned counsel for the appellant that the sole basis of conviction of accused-appellants is that both the appellants had absconded and remained absconded for approximately eleven days which conduct was found to be suspicious one, on the basis of which the

trial court has held them guilty. It was also argued that the circumstances that they had absconded for eleven days was never put to the accused u/s 313 Cr.P.C., hence said piece of evidence could not have relied upon by the trial court. We are convinced by argument of learned counsel for the accused-appellants to the extent that if the sole ground of conviction is that appellants remained absconded for eleven days, then it would be improper for the trial court to base their conviction on that. Unless that circumstance was put to the accused u/s 313 Cr.P.C. But if there were other eye-witnesses also pointing the guilt of the accused persons sufficient enough to prove them guilty, their conviction would not be faulted.

61. We have seen above in the statement of PW 1 who is sister of the deceased that 11 bighas of land was still left to be taken from the accused side because of which the accused Genda Singh had animosity towards the informant and nothing has been suggested in cross-examination in this regard therefore the testimony of this witness with respect to the above piece of land stil being in possession of the accused side is established and it has also come in evidence that to trigger dispute on the fateful night the incident of the rope having been taken away by the accused side had also happened which was protested and which was the immediate cause for the occurrence. It has also been stated by her that the rise of informant was not being liked by the accused side because they had started cultivation work on their own. We find that though PW 1 is real sister of the deceased but her restatement with respect to the motive as stated above seems to be believable and the same cannot be discarded only because she is real sister of the deceased. The Supreme Court has laid down in the case of **Motiram Pandu Joshi and others vs State of Maharastra, (2018) 9 Supreme Court Cases 429** that relationship is not a ground affecting credibility of witness, however judicial approach has to be cautious in dealing with such evidence. Even evidence given by related witness should not be discarded only on the ground that such witness is related.

62. Now we would like to deal with the manner in which the occurrence has taken place and the testimony of eye-witnesses given in this regard and to see as to whether their testimonies are trustworthy or discardable.

63. It is apparent from the statement of PW 1 that initially the incident happened in front of Chappar shown by "E' where in the light of lantern she had seen accused Vijay with barchi, Udai and Genda Singh with knives in their hands who were assaulting his brother (deceased) and apart from them accused Shanti and Chandrakala were pressing the deceased down when she was sleeping in courtyard with her parents, when she had woken up at the scream of the deceased and thereafter when all of them raised alarm witness Suresh, Rajkumar and Khemi also reached there. From there the accused had taken away the deceased towards their Kotha and when they tried to rescue him, they were threatened to be killed due to which they could not come forward to save the deceased from their clutches. The accused thereafter murdered the deceased in the said Kotha which is shown by "F', which is the 2nd place of incident, where the deceased was found dead. She has stated to have seen this incident in the light of lantern which was hanging there both near the Chappar as well as Kotha and also in

the light of the torches which the witnesses were having. A long cross-examination has been made of this witness but we find the testimony of this witness to be partly liable to the extent that the appellants with co-accused Genda Singh were involved in assaulting with above-mentioned weapons in an open place i.e. when he was sleeping in front of Chappar and thereafter he was dragged up to the Kotha which was situated little away from there, but it has come in evidence that cry was heard of the deceased when he was inside Kotha and thereafter it subsided and when she and other witnesses saw inside the Kotha, the deceased was found dead. Therefore it reveals that partly she was an eye-witness of the deceased being assaulted as is stated above and partly the case rests on circumstantial evidence that when the deceased had been taken inside the Kotha, where the deceased was crying and thereafter the said cry subsided and the accused fled away from there, which would indicate that it could be the accused only who had killed the deceased and no one else. Moreover the place where the dead body was found lying is Kotha of Genda Singh, therefore under section 106 of the Indian Evidence Act, the burden lay upon the defence to disclose how the deceased was found dead in their Kotha, which has not been discharged. The presence of this witness on the scene of occurrence is very natural because she was sleeping very close to the deceased and that even accused were also residing in one part of the said house in which this incident happened and it was night time. Although we find little exaggeration in the description as to how the deceased was taken to Kotha from the place where he was sleeping, but in judgment dated **28/08/2018 in Criminal Appeal No. 1198 of 2006 Menoka Mallik and others vs the State of West Bengal and others** the Apex Court has held that it is settled position of law that the testimony of a witness cannot be discarded in toto merely due to the presence of embellishments or exaggerations. The doctrine of falsus in uno falsus in omnibus has been held inapplicable in Indian scenario, where the tendency to exaggerate is common. It is the duty of the court to separate the chaff from the grain. Moreover, minor variations in the evidence will not affect the root of the matter, inasmuch as minor variations need not be given major importance and they would not materially alter the evidence/credibility of the eye-witness as a whole.

64. The statement of P.W.1 has been corroborated by PW 3 who is mother of the deceased who was also sleeping by the side of the PW 1 and close to the deceased. She was also cross-examined at length but we do not find that her testimony suffers from any infirmity with respect to her having seen the occurrence which happened in front of the Chappar and thereafter she also has stated that the deceased was found dead when the accused had dragged him away to their Kotha and soon after the cry of deceased subsided and the accused fled from there, the deceased was found dead by her. Therefore her testimony is also found to be partly reliable despite several embellishments and exaggerations.

65. The informant Layak Singh (PW 6) has also clearly stated to have seen the appellants and the co-accused Genda Singh to have assaulted his son in front of Chappar where he was sleeping and thereafter he was dragged to the Kotha where he was found dead. In cross-examination of this witness nothing such could be elicited by the defence so as to render his testimony unbelievable in totality and we find that he was an eye-witness to the extent that he saw his son having been assaulted by the above accused

despite the fact that he also exaggerated on several counts.

66. PW 4, Khem Singh, who is an independent eye-witness of the occurrence is also found by us to be partly believable because he has clearly stated that he had reached the place of incident after hearing the noise and saw in the light of torch that the accused were carrying the deceased towards their Kotha and that when he tried to rescue him, he was also threatened to be killed and subsequently the deceased was found dead in Kotha and the accused had fled from there. We find that though this witness has stated to have reached the place of incident in the night when the occurrence happened, but he being a neighbour who was residing not at a great distance, his testimony also is found to have corroborated the statements given by the other above-mentioned eye-witnesses supporting that he had seen the accused being dragging the deceased away to the Kotha, where the deceased was found dead when the accused had fled from there. His testimony would fall in the category of proving the circumstance of the deceased having been found dead in quota after having been dragged there by the accused persons.

67. We also find that the testimony of the above-mentioned eye-witnesses, though they are family members, does stand corroborated by the medical evidence because the doctor who conducted post-mortem of the deceased and has been examined as PW 2 had found as many as 9 injuries on the body of the deceased which included cut injuries as well as punctured wounds which could have been caused by the weapons which are stated to have been wielded by the appellants as well as co-accused Genda Singh. We also find that the statement of above mentioned witnesses are also in consonance with the site plan which has been made by the investigating officer, who has also clearly proved that a blood trail was found from the place where the deceased was sleeping in Chappar up to the place where he was found dead i.e. Kotha, which supports the version of the prosecution witnesses.

68. Next, we would like to deal with the most important argument made by the learned counsel for the appellants i.e. when the co-accused Genda Singh had been acquitted by the trial court, therefore on the same piece of evidence how the appellants could have been held guilty and punished and therefore it was prayed that the appellants also deserve to be acquitted. Further it was vehemently argued that the basis of convicting the appellants has mainly been that both of them had absconded for about 11 days and because of that conduct only they were found guilty, despite the fact that the said evidence was not put to them when their statement was being recorded under section 313 Cr. P.C., and therefore they could not been held guilty.

69. As regards the co-accused Genda Singh having been acquitted on the same evidence, on the basis of which the appellants have been held guilty, we are not inclined to accept the argument of learned counsel for the appellants. For this we would rely on the judgment of the Apex Court in the case of **Gangadhar Bahera and others Vs. State of Orissa Cr. Appeal No.1282 of 2001 decided on Oct.10.2002**. The paragraph no.15 is as follows:-

"To the same effect is the decision in State of Punjab v. Jagir Singh

(AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76). Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Alli v. The State of Uttar Pradesh AIR 1957 SC 366.

Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurucharan Singh and Anr. v. State of Punjab AIR 1956 SC 460. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh 1972 3 SCC 751) and Ugar Ahir and Ors. v. The State of Bihar AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v.

State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and Ors. v. The State of Punjab. (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186). Accusations have been clearly established against accused-appellants in the case at hand. The Courts below have categorically indicated the distinguishing features in evidence so far as acquitted and convicted accused are concerned.

Thus it is apparent from above ruling that it is not necessary that if an accused has been acquitted on particular evidence, the other co-accused also deserve to be acquitted on the same evidence.

70. It is also made clear that the other two co-accused Shanti wife of Genda Singh and Chandra Kala wife of appellant Vijay have been acquitted by the trial court on the ground that when the accused were well armed and were assaulting the deceased, there was hardly any reason to take support of two ladies to catch hold of the deceased so that the deceased could be assaulted, and on that ground these two accused appear to have been acquitted.

71. Learned counsel for the appellants in support of his contention has relied upon the judgement of the Apex Court reported in **2015(2) SCC 513 Naushad @ Naura**.

72. In this case appellants no.1, 2 and 3 along with 40 others armed with deadly weapons caused injuries with their weapons to the deceased resulting in his death and on the basis of the statements of nine prosecution witnesses, the trial court convicted the accused-appellant no.1 to 5 and accused-appellant no. 29 out of 44 accused persons. The High Court allowed the appeal preferred by the accused no.4, 5 and 29 and confirmed conviction of accused-appellant no.1 to 3 only. The trial court had made it clear that so called star witness P.W.11 and another were unreliable and unbelievable but used their statements for corroboration of prosecution version regarding appellants. In this case it will be wholly unsafe to rely on such evidence in order to confirm conviction imposed on appellant no.1 to 3, though the very version spoken to by such witness persuaded trial court to acquit all other accused, except accused appellant no.1 to 5 and accused-appellant no.29 and High Court to acquit accused-appellant no.4, 5 and 29 for the same very reasoning. Hence conviction of the appellant nos.1, 2 and 3 would not be sustained.

73. The facts of the present case are not akin to the facts of the above mentioned case and there is no denying the fact that in criminal case each case has it's own facts of which the application of law is required to be made. We do not find that said ruling would be of any help to the appellants in the present case.

74. Learned counsel for the appellants further relied on the judgement of the Apex

Court in the case of **Vadivelu Thevar Vs. State of Madras, 1957, SCR 1981**.

75. In this case it has been laid down by the Apex Court that the court need not insist upon plurality of witnesses in the murder case. The court may convict if the evidence is wholly reliable and may acquit if it is wholly unreliable and may lack corroboration in material particulars of reliable testimony direct or circumstantial if it is neither wholly reliable nor unreliable we have no quarrel with this principle of law.

76. We would like to point out here that we do admit that according to the correct position of law if abscondance of the appellants was the only ground for the trial court to hold them guilty by distinguishing their case from the other co-accused Genda Singh, the said evidence ought to have been clearly put to the accused appellants at the time of recording their statements under sections 313 Cr. P.C., hence that not being done would certainly make the finding in this regard of the lower court to be questionable, but simultaneously we are of the view that even if that piece of evidence be excluded, we find that there is sufficient evidence both ocular, supported by medical evidence and the circumstantial evidence to hold the appellants guilty and in our opinion even Genda Singh ought to have been held guilty, but his acquittal by the trial court would not confer benefit upon the other co-accused to be acquitted in terms of the law laid down in **Gangadhar Bahera case (supra)**. The finding with regard to the co-accused Genda Singh is not found to be in accordance with law but the acquittal of Genda Singh has not been challenged before us. As regards other co-accused Shanti and Chandrakala, we do not find any infirmity in the finding of the trial court.

77. We would also like to take into consideration the defence evidence extended on behalf of the accused appellants so as to take plea of alibi. In this regard, the defence version was that accused Genda Singh had, on the date of incident at about 4 PM gone to the hospital for the treatment of his daughter in law, Chandrakala along with his wife Shanti, also along with appellants and had stayed in the Government hospital Syohara in the night and returned in the morning, then they came to know that Veer Singh had been murdered, whereafter they went to the police station at about 9 AM, where they were detained and the condition of Shanti deteriorated due to which Doctor was called. Doctor after coming to the Police Station had given her medicine and the next day the police challaned them. To prove the defence version, Bhoj Singh DW 1, constable clerk at PS Kotwali City, Bijnor has proved remand sheet, Exhibit Kha - 1. Dr. AP Gupta, Medical Officer, Incharge PHC, Syohara has been examined as DW 2 who stated that on 30/06/1979, he was posted at the said PHC and had examined Chandrakala as outdoor patient and had made an entry in register. She suffered from fits and pain chest and has proved certificate in his handwriting, Exhibit Kha - 2 but in the cross examination he did not recollect when the said certificate was issued. Either the patient or his attendant had moved an application that a certificate in that behalf should be issued, and after having taken the same, the patient had gone though he had not given any treatment to the patient. He also did not recollect whether any medical practitioner had referred her case. The entry of the patient was recorded at 5:30 PM, which was written by different ink, which was closing time of the hospital. Three - four persons were accompanying the patient and there

was no thumb impression on Exhibit Kha 2 nor was there mentioned the name of husband or father of Chandrakala. The said statement clearly reflects that the patient, if it be taken to be true, who was taken to the hospital, was not found to suffer from any serious ailment as she was treated as an outdoor patient and was not admitted, therefore it could not be believed that she would have been admitted and remained in the night there only, which belies the defence version of accused persons staying in the hospital in the night of incident. DW 3 is record keeper, Police Office, Bijnor who had brought general diary of July 1979 of PS Syohara according to which Genda Singh, Shanti and Chandrakala were sent to jail in crime no. 126 under sections 147, 148, 149, 302 IPC as per report no. 16 at 8 AM and the GD was proved as Exhibit Kha - 3. He appears to be a formal witness only. Ashok Kumar Goel, Medical Officer has been examined as DW 4 who has stated that the medical certificate of Doctor Nripendra dated 25/05/1981 was issued by him who was suffering from fever. He has no prescription of medicine on record as the same might be with the patient. The statement of this witness also does not help the case of defence because the Doctor who actually had prepared certificate has not been examined nor does this witness prove that the patient was under treatment in the night of the incident. Later on Dr. N K Verma who was examined as DW 6, has stated that he knew accused Vijay since before, who was not present in court. About 2 years ago at about 11 - 12 a.m. SO, Vijay Pal Singh had telephoned him, in response to which he had gone to PS Syohara, where Genda Singh, his wife and one more lady who had covered her face, were present. Shanti Devi, who had fainted, was given medicine by him. He had asked Genda Singh as to how his wife had fainted, and then he told that she had become nervous. He has stated in cross-examination that he knew Genda Singh from before as he was their family doctor because of which he made no entry in the register. He is a practising doctor for last 20 - 21 years. The said statement does not come to the help of the appellants because it could not be concluded from it that appellants were not present in their house on the date of incident. Therefore from these witnesses it could not be concluded that all the accused including the appellants were away from the place of incident in respect of treatment of Chandrakala on the date of incident.

78. It is pertinent to mention here that the informant Layak Singh has filed Criminal Revision No.1426 of 1981 against the acquittal of co-accused Genda Singh, Smt. Shanti Devi and Smt. Chandrakala @ Munni which is pending before this Court. However, an statement has been made at Bar that the informant Layak Singh as well as co-accused Genda Singh and Smt. Shanti Devi have also expired and with respect to their death, report has been summoned by the Court and as soon as the same is received, the said revision would be disposed of by this Court separately.

79. Therefore, from above analysis, we are convinced that this is a case in which prompt FIR has been lodged and the eye-witnesses of incident named above have actually seen the appellants along with co-accused Genda Singh assaulting the deceased by the weapons mentioned above and the injuries received by the deceased are also corroborated by the post-mortem report of the deceased. The testimonies of the three above mentioned eye-witnesses are found partly believable regarding their having seen the deceased being assaulted by the appellants as well as

Genda Singh and thereafter the circumstantial evidence to the effect that the accused had dragged the deceased in their Kotha, where he was murdered and thereafter the accused fled from there, and after the accused had fled, the witnesses entered the room and found the deceased in dead condition. It is also noteworthy that the Kotha in which the dead body of the deceased was found belonged to the co-accused Genda Singh, although the defence version was that the said house belonged to sister of Genda Singh, but the investigating officer had stated that the same belonged to Genda Singh. In view of this the burden also stood shifted to the accused to prove as to how the deceased was found dead in Kotha belonging to them which could not be discharged by them. Therefore, in view of foregoing discussion we are of the view that the trial court has rightly convicted the accused appellants for the offences mentioned above and the appeal deserves to be dismissed and is accordingly **dismissed**.

80. The appellants are on bail. They may be taken into custody forthwith and sent to jail to serve out the sentence imposed on them by the trial court.

81. Let a copy of this judgment be transmitted to the trial court forthwith along with lower court record for necessary compliance.

(2020)06ILR A462
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Appeal No. 1872 of 2011

Ravindra Singh & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Rajul Bhargava, Sri Deepak Kumar Pandey, Sri Noor Mohammad

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

Civil Law - Juvenile Justice (Care and Protection of Children) Act' 2015- Section 94(2) - The claim of juvenility can be raised at any stage of the proceeding by a person even in the appeal court - For making a claim of juvenility after conviction, the claimant has to produce some material before the appellate court so as to *prima facie* prove that an inquiry into the claim of juvenility is necessary. Initial burden in such a claim has to be discharged by the person who claims juvenility that too before the court where the lis is going on.- As to what would *prima facie* satisfy the Court *cannot* be catalogued *nor can* it be *laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility.* However, the documents referred in sub section (2) of Section 94 of the Act' 2015 have to be treated as sufficient for prima faice satisfaction of the Court about the age of the delinquent to initiate an inquiry under the Act' 2015.
The burden of proof lies upon the person who makes a claim for juvenility before the Court and a prima facie case for the said claim shall be made out on the basis of the requirement of the documents prescribed u/s 94(2) of the Act, 2015.

Civil Law - Juvenile Justice (Care and Protection of Children) Act' 2015- Section 94 - Inquiry- No need of if the claim is bogus and frivolous- If on a prima facie inquiry, the Court before whom the claim of juvenility is raised, finds that the claim is frivolous, bogus or absurd or improbable, it can reject the same at the threshold without referring to the inquiry before the Juvenile Justice Board as it would be

a futile exercise and also abuse of the process of the Court. The reason being that a person who raised a claim has to approach a Court with clean hands and the process of law cannot be allowed to be abused at the hands of an unscrupulous person - Once the Statute provides complete procedure and manner of inquiry and enumerates the material evidence which could be considered in inquiry, no deviation is permissible in the course of inquiry. The Juvenile Justice Board or the Committee, as the case may be, has to strictly follow the procedure and the manner in which inquiry has to be conducted.

There is no requirement to conduct any inquiry by the Juvenile Justice Board if at the very beginning the claim is found to be false and frivolous and that the person has not approached the Court with clean hands. The provisions of the Act have to be strictly adhered to and no deviation from the same is permissible.

Civil Law - Juvenile Justice (Care and Protection of Children) Act' 2015- Section 94 – Medical Opinion- Can be used as a last resort only for corroborating the documentary evidence- As far as medical evidence is concerned, the same has been considered as a last resort in the matter of determination of age - The legislative intent to give primacy to the school record regarding the date of birth and the mark sheet containing the said information is clear and categorical. The medical opinion, if obtained, can only be of corroborative value in case of any doubt in the minds of the courts on the documentary evidences.

While determining the claim of juvenility, primacy has to be given to the school records and the medical opinion can only be used for corroboration of the documentary evidence.

Civil Law - Juvenile Justice (Care and Protection of Children) Act' 2015 - Section 102 - Section 94 - The power to examine the validity of the order of the Juvenile Justice Board in appeal is drawn under Section 102 of the Act' 2015 which confers supervisory revisional jurisdiction on the High Court to call for the records of any proceeding conducted by the Board on its own motion so as to satisfy itself with regard to the legality or propriety of an order passed in such proceeding- An application was moved by the appellant directly before the Juvenile Justice Board without disclosing the fact of pendency of the present appeal. Without making any inquiry regarding pendency of the instant appeal or without any direction of this Court, the Juvenile Justice Board had proceeded to make an inquiry into the claim of juvenility of a convicted accused.

The High Court can examine the legality and propriety of an order passed by the Juvenile Justice Board u/s 102 of the Act- Filing of application claiming juvenility by the Appellant before the Juvenile Justice Board during the pendency of the Criminal Appeal and without disclosing the same, is an abuse of the process of the Court and the inquiry conducted by the Board would be an illegality.

Civil Law - Juvenile Justice (Care and Protection of Children) Act' 2015-Section 94 – The Statute requires that the Board shall conduct an inquiry (in the matter of determination of age) by summoning evidences from the School authorities as the words used in sub section (2) of Section 94 are "by seeking evidence by obtaining" the birth certificate from the school, or the matriculation certificate from the concerned Board of examination- Sufficient evidences were not before the Juvenile Justice Board and it has proceeded to declare the appellant/applicant juvenile on inadmissible evidence such as original (duplicate) school leaving certificate and self attested copy of the admission register produced by the applicant- No prima facie satisfaction can be recorded regarding the claim of the applicant being a juvenile on the date of the incident- the appellant has not approached this Court with clean hands and the plea of juvenility has been raised as a shield to cover his misdeeds that too by placing reliance on insufficient material.

In the absence of any sufficient evidence that could prima facie make out a claim for juvenility of the appellant, the Board could not have declared the appellant juvenile on the date of the incident. Also in view of the fact that the appellant has not come with clean hands before the Court and the claim for juvenility is clearly a shield and a cover to escape from his criminal liability. (Para 47, 48, 50, 51, 56, 62, 63, 68, 74)

Application rejected. (E-3)

Case Law relied upon/ Discussed:-

1. Ashwani Kumar Saxena Vs St. of M.P

2. Anil Agarwala & anr. Vs St. of W.B

3. Dharmbir Vs St. (Nct Of Delhi) & anr.

4. Abuzar Hossain @ Gulam Hossain Vs St. of W.B

5. Om Prakash Vs St. of Raj.

6. Parag Bhati Vs St. of U.P.

7. Ramdeo Chauhan Vs St. of Assam

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Dinesh Pathak, J.)

(Order on application No.20 of 2019 dated 24.09.2019)

1. Heard Sri Noor Mohammad learned counsel for the appellant No.2 Mahesh and Sri Jai Narayan learned A.G.A.-1 for the State.

2. We have heard learned counsel for the appellant on the application dated 24.09.2019 filed on behalf of the appellant No.2 Mahesh to take on record the order dated 25.08.2018 passed by the Juvenile Justice Board as an additional evidence and direct an inquiry with regard to the plea of juvenility raised by the applicant/appellant.

3. To ascertain the claim of the appellant seeking declaration of his juvenility, it would be pertinent to note certain relevant facts of the case.

4. An application dated 24.09.2019 supported by affidavit of brother of the appellant/applicant Rinku aged about 38 years has been filed herein stating that during pendency of the present appeal, the appellant moved an application through his counsel directly before the Juvenile Justice Board, Hathras for declaring him juvenile taking the plea that the appellant was born on 11.08.1991 and he studied upto Class III in Harcharan Lal Poorva Madhyamik Vidyalaya, Nai Ka Nagla, Hathras. The date of birth of the appellant was sought to be proved from the School Leaving Certificate dated 05.07.2018 appended as Annexure No.'1' to the affidavit accompanying the aforesaid application. It is contended that the Juvenile Justice Board after hearing both the parties and perusal of the documents appended by the appellant in support of his application, declared him juvenile by an order dated 25.08.2018. The copy of the said order has been brought on record by means of a supplementary affidavit dated 06.01.2019. It appears that when the matter came up for hearing before this Court on 19.09.2019 on the prayer made by the counsel for the appellant he was permitted to move a fresh application claiming juvenility in the present appeal. As a result of the direction issued by this Court vide order dated 19.09.2019, the appellant has moved the present application for the reliefs as noted above.

5. It is contended that the date of incident is 11.08.2008 and on the said date, the appellant was about 17 years old. It is then contended that an inquiry is to be conducted as per the procedure under the Juvenile Justice Act under the directions issued by this Court.

6. To the above application, a counter affidavit dated 14/26.11.2019 has been filed on behalf of the State to bring on record the order dated 25.08.2018 passed by the Juvenile Justice Board as also the copy of the mark sheet of Class III and the

School Leaving Certificate dated 05.07.2018, the documents relied by the Juvenile Justice Board. It is pertinent to note that alongwith the supplementary affidavit dated 06.01.2019, sworn by the brother of the appellant, the copy of application dated 21.07.2018 moved by the appellant before the Juvenile Justice Board and the order dated 25.08.2018 passed by it have also been brought on record.

7. Considering the above documents, the questions for adjudication before this Court are:- (i) as to whether the appellant was justified in approaching the Juvenile Justice Board directly for making inquiry for declaring him juvenile on the date of the incident i.e. 11.08.2008, without moving any application, at the first instance in the instant appeal more so when the said fact was not disclosed to the Juvenile Justice Board. (ii) Second issue is about the legality and propriety of the order dated 25.08.2018 passed by the Juvenile Justice Board.

8. The issues before us have serious ramification, therefore, it would be apt to go through the entire Scheme of the Juvenile Justice Act alongwith the amendments in the statutory provision relating to Juvenile Justice (Care and Protection of Children) Act brought from time to time to understand the legal position prevailing on the date of the claim made by the appellant for declaring him juvenile. And further to examine the manner in which, inquiry has to be conducted by the Juvenile Justice Board. We would also be required to refer to the judicial pronouncements holding the field.

9. The Juvenile Justice Act' 1986 (Act No.53 of 1986) was incorporated by the Parliament as a result of ratification of the convention on the right of the Child, adopted on 20th November 1989 by the General Assembly of the United Nations. To achieve the objectives of the Convention, the Juvenile Justice (Card and Protection of Children) bill was introduced in the Parliament. On a review of the working of the Juvenile Justice Act' 1986, it was found that the justice system as available for adults was not suitable for being applied to a juvenile or the Child or anyone on their behalf including the police, voluntary organisations, social workers, or parents and guardians, throughout the country. An urgent need was felt for creating adequate infrastructure necessary for the implementation of the proposed legislation with a larger involvement of informal systems specially the family, the voluntary organisations and the community. An Act to consolidate and amend the law relating to juvenile in conflict with law and Children in need of care and protection, by providing proper care, protection and treatment, by catering to their development needs, and by adopting a Child-friendly approach in the adjudication and disposition of matters in the best interest of child and for their ultimate rehabilitation and for matters connected therewith or incidental thereto, was enacted w.e.f 30.12.2000, which is known as the Juvenile Justice (Care and Protection of Children) Act'2000 (56 of 2000) (in short 'The Act' 2000)

10. Exhaustive amendment was brought in the Act' 2000 by the Amendment Act 33 of 2006 introduced w.e.f. 22.08.2006. Some relevant provisions of the Juvenile Justice Act' 2000 have also been amended in the year 2011. The relevant amendment dated 22.08.2006 for ready reference are to be quoted as under:-

"**Section 2** *(k)* "juvenile" or "child" means a person who has not completed eighteenth year of age"

Section 2(l) "juvenile in conflict with law" means a juvenile who is alleged

to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;';

Section 2(s) "probation officer" means an officer appointed by the State Government as a probation officer under the Probation of Offenders Act, 1958 (20 of 1958);"

11. Section 3 of 2000 Act reads as under:-

"**Section 3** Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.--Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."

12. Section 7-A providing procedure to be followed when claim of juvenility is raised before any Court is as under:-

*"**Section 7-A** 7-A (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.*

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.

13. The scope of Section 7-A of the Juvenile Justice Act' 2000 came up for consideration before the Apex Court in **Ashwani Kumar Saxena vs State Of M.P**1 and **Anil Agarwala & another VS. State of West Bengal**2.

14. In a previous decision in **Dharmbir vs State(Nct Of Delhi) & another**3, the effect of insertion of Section 7-A in the Act' 2000 w.e.f. 22.08.2006 was considered to hold as under:-

*"12. At this juncture, it will be profitable to take note of **Section 7A**, inserted in the Act of 2000 with effect from 22nd August, 2006. It reads as follows: ----*

Proviso to sub-section (1) of Section 7A contemplates that a claim of juvenility can be raised before any court and has to be recognised at any stage even after disposal of the case and such claim is required to be determined in terms of the provisions contained in the Act of 2000 and the rules framed thereunder, even if the juvenile has ceased to be so on or before the date of the commencement of the Act of 2000. The effect of the proviso is that a juvenile who had not completed eighteen

years of age on the date of commission of the offence would also be entitled to the benefit of the Act of 2000 as if the provisions of Section 2(k) of the said Act, which defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age, had always been in existence even during the operation of the 1986 Act. It is, thus, manifest from a conjoint reading of Sections 2(k), 2(l),7A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1st April, 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted."

15. In **Anil Agarwal**2, the order passed by the High Court in rejection of application of the appellant therein on the ground of being filed at the belated stage came up for consideration. It was held therein:-

"6. Having regard to the above provisions, we set aside the order passed by the High Court which is incompatible with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and direct the trial court to first of all look into the question of juvenility, as claimed by the appellants herein and after disposal of the claim made by the appellants that they were minors on the date of the alleged incident, it shall proceed with the trial. In the event the trial court comes to a finding that the appellants were minors at the time of commission of the offence, it shall immediately send them to the Juvenile Justice Board concerned for considering their cases in accordance with the provisions of the 2000 Act. It is expected that these applications which have been filed on behalf of the appellants will be disposed of within three months from the date of receipt a copy of this order."

16. In **Ashwani Kumar Saxena**1 while examining the scope of Section 7-A of the Act, it was held that the said statutory provisions obliges the Court to make an inquiry under the Juvenile Justice Act regarding age of the accused/appellant on the date of incident.

17. As far as the scope and the manner of inquiry into the scheme of juvenility of an applicant is concerned, in exercise of powers conferred by Section 68 of the Juvenile Justice Act' 2000, the Central Government framed Rules namely Juvenile Justice (Care and Protection of Children) Rules, 2007 (In short referred as "the Rules' 2007), and it was provided therein that in case, the State has not framed any rule, the rules framed by the Central Government shall apply in every State till the time the State Government frames rules in consonance with the rules framed by the Central Government. It is pertinent to note that though the State of U.P. framed rules in the year 2004 after the Juvenile Justice Act' 2000 came into force but no fresh rules had been framed in consonance with the Model Rules' 2007 framed by the Central Government.

18. Rule 12 of the Model Rules' 2007 provided the procedure to be followed in determination of age 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 Ihe juvenile in conflict with law.

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

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

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

19. A question came up for consideration before the Apex Court in **Abuzar Hossain @ Gulam Hossain vs State Of West Bengal**4 as to when should a claim of juvenility be recognized and sent

for determination when it is raised for the first time on the appeal or before the Apex Court. It was also examined as to what would be the effect when a claim of juvenility was raised in trial and appeal but not pressed and then pressed for the first time before the Apex Court or even raised for the first time after final disposal of the case. The three judges Bench of the Apex Court while dealing with the said issue in light of the provisions under the Juvenile Justice Act' 2000 and the Rules' 2007 has laid down in the report that the expression, "any court' in Section 7A is too wide and comprehensive; it include the Apex Court. Even the Supreme Court Rules do not limit the operation of *Section 7-A* to the Courts other than the Supreme Court where the plea of juvenility is raised for the first time after disposal of the case. The position of law summarized therein is as under:-

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

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

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further inquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh2 and Pawan8 these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an inquiry for determination of the age of the delinquent.

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

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

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

20. In his concurring judgment, Hon'ble Mr. Justice T.S. Thakur (as he then was) speaking for the Bench elaborated paragraph No.36 (iv) noted above to state that the said point sounds a note of caution that an affidavit of a parent or a sibling or other relative would not ordinarily suffice to trigger an inquiry into the question of juvenility of the accused, unless the circumstances of the case are so glaring that the court is left with no option except to record a *prima facie* satisfaction that a case for directing an inquiry is made out. It was observed that what would constitute a glaring case cannot be put in a strait jacket formula as the said question cannot be easily answered by enumerating exhaustively the situations where an inquiry may be justified even in the absence of documentary support for the claim of juvenility. As far as the words "physical appearance" of the accused used in Rule 12(2) of the Rules 2007 are concerned, the same has lost its efficacy with the passage of time in a case where claim of juvenility is made before the Apex Court, as longer the interval between the incident and the court's decision on the question of juvenility, the lesser the chances of the court making a correct assessment of the age of the accused. It was observed that where the claim is made before the Apex Court for the first time, the advantage of "physical appearance" of the accused is further reduced as there is considerable time lapse between the incident and hearing of the matter by the Court.

21. It was further observed that another situation in the matter of claim of juvenility where the accused does not have any evidence, showing his date of birth, by reference to any public document such as register of birth, certificate from school etc. may not be available as the accused was never admitted to any school was to be considered. It was observed that there may be cases in which accused may not be in a position to provide a birth certificate from the Corporation, the Municipalities or the Panchayat as the register of birth and death may not be maintained and if maintained may not be regular and accurate and at times truthful. The expression "absence" in Rule 12(3) of the Rules 2007 was considered in light of literal (dictionary) meaning of the said expression to hold that mere non-production of a document of registration of birth or certificate of school may not, therefore, disentitle the accused of the benefit of the Act nor can it tantamount to deliberate non-production giving rise to an adverse inference unless the Court in the peculiar facts and circumstances of a case

is of the opinion that the non-production is deliberate or intended to mislead the Court or suppress the truth. It was held that approach at the stage of directing the inquiry has of necessity to be more liberal, lest, there is avoidable miscarriage of justice. It was held that while affidavits may not be generally accepted as a good enough basis for directing an inquiry, their non acceptance, however, is not rule of law but a rule of prudence. The Court would, therefore, in each case weigh the relevant factors, insist upon filing of better affidavits if the need so arises, and even direct, any additional information considered relevant including information regarding the age of the parents, the age of siblings and the like, to be furnished before it decides on a case-to-case, basis whether or not an inquiry under Section 7-A ought to be conducted. It will eventually depend on how the court evaluates such material for a prima-facie conclusion that the Court may or may not direct an inquiry.

22. In **Om Prakash Vs. State of Rajasthan**5, the question which arose for consideration before the Apex Court are:-

"(i) whether the respondent/accused herein who is alleged to have committed an offence of rape under Section 376 IPC and other allied sections along with a co-accused who already stands convicted for the offence under Section 376 IPC, can be allowed to avail the benefit of protection to a juvenile in order to refer him for trial to a juvenile court under the Juvenile Justice (Care and Protection of Children) Act, 2000 (shortly referred to as the "Juvenile Justice Act') although the trial court and the High Court could not record a conclusive finding of fact that the respondent-accused was below the age of 18 years on the date of the incident?

(ii) whether the principle and benefit of "benevolent legislation' relating to Juvenile Justice Act could be applied in cases where two views regarding determination of the age of child/accused was possible and the so-called child could not be held to be a juvenile on the basis of evidence adduced?

(iii) whether medical evidence and other attending circumstances would be of any value and assistance while determining the age of a juvenile, if the academic record certificates do not conclusively prove the age of the accused ? "

23. While dealing with the said questions, the Apex Court had observed that the Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a Special Court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was held that procedure for determination of age of a person claiming juvenility has been provided under the Act read with the Rules. However, when the claim of juvenility was made the benefit of the principle of benevolent legislation can be made applicable in favour of only those delinquents who undoubtedly have been held to be a juvenile which leaves no scope for speculation about the age of the alleged accused. It was found by the Apex Court in that case that the trial court as well as the High Court could not arrive at any finding at all as to whether the accused was a major or minor on the date of the incident and yet gave the benefit of the principle of benevolent legislation to an accused whose plea of minority that he was below the age of 18 years itself was in doubt.

24. It was held that in such a situation, the scales of justice is required to be put on an even keel by insisting for a reliable and cogent proof in support of the plea of juvenility. It was held in paragraph No.'22' & '23' as under:-

"22. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

23. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. The matter however would stand on a different footing if the academic certificates ad school records are alleged to have been with held deliberately with ulterior motive and authenticity of the medical evidence is under challenge by the prosecution."

25. In **Parag Bhati Vs. State of U.P.**6, the point for consideration before the Apex Court was as to whether in the fact and circumstance of the said case as to when the date of birth mentioned in the matriculation certificate was doubtful, an ossification test can be the last resort to prove the juvenility of the accused?

26. The Court having gone through the scheme of Juvenile Justice Act (Section 2 and 7-A) as also the Rules 12 of the Rules 2007 held that under the statutory scheme, the Board is enjoined to take evidence by obtaining the matriculation certificate if available, and in its absence, the date of birth certificate from the school first attended and if the same is also not available then the birth certificate given by the local body. In case any of the above certificates are not available, then medical opinion can be resorted to.

27. Considering the decision of the Apex Court in **Ashwani Kumar1, Abuzar Hossain4 Om Prakash**5, it was held therein that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence atleast prima facie proves the same, he would be entitled to the special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being minor, a casual or cavalier approach while recording as to whether the accused is a juvenile or not cannot be permitted. As the Court are enjoined upon to perform their duties with the object to protect the confidence of common man in

the institution entrusted with the administration of justice.

28. It is, thus, held in paragraph Nos.'35' & '36' of the reports as under:-

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

"36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness of date of birth, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain, an enquiry for determination of the age of the accused is permissible which has been done in the present case."

29. The position of law as laid down therein is that if the matriculation certificate is available and there is no other material to disprove the correctness of date of birth, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, in case of any doubt or contradictory stand being taken by the accused which raises a doubt on the correctness of date of birth recorded in the matriculation certificate, an inquiry for determination of age of the accused is permissible.

30. All the above decisions pertain to the procedure "for determination of the age" as provided in the Rules' 2007 which was framed by the Central Government in exercise of power under Section 68 of the Juvenile Justice Act' 2000, when claim of juvenility is raised before the Court.

31. The Juvenile Justice Act, however, has underwent a drastic amendment with the repeal of the Juvenile Justice Act' 2000 and enactment of the Juvenile Justice (Care and Protection of Children) Act' 2015 which has been brought into force on 15.01.2016.

32. This enactment was brought as it was felt that increasing cases of crime committed by the children in the age group of 16 to 18 years in the recent past made it evident that the provisions and system of Juvenile Justice Act' 2000 were ill equipped to tackle child offender in this age group. Numerous changes have been brought by re-enacting a comprehensive legislation to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children, and offences committed against children.

33. In Juvenile Justice (Care and Protection of Children) Act' 2015, the

definition of 'juvenile' under Section 2 sub section (35) reads as under:-

"juvenile" means the child below the age of 18 years.

The "child" and "child in conflict with law" has been defined in sub Section (12) & (13) of Section 2 as under:-

"child means a person who has not completed eighteen years of age"

"child in conflict with law means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence."

Sub section (14) of Section 12 defines "child in need of care and protection" whereas Sub-Section (9) defines "best interest of child".

34. The insistence in the existing legislation, i.e. Act' 2015 is to adopt a wholesome approach for ensuring proper care, protection, development, treatment and social integration of children in difficult circumstances by adopting a child friendly approach keeping in view the best interest of the child in mind.

35. The Juvenile Justice Board has been constituted under Section 7 of the Act' 2015. The Board's function and responsibilities provided under Section 8 of the Act shows that the Board constituted for any district shall have the power to deal exclusively with all the proceedings under the Act' 2015, relating to children in conflict with law in the area of jurisdiction of the Board. The functions and responsibility of the Board includes inquiry for declaring "a fit person regarding care of children in conflict with law and registration of FIR for offences committed against any child in need of care and protection".

36. Section 5 provides for continuation of inquiry in respect of any 'child' under the Act' 2015, even if during the course of such inquiry, the child completes the age of 18 years. This provision, thus, clarifies that the inquiry may be continued by the Board and orders may be passed in respect of a person as if that person had continued to be a child.

37. Section 6 provides that the date of commission of offence would be an equivalent date for treating a person as a child during the process of inquiry. It provides that, if any, person who has completed 18 years of age, and he is apprehended for committing an offence when he was below the age of eighteen years, then, such person shall, subject to the provision of this section, be treated as a child during the process of inquiry.

38. Section 25 provides that notwithstanding anything contained in this Act, all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or Court on the date of commencement of this Act, shall be continued in that Board or Court as if this Act had not been enacted.

39. Section 94 provides the criteria of presumption and determination of age by the Committee or the Board on the appearance of a person before it and is relevant for our purposes. For ready reference, the same is reproduced as under:-

*"**94. Presumption and determination of age-** (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the*

Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

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

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

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

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

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

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

40. Section 101 provides for appeal by any person aggrieved by an order passed by the committee or the Board under the Act within 30 days of such order. Section 102 confers power on the High Court to call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and the High Court may pass such order in relation thereto as he thinks fits. Only rider is that no such order may be passed which may be prejudicial to any person without giving him a reasonable opportunity of being heard.

41. The procedure in inquiries, appeal and revision proceeding under the Act' 2015 has been provided in Section 103 as under:-

*"**103. Procedure in inquries, appeals and revision proceedings.** (1) Save as otherwise expressly provided by this Act, a Committee or a Board while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 for trial of summons cases.*

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973."

42. In exercise of power conferred by sub section (1) of Section 110 of the Act' 2015, the Central Government framed model rules known as the Juvenile Justice (Care and Protection of Children) Model Rules' 2016. The said rule provides for functions of the Board, procedure to be followed by the Board in relation to children in conflict with law and completion of any inquiry under sub section (1) of Section 103 of the Act.

43. Similarly, in exercise of the powers conferred by the proviso to sub section (1) of Section 110 of the Act 2015, the Governor of U.P. has framed rules in conformity with the Model Rules framed by the Government of India, known as as the Juvenile Justice (Care and Protection of Children) Rules' 2019. A careful comparison of both the Rules' 2016 framed by the Central Government and Rules' 2019 framed by the State of Uttar Pradesh, it is evident that there is no conflict or inconsistency in the same. As noted above, the rules provides for function of the Board, procedure in relation to children in conflict with law and children in need and care and protection as also the procedure for completion of any inquiry conducted by the Board in sub section (1) of Section 103 of the Act. Rule 90 of the Rules' 2019 framed by the State of U.P. provides as under:-

"90. (1) No child shall be denied the benefits of the Act and the rules made thereunder.

(2) The benefits referred to in sub-rule (1) shall be made available to all persons who were children at the time of the commission of the offence, even if they ceased to be children during the pendency of the inquiry or trial.

(3) While computing the period of detention or stay or sentence of a child in conflict with law, all such period which the child had already spent in custody, detention, stay or sentence of imprisonment shall be counted as a part of the period of stay or detention or sentence of imprisonment contained in the final order of the court or the Board."

44. Having exhaustively dealt with the Juvenile Justice Act and the rules framed thereunder from time to time, it is evident that the statutory provision in the matter of determination of age of the person brought before the Board is a complete code in itself. The Rule 12 of Rules' 2007 and Section 94 of the Act' 2015 deal with the said issue. The manner of inquiry into the matter of determination of age of the person provided in the above statutes, if compared, it is found that;-

(i) On the appearance of the person before the Board, the Board or the committee or the Court, as the case may be, has to decide the juvenility *prima facie* on the basis of "physical appearance" and has to record its observation stating the age of child as nearly as possible before proceeding to make an inquiry under Section 14 or Section 36 of the Act' 2015.

(ii) In case, the Committee or the Board has reasonable grounds to doubt the age of the person brought before it, in order to ascertain that whether he is child or not, the Committee or the Board has to undertake the process of age determination for which evidence has to be collected/placed/sought from the authority concerned.

(iii) The evidence to be collected by the Board or the Committee in the matter of determination of age of a person brought before it, are clearly enumerated in clauses (i) to (iii) of sub section (2) of Section 94 of the Act' 2015.

(iv) Sub section (3) of Section 94 attaches finality to the decision of the Board or the Committee in the matter of determination of age, subject to any challenge to its decision under Section 101 and 102 of the Act' 2015.

45. A careful reading of sub section (2) of Section 94 of the Act 2015 and Rule 12(3) of Rules 2007 shows that a little departure in the matter of taking evidence

was made in the Act' 2015 as Rules' 2007 [Rule 12 (3)] gives primacy to the matriculation or equivalent certificate in sub clause (a)(i), whereas Section 94 treat both the date of birth certificate from the school or the matriculation or the equivalent certificate from the concerned examination Board at the same level/pedestal.

46. In the matter of consideration of evidence for determination of age of a child considering the language of Section 94 of the Act' 2015 (prevailing as on the date), the inquiry is to complete by seeking evidence from the concerned school or examination board, or the local body who issued the relevant certificate/document and only in the absence of such certificates, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. That means, the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board has been given primacy over the birth certificate issued by the Corporation or a Municipal authority or a Panchayat. The medical opinion has been included as a last resort in such an inquiry, where no documentary evidences as noted above are available.

47. We may further note that there remained no dispute as to the stage of initiation of the said inquiry, in as much as, it is settled position in law that the claim of juvenility can be raised at any stage of the proceeding by a person even in the appeal court. But considering the position of law summarized in **Abuzar Hossain**4, it is evident that for making a claim of juvenility after conviction, the claimant has to produce some material before the appellate court so as to *prima facie* prove that an inquiry into the claim of juvenility is necessary. Initial burden in such a claim has to be discharged by the person who claims juvenility that too before the court where the lis is going on.

48. It is equally well settled that as to what would *prima facie* satisfy the Court *cannot* be catalogued *nor can* it be *laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility.* However, the documents referred in sub section (2) of Section 94 of the Act' 2015 have to be treated as sufficient for prima faice satisfaction of the Court about the age of the delinquent to initiate an inquiry under the Act' 2015.

49. The Court before whom the matter is pending has to *prima facie* ascertain genuineness of the document brought before it to assess the convict being juvenile person at the time of commission of crime. The credibility and/ or acceptability of the documents noted above brought before the Court or obtained by the Board after conviction would depend on the fact and circumstances of each case and no strait-jacket formula can be prescribed as to how and when the Court can record its *prima facie* satisfaction or reject the claim of juvenility to initiate an inquiry. In any case, it is for the Court wherever the claim has been raised for the first time either in appeal or revision during the pendency of the matter to examine the documents brought before it to ascertain the genuineness of the plea and decide as to whether the same satisfies the judicial conscious of the Court to order an inquiry for determination of age of the accused. (Reference paragraph '39.3', '39.4' of **Abuzar Hossain**4) emphasis added. It has

been held in **Abuzar Hossain**4 that while examining the plea of juvenility raised by an accused for the first time in appeal, the Court has to be alive to the objectives of the Juvenile Justice Act being benevolent legislation and to ensure that its purpose and object is not defeated by the hyper technical approach. However, at the same time, the claim of juvenility which lacks in credibility or frivolous claim of juvenility or patently absurd or inherently impossible claims of juvenility have to be rejected by the Court at the threshold whenever raised. (emphasis added).

50. This means if on a prima facie inquiry, the Court before whom the claim of juvenility is raised, finds that the claim is frivolous, bogus or absurd or improbable, it can reject the same at the threshold without referring to the inquiry before the Juvenile Justice Board as it would be a futile exercise and also abuse of the process of the Court. The reason being that a person who raised a claim has to approach a Court with clean hands and the process of law cannot be allowed to be abused at the hands of an unscrupulous person.

51. We may note that lot of time of the Appellate Court is wasted in sending the matter to the Juvenile Justice Board for inquiry, if such an inquiry is ordered in a casual manner. In many appeal hearing is prolonged on account of such frivolous claims. We may clarify that we may not be misunderstood so as to infer that every claim made before the Appellate Court can be rejected out-rightly or has to be viewed with great circumspection. Our emphasis is that before relegating the matter to the Juvenile Justice Board for making an inquiry in accordance with the statutory scheme, the Appellate Court may examine the record to make a *prima facie* satisfaction as to whether the claim is genuine or not. If upon such an inquiry, the Court finds that the document, brought before it to raise a claim for juvenility are not genuine or manufactured documents or insufficient to direct for inquiry by the Board, it can reject the application out-rightly seeking relegation to the Juvenile Justice Board for determination of age of the appellant. This conclusion of ours is based upon the decision of the Apex Court in **Abuzar Hossain**4.

52. Our view is further fortified from the decision of the Apex Court in **Om Prakash5, Parag Bhati**6 wherein the Apex Court has observed that the claim of juvenility cannot be allowed to be raised merely to create a mist or a smokescreen to seek shelter by using it as a protective umbrella or Statutory shield. The provisions of a benevolent legislation (Juvenile Justice Act) cannot be used to subvert or dupe the cause of justice.

53. As observed by the Apex Court in **Ramdeo Chauhan Vs. State of Assam**7, the Courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system or shakes the faith of the common man in the justice dispensation system has to be discouraged. The plea of juvenility when made a shield to dodge or dupe the arms of law, cannot be allowed to come to the rescue of a claimant.

54. We also find that the claim of juvenility whenever raised has to be finally determined by the Juvenile Justice Board within the parameters prescribed in the Act' 2015 read with the Rules framed thereunder.

55. As far as the inquiry by the Board, it has been mandated to make an inquiry based on the evidence and there is no scope of speculation. The document such as school leaving certificate, the mark sheet and the birth certificate etc. are to be treated as relevant documents for directing an inquiry and verification of the age of the person concerned.

56. The inquiry has to be strictly made in accordance with the statutory provision (Section 94 of the Act' 2015) and no deviation or departure in this regard is permissible. The Juvenile Justice Board while making an inquiry has to necessarily satisfy itself about the genuineness of the claim by summoning necessary documents from the School or the Board concerned. The genuineness of the documents appended with the application to claim juvenility has also to be ascertained by the Board. No doubt, roving or fishing inquiry cannot be done by the Board but inquiry regarding due execution of the document(s) relied upon by the applicant has to be made by summoning necessary original records from the School or the Board concerned, as the case may be. The authenticity or genuineness of the School leaving certificate with reference to the date of admission and the date of leaving school, the Class of study and other surrounding circumstances has to be ascertained with reference to the material particulars obtained from the concerned school. Similarly genuineness of the mark sheet or the birth certificate placed before the Board to assert the claim of juvenility has to be verified from the examination board or the School which had issued the document/certificate. Such an inquiry is necessary so that no unscrupulous person can get benefit of such a benevolent legislation. In any case, cavalier or casual approach by the Board in the matter of inquiry to grant benefit of benevolent legislation under the Juvenile Justice Board cannot be accepted.

57. To substantiate the above, we would be benefited by the following observation of the Apex Court in **Om Prakash**5 and **Parag Bhati**6 as under:-

"(Om Prakash)5 para 37*.....Juvenile Justice Act which undoubtedly is a benevolent legislation but cannot be allowed to be availed of by an accused who has taken the plea of juvenility merely as an effort to hide his real age so as to create a doubt in the mind of the courts below who thought it appropriate to grant him the benefit of a juvenile merely by adopting the principle of benevolent legislation but missing its vital implication that although the Juvenile Justice Act by itself is a piece of benevolent legislation, the protection under the same cannot be made available to an accused who in fact is not a juvenile but seeks shelter merely by using it as a protective umbrella or statutory shield. We are under constraint to observe that this will have to be discouraged if the evidence and other materials on record fail to prove that the accused was a juvenile at the time of commission of the offence."*

"(Parag Bhati)6 para 35. *The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidene regarding his minority as the benefit of the possibilities of two vies in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of*

mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dube the arms of law, cannot be allowed to come to his rescue."

58. It was held that in a case of commission of heinous crime, the plea of juvenility cannot be allowed to be raised merely on a doubtful School admission record. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least *prima facie* proves the same, he would be entitled for the special protection under the Juvenile Justice Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. (Reference para '22' in Om Prakash) (emphasis added).

59. In this context only, the Apex Court in **Om Prakash**5 drawn a parallel between the plea of minor or plea of alibi to observe as under:-

"32. Drawing parallel between the plea of minority and the plea of alibi, it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of alibi which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi.

33. Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

60. While considering the nature of inquiry, it was observed in paragraph No.'34' in **Om Prakash**5 that the benefit of benevolent legislation under the Juvenile Justice Act obviously will offer protection to a genuine child accused/juvenile whose claim is not based on shaky evidence like the school admission register or oral evidence based on the conjectures leading to further ambiguity and by putting the Court into any dilemma on adducing evidence in support of the plea of minority. Such an evidence cannot be relied upon to grant benefit of the Juvenile Justice Act.

61. In the same context, while considering the relevance and value of medical evidence in the inquiry by the

Board in **Ramdeo Chauhan**7 the Apex Court has observed that:-

"21. .....The doctor has opined the age of the accused to be admittedly more than 20 years and less than 25 years. The statement of the doctor is no more than an opinion. the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. ***An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and texicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform." (emphasis supplied)***

"22. .....there is not an iota of doubt in my mind to hold that the petitioner was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act or the Children Act. He is proved to be a major at the time of the commission of the offence. No doubt, much less a reasonable doubt is created in the mind of the Court, for the accused entitling him the benefit of a lesser punishment. It is true that the accused tried to create a smoke screen with respect to his age but such efforts appear to have been made only to hide his real age and not to create any doubt in our mind. The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists for finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakens the faith of the common man in the justice dispensation system has to be discouraged."

"23. After committing the crime of murder of four innocent persons, the petitioner cannot be permitted to resort to adopt means and tactics or to take measures which, if accepted or condoned, may result in the murder of the judicial system itself. The efforts made by the accused by way of this petition, are not likely to advance the interests of justice but on the contrary frustrate it."

62. From the analysis of the statutory provision and the judicial pronouncements holding to the field noted above. We find that once the Statute provides complete procedure and manner of inquiry and enumerates the material evidence which could be considered in inquiry, no deviation is permissible in the course of inquiry. The Juvenile Justice Board or the Committee, as the case may be, has to strictly follow the procedure and the manner in which inquiry has to be conducted.

63. It is evident that as far as medical evidence is concerned, the same has been considered as a last resort in the matter of determination of age. The reason being that the doctor's estimation of age is merely an opinion though based on scientific medical

test like ossification and radio-logical examination. In absence of all other acceptable materials, if such opinion points to a reasonable possibility regarding the range of age of the person it has to be considered having corroborative value while determining the age of the alleged juvenile accused. The medical evidence neither can be given primacy nor such a course can be resorted to lean in favour of an accused claiming juvenility who relied upon documentary evidences such as academic record to determine his age or declare him juvenile. If the documents pertaining to academic record of the accused are filed to state that the accused had gone to the school and his date of birth was duly recorded in the school admission register or the academic record, then genuineness/authenticity of such a claim has to be ascertained instead of resorting to ascertain his age by getting medical opinion. The legislative intent to give primacy to the school record regarding the date of birth and the mark sheet containing the said information is clear and categorical. The medical opinion, if obtained, can only be of corroborative value in case of any doubt in the minds of the courts on the documentary evidences. The question whether the medical evidences should be relied upon or not will obviously depend on the value of the evidence laid by the contesting party. Thus, in an inquiry into the claim of juvenility, the Juvenile Justice Board has to examine each case within the parameters of the legislation by making a careful scrutiny regarding the genuineness of the claim.

64. In light of the above, while examining the facts of the present case we find that during pendency of the instant appeal, an application dated 21.07.2018 was moved by the appellant directly before the Juvenile Justice Board without disclosing the fact of pendency of the present appeal. The said application, found on record, states in a casual manner that the applicant was convicted by the Sessions Court vide judgement and order dated 11.03.2011 under Section 302/34 IPC and sentenced for imprisonment for life alongwith fine and that the applicant was languishing in jail and was juvenile on the date of the incident which is 11.08.2008. It was then stated therein that the appellant had studied upto Class III in Harcharan Lal Poorva Madhyamik Vidyalaya, Nai Ka Nagla, Hathras. This application was supported by the affidavit of brother of the appellant. A perusal of the record of the Juvenile Justice Board indicates that on presentation of such an application, without making any inquiry regarding pendency of the instant appeal or without any direction of this Court, the Juvenile Justice Board had proceeded to make an inquiry into the claim of juvenility of a convicted accused. We note our displeasure on such a casual approach being adopted by the Juvenile Justice Board. Had the decision of the Apex Court in **Abuzar Hossain**4 been kept in mind, the Juvenile Justice Board would have relegated the appellant to approach this Court by moving a proper application to raise his claim of juvenility in the instant appeal.

65. It appears that for this reason, this Court while passing the order dated 19.09.2019 allowed the appellant to move a fresh application for claiming juvenility in the present appeal. The application dated 24.09.2019 has thus, been moved by the appellant appending the school leaving certificate issued on 05.07.2018 noticing the date of birth of the appellant as 11.08.1991.

66. We may also note that the plea of juvenility put forth by the appellant herein is based on the same document into which an inquiry had already been conducted by the Juvenile Justice Board though without any order or direction of this Court or any reference to the instant pending appeal. We are, therefore, are not inclined to entertain the plea of the learned counsel for the appellant to relegate the matter for ascertaining the claim of juvenility of the appellant afresh.

67. We have heard the learned counsel for the appellant and the learned AGA on the merits of the order of the Juvenile Justice Board.

68. As to the power to examine the validity of the order of the Juvenile Justice Board in appeal, we may draw such power in Section 102 of the Act' 2015 which confers supervisory revisional jurisdiction on the High Court to call for the records of any proceeding conducted by the Board on its own motion so as to satisfy itself with regard to the legality or propriety of an order passed in such proceeding.

69. Drawing source from the above provision, we have summoned the original record of the Juvenile Justice Board and having examined the same we find that the Board has adopted a completely casual approach in making the inquiry. Two witnesses namely a teacher Sahab Singh and mother of the appellant had appeared in the witness box as EPW-1 and EPW-2. Sahab Singh made a statement that the appellant was admitted in the School in July 1999 when his date of birth was recorded as 11.08.1991. The admission form was filled by his father and he was duly granted admission. In S.R. register (scholar register) at serial No.3488, name of the appellant is recorded and he had passed Class III on 20.05.2000. The duplicate copy of the transfer certificate was issued to the father of the appellant on 05.07.2018 which was on record. This witness was cross-examined by the public prosecutor and he has reiterated that the transfer certificate dated 05.07.2018 was issued by him which records date of birth of the appellant as 11.08.1991 and all entries in the said document are based on the records available in the School office. It appears that the applicant had filed original copy of the School Leaving Certificate and the self attested photo stat copy of the admission register.

70. Considering the above evidences, the Juvenile Justice Board believing the date of birth of the applicant as 11.08.1991 recorded that as it appears that on the date of incident i.e. 11.08.2008, the appellant was aged about 17 years and being less than 18 years, he was declared juvenile.

71. From the above, it is evident that the Juvenile Justice Board has not conducted proper inquiry in the matter of age determination of the application, as genuineness or authenticity of the duplicate copy of the School Leaving Certificate by obtaining original academic record from the School has not been ascertained. The teacher/principal of the institution had only verified issuance or execution of the duplicate copy of the transfer certificate, which was issued during pendency of the present appeal on 05.07.2018. It is not known nor proved as to when the original copy of the transfer certificate was issued to the appellant or his parent and why the occasion had arisen for issuance of the duplicate copy of the transfer certificate on 05.07.2018. The Juvenile Justice Board has not ascertained from the School records

that the appellant was admitted in the School concerned in July 1989 and had passed Class III on 20.05.2000. The said fact has been held proved only on the basis of statement of the Principal/Teacher namely Sahab Singh examined as EPW-2.

72. Even accepting his statement, the said witness examined as EPW-2 has simply proved execution of the School Leaving Certificate dated 05.07.2018 in his own handwriting and signature but did not prove the relevant entries in the same by bringing the material documents before the Juvenile Justice Board such as the Original Scholar Register, the admission register and the register for issuance of the transfer certificate (both original and duplicate). The self attested photo stat copy of the admission register produced by the applicant/appellant on his own was inadmissible in evidence as it was not verified from the original brought by the competent person, who is custodian of the said document. The statement of the Principal/teacher of the institution cannot be taken as a gospel truth and, moreover, has only corroborative value of due execution of the documents brought on record.

73. The statement of EPW-1 cannot be treated as sufficient evidence to attach genuineness to the duplicate copy of the transfer certificate dated 05.07.2018 filed in evidence as a proof of date of birth of the accused/appellant.

74. Moreover, the Statue requires that the Board shall conduct an inquiry (in the matter of determination of age) by summoning evidences from the School authorities as the words used in sub section (2) of Section 94 are "by seeking evidence by obtaining" the birth certificate from the school, or the matriculation certificate from the concerned Board of examination. The documents brought on record were to be verified by the Juvenile Justice Board from the School and from the Board concerned by summoning the original register such as admission register, scholar register and other relevant academic records before returning its finding to determine the age of the applicant. The casual and cavalier approach of the Juvenile Justice Board in granting the benefit of benevolent legislation of the Juvenile Justice Act to the applicant/accused appellant cannot be approved of. The statement of mother of the applicant cannot have any corroborative value in light of the requirements of the legislation for conducting an inquiry for determination of age.

75. As we find that sufficient evidences were not before the Juvenile Justice Board and it has proceeded to declare the appellant/applicant juvenile on inadmissible evidence such as original (duplicate) school leaving certificate and self attested copy of the admission register produced by the applicant, the order dated 25.08.2018 passed by it allowing the claim of juvenility of the applicant on the date of the incident is liable to be set aside.

76. We, therefore, find that the order dated 25.08.2018 cannot be sustained and is, accordingly, being set aside.

77. Now on the question as to whether the matter is to be relegated to the Board for fresh decision, we find that while raising the plea of juvenility in the application dated 21.07.2018, supported by the affidavit of the brother of the applicant, it is not indicated as to when and why the appellant had left the school after he took admission in July 1999 in Class III in the school-in-question. It is not disclosed as to whether the appellant had attended any school prior to Class III. It is also not disclosed as to whether the appellant had studied further or had appeared in the matriculation examination

which could have been undertaken by him either in the Academic Session 2006-07 or 2007-08, which fall prior to the date of the incident, which is 11.08.2008 in the instant case. It is also not disclosed as to whether the appellant was studying and if so, in which class at the time of the incident or when he had left his studies. The application to raise claim of juvenility is silent on all these aspect. Further, we may note here that the appellant has not come up with clean hands in the matter of raising claim of juvenility as he did not move any application in the instant appeal at the first instance. The action of the appellant in approaching the Juvenile Justice Board directly without disclosing the pendency of the present appeal proves that his claim is not genuine. Further the ignorance shown by the Juvnile Justice Board in the proceeding for inquiry about the fact of pendency of the appeal is liable to be condemned.

78. We may record, at the cost of repetition, that an unscrupulous person who is trying to cover his misdeed under the shield of juvenility by raising a false and frivolous claim cannot be allowed to use the process of law as a tool. A person who is claiming the benefit of benevolent legislation under the Juvenile Justice Act has to approach the competent court with clean hands. In the instant case, it was required for the appellant to move an application raising the claim of juvenility by bringing necessary material before the appellate court who after recording *prima facie* satisfaction on the material before it could have relegated the matter for detail inquiry by the Juvenile Justice Board, strictly in accordance with the provisions of Juvenile Justice Act.

79. All this has not been done in the instant case. Further on careful scrutiny of the material before us, we are unable to record any *prima facie* satisfaction regarding the claim of the appellant being juvenile on the date of the incident i.e. 11.08.2008. The material brought before us do not inspire our confidence. We do not find it just, fit and proper in the facts and circumstances of the instant case to relegate the matter to the Juvenile Justice Board for making fresh inquiry into the claim made by the applicant as such an exercise would be an exercise in futility. Further we are convinced that the appellant has not approached this Court with clean hands and the plea of juvenility has been raised as a shield to cover his misdeeds that too by placing reliance on insufficient material.

80. In the totality of facts and circumstances of the instant case, we do not find any merit in the application dated 24.09.2019 filed with the prayer to take the order of the Juvenile Justice Board dated 25.08.2018 on record or to treat the same as an additional evidence to direct a full-fledged inquiry regarding the claim of juvenility raised by the applicant/appellant.

81. The application No.20 of 2019 dated 24.09.2019 is found misconceived and is rejected as such.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. &
Hon'ble Dinesh Pathak, J.)

1. The hearing of the appeal has been delayed since 2018 on account of the application moved by the appellant. The appeal is of the year 2011. We propose to proceed for hearing of the appeal for final disposal.

2. Lower court record has been received.

3. Office is directed to prepare the paper book within three weeks from today. The copy of the same be obtained by the

learned Advocate for the appellant on payment of usual charges, immediately thereafter.

4. List this matter for final hearing/disposal on 13.04.2020.

(2020)06ILR A486
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2017

BEFORE

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

Criminal Appeal No. 2001 of 1995

Ram Bhajan & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri S.S. Rathore, Sri Awadh Bihari Pandey, Sri Sarvesh, Sri Vinay Saran, Sri K.K. Singh, Sri Ghanshyam Chaubey, Sri S.K. Verma

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

P.W.1 in his evidence tendered during the trial has fully supported the prosecution case as spelt out in the F.I.R. on all material points relating to the occurrence. P.W.2 has fully corroborated the evidence of P.W.1 on all material aspects of the matter although their evidence qua Rinkal being shot by Jitendra (A2) accidentally may not be believable but on that score alone, their entire evidence cannot be thrown out- The maxim *"falsus in uno, falsus in omnibus"* has neither received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely rule of caution. All that it amounts to, is that in such cases testimony may be disregarded and not that it must be disregarded. Even if major portion of evidence is found to be deficient in case residue is sufficient to prove guilt of an accused, his conviction can be maintained and it is the duty of Court to separate grain from chaff and whether chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient or to be not wholly reliable - If the statement of P.W.1 was not recorded by the Investigating Officer promptly, the defence will not get any benefit due to any laxity on the part of the Investigating Officer - The actions of Jitendra (A2) namely bringing his father's gun from his house, his firing at deceased Sarvesh although the shot did not hit him, and then his father snatching the same from his hands and firing at deceased Sarvesh amount to acts done in furtherance of a common intention. Therefore, we do not find that the trial Judge committed any illegality or infirmity in convicting Jitendra (A2) u/s 302/34 I.P.C. the prosecution has not been able to prove by any cogent evidence that Rinkal had received fire-arm injuries at the hands of Jitendra (A2). Hence, the conviction of the accused-appellants recorded u/s 307/34 I.P.C. cannot be sustained and is liable to be set-aside.

Evidence Law - Indian Evidence Act- Section 5-"falsus in uno, falsus in omnibus" (false in one thing, false in everything) - The maxim has not received general acceptance in different jurisdiction in India, nor has this maxim come to occupy the status of rule of law- It is merely a rule of caution- It is the duty of the court to separate the grain from the chaff but where the two are inextricably mixed up, then the evidence has to be discarded completely. Although the injured witness (PW3) has turned hostile and neither the medical evidence and nor the site plan supports the case of the prosecution that the Accused/Appellants shot him , but that would not mean that the evidence of the other witnesses can be discarded on the point of the Accused/ Appellants having committed the murder of the deceased.

Criminal Law - Code of Criminal Procedure 1973- Section 161- Delay in recording statement of witness by the investigating officer- Defects in investigation- If the statement of P.W.1 was not recorded by the Investigating Officer promptly, the defence will not get any benefit due to any laxity on the part of the Investigating Officer.- It is settled law

that the accused cannot take benefit of the laxities, omissions and commissions of the investigating officer.

Criminal Law - Indian Penal Code, 1860- Section 34- Common Intention- The actions of Jitendra (A2) namely bringing his father's gun from his house, his firing at deceased Sarvesh although the shot did not hit him, and then his father snatching the same from his hands and firing at deceased Sarvesh amount to acts done in furtherance of a common intention.- Even though A2 did not cause any injury to the deceased but the fact that he fired at the deceased and then provided the gun to A1 who shot the deceased, establishes the common intention of A2 with A1 to commit the offence.

The prosecution has not been able to prove by any cogent evidence that Rinkal had received fire-arm injuries at the hands of Jitendra (A2). Hence, the conviction of the accused-appellants recorded u/s 307/34 I.P.C. cannot be sustained and is liable to be set-aside while the conviction of the Appellants u/s 302/34 IPC is upheld. (Para 25, 27, 30, 32, 33)

Criminal Appeal partly allowed. (E-3)

Case law relied upon:-

1. Gunnana Pentayya @ Pentadu & ors. Vs St. of A.P., (2008) 62 ACC 898 SC = (2008) 69 AIC 57 SC

2. Triloki Nath Vs St. of U.P., (2006) 54 ACC 591 SC = (2006) 38 AIC 206

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

1. Heard Sri Vinay Saran, assisted by Sri Awadh Bihari Pandey learned counsel for appellant no.1 Ram Bhajan, Sri Sarvesh, learned counsel for the appellant no.2 Jitendra and Kumari Meena, learned AGA for the State.

2. This criminal appeal has been filed by the appellants Ram Bhajan and Jitendra who are father and son against the judgement and order dated 08.12.1995 passed by VIth Additional District and Sessions Judge, Kanpur Nagar in S.T. No. 115 of 1993, State Vs. Ram Bhajan and Another, by which both the appellants were convicted and sentenced to imprisonment for life u/s 302/34 I.P.C., five years rigorous imprisonment and a fine of Rs. 500/-, in default of payment of fine, one month rigorous imprisonment u/s 307 r/w 34 I.P.C. Both the sentences were directed to run concurrently.

3. Briefly stated the facts of this case are that on the basis of the written report (Ext.Ka.1) given by P.W.1 informant Banshi at P.S.- Narval, District- Kanpur Nagar on 19.03.1992 at 1745 hours, Case Crime No. 28/92 u/s 302/307 I.P.C. was registered against four persons namely Ram Bhajan (A1), Jitendra (A2), Moti Lal and Mauji Lal. In the written report of the occurrence, it was alleged by P.W.1 informant Banshi that while the festival of Holi was being celebrated by the residents of the village- Dalpatpur including Jitendra (A2) son of Ram Bhajan (A1) and Sarvesh, son of P.W.1 informant Banshi, a heated argument took place between them which attracted Ram Bhajan (A1), Moti Lal and Mauji Lal to the place where they were arguing and abusing each other. On noticing his son, Jitendra (A2) and Sarvesh, son of informant Banshi abusing each other, Ram Bhajan (A1) exhorted his son to bring his licensed gun from his house and kill Sarvesh on which Jitendra (A2) ran to his house and returned with the licensed gun of his father Ram Bhajan (A1) and fired at Sarvesh with the intention of committing his murder. But the shot fired by Jitendra (A2) hit Rinkal who was standing next to Sarvesh causing fire-arm injuries to him, as a result of which he fell on the ground. Thereafter, Ram Bhajan (A1) grabbed his gun from the hands of his son Jitendra (A2) and fired at Sarvesh with the

object of killing him. The shot so fired by him hit him on his chest causing fire-arm injury to him which resulted in his falling down on the ground and dying instantaneously. The incident which had taken place in the lane in-front of house of Raghuvar Dayal was witnessed by Ramesh Chandra, Uresh Chandra, Brijpal, Indrapal, Satish and several other villagers. On being challenged by the villagers, the assailants retreated from the place of occurrence, challenging and abusing the villagers. Injured Rinkal was taken by his maternal grandfather and maternal uncle for treatment to Ursula Hospital. Leaving behind the dead body of his son, the informant went to the police station to lodge the F.I.R. of the occurrence.

4. The investigation of the case was entrusted to S.I. Ramesh Chandra Patel who reached the place of occurrence promptly and after taking the possession of dead body of Sarvesh, conducted the inquest and prepared the inquest report (Ext.Ka.4) and other related documents, letters addressed to C.M.O and R.I., photo nash, challan lash, impression of specimen seal, etc (Ext.Ka.5 to Ka.10).

5. After completing the inquest, he got the dead body of Sarvesh sealed and dispatched through Constable Sahdev Singh and Ram Charan to morturary for conducting postmortem. He also inspected the place of occurrence and prepared its site plan (Ext.Ka.14). He seized plain and blood-stained earth from the place of occurrence and kept the same in two different containers and then sealed the same and prepared the recovery memos (Ext.Ka.11 and Ka.12). He also seized two empty cartridges of 12 bore from the crime scene and prepared recovery memo (Ext.Ka.13). He recorded the statements of P.W.1 informant Banshi and other witnesses and then proceeded to search Ram Bhajan (A1). On 30.04.1992, he seized the licensed gun (bearing no.64459) of Ram Bhajan (A1) from an *almirah* in his house in the presence of witnesses, sealed the same on the spot and prepared its recovery memo (Ext.Ka.18). The seized weapon was sent to the ballistic expert for its examination. The report of the ballistic expert was received on 31.03.1993. The postmortem on the dead body of deceased Sarvesh was conducted by P.W.3 Dr. M.K. Jain in K.P.M. Hospital, Kanpur Nagar who also prepared his postmortem report (Ext.Ka.2).

6. The Investigating Officer after completing the investigation submitted charge-sheet (Ext.Ka.16) against both the accused-appellants u/s 307/34 I.P.C. and 302/34 I.P.C. before Chief Metropolitan Magistrate, Kanpur Nagar. Since the offences mentioned in the charge-sheet were triable exclusively by the Court of Sessions, Chief Metropolitan Magistrate, Kanpur Nagar committed the case for trial of the accused-appellants to the Court of Sessions Judge, Kanpur Nagar where it was registered as S.T. No. 115 of 1993, State Vs. Ram Bhajan and another and made over for trial from there to the Court of VIth Additional District and Sessions Judge, Kanpur Nagar, who on the basis of material collected during investigation and after hearing the prosecution as well as accused-appellants on the point of charge, framed charge u/s 307/34 I.P.C. and 302/34 I.P.C. against the accused-appellants. The accused-appellants pleaded not guilty and claimed trial.

7. The prosecution in order to prove the charges framed against the accused-appellants examined as many as six witnesses of whom P.W.1 informant Banshi, P.W.2 Ramesh Chandra and P.W.4 Rinkal who had received injuries in the

occurrence but had failed to support the prosecution case and declared hostile, were examined as witnesses of fact while P.W.3 Dr. M.K. Jain who had conducted the postmortem on the dead body of Sarvesh and proved his postmortem report (Ext.Ka.2), P.W.5 Ramesh Chandra Patel, Investigating Officer of the case and P.W.6 Dr. R.B. Gautam who had examined the injuries of P.W.4 Rinkal and proved his injury report (Ext.Ka.18) were produced as formal witnesses.

8. The accused-appellants in their statements recorded u/s 313 Cr.P.C. alleged that they were falsely implicated in the present case due to enmity with the witnesses. They also alleged that Awadh Narayana Shukla, Ex-pradhan of the village was inimical towards them and it was he who had got the instant case registered against them pursuant to a conspiracy hatched by him against them. The accused-appellants did not examine any witness in defence.

9. Learned VIth Additional District and Sessions Judge, Kanpur Nagar after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, both oral as well as documentary, convicted the accused-appellant no.1, Ram Bhajan and accused-appellant no.2, Jitendra u/s 307/34 I.P.C. and 302/34 I.P.C. and awarded aforesaid sentences to them while co-accused Moti Lal and Mauji Lal were acquitted of all the charges.

10. Hence, this appeal.

11. It has been submitted by Sri Vinay Saran, learned counsel for the appellants that the testimonies of the two witnesses examined during the trial by the prosecution are inconsistent and do not inspire confidence in view of the inherent contradictions in their evidence. The acquittal of co-accused Moti Lal and Mauji Lal on the non-acceptance of evidence tendered by P.W.1 informant Banshi and P.W.2 Ramesh Chandra to a large extent warranted throwing out the entire prosecution case. In essence prayer was made to apply the principle of *falsus in uno falsus in omnibus* (false in one thing, false in everything). He further submitted that the medical evidence on record does not corroborate the eye-witness account. The prosecution has not been able to establish the motive for the accused-appellants to commit the murder of Sarvesh. The recording of the statements of the eye-witnesses of the occurrence after 5 or 6 days is clearly indicative of the fact that none of the so-called eye-witnesses had neither actually seen the occurrence as they were neither present in the village on the date of occurrence nor they were available for recording of their statements u/s 161 Cr.P.C. till lapse of 4-5 days. Since the prosecution miserably failed to prove its case at the trial, neither the recorded conviction of the accused-appellants nor the sentences awarded to them can be sustained.

12. Per contra Kumari Meena, learned AGA appearing for the State submitted that the prosecution has succeeded in establishing both the charges framed against the accused-appellants by leading cogent evidence. P.W.1 informant Banshi in his evidence tendered during the trial has fully supported the prosecution case as spelt out in the F.I.R. His evidence has been fully corroborated by P.W.2 Ramesh Chandra on all material points relating to the time, place and manner of assault as

well as the identity of the perpetrators of the crime. There is no irreconcilable conflict between the ocular version and the medical evidence on record. The prosecution has proved that the murder of Sarvesh was committed by the accused-appellants as a fallout of the fight which had taken place between them 15 days prior to the occurrence with regard to a raising of boundary wall by the accused-appellants on the land of public passage which was objected to by the informant by cogent evidence. The impugned judgement and order do not suffer from any illegality or infirmity requiring any interference by this Court. This appeal lacks merit and is liable to be dismissed.

13. The only question which arises for our consideration in this appeal is whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not.

14. Record shows that the occurrence in which Sarvesh, son of P.W.1 informant Banshi was allegedly shot dead by Ram Bhajan (A1) and one Rinkal had received fire-arm injury, author whereof was Jitendra (A2), had taken place on 19.03.1992 at about 4 P.M. when the villagers were celebrating Holi, the festival of colours. The F.I.R. of the incident was promptly lodged by P.W.1 informant Banshi, father of deceased Sarvesh on the same day at 1745 hours. The postmortem report on the dead body of Sarvesh was conducted by P.W.3 Dr. M.K. Jain in K.P.M. Hospital, Kanpur Nagar on 20.03.1992 who had also prepared his postmortem report (Ext.Ka.2).

15. P.W.1 informant Banshi, in his evidence recorded before trial court, apart from supporting the prosecution case as spelt out by him in the F.I.R., further deposed that 15 days prior to the incident, accused Moti Lal and Mauji Lal had encroached upon the public passage existing in the south of the village by raising a boundary wall thereon which was demolished by his sons Dinesh and Sarvesh after Moti Lal and Mauji Lal had refused to remove the aforesaid wall. On account of demolition of the aforesaid wall by Dinesh and Sarvesh, sons of P.W.1 informant Banshi, the accused Moti Lal, Mauji Lal and Ex-pradhan of the village, Awadh Narayana Shukla had become inimical towards the first informant and his family members. Due to intervention of Awadh Narayana Shukla, the matter was compromised and it was agreed that Moti Lal would reconstruct the wall after leaving the area of passage on which he had earlier encroached. However, next day Ram Bhajan (A1), Moti Lal and Mauji Lal again constructed the boundary wall on the same place where it was existing earlier and after constructing it, accused Moti Lal, Mauji Lal and Ram Bhajan (A1) challenged the first informant and his family members to dare to demolish the wall constructed by them on the village passage. He also deposed that he got the written report scribed by Dinesh Kumar.

16. P.W.2 Ramesh Chandra, the other eye-witness of the occurrence deposed before the trial court that the incident had taken place in the village on 19.03.1992 when the villagers were celebrating Holi in the southern corner of the lane running east to west in-front of the house of Raghuvar Dayal where Sarvesh and Jitendra were arguing. Moti Lal, Mauji Lal and Ram Bhajan also reached the place of occurrence where Sarvesh and Jitendra were arguing and challenged Sarvesh and Ram Bhajan (A1) ordered Jitendra to bring his licensed gun from his house on which

Jitendra went to his house and returned with the licensed gun of his father and fired at Sarvesh from a place which was at a distance of 4-5 paces from the door of his house. The gunshot hit a small boy Rinkal who was standing next to Sarvesh. As a result, he fell on the ground and started wriggling with pain. Thereafter, Ram Bhajan snatched his gun from his son and on the exhortation of Moti Lal and Mauji Lal, Ram Bhajan reloaded his gun and fired a shot at Sarvesh which stuck him on his chest, as a result of which he fell on the ground and died instantaneously. He further deposed that the distance between the place from where Ram Bhajan had fired and the spot where Sarvesh was hit was about 14-15 paces approximately. The incident, apart from himself, was witnessed by Uresh Chandra, Brijpal, Indrapal, Satish and several other villagers. He and the other persons present at the place of occurrence had tried to catch the accused but since one of them, Ram Bhajan (A1) was armed with a gun and had threatened anyone who dared to follow them, with dire consequences, they retreated and the accused fled towards the field in the east, hurling abuses at the villagers. He also deposed that about 15 days before the occurrence, Moti Lal and Mauji Lal, the cousin brothers of Ram Bhajan, in the process of constructing boundary wall of their house, had encroached upon some portion of the village passage on account of which deceased Sarvesh, his family members and family members of Moti Lal had quarreled with each other and the dispute was referred to Ex-Pradhan of the village, Awadh Narayana Shukla who after inspecting the disputed site had succeeded in pacifying both the parties. But the accused-appellant Ram Bhajan did not abide with compromise and declared that he was going to build his boundary wall on the same land and dared anybody to stop him. Injured Rinkal was taken to Kanpur for treatment by his maternal uncle and maternal grandfather. P.W.2 identified the accused present in the Court room as the same persons who had committed the murder of Sarvesh and shot Rinkal.

17. Dr. M.K. Jain, who had conducted the postmortem on the cadaver of Sarvesh on 20.03.1992 in K.P.M Hospital, Kanpur Nagar, was examined as P.W.3. He proved the postmortem report of the deceased (Ext.Ka.2). The postmortem report of the deceased indicates following ante-mortem injuries on his dead body:-

1) Multiple fire-arm wounds of entries in number 19 left side of chest and abdomen

2) Multiple wounds of entries twenty-four in number over right side of chest and abdomen

3) Two wounds of entries over left upper part of front of thigh

4) Three wounds of entries over right upper front of thigh

5) Five wounds of entries over left front of upper arm

6) Three wounds of entries over left front of fore arm

7) Two wounds of entries over right shoulder

8) Five wounds of entries over back of right fore arm

9) Two wounds of entries over right submental area

10) One wound of entry over right eye.

All the above wounds are size 0.25 to 8 cm round with blackening and skin, muscle to cavity deep.

18. He deposed that the shot was fired from a considerable distance. But he was not in a position to say with precision about the distance from which the shot was fired as the aforesaid issue fell within the domain of a ballistic expert. As regards the

presence of blackening around the wound, he deposed that it could be due to the heat of the pellets. He further deposed that it was possible that the deceased had died on 19.03.1992 at about 4 P.M. The ante-mortem injuries found on the dead body of Sarvesh could be caused by one or two gunshots. Thus, from the evidence of P.W.3, it is proved that the deceased had died as a result of the ante-mortem injuries received by him on 19.03.1992 at about 4 P.M. which could have been caused by a single shot. In his cross-examination on page 35 of the paper book, he deposed that when a shot is fired from a distance of 4-5 feet then the blackening is caused around the wound due to gun powder.

19. Rinkal, who was also allegedly injured in the incident in which Sarvesh had lost his life, was examined as P.W.4. However, he in his evidence tendered before the trial court failed to attribute the gunshot which had caused fire-arm injuries to any of the accused. Rather he deposed that he had not seen the person who had shot him because as soon as he received the gunshot injury, he became unconscious and he was not aware as to who had died in the occurrence. P.W.4 Rinkal was declared hostile on the request of the prosecution and cross-examined by ADGC (Criminal) with the permission of trial court. Upon being confronted with his statement recorded u/s 161 Cr.P.C. in which he had stated that Jitendra (A2) had fired at him, he denied having made any such statement before the Investigating Officer and he could not say why the Investigating Officer had recorded aforesaid fact in his statement recorded u/s 161 Cr.P.C. He denied that he knew the accused-appellants who were present in the Court.

20. P.W.5 S.I. Ramesh Chandra Patel, the Investigating Officer of the case in his evidence tendered during the trial proved the check F.I.R. (Ext.Ka.3) which was in the hand-writing of Head Moharrir. He proved the inquest report (Ext.Ka.4), letters addressed to the C.M.O. and R.I., photo nash, challan lash and other documents (Ext.Ka.5 to Ka.10). He also proved the recovery memos of plain, simple earth and blood-stained earth and two empty cartridges of 12 bore collected from the place of occurrence (Ext.Ka.11, Ka.12 and Ka.13). He also proved the site plan of the occurrence (Ext.Ka.14) and the charge-sheet (Ext.Ka.16). He further deposed that on 30.04.1992 on the information received by him from the police informer, he seized the licensed gun of Ram Bhajan from his house, Serial No. whereof was 64459 and deposited it in the *malkhana* of the police station. He proved the check F.I.R. of the case registered against the accused-appellant no.1, Ram Bhajan under the Arms Act and the carbon copy of the G.D. of the case which were in the hand-writings of Constables Sahdev Singh and Ram Charan as (Ext.Ka.17) and recovery memo of the gun (Ext.Ka.18).

21. Dr. R.B. Gautam, who had examined the injuries of P.W.4 Rinkal was produced as P.W.6. He in his evidence tendered before the trial court proved the injury report of the injured Rinkal. The injury report of the injured Rinkal indicated following injuries on his person:-

1) Fire-arm wound of entry 0.3 cm x 0.3 cm, depth not measured, on right side of forehead 4 and ½ cm above the eyebrow. Blood oozing out from wound.

2) Fire-arm wound of entry 0.3 cm x 0.3 cm, on outer portion of left forearm and 3 and ½ cm below the shoulder

3) Fire-arm wound of entry 0.2 cm x 0.2 cm, from behind the chest 4 cm below the shoulder

4) Fire-arm wound of entry 0.1 cm x 0.2 cm, on right arm 6 cm below the elbow. Blood oozing out from the wound.

5) Fire-arm wound of entry 0.4 cm x 0.4 cm, depth not measured which was on upper part of the abdomen on epigastrium

6) Fire-arm wound of entry 0.3 cm x 0.3 cm, on upper left side of abdomen which was 20 cm below the auxila

7) Fire-arm wound of entry 0.2 cm x 0.2 cm, on the lower part of abdomen which was 10 cm below the navel

22. Both P.W.1 informant Banshi and P.W.2 Ramesh Chandra were cross-examined extensively by the defence counsel but their evidence on the point of deceased Sarvesh having been shot by Ram Bhajan (A1) has throughout remained clinching and consistent. Both the witnesses have proved the presence of each other at the time and place of occurrence. Learned counsel for the appellants has relied heavily upon the site plan and the medical evidence on record, namely the postmortem report of the deceased Sarvesh and the injury report of Rinkal for proving that none of the two witnesses had seen the incident. Inviting our attention to the ante-mortem injuries noted by P.W.3 Dr. M.K. Jain on the dead body of the deceased and recorded by him in the postmortem report (Ext.Ka.2) which indicated the presence of blackening around the multiple fire-arm wounds of entry, 19 in number over left side of chest and abdomen, multiple fire-arm wounds of entry, 24 in number, over right side of chest and the deceased's abdomen, two fire-arm wounds of entry over left upper part of front of thigh, three fire-arm wounds of entry over right upper part of front of thigh, five fire-arm wounds of entry over left front of upper arm, three fire-arm wounds of entry over left front of fore arm, two fire-arm wounds of entry over right shoulder, five fire-arm wounds of entry over back of right fore arm, two fire-arm wounds of entry over right submental area and one fire-arm wound of entry over right eye, he submitted that the blackening around the wounds unequivocally suggested that the fire was shot at the deceased from a distance of not more than 4-5 paces. He further invited our attention to the injury report of P.W.4 Rinkal which indicated that he had received 7 fire-arm wounds of entry but no blackening was present around his wounds which according to the learned counsel for the appellants indicated that the shot which had caused fire-arm injuries to injured Rinkal was not shot from the same place from where the deceased was shot at and Rinkal was not standing next to Sarvesh when he was shot. In the site plan of the place of incident prepared by the Investigating Officer, the spot where the dead body of deceased Sarvesh was found lying, has been shown by letter 'A'. The place where Rinkal received gunshot injury is denoted by letter 'XB'. The place from where the accused had fired at the injured and the deceased, has been shown by letter 'C'. The distance between the point 'C' and point 'A' and 'XB' has been mentioned as 27 paces which comes to about 68 feet.

23. The question which arises for our consideration is whether the consistent case of prosecution that when Rinkal was shot unintentionally by Jitendra (A2), he was standing next to Sarvesh and on being shot, he immediately fell on the ground and became unconscious and thereafter Ram Bhajan snatched the gun from Jitendra (A2) and shot Sarvesh, stands totally demolished in view of the factual position that dead body of Sarvesh was found lying at a distance of about 54 paces from the place

where Rinkal was shot, as is evident from the perusal of the site plan. If both the accused-appellants had fired at deceased Sarvesh and injured Rinkal from the same point and both the victims were standing at the same distance from the place where the accused had stationed themselves, then the dead body of the deceased Sarvesh should have been found lying at the same place where Rinkal was shot or vice-versa. But it is not like that.

24. Kumari Meena, learned AGA for the State by inviting our attention to the diagram of the dead body prepared at the time of the inquest, submitted that the blackening present around the fire-arm wounds found on the dead body of Sarvesh was due to the heat of the pellets which had entered into his body after the shot was fired. The blackening in this case is not due to the gun powder. If the blackening was present around the area enclosing the multiple fire-arm wounds found on the dead part of the deceased's dead body, then in that case it could be said that the shot was fired from a close distance. In the instant case, the presence of blackening around the pellet entry wounds does not indicate that the shot was fired from a close range and hence there is no discrepancy between the ocular version and the medical evidence on record. However, Kumari Meena has not been able to explain how the injured Rinkal had received gunshot injuries at a place which was at the distance of about 54 paces from the spot where the deceased was shot.

25. The moot question which arises for our consideration is whether the entire prosecution case is liable to be discarded due to the aforesaid inconsistencies in the evidence led by the prosecution and also on the ground of non-acceptance of evidence tendered by P.W.1 informant Banshi and P.W.2 Ramesh Chandra qua co-accused Moti Lal and Mauji Lal which resulted in their acquittal. The evidence of witnesses of fact produced during the trial may not be found to be reliable on the point of Rinkal receiving injuries as a result of the gunshot which was aimed by Jitendra (A2) at Sarvesh, accidentally hitting him, in view of the above inconsistencies and the evidence of Rinkal himself and also with regard to the participation of co-accused Moti Lal and Mauji Lal in the occurrence. But whether the evidence of the two prosecution witnesses on the point of deceased Sarvesh having been shot by Ram Bhajan (A1) after snatching his gun from his son's hands which he had brought from his house on his father Ram Bhajan's order is also liable to be disbelieved. The substantive evidence on record consists of the statements of P.W.1 informant Banshi and P.W.2 Ramesh Chandra, recorded during the trial. We have already held that P.W.1 in his evidence tendered during the trial has fully supported the prosecution case as spelt out in the F.I.R. on all material points relating to the occurrence. P.W.2 has fully corroborated the evidence of P.W.1 on all material aspects of the matter although their evidence qua Rinkal being shot by Jitendra (A2) accidentally may not be believable but on that score alone, their entire evidence cannot be thrown out in view of the principle of law laid down by the Apex Court in the case of **Gunnana Pentayya @ Pentadu and others v. State of A.P., 2008 (62) ACC 898 (SC) = 2008 (69) AIC 57 (SC).** The Apex Court in paragraph 15 of its judgement rendered in the aforesaid case has held as hereunder:-

"The next plea as noted above related to the acquittal of number of persons. Stress was laid by the accused-

appellants on the non-acceptance of evidence tendered by P.W.1 to a large extent to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of *falsus in uno falsus in omnibus"* (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient, or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus in omnibus"* has no application in India and the witness or witnesses cannot be branded as liar(s). The maxim *"falsus in uno falsus in omnibus"* has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence' (See **Nisar Ali v. The State of Uttar Pradesh, AIR 1957 SC 366**). In a given case, it is always open to a Court to differentiate accused who had been acquitted from those who were convicted where there are a number of accused persons (See **Gurucharan Singh and another v. State of Punjab, AIR 1956 SC 460**). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment."

26. In **Triloki Nath v. State of U.P., 2006 (54) ACC 591 (SC) = 2006 (38) AIC 206** it has been observed by the apex Court as under:-

"30. *'Falsus in uno, Falsus in omnibus'* is not a rule of evidence in criminal trial and it is the duty of the Court to disengage the truth from falsehood, to sift the grain from the chaff."

27. Thus, what follows from the reading of the aforesaid law reports is that the maxim *"falsus in uno, falsus in omnibus"* has neither received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely rule of caution. All that it amounts to, is that in such cases testimony may be disregarded and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances. Even if major portion of evidence is found to be deficient in case residue is sufficient to prove guilt of an

accused, his conviction can be maintained and it is the duty of Court to separate grain from chaff and whether chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient or to be not wholly reliable.

28. After carefully scrutinizing the evidence of P.W.1 and P.W.2, we find that there evidence on the point of deceased having been shot dead by Ram Bhajan (A1) inspires full confidence. The defence has neither challenged the time nor place or manner of incident qua deceased Sarvesh.

29. Another circumstance which has been relied upon by the learned counsel for the appellants for proving that P.W.1 informant Banshi was not present at the place of occurrence is that the statements of P.W.1 informant Banshi u/s 161 Cr.P.C. was recorded by the Investigating Officer after 5-6 days of the occurrence.

30. If the statement of P.W.1 was not recorded by the Investigating Officer promptly, the defence will not get any benefit due to any laxity on the part of the Investigating Officer. Moreover, it is proved from the G.D. entry (Ext.Ka.4) that the written report of the occurrence was given by P.W.1 Banshi himself at P.S.-Narval, District- Kanpur Nagar on the basis of which Case Crime No. 28/92 u/s 302/307 I.P.C. was registered against the accused-appellants. The defence has not challenged the aforesaid entry recorded in G.D. (Ext.Ka.4).

31. As far as motive in this case is concerned, it is true that the same has not been mentioned in the F.I.R. but P.W.1 informant Banshi in his examination-in-chief has categorically deposed that about 15 days before the occurrence, Moti Lal and Mauji Lal, cousin brothers of Ram Bhajan (A1) while constructing the boundary wall of their house had encroached upon some portion of the common passage in the south of the village to which deceased Sarvesh and his family members had objected and requested them to remove the wall. The informant's son and deceased Sarvesh had demolished the boundary wall when they refused. The dispute was referred to Awadh Narayana Shukla, Ex-Pradhan of the village who had persuaded the parties to enter into some kind of compromise under which Moti Lal and Mauji Lal had agreed to reconstruct their boundary wall after leaving the area of public passage. But the accused-appellants did not abide with the terms of the compromise and Ram Bhajan (A1) reconstructed the boundary wall on the same place where he had constructed the boundary wall earlier and thereafter he had threatened anyone including Ex-Pradhan, Awadh Narayana Shukla, who dared to demolish the boundary wall with dire consequences and on the account of the aforesaid enmity, the offence was committed by the accused-appellants. P.W.2 Ramesh Chandra has substantially corroborated the evidence of P.W.1 on the aforesaid aspect of the matter. Thus, we find that the prosecution has also succeeded in proving the motive for the accused-appellants to commit the murder of the deceased.

32. The question which arises for our consideration next is whether the conviction of Jitendra (A2) recorded by the trial court u/s 302 I.P.C. by invoking aid of Section 34 of the I.P.C. can be maintained or not as admittedly Jitendra (A2) has not caused any injury to the deceased. There is no evidence on record

showing that Jitendra (A2) had exhorted Ram Bhajan (A1) to kill Sarvesh. The incriminating circumstances against him which appear to have weighed with the trial court while convicting Jitendra (A2) are that on the command of his father Ram Bhajan, (A1), while deceased Sarvesh and Jitendra (A2) were arguing with each other, to get his licensed gun from his house, he had gone to his house and returned with his father's licensed gun and had fired at deceased Sarvesh at the instigation of his father. But the shot fired by him instead of hitting Sarvesh had struck P.W.4 Rinkal. We have already held that there is no reliable evidence on record proving the aforesaid part of occurrence. But the fact remains that if he had not obeyed the command of his father and had not brought his father's licensed gun from his house, the incident may not have taken place at all. The actions of Jitendra (A2) namely bringing his father's gun from his house, his firing at deceased Sarvesh although the shot did not hit him, and then his father snatching the same from his hands and firing at deceased Sarvesh amount to acts done in furtherance of a common intention. Therefore, we do not find that the trial Judge committed any illegality or infirmity in convicting Jitendra (A2) u/s 302/34 I.P.C.

33. Thus, upon a holistic view of the entire facts and circumstances of the case and a critical appraisal and evaluation of the evidence on record both oral as well as documentary, we find that although the prosecution has succeeded in proving that deceased Sarvesh had died as a result of fire-arm injuries received by him from the gunshot fired by Ram Bhajan (A1) from his gun which was brought by his son Jitendra (A2) from his house on his instructions but the prosecution has not been able to prove by any cogent evidence that Rinkal had received fire-arm injuries at the hands of Jitendra (A2). Hence, the conviction of the accused-appellants recorded u/s 307/34 I.P.C. cannot be sustained and is liable to be set-aside.

34. Thus for the aforesaid reasons, the conviction of accused-appellants recorded u/s 302/34 I.P.C. and the sentence of imprisonment for life awarded to them is confirmed. But the accused-appellants are acquitted of the charge u/s 307/34 I.P.C. framed against them.

35. The appeal stands **allowed in part** and the impugned judgement and order stands modified to the aforesaid extent.

36. The accused-appellants are on bail. Chief Metropolitan Magistrate, Kanpur Nagar shall forthwith get the accused-appellants, Ram Bhajan and Jitendra arrested and sent to jail for serving out the remaining part of their sentences.

(2020)06ILR A497
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.06.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Appeal No. 2349 of 2017
&
Criminal Appeal No. 2547 of 2017
&
Criminal Appeal No. 3237 of 2017
&
Criminal Appeal No. 2433 of 2017

Satya Pal Singh & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Babu Sharma, Sri Ardhendhu Shekhar Sharma, Sri Santosh Kumar Tiwari

Counsel for the Opposite Party:
A.G.A., Sri J.K. Upadhyay

No eye-witness account to the incident and the entire case of the prosecution is based on circumstantial evidence - The only piece of evidence against the appellants is the evidence of last seen by (PW-2) and (PW-3) - - The evidence of last seen is being treated as a weak evidence and the same can be made basis for conviction only when it is trustworthy and inspire the confidence of the Court - It is a settled proposition of law that suspicion howsoever grave it is, it cannot take place of evidence - The quality of evidence of PW-2 and PW-3 regarding last seen of the accused persons in the company of the deceased is not very conclusive and clinching. It does not inspire the confidence of the Court because but for this evidence there is no other evidence on record connecting the appellants in commission of murder of the deceased- Where dead body of the deceased was found near a canal in an open space and thus it is difficult to hold that it is the accused persons alone, who have killed her - No FSL report on record and no other evidence to establish as to in what manner these two articles have been used in commission of murder or carrying the dead body of the deceased. Importantly, this seizure has been made from the open place accessible to everyone.

Evidence Law - Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- Law is well settled that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused.
In a case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully established and should be consistent only with the hypothesis of the guilt of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- Evidence of " last seen"- The evidence of last seen is being treated as a weak evidence and the same can be made basis for conviction only when it is trustworthy and inspire the confidence of the Court - It is a settled proposition of law that suspicion howsoever grave it is, it cannot take place of evidence.
The evidence of the deceased having been " last seen" in the company of the deceased is a weak type of evidence and in order to secure the conviction of the accused, the said evidence has to be clinching and conclusive. It is settled law that suspicion, however strong, cannot be allowed to take the place of proof.

Evidence Law - Indian Evidence Act, 1872- Section 3- Section 106- Where dead body of the deceased was found near a canal in an open space and thus it is difficult to hold that it is the accused persons alone, who have killed her.
The fact that the dead body of the deceased was found at an open place, easily accessible to all, would not shift the burden of proof upon the accused persons as the said fact cannot be especially within the knowledge of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 27- Recovery and seizure- Of a rope and gunny bag upon the instance of the accused from an open place- No FSL report on record and no other evidence to establish as to in what manner these two articles have been used in commission of murder or carrying the dead body of the deceased. Importantly, this seizure has been made from the open place accessible to everyone.
The recovery of two articles upon the instance of the accused from an open place , easily accessible to all, and without any corroborative evidence of the Forensic Science Laboratory would not be a relevant fact under Section 27 of the Evidence Act so as to connect the accused with the commission of the offence. (Para 18, 20, 21, 22, 23)

Criminal Appeal allowed. (E-3)

Case Law relied upon:-

1. Vikramjit Singh @ Vicky Vs St. of Punj. (2006) AIR SCW 6197

2. Satpal Vs St. of Har.; AIR (2018) SC 2142

3. Sattatiya @ Satish Rajanna Kartalla Vs St. of Maha, (2008) 3 SCC 210

4. Devi Lal Vs St. of Raj.; AIR (2019) SC 688

5. Digamber Vaishnav Vs St. of Chhattis.; AIR (2019) SC 1367

6. Anjan Kumar Sarma & ors. Vs St. of Assam; (2017) 14 SCC 359

7. Kali Ram Vs St. of H. P, ;(1973) AIR SC 2773

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. As all these four appeals arise out of a common judgement and order dated 27.04.2017 passed by Additional District & Sessions Judge, Court No. 13, Aligarh in Sessions Trial No. 575 of 2012 (State vs. Kaptan Singh & Ors.), convicting the accused-appellants under Sections 498A, 302/149, 201, 120B of IPC, P.S. Khair, District Aligarh and sentencing accused-appellants Satya Pal Singh, Smt. Munesha Devi and Pankaj under Section 302/149 of I.P.C. to undergo imprisonment for life and a fine of Rs. 25,000/- each, in default thereof, to further undergo one year rigorous imprisonment, further sentencing all the accused-appellants to undergo five years rigorous imprisonment under Section 201 and a fine of Rs. 10,000/- each, in default thereof, to further undergo three months additional rigorous imprisonment; to undergo imprisonment for life under Section 120B and a fine of Rs. 15,000/- each, in default thereof, to further undergo one year rigorous imprisonment and to undergo three years simple imprisonment under Section 498A and a fine of Rs. 10,000/- each, in default thereof, to further undergo one month's additional simple imprisonment, they are being disposed of by this common order.

2. In the present case, the name of deceased is Smt. Anita, wife of accused Kaptan Singh. Their marriage was solemnized about 6-7 years prior to the date of incident i.e. 02.02.2012. It is alleged that deceased was subjected to cruelty for demand of Rs. 2 lakhs for expansion of business of her husband. However, the same could not be paid to the husband on account of poor financial condition of the father and brother of the deceased. It is said that a month prior to the date of incident, a Panchayat meeting was called at village Nandpur Pala, which was attended by the accused persons including villagers and in the said meeting, complainant Nagendra Singh (PW-1), brother of the deceased and his family members were threatened for either giving Rs.2 lakhs or to face dire consequences. Further case of the prosecution is that on 02.02.2012, there was a marriage in the relation of the complainant at Delhi, deceased left her house from village Nandpur Pala but she did not reach to Delhi. Near village Khair, at a place called Barka, dead body of the deceased was found near a canal. On the basis of written report lodged by Nagendra Singh (PW-1), brother of the deceased on 03.02.2012, FIR Ex. Ka.2 was registered at 01.30 p.m. against the accused persons, Kanti Devi and one Subhash under Sections 498A, 304B, 201 of IPC read with Section 3/4 of Dowry Prohibition Act.

3. Inquest on dead body was conducted vide Ex. Ka.11 on 03.02.2012 and the body was sent for postmortem, which was conducted on 04.02.2012 vide Ex. Ka.6 by PW-6 Dr. R. Bihari.

4. As per Autopsy Surgeon, following injuries have been found on the body of the deceased:

"(i) Contusion 4cm x 3cm over left forehead.

(ii) Abraded contusion 5cm x 4cm over right forehead.

(iii) Ligature mark 26cm x 1.5cm over front of both side of neck between chin and thyroid cartilage interrupted on back of neck area of 4cm ligature mark directed upward and backward on both brown hard. On dissection glistering white present underneath the ligature mark echymosis present in subcutaneous tissue."

The cause of death of the deceased was due to asphyxia as a result of antemortem hanging.

5. Though Subhash has been made accused in the FIR but after investigation, charge-sheet was not filed against him. It was filed against the appellants and one Kanti Devi, Jethani of the deceased. However, the said Kanti Devi expired during pendency of the trial.

6. While framing charge, the trial court has framed charge against the accused persons under Sections 498A, 302/149, 201, 120B of IPC.

7. So as to hold the accused appellants guilty, prosecution has examined eight witnesses. Statements of accused persons were also recorded under Section 313 Cr.P.C. in which, they pleaded their innocence and false implication.

8. By the impugned judgment, the trial Judge has convicted the accused appellants under Sections 498A, 302/149, 201, 120B of IPC and sentenced them as mentioned in paragraph no. 1 of this judgement. Hence these appeals.

9. Learned counsel for the appellants submits:

(i) that there is no eye-witness account to the incident and the appellants have been convicted solely on the basis of weak circumstantial evidence.

(ii) that the main piece of evidence against the accused persons is the evidence of last seen by Rajendra Pal Singh (PW-2) and Raju (PW-3). However, the said evidence is not conclusive in nature and merely based on the same, the appellants cannot be convicted specially when there is no other evidence against them.

(iii) that in Section 313 Cr.P.C. statement, accused Kaptan Singh, husband of the deceased, had taken specific defence that while the deceased was going to Delhi to attend the marriage in her relative's house, she appears to have been killed by someone. Learned counsel for the appellants have placed their strong reliance on the judgment of the Apex Court in **Vikramjit Singh @ Vicky vs. State of Punjab (2006) AIR (SCW) 6197.**

10. On the other hand, supporting the impugned judgment, it has been argued by the State counsel:

(i) that the conviction of the appellants is in accordance with law and there is no infirmity in the same. He submits that conviction can be based even solely on the basis of last seen evidence provided that the said evidence inspires the confidence of this Court and present is one of such case.

(ii) that there was strong motive for the appellants to commit the murder of the deceased as in the Panchayat meeting, the accused persons have openly threatened the family members of the deceased for dire consequences.

(iii) that once the deceased died homicidal death, burden lies on the appellants to explain as to how she died.

(iv) that when the appellants were supposed to go along with the deceased to Delhi, they are under the obligation to offer suitable explanation as to under what circumstances, the deceased died. Admitting for the sake of argument that the deceased might have been killed by third person and could not reach to Delhi, appellants were under the obligation to at least search the deceased as to where she had gone. He placed reliance on the judgment of the Apex Court in **Satpal vs. State of Haryana; AIR 2018 SC 2142.**

11. We have heard counsel for the parties and perused the record.

12. Nagendra Singh (PW-1), is the brother of deceased and the informant. He states that the marriage of deceased was solemnized with Kaptan Singh about 6-7 years prior to the incident and about Rs. 5 lacks were spent in the said marriage. The accused persons were not satisfied with the dowry given in the marriage and for expansion of their business, they were demanding Rs. 2 lacks from the deceased. He states that all the accused persons were residing at Nandpur Pala at Khair. About a month prior to the incident, he was called by the accused persons in their house and there also, the demand was repeated. He further states that at village Nandpur Pala, a Panchayat meeting was also called, which was attended by the accused persons including accused Vinod and Chota and in the said meeting also, demand was repeated and a threat for dire consequences was extended. He states that on 02.02.2012, marriage of his cousin was to take place at Delhi and deceased was also supposed to attend the same. On 02.02.2012, on phone, accused Kaptan Singh had informed him that he would also be attending the said marriage along with the deceased and two other accused persons namely Vinod and Chota and another relative Subhash. He states that when accused persons and the deceased did not reach to Delhi, he called one Rajendra Pal Singh, who informed him that all of them had gone to Delhi. On the next day, accused Satyapal Singh called him and enquired about the deceased and his other family members but as they did not reach to Delhi, he informed them accordingly. He further states that when he was going to village Khair, on the way near Barka, he met certain persons, who informed him that a dead body of a lady is lying near the canal and the said dead body was of the deceased. Naming all the accused persons as accused, he states that they have killed the deceased. He further states that he could not get the whereabouts of his niece Priyanshi aged 5 years for some time and then the police recovered the said child and handed over to him on 'Supurdhnama'. This witness was subjected to various unnecessary questions in the cross-examination. However, the contents of the said cross-examination are that the deceased was subjected to cruelty. He states that the Panchayat was also attended by him and he returned from the Panchayat by saying that whenever he would arrange Rs.2 lacks, the same would be given to the accused persons. There are some contradictions in the Court statement of this witness, from his diary statement and that of FIR lodged by him.

13. Rajendra Pal Singh (PW-2) was the mediator in the marriage of deceased and Kaptan Singh. He is a resident of village Nandpur Pala where some of the accused persons were also residing. He states that in the marriage about Rs. 5 lakhs were spent by the family members of the

deceased. However, the accused Kaptan Singh and his brother-in-law Subhash were insisting for further Rs. 2 lakhs for which all the accused persons used to harass the deceased. He states that deceased was ousted from village Khair and then she was residing in her village Ballor. He further states that from Ballor, deceased called him and requested for settlement by saying that how long she would reside in her parents' house and accordingly a village Panchayat was called. However, the accused persons had insisted for Rs. 2 lakhs and somehow deceased started living at Nandpur Pala. On 02.02.2012, there was a marriage of cousin of the deceased at Delhi and on the same day, at about 03.00 p.m., accused appellant Kaptan Singh on his motorcycle took the deceased and his daughter to Delhi and before that the other accused persons namely Vinod, Chota and Kanti Devi had already left for Delhi. At about 08.00 p.m., he received a call from Nagendra Singh (PW-1) that the deceased and her husband have not reach Delhi and then they were searched and later an information was received about the dead body of one lady, which was later identified to be that of the deceased. He was suggested for falsely implicating the accused persons for various reasons but he has denied all those suggestions.

14. Raju (PW-3) has also been examined as witness of last seen. He states that on 02.02.2012 at about 4.30 p.m., when he and his brother Narendra were returning from the market of Khair, at Somna trijunction, he saw accused Vinod, Chota and Kanti Devi on a motorcycle, who had covered their faces and on the other bike he saw accused Kaptan Singh, his daughter and the deceased and that they were coming towards their house at Khair. He further states that on the second day, he came to know about the death of the deceased and the fact that her dead body was lying near a canal. He states that he had gone to see the accused persons in their house but their house was found to be locked.

15. Rakesh Kumar (PW-4) is a police constable who has proved the general diary and the FIR. Om Prakash (PW-5) is the Station House Officer of Khair, states that at the instance of the accused Kaptan Singh, from the field of one Prem Pal, one gunny bag and a rope of about one meter was seized vide Ex.Ka.5.

16. Dr. R. Bihari (PW-6) conducted postmortem on the body of the deceased. The cause of death of the deceased was asphyxia due to hanging. He states that the deceased died about one and a half day prior to the date of postmortem, which was conducted on 04.02.2012 at 00.15 a.m.

17. S.S. Rathi (PW-7) is the Investigating Officer of the case. Vikram Singh (PW-8) is a constable who assisted during investigation.

18. Close scrutiny of the evidence makes it clear that there is no eye-witness account to the incident and the entire case of the prosecution is based on circumstantial evidence. Law in respect of **circumstantial evidence** is very clear.

19. In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra, (2008) 3 SCC 210**, the Supreme Court, while dealing with circumstantial evidence, observed as under:

"11. In *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC

343], which is one of the earliest decisions on the subject, this court observed as under:

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

12. In *Padala Veera Reddy v. State of AP* [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

13. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Further in **Satpal Vs. State of Haryana; (2018) 6 SCC 610,** the Supreme Court has observed as under:

"6. We have considered the respective submissions and the evidence on record. There is no eye witness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by

itself to found conviction upon the same singularly.

But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place.

If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

Recently, in **Devi Lal vs. State of Rajasthan,** Criminal Appeal No.148 of 2010, decided on 08.01.2019, the Supreme Court, while dealing with circumstantial evidence, observed as under:

14. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116*. The relevant excerpts from para 153 of the decision is assuredly apposite:

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra [(1973) 2 SCC 793* where the observations were made:

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

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

15. It has further been considered by this Court in ***Sujit Biswas Vs. State of Assam 2013 (12) SCC 406*** and ***Raja alias Rajinder Vs. State of Haryana 2015 (11) SCC 43.*** It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and

completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused."

Most recently, in **Digamber Vaishnav Vs. State of Chhattisgarh; AIR 2019 SC 1367** decided on 05.03.2019, the Apex Court has held as under (with respect to circumstantial evidence):

"15. 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 the prosecution cannot 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.

16. This Court inJaharlal Das v. State of Orissa, (1991) 3 SCC 27, has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

i.) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii.) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

iii.) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused."

20. If the above principles of law is applied in the present case, what emerges is that the only piece of evidence against the appellants is the evidence of last seen by Rajendra Pal Singh (PW-2) and Raju (PW-3). If we analyze the evidence of these two witnesses, both of them have stated that they saw the accused persons coming toward their own village Khair and not towards the place Barka where the dead body of the deceased was found. Raju

(PW-3) saw the accused Vinod, Chota and Kanti Devi on a motorcycle, these persons had covered their faces, and on the other vehicle, he saw Kaptan Singh, the deceased and their daughter. Here also evidence of these witnesses becomes doubtful because once some of the persons had covered their faces, while sitting on motorcycle, identification of such persons can be doubted. It is not a case of PW-2 and PW-3 that they saw the accused persons taking the deceased towards the place Barka where her dead body was found. The quality of evidence of PW-2 and PW-3 regarding last seen of the accused persons in the company of the deceased is not very conclusive and clinching. It does not inspire the confidence of the Court because but for this evidence there is no other evidence on record connecting the appellants in commission of murder of the deceased.

21. The evidence of last seen is being treated as a weak evidence and the same can be made basis for conviction only when it is trustworthy and inspire the confidence of the Court. Law in this regard is well settled. In the case of **Anjan Kumar Sarma And Ors. Vs. State of Assam; (2017) 14 SCC 359**, the Apex Court has observed as under:

"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must' or "should' and not "may be' established;

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

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (See: Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 (para 185 & 153); M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200 (para 18).

19. The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715, this court held that:

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant. .....

15. The theory of last seen--the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved

that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan [(2010) 15 SCC 588]."

22. Mr. R. Venkataramani relied upon Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570 at p.582, to buttress his submission that the circumstance of last seen together coupled with lack of any satisfactory explanation by the accused is a very strong circumstance on the basis of which the accused can be convicted. It was held by this Court in the above judgment as follows: (AIR pp. 806-07, para 9)

"It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. We are, therefore, of the opinion that this is a case which satisfies the standards requisite for conviction on the basis of circumstantial evidence."

23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:- (SCC p.776, para 34).

"34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be

no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

22. Though there is no explanation from the accused persons in particular accused Kaptan Singh as to how the deceased died but present is a case where dead body of the deceased was found near a canal in an open space and thus it is difficult to hold that it is the accused persons alone, who have killed her. There are as many as six accused appellants in the present case and in absence of any specific role assigned to individual accused, it will not be safe for this Court to uphold the conviction of all the accused persons. Accused Vinod and Pushpendra were made accused merely on the evidence that they attended the village Panchayat and there they threatened the family members of the deceased for giving the dowry amount or to face dire consequences. Likewise, what role has been played by accused Satyapal Sing, Smt. Munisha Devi and Pankaj has also not been made very clear. It is a settled proposition of law that suspicion howsoever grave it is, it cannot take place of evidence. Recently in **Devi Lal vs. State of Rajasthan; AIR 2019 SC 688** the Apex Court, while dealing with a case, observed as under:

"On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof."

Recently, in the case of **Digamber Vaishnav Vs. State of Chhattisgarh (Supra)** decided on 05.03.2019, the Apex Court has held as under (with respect to last seen):

"40 The prosecution has relied upon the evidence of PW-8 to show that the

accused and victims were last seen together. It is settled that the circumstance of last seen together cannot by itself form the basis of holding accused guilty of offence. If there is any credible evidence that just before or immediately prior to the death of the victims, they were last seen along with the accused at or near about the place of occurrence, the needle of suspicion would certainly point to the accused being the culprits and this would be one of the strong factors or circumstances inculpating them with the alleged crime purported on the victims. However, if the last seen evidence does not inspire the confidence or is not trust worthy, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close proximity between the time of seeing and recovery of dead body."

23. At the instance of Kaptan Singh, seizure of one rope and gunny bag has been made but there is no FSL report on record and no other evidence to establish as to in what manner these two articles have been used in commission of murder or carrying the dead body of the deceased. Importantly, this seizure has been made from the open place accessible to everyone.

24. Considering the nature of evidence available on record, we are of the view that the accused persons are entitled to get the benefit of doubt. Law in this respect is also very clear. In **Kali Ram vs. State of Himachal Pradesh, the Supreme Court; 1973 AIR 2773,** while dealing with the issue relating to withholding or affording benefit of doubt, observed as under:

"26. It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on page 3 of the book entitled "The Accused" by J.A. Coutts 1966 Edition, "When once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal.

27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is

hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, Second Edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahabrao Bobade & Anr. (AIR 1973 SC 2622) as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

25. Taking cumulative effect of the evidence, we find it difficult to uphold the conviction of the appellants. They are entitled to get the benefit of doubt.

26. Accordingly, the appeals succeed and are allowed. The impugned judgment is set-aside.

27. Appellant Satyapal Singh, Smt. Munisha Devi and Pankaj are on bail and, therefore, no further order is required in their respect.

28. Rest of the appellants are in jail, they be set free forthwith if not required in any other case

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(2020)06ILR A510
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 2378 of 2018

Mahipal & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Brijesh Kumar Pandey

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

Criminal Law – Indian Penal Code, 1860 - Sections 307 and 504 - Sentence to the appellant of five years rigorous imprisonment with fine of Rs. 2000 - Modification of the order of the sentence for the period already undergone by the appellant-. He was awarded maximum sentence of five years - The

substantive period already undergone by the appellant in this case and the fact that the appellant is a young person and he is the only bread earner in the family and that he might have realized the mistake committed by him and might remorseful of his conduct to the society to which he belongs, he should be given a chance to reform himself and his better contribution to the society to which he belongs to - He has already served about four years and it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced- The accused-appellant is sentenced to the period already undergone by him in jail during trial and after conviction an amount of fine of Rs. 4000/- be enhanced to Rs. 10,000/-.

Quantum of Sentence- Reformative Theory- The substantive period already undergone by the appellant in this case and the fact that the appellant is a young person and he is the only bread earner in the family and that he might have realized the mistake committed by him and might remorseful of his conduct to the society to which he belongs, I am of the considered opinion that he should be given a chance to reform himself and his better contribution to the society to which he belongs to.

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 9, 10)

Criminal Appeal partly allowed. (E-3)

Case Law relied upon:-

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

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

1. Learned counsel for the appellants has very fairly stated that appellant no. 2, Amar Singh has already served the sentence and in view of the above, the appeal against the appellant no. 2, Amar Singh has become infructuous.

2. Having regard to the submission made by the learned counsel for the appellant, the appeal against appellant no. 2, Amar Singh is dismissed as infructuous.

3. This criminal appeal has been filed against the judgement and order dated 13.3.2018 passed by Addl. Sessions Judge, Court no. 1, Budaun in S.T. No. 472 of 2014 (State vs. Munendra and others), under Sections 307 and 504 I.P.C., P.S. Bisauli, district-Budaun, whereby learned Judge convicted and sentenced the appellant to five years rigorous imprisonment with fine of Rs. 2000/- and in default of payment of fine further additional imprisonment for three months, one year rigorous imprisonment under Section 504 I.P.C. with a fine of Rs. 1000/- and in default of payment of fine, further additional imprisonment for one month.

4. Both the sentences shall run concurrently.

5. The prosecution story in brief is that on 14.6.2014 the complainant along with his other family members had returned back from the 'Lagun ceremony' of his daughter Vimlesh and his other daughter Kanti had come from her in-laws house to attend the marriage. On 15.6.2014 all the family members were present at home in preparation for the procession. Resident of same village Munendra son of Amar Singh who was armed with firearm started abusing them. Along with Munendra, the residents of same village namely, Mahipal and Amar Singh, son of Natthu, who were having

firearms in their hands also came before us and started abusing. When they objected for abusing then at about 6:00 p.m. Munendra started firing with the intention to kill us, which was hit Kanti, as a result of which she collapsed on the 'kharanja'. The incident was witnessed by the residents of the village namely, Gaurav Kumar, Arvind, son of Chatrapal, Dinesh, son of Munshi and several others. All the accused persons after firing ran away towards fields.

6. At the very outset, Sri Umesh Chandra Tiwari, 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.

7. Learned counsel for the appellant has submitted that only single shot was fired by the accused Munendra and no overt act of any kind has been attributed to appellant no. 1, Mahipal. He next submitted that at the time of incident the accused was aged about 25 years and at present the accused is more than 31 years of age. He has next submitted that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He further submitted that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the family status. Learned counsel for the appellant further submits that the appellant was awarded rigorous imprisonment of five years and that he has already undergone two years before conviction and about two years after conviction, meaning thereby that he has undergone about four years of the awarded sentence.

8. 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."

9. Considering the facts and circumstances of the case and the substantive period already undergone by the appellant in this case and the fact that the appellant is a young person and he is the only bread earner in the family and that he might have realized the mistake committed by him and might remorseful of his conduct to the society to which he belongs, I am of the considered opinion that he should be given a chance to reform himself and his better contribution to the society to which he belongs to.

10. Considering the fact that the accused is in jail since 13.3.2018. He was awarded maximum sentence of five years; that he has served two years before conviction and about two years after conviction; that he has already served about four years and it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced.

11. Considering all the facts and circumstances of the case, the accused-appellant is sentenced to the period already undergone by him in jail during trial and after conviction an amount of fine of Rs. 4000/- be enhanced to Rs. 10,000/-.

12. Accused-appellant is directed to deposit the fine of Rs. 10,000/- before learned lower court at the time of applying for release order, out of which Rs. 9000/- shall be paid to the injured, if he/she is alive and in case he/she is dead, then it would be paid to his/her legal heirs.

13. Appeal is partly allowed in the above terms.

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

(2020)06ILR A513
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. - 4156 of 2017
&
Criminal Appeal No. - 1807 of 2019

Hukam Singh & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Anil Kumar Srivastava, Sri Ram Bahadur

Counsel for the Opposite Party:
A.G.A., Sri Bharat Singh

Criminal Law - Indian Penal Code, 1860- Conviction of the appellants under Sections 394, 307 read with Section 34, 411 - and sentenced to undergo 8 years rigorous imprisonment with fine of Rs.10,000/- each under Section 307 read with Section 34 I.P.C.. under Section 394 I.P.C. for seven years rigorous imprisonment with fine of Rs.5,000/- and under Section 411 I.P.C. for three years rigorous imprisonment with fine of Rs.5,000/- The doctrine of proportionality sentencing for any

offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric.The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers - In our country the reformative and corrective approach has been adopted in criminal justice administration. There is nothing on record to show that the accused-appellants are incapable of being reformed. The accused-appellants are in jail continuously for more than five years. Every convict is entitled for the advantage of reformative and corrective jurisprudence-The accused-appellants had assaulted the injured causing grievous and serious injuries, which were fatal to life. Therefore, their appeals on merit are dismissed and only heard on the quantum of sentence - Considering the facts and circumstances of the case and looking to the facts that appellants are in jail and more than five years have elapsed; they are married persons and they have to support their families; there is no one to look after their families and their families are at the verge of starvation and also considering the status of the appellants this Court considers that end of justice would be served if the appellants are punished for the period already undergone and with fine only. The fine is enhanced from Rs.20,000/- to Rs.25,000/- each.

Quantum of sentence- Doctrine of Proportionality of Sentence – Has a social goal and is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric.

It is settled law that sentence awaded should be proportionate to the gravity of the offence committed by the accused so that the accused must realize the effect of the offence on the life of the victim and the society.

Quantum of Sentence- Reformative Theory of Punishment- In our country the reformative and corrective approach has been adopted in criminal justice administration- The judicial trend in the country has been towards striking a balance between reform and punishment. The accused-appellants had assaulted the injured causing grievous and serious injuries, which were fatal to life- Therefore, their appeals on merit are dismissed and only heard on the quantum of sentence- end of justice would be served if the appellants are punished for the period already undergone and with fine only.

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 18, 19,22, 25, 26)

Criminal Appeals partly allowed. (E-3)

Case Law relied upon:-

1. Mohd. Giasuddin Vs St. of AP AIR (1977) SC 1926

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

3. St. of M.P Vs Najab Khan (2013) 9 SCC 509

4. Deo Narain Mandal Vs. St. of UP (2004) 7 SCC 257

5. Shyam Narain Vs St. (NCT of Delhi) (2013) 7 SCC 77

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

7. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

8. Raj Bala Vs St. of Har. (2016) 1 SCC 463

9. Kokaiyabai Yadav Vs St. of Chhattis. (2017) 13 SCC 449

10. Ravada Sasikala Vs St. of A.P. AIR (2017) SC 1166

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

1- Short counter affidavit filed on behalf of the complainant is taken on record.

2- Heard Sri Anil Kumar Srivastava, learned Senior Advocate appearing on behalf of the appellants in (Criminal Appeal No. 4156 of 2017) and Sri N.I. Zafri, learned Senior Advocate appearing for the appellant in (Criminal Appeal No. 1807 of 2019), Sri Bharat Singh, learned counsel appearing for the complainant and Sri Ravi Prakash Pandey and Sri Dinesh Kumar Singh learned A.G.A. for the State.

3- Delay, if any, in filing the Criminal Appeal No. 1807 of 2019 is condoned and the application for condonation of delay, if any, is allowed.

4- With the consent of learned counsel for both the parties, these two above criminal appeals have been heard together and they are being decided by a common judgment.

5- These criminal appeals have been preferred by the appellants-Hukam Singh, Chainpal and Raksha Pal against the judgment and order dated 05.06.2017 passed by the Additional Sessions Judge/Special Judge, D.A.A., Budaun in Special Sessions Trial No. 109 of 2014 (State Vs. Rakashpal and others) convicting the appellants under Sections 394, 307 read with Section 34, 411 I.P.C. and sentencing them to undergo 8 years rigorous imprisonment with fine of Rs.10,000/- each under Section 307 read with Section 34 I.P.C.. In case of default of payment of fine, they shall further undergo one year additional imprisonment, under Section 394 I.P.C. for seven years rigorous imprisonment with fine of Rs.5,000/-. In case of default of payment of fine, they shall further undergo six months additional imprisonment and under Section 411 I.P.C. for three years rigorous imprisonment with fine of Rs.5,000/-. In case of default of payment of fine, they shall further undergo six months additional imprisonment. All the sentences awarded to the appellants shall run concurrently. The period of detention spent by the appellants in jail shall be adjusted.

6- In nutshell, according to prosecution case, an F.I..R. was lodged against the appellants under Sections 394/37 I.P.C. alleging therein that on 09.08.2014 at about 5-00 P.M. when the informant was closing the shop of jewellery then Rakashpal, Hukam Singh and Chainpal and another unknown person, who were armed with iron rods and sariya in their hands, came in front of informant shop with intention to kill him and badly beaten him as a result of which he received injuries on head, hand and leg and while going they had taken away 400 gramsof golden jewellery, five kilograms of silver jewellery along with cash of Rs.65,000/-. At the time of incident, some shopkeepers had gathered there but due to threat nobody came forward to save him. Before this incident, there was some 'marpits'; between the complainant and accused persons. Accused looted his motorcycle. In this regard a report was lodged at the Police Station and the accused were arrested and sent to jail.

7- A case was registered. After investigation, charge-sheet was submitted against the appellants under Sections 394,

307 & 411 I.P.C. and charges were framed to which appellants pleaded not guilty and claimed to be tried.

8- In support of its case, the prosecution examined five witnesses, namely, P.W.1-Deepak Varma-injured, P.W.2- Sunil Varma, P.W.3 - S.I./Investigating Officer Amit Kumar, P.W.4 -Dr. Brajeshwar Singh and P.W.5 - Dr. Manoj Mishra and they proved the relevant documents relating to this crime.

9- Statement of the accused/appellants were recorded under Section 313 Cr.P.C. in which they stated that they have been falsely implicated in this case.

10- After hearing learned counsel for the appellants as well as District Government Counsel (Criminal), impugned judgment and order dated 05.06.2017 was passed by the Additional Sessions Judge/Special Judge, D.A.A., Budaun convicting the appellants-Hukam Singh, Chainpal and Raksha Pal, under Sections 394, 307 read with Section 34, 411 I.P.C.

11- Learned counsel for the appellant submitted that the impugned judgment is against law and fact. Sentences awarded by the court below are excessive and harsh. No offence under Sections 394, 307 read with Section 34, 411 I.P.C. is made out against the appellants. Learned counsel for the appellants further submitted that accused-appellants faced trial from jail and they were not bailed out during trial and more than five and half years have elapsed and two accused amongst three are real brothers (Hukam singh and Chainpal) and third accused-appellant is a family member of the aforesaid two appellants. At the time of incident, the age of the appellants, namely, Hukam singh was 35 years, Chainpal 30 years and Rakshpal Pal 26 years, respectively. At present, the age of the appellants is 40-41 years, 36 years and 30 years, respectively. They are married persons and they have to support their families. The appellants belong to the rural area; they are very poor persons; there is no criminal antecedent/criminal history against the appellants and reformative theory is prevailing in India, hence ends of justice would be served if the appellants are sentenced to the period already undergone and with same fine only.

12- Learned counsel for the appellants further submitted that F.I.R. was lodged against three accused-appellants only on the basis of the fact that assault was committed by the appellants on the injured.

13- Learned counsel for the appellants further submitted that all the witnesses of fact have clearly stated that all accused had assaulted the injured and general role of causing injury to injured was assigned to all accused/appellants, it is not clear who is the author of injury caused on head, hand and leg of the injured. Learned counsel for the appellants has further submitted that he does not want to press these appeals on merits. He wanted to press these appeals only on the quantum of sentence and on the quantum of sentence has submitted that the accused are in jail since they have been arrested in this crime and they were not released on bail during the trial and after their conviction. They are in jail since more than five and half years. They are poor persons. They are the only bread earners of their families and their families are at the verge of starvation.

14- On the other hand, learned A.G.A. has supported the judgment of the trial court by saying that injured had deposed in

the court below against the appellants which is corroborated by the medical evidence; hence the appeal is liable to be dismissed.

15- In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:-

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by re-culturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

16- In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

17- In ***State of MP vs Najab Khan, (2013) 9 SCC 509***, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734***, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

18- Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

19- In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77***, it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323, State of Punjab vs Bawa Singh, (2015) 3 SCC 441,*** and ***Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

20- In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449***, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

21- In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced.

22- The judicial trend in the country has been towards striking a balance between reform and punishment. The

protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

23- In view of the above, it is clear that in our country the reformative and corrective approach has been adopted in criminal justice administration. There is nothing on record to show that the accused-appellants are incapable of being reformated. The accused-appellants are in jail continuously for more than five years. Every convict is entitled for the advantage of reformative and corrective jurisprudence.

24- I have heard learned counsel for the appellants, learned A.G.A. for the State as well as perused the injury report of the injured which shows that the accused-appellants had assaulted the injured causing grievous and serious injuries, which were fatal to life. Therefore, their appeals on merit are dismissed and only heard on the quantum of sentence.

25- After considering the rival submissions made by the learned counsel for the parties and considering the facts and circumstances of the case and looking to the facts that appellants are in jail since 17.8.2014 and more than five years have elapsed; they are married persons and they have to support their families; there is no one to look after their families and their families are at the verge of starvation and also considering the status of the appellants and considering that the incident took place on 9.8.2014 and the accused-appellants were arrested and and since then they are in jail, this Court considers that end of justice would be served if the appellants are punished for the period already undergone and with fine only. The fine is enhanced from Rs.20,000/- to Rs.25,000/- each.

26- In above backdrop, both the appeals are partly allowed. The impugned judgment and order dated 05.06.2017 passed by the Additional Sessions Judge/Special Judge, D.A.A., Budaun is modified to the extent that the appellants are sentenced to the period already undergone under Sections 394, 307/34 & 411 with fine of Rs.25,000/- (Twenty five thousand). In case of default of payment of fine, they shall further undergo six months simple imprisonment. The appellants shall be released forthwith if they are not wanted in any other case.

27- The appellants are directed to deposit the fine of Rs.25,000/- (Twenty five thousand) within a period of six months from today, which shall he paid to the injured (Deepak Varma).

28- Office is directed to send the copy of this order along with lower court record to the court concerned immediately for necessary compliance. Compliance report shall be submitted within three months, which shall be kept on record.

(2020)06ILR A520
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.05.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. - 4537 of 2018

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

Counsel for the Appellant:
Sri Lalit Kumar Srivastava, Sri Narendra Kumar Sharma, Sri Sandeep Kumar, Sri Sunil Kumar Kushwaha

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

Nowhere it has been mentioned by the prosecution in its evidence as to wherefrom the weighing machine was brought and from whom it was brought- It was a public duty cast upon the concerned police official to disclose the name of the shop keeper in the FIR as well as in the charge sheet, but the name of shop keeper has not been disclosed for the reasons best known to the prosecution side and this lacuna is sufficient to make the prosecution story doubtful- Nowhere it has been mentioned by the prosecution that the report of the seizure of the contraband and arrest of the accused was given to the Superior Officer as laid down by the Section 42 of the NDPS Act- Nor, the prosecution has adduced any evidence regarding the sending of special report to the Superior Officer, hence compliance of the provisions of Section 42 has not been proved by the prosecution- Compliance of Section 55 was not made- No evidence by the prosecution has been led that the recovered articles were given in the charge of concerned officer of the police station and the alleged recovered contraband was kept in safe custody- No evidence has been adduced by the prosecution that the matter was produced before the Station House Officer and he put his signature and seal over the alleged recovered contraband and then, it was kept in safe custody or it was given to the *Maalkhana Moharrir* who could place it in the safe custody because no *Malkhana* register was ever produced in evidence before the Trial Court and no such oral evidence in this regard was ever produced by the prosecution before the Trial Judge - Non compliance of 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- Section 50 of the NDPS Act was not complied with and the non compliance of this Section has vitiated the whole prosecution story seriously which makes the conviction of the appellant by the learned Trial Court contrary to the law-The requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with- It cannot be ascertained that the provisions laid down in Section 50 of the Act were complied with in its entirety. In this context PW-3, Vidya Kant Patel, has said only that the arrested person was apprised of his right if he wished that his search be conducted before any Gazetted Officer or Magistrate, he was not agree for his search before Magistrate and he consented that search be made by the police party itself.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20 – Seizure of Ganja- No disclosure by prosecution about the person from whom the weighing machine was obtained- Owner of weighing machine not a witness in the Charge sheet- It was a public duty cast upon the concerned police official to disclose the name of the shop keeper in the FIR as well as in the charge sheet, but the name of shop keeper has not been disclosed for the reasons best known to the prosecution side and this lacuna is sufficient to make the prosecution story doubtful.
In order to prove it's case it was incumbent upon the prosecution to disclose the owner of the weighing machine and make him a witness in the police report / charge sheet, in absence of which the case of the prosecution becomes doubtful.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 42- Non- compliance of- No report of seizure of contraband and arrest of the accused sent to the superior officer- The prosecution has not adduced any evidence regarding the sending of special report to the Superior Officer, hence compliance of the provisions of Section 42 has not been proved by the prosecution.

It is settled law that the total non-compliance of the provisions of sub-Sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced. In the present case there is total non- compliance of the provisions of Section 42 which is impermissible.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 55- Link Evidence- No Maalkhana register produced by the prosecution- No oral evidence evidence led before the trial court regarding compliance of Section 55 of the Act- Non compliance of Section 55 also casts a doubt on the veracity of the prosecution case as there is no evidence on file that the alleged seized contraband was ever produced before the officer in charge of the concerned police station.

Failure of the prosecution to bring on record the Maalkhana 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 - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 57- Report of search and seizure- Non-compliance of-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.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985- Section 50- Requirement of strict compliance- The non compliance of Section 50 of the Act has vitiated the whole prosecution story seriously which makes the conviction of the appellant by the learned Trial Court contrary to the law .The requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with.
Law is settled that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate and it is mandatory for the officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate. Non- compliance of the provisions of Section 50 will vitiate the whole trial. (Para 13, 16, 19, 20, 21, 23, 24, 26)

Criminal Appeal allowed. (E-3)

Case law relied upon/ discussed:-

1. Kishan Chand Vs St. of Har., LAWS (SC) 2012-12-55

2. Rajinder Singh Vs St. of Har. (2011) 8 SCC 130

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

4. Ashok Kumar Sharma Vs St. of Raj. (2013) 2 SCC 67

5. Vijaysinh Chandubha Jadeja Vs St. of Guj., (2011) 1 SCC 609

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

1. Heard learned counsel for appellant, learned A.G.A. appearing for State and perused the record of this case.

2. This criminal appeal has been filed against the judgment and order dated 31.07.2018 passed by learned Sessions Judge (F.T.C.), District Jalaun at Orai in

Special Session Trial No. 19 of 2014 (State Vs. Darshan Singh Dhimar) arising out of Case Crime No. 1175 of 2013, under Section 20 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "the NDPS Act"), Police Station Kotwali, Orai, District Jalaun. By the impugned judgment and order the appellant has been convicted and sentenced to undergo five years' rigorous imprisonment under Section 20 of the N.D.P.S. Act with a fine of Rs. 10,000/-. It has also been stipulated by the learned Trial Court in the order impugned that in case of failure to pay the fine, the appellant will undergo an additional sentence of six months' simple imprisonment.

3. The prosecution case in brief is that on 02.06.2013 SI G.P. Ojha along with Constable Vidya Kant Patel were on patrolling duty at Vinawar area in O.P. Deputyganj and were going towards Ramleela Maidan. They saw a person coming carrying with him a plastic bag (sack) filled with some light weight substance. All of a sudden seeing the police men, he stopped, turned around and tried to run towards Pani Ki Tanki Road. On suspicion, he was asked to stop, but he did not stop. At about 11:00 P.M. in night with the help of companion constable the accused appellant was caught with plastic bag in his hand. It being a sudden incident and happened in night, no public witnesses could be found. The arrested person told his name and address. He gave a written consent (Ext. Ka. 7) and on his written consent, the search was done and on search so made, it was found that he was having contraband namely Ganaj in the plastic bag (sack) and a sum of Rs. 450/- was also recovered from his pocket, about which it was told by accused to have been obtained by sale of Ganja.

4. The aforesaid contraband substance was seized and the accused was taken in police custody. From a shop weight and balance were brought by Constable Vidya Kant Patel and weight of the seized item was done, which weighed to be 9 Kgs. Recovery memo (Ext. Ka.6) was prepared and the seized item along with Rs. 450/- was packed and sealed in the said plastic bag; a sample of 100 Gms. of the said recovered Ganja was taken and was got packed and sealed in a separate packet (Ext. Ka. 5) to be sent to Forensic Science Laboratory. Thereafter, First Information Report (Ext. Ka.1) was lodged on 03.06.2013 on the written information of complainant SI Shri G.P. Ojha, Police Station - Kotwali, Orai.

5. After lodging of the First Information Report, investigation was done by SI Shri Sudhakar Singh and charge sheet dated 19.07.2013 (Ext. Ka. 4) was submitted against appellant under Section 20 of the NDPS Act. The case against appellant was registered as Special Session Trial No. 19 of 2014. On 03.12.2014 charge was framed against accused appellant and trial proceedings commenced in this case.

6. The Trial Court recorded the prosecution evidence and also recorded the statement of accused under Section 313 Cr.P.C. The defence evidence of DW-1 Ram Kisun was also recorded. After considering the evidences available on record, the learned Trial Court found him guilty of the charges levelled upon him and by impugned judgment and order, the Trial Court convicted and sentenced the appellant, who is languishing in jail since the date of the judgment.

7. The learned counsel for the appellant has submitted that the impugned judgment and order is not correct in the eyes of law because the learned Lower Court has not considered the provisions of Sections 42, 43, 50, 55 and 57 of the NDPS Act in their right perspective.

8. The learned counsel has further argued that there are various contradictions and infirmities in the statement of the PW-3 who is the only witness of the alleged recovery. The other argument raised by the learned counsel for the appellant is that there is no link evidence produced by the prosecution to prove its case as per mandate of Sections 42, 55 and Section 57 of the Act.

9. On the other hand, the learned AGA has submitted that the accused has been rightly convicted by the Trial Court and because the incident has happened in the night and no public witness could be procured at that time, there is no infirmity or illegality on the part of the prosecution in conducting the case. The impugned judgment deserves to be affirmed.

10. I have heard the arguments of the learned counsel for the parties and perused the record of the case.

11. This Court finds that nowhere it has been mentioned by the prosecution in its evidence as to wherefrom the weighing machine was brought and from whom it was brought. No statement regarding this has been recorded by the Investigating Officer, which casts a serious doubt on the veracity of the prosecution case. The statement of prosecution witness Vidya Kant Patel, PW-3 as well as the version of informant both read as under:-

"कांटा बाँट दरोगाजी एक दुकान से लाये थे किस दुकान से लेकर आये थे. यह भी याद नहीं है कि तराजू इलेक्ट्रॉनिक था या बाँट वाला था."

In the recovery memo dated 02.06.2013 (Ex. Ka-6) the following version has been recorded:-

"हमराही Con. विद्या कांत पटेल को भेजकर दुकान से कांटा बाँट मंगा कर वजन किया गया तो कुल भर नौ केजी तौल में आया।"

12. From the above quoted statements, it is evident that nothing specific has been said either by PW-3 in his statement or by the informant in the FIR. The informant has used word "Dukan" and PW-3 has used words "Ek Dukan", which appears to be vague. PW-3 says that weighing machine was brought by Darogaji and FIR version says that it was brought by Vidya Kant Patel, PW-3, there being serious contradiction, it cannot be said that the prosecution had proved its case before Trial Court beyond reasonable doubts.

13. This Court has gone through the charge sheet as well as the lower court record along with the impugned order and finds that there is nowhere mention about the details of the shop from where *kanta-baant* were allegedly brought. The Investigating Officer had not attempted to record and identify the name of the shop or shop keeper who had given *kanta-baant* in night to weigh the contraband. It was a public duty cast upon the concerned police official to disclose the name of the shop keeper in the FIR as well as in the charge sheet, but the name of shop keeper has not been disclosed for the reasons best known to the prosecution side and this lacuna is sufficient to make the prosecution story doubtful. I find that the only witness of fact *Vidya Kant Patel* examined by the prosecution to prove its case has not supported the prosecution case fully and there are various inconsistencies, contradictions in his statement as noted down above. This witness who was said to be present at the place of occurrence along with the informant when the alleged

contraband seized from the present appellant, has deposed before the learned Trial Court in his examination in chief that he brought the weighing machine with which the alleged contraband was weighed but in his cross examination this witness has said that the weighing machine was brought by Daroga Ji from any shop. This is a material fact which casts doubt about the recovery of the contraband from the accused appellant.

14. Although there was a serious contradictions in the statement of the prosecution witness on the question of who brought the weighing scale for weighing the alleged contraband as PW -3 has stated that he does not remember as to who brought the weighing machine and in the recovery memo SI J.P. Ojha has noted down that the police constable Vidya Kant Patel was sent to get the weighing scale from a shop, yet the learned Trial Court has taken their statements to be reliable and trustworthy only on the ground that the evidence of police officials has to be taken as valuable and qualitative without there being any strait jacket formula in this regard.

15. Moreover, the relevant provisions of the NDPS Act which were mandatory to be complied with, were not complied with by the police officials since the very inception, but this aspect of the matter has not been dealt with by the learned Trial Court in right perspective in its judgment and order. That is why the impugned judgment and order suffers from manifest error of law and fact.

16. I have perused the entire evidence to find out the compliance of Section 42 of the NDPS Act and I find that nowhere it has been mentioned by the prosecution that the report of the seizure of the contraband and arrest of the accused was given to the Superior Officer as laid down by the Section 42 of the NDPS Act. I have also gone through the entries of the G.D. regarding this argument and find that the provisions of Section 42 of the NDPA Act were not complied with. Nor, the prosecution has adduced any evidence regarding the sending of special report to the Superior Officer, hence compliance of the provisions of Section 42 has not been proved by the prosecution, which casts serious doubt on the veracity of the prosecution case.

17. In **Kishan Chand Vs. State of Haryana, LAWS (SC) 2012-12-55** the Hon'ble Apex Court has held as under:-

"In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in the case of Karnail Singh (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat*** *[(2000) 2 SCC 513], a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of Sajan Abraham (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not,*

will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-

35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42 (1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42 (1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to

(d) of Section 42 (1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42 (1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While ***total non-compliance with requirements of sub- sections (1) and (2) of Section 42 is impermissible,*** *delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non- sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42 . But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act.* ***Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act.*** *Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001." (emphasis supplied)*

18. Following the above judgment, a Bench of this Court in the case of ***Rajinder Singh Vs. State of Haryana [(2011) 8 SCC 130*** took the view that total non-compliance of the provisions of sub-Sections (1) and (2) of Section 42 of the

Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.

19. As regards the submission of the learned counsel for the appellant that compliance of Section 55 was not made, this Court finds that no evidence by the prosecution has been led that the recovered articles were given in the charge of concerned officer of the police station and the alleged recovered contraband was kept in safe custody. Section 55 reads as under:-

Section 55 in The Narcotic Drugs and Psychotropic Substances Act, 1985.

"55. Police to take charge of articles seized and delivered.—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

20. The prosecution has not led any evidence in this regard and compliance of Section 55 does not find any mention in the papers produced by the prosecution during the trial of this case. This Court finds that non compliance of Section 55 also casts a doubt on the veracity of the prosecution case as there is no evidence on file that the alleged seized contraband was ever produced before the officer in charge of the concerned police station. No evidence has been adduced by the prosecution that the matter was produced before the Station House Officer and he put his signature and seal over the alleged recovered contraband and then, it was kept in safe custody or it was given to the ***Maalkhana Moharrir*** who could place it in the safe custody because no *Malkhana* register was ever produced in evidence before the Trial Court and no such oral evidence in this regard was ever produced by the prosecution before the Trial Judge.

21. 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.

22. 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****. In 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 possessingpoppy-husk."***

(emphasis supplied)

23. 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.

24. Now, this Court is of the considered opinion that Section 50 of the NDPS Act was not complied with and the non compliance of this Section has vitiated the whole prosecution story seriously which makes the conviction of the appellant by the learned Trial Court contrary to the law as the provisions of Section 50 of the Act were not properly followed. Section 50 of the Act is qouted below:-

"50. Conditions under which search of persons shall be conducted.*--(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.*

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

25. In ***Ashok Kumar Sharma Versus State of Rajastha,*** **2013 (2) SCC 67 the Hon'ble Apex Court has observed thus:-**

"7. We are in this case concerned only with the question whether PW1, the officer who had conducted the search on the person of the appellant had followed the procedure laid down under Section 50 of the NDPS Act. On this question, there were conflicts of views by different Benches of this Court and the matter was referred to a five Judge Bench. This Court in Vijaysingh Chandubha Jadeja (supra) answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act, to be searched before a Gazetted Officer or a Magistrate. This Court also held that it is mandatory on the part of the authorized officer to make the accused aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer concerned, an obligation is cast on him under Section 50 of the NDPS Act to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate. The question, as to whether this procedure has been complied with or not, in this case the deposition of PW1 assumes importance, which reads as follows:

"He was apprised while telling the reason of being searched that he could be searched before any Magistrate or any Gazetted Officer if he wished. He gave his consent in written and said that I have faith on you, you can search me. Fard regarding apprising and consent is Ex.P- 3 on which I put my signature from A to B and the accused put his signature from C to D. E to F is the endorsement of the consent of the accused and G to H is signature, which has been written by the accused."

13. The above statement of PW1 would clearly indicate that he had only informed the accused that ***he could be searched before any Magistrate or a Gazetted Officer if he so wished. The fact that the accused person has a right*** *under Section 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate* ***was not made known to him.*** *We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a Gazetted Officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.*

14. We may, in this connection, also examine the general maxim "ignorantia juris non excusat" and whether in such a situation the accused could take a defence that he was unaware of the procedure laid down in Section 50 of the NDPS Act. Ignorance does not normally afford any defence under the criminal law, since a person is presumed to know the law. Indisputedly ignorance of law often in reality exists, though as a general proposition, it is true, that ***knowledge of law must be imputed to every person.*** *But it must be too much to impute knowledge in*

certain situations, for example, ***we cannot expect a rustic villager, totally illiterate, a poor man on the street,*** *to be* ***aware of the various law*** *laid down in this country i.e. leave aside the NDPS Act. We notice this fact is also within the knowledge of the legislature, possibly for that reason* ***the legislature in its wisdom imposed an obligation on the authorized officer*** *acting under Section 50 of the NDPS Act* ***to inform the suspect of his right under Section 50*** *to be searched in the presence of a Gazetted Officer or a Magistrate warranting strict compliance of that procedure.*

15. We are of the view that ***non-compliance of this mandatory procedure has vitiated the entire proceedings*** *initiated against the accused- appellant. We are of the view that the Special Court as well as the High Court has committed an error in not properly appreciating the scope of Section 50 of the NDPS Act. The appeal is, therefore, allowed. Consequently the conviction and sentence imposed by the Sessions Court and affirmed by the High Court are set aside. The accused-appellant, who is in jail, to be released forthwith, if not required in connection with any other case." (emphasis supplied)*

26. A Full Bench of the Hon'ble Apex Court in the case of ***Vijaysinh Chandubha Jadeja vs. State of Gujarat, 2011(1) SCC 609*** has held that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. In the present case, from perusal of the entire evidence available on record it cannot be ascertained that the provisions laid down in Section 50 of the Act were complied with in its entirety. In this context PW-3, Vidya Kant Patel, has said only that the arrested person was apprised of his right if he wished that his search be conducted before any Gazetted Officer or Magistrate, he was not agree for his search before Magistrate and he consented that search be made by the police party itself.

27. From perusal of the entire record, it is evident that the prosecution has not adduced any evidence regarding that recovered contraband was kept in a safe custody after it was recovered and it was sent from that safe custody to the Forensic Science Laboratory. No such evidence regarding this aspect of the matter is available on record which also casts a serious doubt on the veracity of the prosecution story.

28. Thus, from the aforesaid discussions and evidence on record, it is evidence that the recovery of the contraband article from the possession of

the appellant appears to be doubtful and the prosecution has not proved its case beyond reasonable doubt against the appellant proving the recovery against him in strict compliance of the provisions of N.D.P.S. Act, hence his conviction and sentence by the trial court is not sustainable in the eyes of law. Thus, the impugned judgment and order passed by the trial court convicting and sentencing the appellant is hereby set aside. The appeal stands allowed.

29. The appellant shall be released forthwith from the jail, if he is not wanted in any other case. It is further directed that the lower court record be sent to the Trial Court.

(2020)06ILR A530
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Criminal Appeal No. 5194 of 2013

Nishu @ Brijesh Dixit & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Apul Mishra, Sri Amit Tripathi, Sri Anees Ahmad, Sri Arvendra Singh, Sri Pradeep Saxena, Sri Pravin Kumar , Sri Rakesh Kumar Rathore, Sri Sanjeev Kumar Rathore

Counsel for the Respondent:
A.G.A., Sri N.K. Maurya, Sri Vinay Saran, Sri Pravendra Kumar Chauhan, Sri Pradeep Kumar Mishra

Conduct of PW1 goes to show that he tried to implicate co-accused Chandan Tiwari during the course of investigation in the present case falsely for conspiring the murder of the deceased, but the said fact was not disclose by him in the F.I.R. It is true that F.I.R. is not an encyclopedia of the prosecution case but the said conduct of PW1 definitely cast doubt about his credibility and trustworthiness stating about the incident raising suspicion about his testimony relating to the prosecution case- The unnatural conduct of PW1 and PW2 soon after the incident further reflects that their presence at the place of occurrence is not established on account of the fact that when the deceased was dragged from the car by the appellants and was shot with their respective firearms weapons, they have stated that they were witnessing the incident while they were sitting in the car and did not come out immediately coupled with the fact that after the incident when the deceased Ambarish Kumar was lying in a seriously injured condition, no effort was made by PW1 and PW2 to touch him or to help the other persons who had picked the injured in the Opel Astra Car of PW1 as no blood stains were found either on the clothes of PW1 or PW2 nor, the same was found in the Opel Astra Car- The recovery of two weapons from the said accused after one month of the incident has been disbelieved by the trial Court when they were put to trial under the Arms Act- The metallic bullet was recovered from the occipital region of the deceased but the same was not sent to the Forensic Science Laboratory in order to ensure whether the same was shot by the respective weapons which were recovered from the two appellants - No doubt that PW1 and PW2 are the parents of the deceased and claimed themselves to be the eye witness of the occurrence, but after going through their testimony they can be put in the category of neither wholly reliable nor wholly unreliable witness as their evidence does not conclusively prove the guilt of the accused appellants beyond reasonable doubt though their evidence examined by the Court for corroboration in material particulars by direct and circumstantial testimony- It is first duty of the prosecution to establish its case beyond reasonable doubt against the accused than to question the accused for their false implication which the prosecution has failed to prove its case beyond reasonable doubt against the appellants.

Evidence Law - Indian Evidence Act, 1872- Section 155- Code of Criminal Procedure- Section 154- Credibility of witness- Accused implicated during course of investigation though not named in FIR- It is true that F.I.R. is not an encyclopedia of the prosecution case but the said conduct of PW1 definitely cast doubt about his credibility and trustworthiness stating about the incident raising suspicion about his testimony relating to the prosecution case.
The fact that one of the accused was subsequently implicated by the prosecution witness, assigning him the role of hatching the conspiracy, during the course of investigation creates doubt about the credibility of the witness.

Evidence Law - Indian Evidence Act, 1872- Section 8 – Conduct of witnesses- The unnatural conduct of PW1 and PW2 soon after the incident further reflects that their presence at the place of occurrence is not established on account of the fact that when the deceased was dragged from the car by the appellants and was shot with their respective firearms weapons, they have stated that they were witnessing the incident while they were sitting in the car and did not come out immediately - When the deceased was lying in a seriously injured condition, no effort was made by PW1 and PW2 to touch him or to help the other persons who had picked the injured in the Opel Astra Car of PW1 as no blood stains were found either on the clothes of PW1 or PW2 nor, the same was found in the Opel Astra Car.
The unnatural conduct of the prosecution witness at the time of the occurrence and immediately thereafter would be a relevant fact reflecting their absence from the place of the occurrence.

Civil Law - The Arms Act, 1959- Section 25, Indian Evidence Act, 1872- Section 157-Aquittal u/s 25 of the Arms Act- Absence of independent/ scientific corroboration- The recovery of two weapons from the said accused after one month of the incident has been disbelieved by the trial Court when they were put to trial under the Arms Act- The metallic bullet was recovered from the occipital region of the deceased but the same was not sent to the Forensic Science Laboratory in order to ensure whether the same was shot by the respective weapons which were recovered from the two appellants.
The fact that the accused have been acquitted u/s 25 of the Arms Act and the recovered bullet was not sent to the FSL demonstrates that there is no independent corroboration of the oral testimony.

Evidence Law - Indian Evidence Act, 1872- Section 134 – Quality of evidence - Category of neither wholly reliable nor wholly unreliable witness - No doubt that PW1 and PW2 are the parents of the deceased and claimed themselves to be the eye witness of the occurrence, but after going through their testimony they can be put in the category of neither wholly reliable nor wholly unreliable witness as their evidence does not conclusively prove the guilt of the accused appellants beyond reasonable doubt through their evidence examined by the Court for corroboration in material particulars by direct and circumstantial testimony.
Where the witnesses are neither wholly reliable nor wholly unreliable, then the Court has to be circumspect and look for corroboration in material particulars and if there is no corroboration , then no reliance can be placed on such witness for the purpose of securing the conviction of the accused.

Evidence Law - Indian Evidence Act, 1872- Section 101- Burden of Proof- It is first duty of the prosecution to establish its case beyond reasonable doubt against the accused than to question the accused for their false implication which the prosecution has failed to prove its case beyond reasonable doubt against the appellants.

The burden of proving the guilt of the accused beyond all reasonable doubt always rests on the prosecution and it is impermissible for the prosecution to question the accused for their false implication when the prosecution has failed to discharge its burden. (Para 94, 95, 97, 101, 104)

Criminal Appeal Allowed. (E-3)

Case Law relied upon/ Discussed:-

Vedivelu Thevar Vs St. of Madras, AIR (1957) SC 614

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

1. The present Criminal Appeal has been preferred against the judgment and order dated 30.10.2013 passed by the Additional Sessions Judge/Special Judge (S.C./S.T. P.A. Act), Mainpuri in Crime No.541 of 2006, Police Station Bewar, District Mainpuri giving rise to S.T. No.332 of 2007 (State Vs. Nishu @ Brijesh Dixit and others) convicting the appellant no.1 Nishu @ Brijesh Dixit and appellant no.3 Chandan Kumar under Sections 302/120B I.P.C. and sentencing both of them to imprisonment for life along with fine of Rs.10,000/- and in default of the payment of fine to further undergo six months' Simple Imprisonment. Further convicting appellant no.2 Lalit Dixit under Sections 302/120-B I.P.C. and sentencing him to imprisonment for life along with fine of Rs.20,000/- and in default of the payment of fine to further undergo one year's Simple Imprisonment. Further convicting the appellant no.2 Lalit Dixit under Section 504 I.P.C. and sentenced to one year's Rigorous Imprisonment. Further convicting all the three appellants under Sections 384/120-B I.P.C. and sentencing each of them to three years Rigorous Imprisonment. All the sentences were directed to run congruently.

2. The prosecution case as has come up in the FIR lodged by PW1-Ghurai Lal who submitted a written report on 13.12.2006 (Ext. Ka.1) narrating therein that he is a permanent resident of Quazi Tola West, Kasba and Police Station Bewar,District Mainpuri. On 12.12.2006 at about 4.35 p.m. in the evening he along with his wife Smt. Ram Khushi and his son Ambarish Kumar Gupta alias Guddu was returning after taking medicine on his car from Mainpuri to their house. As soon as his car had come down to District Hospital and entered in the Kasba, Nishu, son of Lalit Dixit, Lalit Dixit son of Bal Kishan Dixit, resident of Mohalla Markichiya, Kasba and Thana Bewar, Chandan Kumar son of Nand Kishore Gupta, resident of Mohalla Brahmnand, Kasba and Thana Bewar, District Mainpuri, who were armed with country-made pistols stopped his car by giving a call. As soon as the car stopped, the aforesaid three accused came to the window of the car and after opening the window, Nishu Dixit and Chandan Kumar forcibly took out Ambarish Kumar from the car and by hurling abuses uttered that he poses himself to be a big ration dealer, he will have to give them ration and kerosene oil without any ration card and further have to pay Rs.5,000/- per month to them. On which, Ambarish told that he will distribute the ration as per the rules and he will not pay any form of Chauth (Gunda Tax). On this, Lalit Dixit while hurling abuses stated that since he is becoming a leader, he will not concede and exhorted to kill him and then Nishu Dixit and Chandan Kumar fired shot with their respective country-made pistols with an intention to kill Ambarish, on account of which Ambarish was seriously injured. Thereafter the informant raised alarm to save his son and the aforesaid three accused persons had fled away by displaying their firearms which they were carrying in their hands and by firing shot in the air and because of the terror of the accused persons, all the shop keepers fled away by closing down the shutter of their shops. The informant and his wife took his seriously injured son to the District Hospital, Mainpuri on their own car from where his son was referred to Agra as his condition was critical and in Kamayani Hospital, Agra his son died during treatment. After bringing back the dead body he has come to report.

3. On the basis of the written report submitted to the police station concerned, the First Information Report of the incident was lodged on 13.12.2006 (Ext. Ka.3) by PW1 Ghurai Lal which was registered as Case Crime No.541 of 2006, under Sections 302, 384, 504, 506 I.P.C. and under Section 7 Criminal Law Amendment Act which was registered as Police Station Bewar, District Mainpuri. The relevant entries were made in G.D.No.4 at 4 a.m. on the same day being Ext. Ka.4. The investigation was entrusted to the Station Officer Sri Udai Bhan Singh Yadav (PW5).

4. The panchayatnama of the deceased was conducted at the house of the informant where the dead body was lying at the door of the house. The Investigating Officer appointed Panchas and prepared the inquest report (Ext. Ka.9) between 6.30 a.m. to 7.35 a.m. on 12.12.2006. Thereafter, the dead body of the deceased was sealed and sent for post mortem examination through CP 66 Dina Nath and CP 690 Pawan Kumar to the District Hospital, Mainpuri along-with eight relevant papers. The post-mortem of the deceased was conducted by Dr. R.K. Sagar on 13.12.2006 at 11.50 a.m. which is marked as Ext. Ka.2.

5. The investigating officer proceeded with the investigation on 13.12.2006 itself. He recorded the statement of the informant Ghurai Lal Gupta under Section 161 Cr.P.C. and prepared the site-plan (Ext. Ka 5) after inspecting the place of occurrence. He further prepared the recovery memo of Opel Astra Car No. MH 008990 (Erxt. Ka.6) and thereafter handed over the said car to the informant. He also prepared the recovery memo (Ext. Ka.7) of three empty cartridges of 315 bore which were recovered from the place of incident. Recovery memo (Ext. Ka.8) regarding the plain earth and blood-stained concrete chips taken from the place of occurrence, was also prepared by him.

6. The accused appellant Lalit Dixit was arrested on 14.12.2006 and his statement was also recorded. On 15.12.2006 statements of eye-witnesses Smt. Ram Khushi and Jitendra Kumar Gupta were recorded under Section 161 Cr.P.C. Accused Chandan Tiwari was arrested on 8.1.2007 and his statement was recorded.On 19.1.2007, accused Nishu @ Brijesh Dixit and Chandan Gupta were arrested in a police encounter and from their possession illegal countryman pistols were recovered. The confessional statements of both the accused were recorded. The Investigating Officer further recorded the statements of CP Dina Nath, CP 690 Pawan Kumar, CP 43 Ajant Singh and S.I. Virendra Kumar on 8.2.2007. The statements under Section 161 Cr.P.C. of other witnesses, namely, Ajay Gupta, Jitendra Kumar Gupta, Anil Kumar, Sudesh Chandra Gupta and Pradeep Kumar were recorded on 12.2.2007.After completing the investigation, the investigating officer submitted charge sheet against the four accused persons, namely, Chandan Tiwari, Chandan Kumar, Lalit Dixit and Nishu @ Brijesh Dixit, under Sections 302, 384, 504, 506, 120-B I.P.C. and under Section 7 Criminal Law Amendment Act being Charge Sheet No.30 of 2007 (Ext. Ka.13).

7. The competent Court took cognizance over the charge sheet and after compliance of Section 207 Cr.P.C. on 20.6.2007 the case was committed to the Court of Sessions by the then Chief Judicial Magistrate, Mainpuri.

8. The trial Court framed charges against the accused appellants and co-accused Chandan Tiwari for the offence under Sections 120B, 384/120B, 302/120B

and 504 I.P.C. on 1.11. 2007. the accused denied the charges and claimed their trial.

9. The prosecution in support of its case has examined PW1-Ghurai Lal Gupta, informant of the case (father of the deceased), PW2-Smt. Ram Khushi, wife of the informant (mother of the deceased), who are the two eye-witnesses of the occurrence, PW3-Dr. Rakesh Kumar Sagar who conducted the post mortem of the deceased, PW4 CP 59 Shyam Singh who was the Head Moharrir posted at Police Station Bewar and was scribe of the F.I.R., PW5-S.I. Udai Bhan Singh, investigating officer of the case, PW6-Dr.Subodh Kumar, who prepared the injury report of the deceased while being alive at District Hospital, Mainpuri, PW7- S.I. Virendra Singh who had conducted the inquest proceeding and prepared the inquest report and further prepared the recovery memo of two pistols found from the possession of the accused Chandan Kumar and Nishu Dixit.

10. The documentary evidence produced by the prosecution and relied upon by it are Ext. Ka.1 to 16 which are Written Report, Chik FIR, G.D.No.4 dated 13.12.2006, Site Plan of the place of occurrence, recovery of Opel Astra Car No. MH-008990, recovery memo of three empty cartridges recovered from the place of occurrence, recovery memo of plain earth and blood stained concrete chips, Panchayatnama, Photo-Nash, Challan-Nash, letter of C.M.O., Charge Sheet, Injury report of the deceased, recovery of two country-made pistols of 315 bore, Site plan of the recovery of two country-made pistols and arrest of accused Nishu Dixit and Chandan Kumar, Paper no.104-A-report of Forensic laboratory, Agra, dated 5.10.2007.

11. Material evidence which were produced by the prosecution are as under:-

Material Ext. 1-Concrete chips and plain earth recovered from the place of occurrence.

Material Ext.2-Blood stained concrete chips and blood stained earth recovered from the place of occurrence.

Material Ext.3-Under-wear of blue colour recovered from the body of the deceased.

Material Ext.4-Bandage recovered from the body of the deceased.

Material Ext.5-Cotton recovered from the body of the deceased.

12. The statements of the accused under Section 313 Cr.P.C. were recovered by the trial Court on 13.10.2011 and the accused denied their participation in the incident and further have categorically stated that they have been falsely implicated in the present case and the eye-witnesses have falsely deposed against them. Moreover it was also categorically stated by the accused Nishu Dixit and Chandan Kumar that the country-made pistols which were said to have been recovered from them, were false plantation and in fact no such weapon was recovered from them.

13. In defence, the accused have examined Dr. P.K.Gupta as DW1. On behalf of the accused Chandan Kumar , two documentary evidence were filed, i.e., Ext. Kha1-Bed Head Ticket No.7126 of Ambarish Gupta which was prepared at Raja Tej Singh District Hospital, Mainpuri and Ext. Kha-2-Injury rreport of Ambarish Kumar which was prepared at District Hospital, Mainpuri on 12.12.2006 at 5 p.m.

14. PW1-Ghurai Lal in his deposition before the trial Court has reiterated the prosecution story as disclosed by him in the FIR. He stated that his son Ambarish Kumar was murdered on 12.12.2006 at about 4.35 p.m. in Kasba Bewar near sweet shop and his son was shot by the accused appellants. On the day of incident, he along with his wife and son had gone by his car to Mainpuri for taking medicine. He had to take medicine and after taking medicine he was returning to his house on his vehicle and his son was driving the car. As soon as his car reached in front of the shop of Ram Nath, on that moment accused Lalit Dixit, Nishu Dixit and Chandan Kumar Gupta carrying country-made pistols in their hands raised a voice and stopped the car, on which his son Ambarish Kumar stopped the vehicle. Soon after the vehicle was stopped, all the three accused came near window of the car and dragged his son outside the car.

15. Nishu Dixit and Chandan Gupta stated that he poses himself to be a big ration dealer and without ration card he has to give ration and kerosene oil to them and further Rs.5000/- per month is to be given to them, on which his son stated that he would distribute the ration in accordance with the rules and would not pay any Chauth to them. On which, Lalit Dixit stated that he would not concede as he is a big leader and exhorted to kill him, on which Nishu Dixit and Chandan Kumar Gupta fired at Ambarish Kumar with their respective weapons with an intention to kill him. One shot which was fired by the accused Chandan Kumar Gupta hit Ambarish Kumar on his hand and the shot which was fired by accused Nishu Dixit hit on his left eye and as soon as they came out after opening the window of the car, the accused fired in the air and fled away and they raised alarm to save his son. When the shot was being fired on the deceased, he along with his wife and other persons in the market had seen the incident. On receiving the fire shot his son was seriously injured.

16. This witness carried his injured son to the Bewar Hospital which was closed and thereafter he took him to District Hospital, Mainpuri where he was given some medical treatment and medicine and referred to Agra. Thereafter, he took him to Kamayani Hospital, Agra and during the treatment at 12.30 a.m. in the intervening night his son died on account of the injuries. After the death he brought the dead body of his to his house at Bewar.

17. This witnesses in his examination-in-chief has stated that many other relatives had arrived and he did not go to lodge the F.I.R. In the night and had gone in the morning at 4 a.m. to lodge it. The witness proved the paper no.8A, then identified the same to be his written report which was in his hand writing and signature and proved the same as Ext. Ka.1.

18. This witness further deposed that his son was a ration dealer having a fair price shop at Kasba Bewar and his son had kept the accused Chandan Tiwari for the work of weighing of essential commodities at his shop who used to misappropriate the essential commodities and sale the same without the knowledge of his deceased son and when the said act of misappropriation came into the knowledge of his son he removed Chandan Tiwari from the job. Accused Chandan Tiwari started pressuring his son for taking him back in the shop with the help of appellant Nishu Dixit, Lalit Dixit and Chandan Kumar Gupta but his son refused to come under the pressure of the accused persons.

19. This witness further stated that 2-3 days before the present incident, Nishu Dixit and Chandan Gupta had snatched the mobile phone of his son and he went to the house of Lalit Dixit where he found that Chandan Tiwari, Chandan Gupta , Nishu Dixit and Lalit Tiwari were talking to each other and were saying that if Ambarish Kumar is not agreeing then within 2-3 days he will be killed and after that he opened the door and entered in the house and told Lalit Dixit that his son had snatched the mobile of Ambarish Kumar, hence, it may be returned but he did not agree on that and in lieu of returning the mobile Rs.5000 was paid by this witness.

20. In his cross-examination this witness has admitted that in his report (Ext. Ka.1) he has not mentioned any incident related with Chandan Tiwari with respect to the fair price shop but he denied the suggestion that it is wrong to say that there was no ration shop with him at the time of incident or prior to it. The licence of the shop was in the name of his son Ambarish Kumar Gupta. He had not lodged any report against Chandan Tiwari with regard to misappropriation of the essential commodities of the shop. The card holders used to make oral complaints to his son but no written complaint was given to him. He had no knowledge whether any investigation was done by the supply department regarding any shortage in the shop or was detected or not.

21. This witness has further stated that about 1½-2 months ago Chandan Tiwari was ousted from the shop by his son. His son was receiving threats on phone to take back Chandan Tiwari on the shop and regarding the threat his son had told him and in this regard his son had given an information about 3-4 days prior to the incident but he further admitted that no written report was lodged in this regard.

22. This witness further deposed that his son was not having good terms with all the four accused but he had not lodged any complaint with the police regarding the said dispute and only oral information was given to the police. He denied that neither his son nor he had any relationship with the accused Chandan Tiwari.

23. On the cross-examination made on behalf of the appellant Chandan Gupta from the witness, this witness stated that the said appellant used to reside in mohalla Brahmanand and this witness resided in mohalla Quazi Tola and both the mohalla are adjacent to each other and the distance between the house of this witness and and accused Chandan Gupta was about one furlong and there was no common house of the witness and Chandan Gupta nor there was any common land between them. There was no business dealing of the witness with Chandan Gupta but it was with his father. He was having no enmity with Chandan Gupta. This witness had heard regarding the dispute between his son and Chandan Gupta but his son had not lodged any F.I.R. at the police station.His statement was recorded by the investigating officer under Section 161 Cr.P.C. and he told him that there was some quarrel of his son with Chandan Gupta and he could not tell the reason as to why the investigating officer has not mentioned about the same in 161 Cr.P.C.The fact about the dispute was known to the investigating officer prior to giving of the application and hence he did not tell about it. He had further given a written information regarding the conspiracy to the police.

24. The car on which he had gone, was with him and the same was not

produced in the Court and was only shown to the investigating officer and he had taken the car to the police station in the morning on 13.12.2006. the Station Officer had given Supurdgi of the said car to him. The father of the appellant Chandan Gupta was initially a driver and thereafter he was running a shop of ornaments. At the time of the incident, father of the appellant Chandan Gupta had expired and he used to run the shop ornaments at Amar Shahid College. The management of the shop was supervised by the Manager Updesh Singh Chauhan of Amar Shahid College.

25. This witness has further deposed that the fair price shop was being run by his son Ambarish Kumar since 2000 which was in his name and now the same is in the name of his wife. There is no partner in the said shop. In the city there were eight fair price shops and his son only used to run the fair price shop and did not other work.

26. This witness further deposed that they were returning after taking medicine from Dr. Pramod Gupta who was an Orthopedic. He used to have pain in his knees, shoulder and neck and the doctor used to give medicine and used to issue prescription but the doctor did not give any prescription to him. He had given medicine to the witness himself. He had gone to take medicines probably between 3- 3 ½ p.m. and proceeded back to Mainpuri at about 3.45 p.m. He had not written in the F.I.R. that he was coming back after taking medicine from Dr. Pramod Gupta nor he has given the statement under Section 161 Cr.P.C. to the investigating officer that he was having pain in his body. He told about taking of the medicine to the investigating officer. He had brought the medicine on the day of the incident only and prior to it he had never visited Dr. Pramod or had taken any medicine from him. Prior to the incident accused Chandan Gupta had not said any bad words to him, his wife was not suffering from any disease, except taking medicine this witness had no work in District Mainpuri. Firstly, he had gone to the office of his son Anoop at Bajaj Alliance and thereafter had gone to the doctor for taking medicine. His son used to live in the office of Bajaj Alliance. At the place of occurrence, the shops were open and the shop keepers were sitting on their shops and there were customers also standing in the market as it was a day of the market. There were no trees on the either side of the road where the incident had taken place. The dispute of his son was with all the four accused. He had not given any application. Whether his son had given any application or not he was not aware of the same and only oral information was given. His son had told him that on telephone he was being abused and when he came to know about the same he did nothing. He did not take any action. He was not aware about the fact that Updesh Singh Chauhan had grabbed the house of Chandan Gupta. He was also not aware of the fact that the shop of the father of Chandan Gupta was given to some other person and further he did not know whether any person of the family of Chandan Gupta resides in Kasba Bewar or not.

27. He had taken his son in the injured condition to Mainpuri Hospital at 5 p.m. and except him and his wife there was no other person. They stayed at District Hospital for about 10-15 minutes. In the District Hospital his son was given bottle of glucose and thereafter referred to Agra. After the incident he had not gone to the police station. The boundary wall of the police station is probably by the side place of the incident. The police station might be

at a distance of 200 meters from the place of occurrence.

28. This witness denied the suggestion that he was deposing falsely and was not with his son nor, had taken his son in the injured condition to the District Hospital. On the day of incident he had reached at 8.30 p.m. at Kamayani Hospital, Agra where he was given medical treatment four about 3 ½ hours. At 12.30 a.m. in the night his son was declared dead. He took his son up to Mainpuri in the car in which the incident had taken place. Thereafter, he was taken by Ambulance. At 3 a.m. in the night he had returned to Bewar. In the night he did not go straight to the police station as he was disturbed, therefore, he directly went to his house.

29. This witness further deposed that that he had gone to the police station at 4 a.m. where he found a Constable sitting and showed his written report and further informed about the incident. He got a copy of the F.I.R. within an hour. Head Moharrir had called the Station Officer at the police station. The Station Officer had interrogated him at the police station regarding the fact that where he had gone and was returning back and whether he had not shown to any one in Bewar. No X-ray was got conducted at Mainpuri and got it done afterwords. The mobile phone of his son was snatched three days prior to the incident and the same was snatched by Nishu Dixit, Chandan Tiwari and Chandan Gupta. He did not lodge any F.I.R. regarding snatching of the mobile but had informed about the said incident to Babloo Mishra, Chunnu Dixit, Vinay and others and the said fact was known to all the persons of his mohalla but did not inform at the police station. He did not face any proceeding in the Court. He denied the suggestion that he faced any case in Maharashtra nor, his son was having any case for which he faced any proceedings. The mobile phone was of Motorola and his son was having several sims and his son was having receipts of the same and this witness had no receipts about it.

30. This witness denied the suggestion that In-charge S.O. had brought him in the Court for the offence for cutting of the vehicles. He had written the report at his house and at the time of writing the report,Pradep Kumar, Anil Kumar, Jitendra Kumar, Suresh Chandra and Ajay Kumar were present and he had written the report within 20-30 minutes and all the five persons had gone with him to the police station.

31. This witness further deposed that it took about one hour for conducting panchayatnama by the police and dead body was sent by the police at 7.30 p.m. to Mainpuri and again stated that it was sent at 8 p.m. by vehicle Tata No.407 and he did not go along with the dead body and all the five persons were the witness of panchayatnama. When he had gone to Mainpuri, his son son Ambarish was wearing jeans and printed shirt. At the time of panchayatnama he was not asked about the names of the persons who have shot the deceased, hence, he did not state about them.

32. He further deposed that after the incident Ambarish was taken in the car in a serious condition to the hospital but as the channel of the same was closed hence he was taken to Mainpuri Hospital. He could not identify the persons who had put Ambarish in the car and the said persons could not be traced out by him till date. In the incident his son had received fire shot

due to which he became helpless, hence, he could tell whether the shop keepers of the nearby areas had arrived or not and after the incident within 2-3 minutes he had proceeded. The vehicle which was given in his supurdgi he had taken the deceased to the hospital in the said vehicle. No blood was fallen in the vehicle and the place where the deceased was shot, the blood had fallen there and while he was sitting in the car the shot was fired and on account of which he could not tell as to in which direction the gun of the accused were. He denied the suggestion that he was not present at the place of occurrence nor, had seen the incident.

33. In the cross examination done on behalf of the appellant Nishu Dixit, this witness has stated that the doctor from whom he had taken the medicine belonged to his caste and his name was Pramod Gupta. He stated that neither in the F.I.R. nor in his161 Cr.P.C. statement he disclosed that he took the medicine from Dr. Pramod Gupta. After lodging the F.I.R. he proceeded to his house at 6 a.m. From the police station he had gone to the place of occurrence at 5.15 a.m. and remained there for about 45 minutes. The distance of police station from the place of occurrence is 200 meters. When his son was shot, then no police personnel arrived at the place of occurrence. At the place of occurrence three fires were shot and the fire shots were loud one. There was a great chaos and panic in the market. The car was being driven by Ambarish. He was dragged by pulling his collar and whether the same was torn or not, he could not remember. When the first shot was fired, Ambarish did not fall, which hit him on his right hand and at that time his injured hand was on his forehead.The said shot was fired by country-made pistol. The person who had fired shot, was at a distance of 1 ft. towards the south of deceased Ambarish. Thereafter the second shot was fired which hit him below the left eye, while this witness was coming out of the car. Both the shots hit the deceased and it was heavily bleeding. This witness did not pick up Ambarish after fire was shot on him and people of nearby area had picked the Ambarish and he did not remember their names. He had put Ambarish in his car and his blood stained were found in the car. The Sub Inspector did not see the blood. The police had given supurdgi of the vehicle to him. By that time his relatives had wiped off the blood from the seat as the vehicle had been taken to Agra. The blood was wiped off at Mainpuri Hospital. In Mainpuri Hospital, Ambarish had stayed for about 10-15 minutes. The doctor after examining Ambarish had given some medicine to him. This witness told the doctor that the shot was fired by some miscreants and he had also told the doctor at Agra that some miscreants had fired shot. None of the miscreants had fired shot while the car was moving.No pellets hit the vehicle. Pellets and tikli were recovered on the next day from the place of occurrence.

34. On 10.12.2006 a conspiracy of murder to kill Ambarish was hatched. It was about 7.30 a.m. in the morning. This witness has further admitted that in the F.I.R. he did not mention about the conspiracy. The accused suddenly came out from a lane with country-made pistols. It was a busy place. The vehicle was stopped and he did not ask Ambarish to stop the vehicle. All of sudden the accused came out armed with country-made pistols and asked to stop the vehicle. They only asked once to stop the vehicle. The said fact was not stated by him in the report nor, the same was disclosed in the statement before the investigating officer. He did not lodge

the report either at Mainpuri or Agra. In Mainpuri the police of Bewar had reached. The police personnel and the son of this witness were signing. This had happened in the evening of 12.12.2006 at about 5.15 p.m.

35. Amongst the police personnel, there was one Sub Inspector and two Constables. The said police personnel did not go to Agra. By 5.15 p.m. to 5.30 p.m. Ambarish had gone by Ambulance to Agra whereas this witness had gone by his car to Agra.

36. This witness further deposed that in the F.I.R. he has rightly mentioned that he came to the police station with the dead body of the deceased and also about the snatching of the mobile phone was not mentioned in the report nor, about giving of the money, for which he cannot tell any reason.This witness denied the suggestion that the police had not recorded his statement under Section 161 Cr.P.C. on 13.12.2006 and recorded thereafter. On 13.12.2006 the police had arrived his house and remained there for about more than an hour and at that time police had not interrogated his wife.

37. He further deposed that his son had purchased the vehicle 2-3 months prior to the incident. This witness did not possess any paper of the vehicle because it was not transferred. The blood was oozing out from the injuries of his son who had fallen at a distance of two paces towards South-East.

38. This witness denied the suggestion that he had not seen the incident and police personnel had informed him at his house and thereafter he came to the place of occurrence. He further denied the suggestion that Ambarish shot dead by unknown person at an unknown place and accused Lalit and Nishu were falsely implicated in the present case.

39. On the cross-examination done by this witness on behalf of the Lalit Dixit, this witness denied the suggestion that he had not admitted his son Ambarish in the hospital but he was admitted by Constable Shyam Singh and he is falsely deposing. He further denied the suggestion that he has falsely implicated Chandan Gupta as he owed some money from his father, which he did not want to pay, who was doing the work of jewellery.

40. This witness further denied the suggestion that he was confined in Muzaffarnagar jail prior to 4-5 days of the incident and was not present at the place of occurrence. He also denied the suggestion that he had shown the stolen car for which he did not produce papers in the Court and also denied the suggestion that accused Lalit Dixit was not involved in the present case and he is falsely deposing against him.

41. Similarly, statement of PW-2 Smt. Ram Khushi who is mother of the deceased and wife of PW1 was also recorded by the trial Court. She in her deposition has reiterated the prosecution case as has been set up by his husband PW1 and for the sake of brevity her evidence is discussed in short by the Court.

42. This witness has stated in her examination-in-chief that her husband had got the deceased picked up from the place of occurrence in the car with the help of passer by and took him to the District Hospital, Mainpuri from where he was given some medical treatment and taken by her husband to Agra where he was referred and when they had reached to Mainpuri

Hospital, Bewar police had arrived. Thereafter they took their son to Agra and got him medically treated at Kamayani Hospital where his son succumbed to his injuries at 12.30 in the night. They had brought the dead body of the deceased back to their house. She also disclosed about the conspiracy hatched by Chandan Tiwari who was a helper in the fair price shop of his son and was ousted by him and all the accused hatched conspiracy with ChandanTiwari to kill him as his son had refused to take back the accused Chandan Tiwari in his shop. She also disclosed about the mobile phone snatched by the accused Nishu Dixit and Chandan Gupta earlier as has been deposed by her husband PW1.

43. On the cross-examination made on behalf of Nishu Dixit, this witness deposed that on the day of the incident she had gone along with her husband to Dr. Gupta and reached there at about 3.15 p.m. at Mainpuri. Dr. Gupta had seen here husband and had not given any prescription for medicine. Dr. Gupta was known to his son but cannot tell whether he was his son's friend or not. She was not aware of the fact since when the said doctor was known to his son. Neither she nor her husband had visited to Dr. Gupta prior to the date of incident and had gone to take medicine only on 12.12.2006.

44. She further stated that once her grand-son (Nati) had fractured his hand and on the said occasion also she had gone to Dr. Gupta and and she had gone a year back from the said incident. She did not have any document regarding the said medical treatment. The doctor had not endorsed the name of her husband in the register as he was known to her husband. She denied the suggestion that on the day of the incident she did not go to the doctor. She also did not remember the number of the car in which she had gone. The car was purchased by her son but it could not be transferred, hence, whether it was registered or not she was not aware of the fact. The said car was purchased 3-4 months prior to the incident and from whom the car was purchased she was not aware and the car was brought from Kanpur.

45. This witness denied the suggestion that on the day of the incident she was not having the car. The distance of her house from the place of occurrence is one furlong and the distance of police station from her house is 200 paces. There are 15-16 shops between the place of occurrence and police station. On the day of incident the market was opened and after the shot was fired, it hit her son. Many persons of the nearby area had gathered. The vehicle was not stopped and her son was also not dragged. The shot hit on the right side of the vehicle. When the Ambarish was shot, she along with her husband was sitting inside the car. The first shot which was fired by Chandan Gupta hit the right hand of the deceased and the hand was above the waist. On receiving the first shot Ambarish did not fall and his blood had fallen on one place and after 2-3 minutes the second shot was fired. On hearing the first shot no police personnel had arrived at the place of occurrence and after the shot was fired they came out of the car. They did not pick up Ambarish and she did not know the names of the persons who had picked him up. At the place of occurrence Ambarish was seriously injured and he remained alive for 10-12 hours. She did not see any cartridge on the ground as they had taken the deceased to the hospital. From Mainpuri they proceeded for Bewar at 5 p.m. in the evening and reached at

Mainpuri probably at about 5 p.m. It took about 20-25 minutes to reach at Mainpuri. At Mainpuri Hospital the police personnel had arrived. The police arrived within 2-3 minutes after they had arrived Mainpuri Hospital. She did not see whether Sub Inspector was there. The police personnel did not made any interrogation from them. The police did not ask them to lodge a report and it might be possible that the police had asked her husband for the same.

46. This witness further deposed that her husband probably had gone to take medicine. She had not taken her son in her lap as she was sitting in front and her son was sitting at the back seat. Her clothes were blood stained and she had not shown her clothes to the Sub Inspector. She had not gone to the police and her husband had probably gone to police station at 4 a.m. in the morning. They had returned from Agra to Bewar at 3 a.m. in the morning. The police had not gone with her son to Agra. She further deposed that she had no enmity with Nishu whose house was at a distance of one furlong from her house. The dead body of her son was not not taken to the police station and at about 6 a.m. in the morning the police had arrived and the dead body of her son was taken from the house at 7.30 a.m.

47. The investigating officer recorded her statement on 15.12.2006. She denied the suggestion that she had not witnessed the incident and was not present at the place of occurrence.

48. On the cross-examination made on behalf of Nishu Dixit, this witness deposed that she is known to Chandan Tiwari. Chandan Tiwari did not belong to his mohalla as he is a resident of the place where the appellant Nishu Dixit resides. No report was lodged regarding the incident of snatching of mobile phone of her son.

49. She in her cross-examination has stated that she was not suffering from any ailment. She had no work at Mainpuri. She stayed at Dr. Pramod Gupta's clinic for about 1 ½ hours.The doctor had given one tube, some capsules but did not give any prescription. He had given medicine himself. Dr. Pramod Gupta had met her at 3.30 p.m. She had heard the conversation for conspiring to kill her son three days prior to the incident. Her son and her husband were with along with her when they reached the house of accused Nishu Dixit and they did not lodge any F.I.R. about the incident. After the incident her husband had driven the vehicle. She did not have any enmity with the accused Chandan Gupta. She knows one or two shop keepers nearby area. At the place of occurrence all the shop keepers had arrived and amongst them Raju Halwai, Rajpoot Misthan wale, Anoop P.C.O. wale Roop Lal Saxena etc. also arrived and all of them had seen the incident. The shop keepers and passer-by had picked up her son in an injured condition and kept him in the vehicle. She is unaware of the names of the passer-by. She did not disclose their names to the investigation officer. She had gone to the District Hospital and remained there for about 15-20 minutes and many persons had arrived there to see her son. She had informed her younger son that Nishu Dixit and Chandan Gupta had shot Ambarish. Her younger son was having a mobile phone. She had seen the police personnel at at the hospital and the police personnel to whom she met, had informed that Nishu Dixit and Chandan Gupta had fired shot. When she reached the hospital then after 3-4 hours the police had arrived there. The fact that the police personnel had followed

her son to the hospital, she had not stated about the said fact to the investigating officer as the investigating officer had not made any query about it. Her husband was along with her in the hospital. She was not aware of the fact whether her husband had any conversation with the police personnel. There was no quarrel of her son with Chandan Gupta ever before. Mobile phone was snatched by Chandan Gupta and Nishu Dixit. There was no quarrel of her with Chandan Gupta with respect to the mobile.

50. This witness denied the suggestion that she was not present at the place of occurrence and she was present at her house. She further denied the suggestion that her son was shot by unknown persons and she arrived at the place of occurrence after an information was given to her by the police. She also denied the suggestion that her husband had arrived at the hospital after he was given an information by the police personnel. She also denied the suggestion that she had made a call to her younger son Anoop on his mobile and on her call her son had arrived at the hospital. She also denied the suggestion that her son was admitted in the hospital by Head Constable Shyam Singh in an injured condition.This witness again stated that the deceased Ambarish was admitted in the hospital by Head Constable Shyam Singh and her son Anoop in an injured condition.

51. PW3-Dr. Rakesh Kumar Nagar in his deposition before the trial Court has stated that on 13.12.2006 he was posted at District Hospital, Mainpuri on the post of Senior Child Specialist and on the said date he received the dead body of the deceased Ambarish in a sealed clothe from Constable Dina Nath and Pawan Kumar who had brought him Bewar. He conducted the post mortem of the deceased on the said date and found the following ante-mortem injuries on his person:

"1.Fire-arm wound of entry 1 cm. x 1 cm. x bone deep on medial aspect of right fore-arm.Margins inverted, blackening and tattooing present in area of 6 cm. x 4 cm. around the wound 3 cm. above to wrist joint fracture of underlying of tibia, direction backward and upward.

2. Fire-arm wound of exit 2.5 cm. x 1 cm. x bone deep and communicate to injury no.1. Margins everted.

3. Fire-arm wound of entry 1.5 cm. x 1 cm. x bone deep on left side of face just below lower eye lid. Blackening and tattooing present in an area of 4 cm. x 4 cm. around the wound. Margins inverted, fracture of underlying of Zygometic bone, left eye ball missing, direction backward and upward."

52. On the internal examination he found metallic bullet in the occipital region which was taken out by him and handed over in the sealed envelope to the Constable.The brain and its membrane were lacerated.

53. In the opinion of the doctor, the cause of death of the deceased was shock and hemorrhage as a result of ante mortem injuries. He has proved the post mortem report as Ext. Ka.2.

54. This witness in his cross-examination has stated that the deceased was shot within a distance of 3 ft. and the injuries which were received by the deceased could be possible in a sitting position and the person who caused injuries to the deceased was just right in front of the deceased and if the deceased was shot from left to right direction then the said injuries could not be caused. Both the injuries could be caused by one weapon. The shot which

hit the hand, could also result injury possibly on head also.

55. P.W.4 Shyam Singh has deposed before the trial court that on 13.12.2006 he was posed at police station Bewar, district Mainpuri as Head Constable. On the said day at about 4 a.m. in the morning Ghurai Lal Gupta along with Pradeep Kumar, Suresh, Ajay and Jitendra had come to the police station with the written report against Nishu Dixit, Lalit Dixit, Chandan Kumar with respect to an incident in which it has been stated that the said accused had attempted to kill Ambrish Kumar by fire-arm shot and had given the report at the said police station which was shown to him as Ext. Ka-1. On the basis of the said report, he prepared Chik FIR and registered as Case Crime No.541 of 2006 under Section 302, 384, 504, 506 IPC and 7 Criminal Law Amendment Act and endorsed the same in the G.D. No.4 on 13.12.2006 at 6 p.m. The papers for conducting panchayatnama was given to S.O Udaibhan. He proved the Chik FIR in his handwriting and signature as Ext. Ka-3. In his cross-examination he has stated that prior to 13.12.2006 Ghurai Lal Gupta had never come to him at police station with the written report. He stated that he was at police station on duty for last 24 hours. All the entries were made on 13.12.2006 were not in his handwriting and were of Assistant Moharrir and Sub-Inspector. The incident has taken place on 12.12.2006 at 4 p.m. The distance of police station from the place of occurrence is 200 meters. The place of occurrence is between district hospital and kasba Bewar. On 12.12.2006 he was on duty as Head Moharrir at the police station. Photocopy of the G.D dated 12.12.2006 was produced on behalf of accused persons which was shown to the witness and he stated that G.D. No.22 (time 16.37) is in the handwriting of his assistant C.C.580 Mohd. Ashfaq and G.D. No.21 (time 16.31) is in his handwriting and G.D. No.12 (time 16.37), an endorsement was made regarding the fact that S.I. Om Pal has given an information which has been endorsed in the said G.D. He denied the suggestion that after receiving the information which was endorsed in G.D. No.22 dated 12.12.2006 he took Ambrish Gupta to District Hospital, Mainpuri instead his family members took Ambrish Gupta to Mainpuri Hospital and thereafter he along with police officials had followed him to the hospital for security purposes. He further denied the suggestion that he took injured Ambrish to the police station and the doctor had conducted the medical examination of the injured at his instance. There was signature of the witness in the bed head ticket. He further submitted that from the police station no chitthi majroobi was taken by him. It was stated by him in his cross-examination that he had returned back to the police station on 12.12.2006 which was also endorsed in the G.D. No.22 (time 16.37). Prior to it the information was already given by the Station Officer through wireless at the police station. In G.D. No.22 (time 16.37) endorsement about the said fact has been given. He had not submitted the medical examination report of Ambrish Gupta at the police station and he remained at Mainpuri Hospital till he was referred to district Agra. Thereafter from the hospital he came back to police station Bewar. Ghurai Lal did not met him near the injured at the hospital. Ghurai Lal met him till he remained in the hospital. The mother of the injured was crying and he did not have any conversation with her who also did not tell him anything. The injured was sent to Agra along with S.I. Ompal Singh and constable for security purposes. On 13.12.2006 at

7.15 in the morning Ompal returned to the police station Bewar. The Investigating Officer of the case returned to the police station after investigation on 13.12.2006 in the night at 21.40 hours. In the G.D. no endorsement of the statement of any witness was mentioned. In the hospital, the medical examination report of the injured was taken by his family members which was received by him and given to his family members. The said fact was endorsed by him in the G.D. He denied the suggestion that the medical examination report of the injured was concealed by him and was falsely deposing. The Investigating Officer had recorded his statement under Section 161 Cr.P.C. and he had not asked from him about the medical treatment of the injured nor he disclosed about the said fact to him that he got the medical examination of the injured done. He did not inform the Investigating Officer that he had accompanied the injured nor he had told that he had given the copy of the medical examination report to the family members of the injured. The Investigating Officer was aware about the incident from before.

56. P.W.5 Udai Bhan Singh has deposed before the trial court in his examination-in-chief that on 13.12.2006 he was posted as Station House Officer at police station Bewar, district Mainpuri. In his presence, the informant Ghurai Lal Gupta who has submitted a written report about the incident on the basis of which the FIR was registered against Nishu Dixit, Lalit Dixit, Chandan Kumar as Case Crime No.541 of 2006 under Section 302, 384, 504, 506 IPC and 7 Criminal Law Amendment Act at Police Station Bewar. He thereafter took over the investigation of the case. On 13.12.2006 he recorded the statement of Head Moharrir constable Shyam Singh informant Ghurai Lal Gupta and made spot inspection of the place of occurrence and prepared the site-plan of the same as Ext. Ka-5 and also further recorded the statement of the other witnesses. He further prepared the recovery memo of Opal Extra Car No. MH OU-800 of silver colour at the place of occurrence in the presence of the witness Munar Zafar and thereafter given Supurdagi of the said car to the informant Ghurai Lal Gupta and proved the supurdaginama as Ext. Ka-6. Thereafter he recovered three empty cartridges of 315 bore carrying to the case and prepared the recovery memo in the presence of Ajay Gupta and Jitendra Gupta and sealed the same. The recovery memo was marked as Ext.Ka-7. He also prepared recovery memo Ext.Ka-8 of the plain earth and blood-stained earth taken from the place of occurrence in the presence of witness Ajay Gupta and Jitendra Gupta. Thereafter he visited the house of the informant Ghurai Lal Gupta where he instructed S.I. Virendra Kumar Singh to conduct the inquest proceedings on the dead-body of the deceased Ambarish Kumar Gupta @ Guddu and he proved the same as Ext.Ka-9. He prepared the Challan Nash and Photo Nash as Ext.Ka-10 and 11 and after the panchayatnama was conducted, the dead-body of the deceased was sealed and sent for postmortem by constable Deena Nath and Pawan Kumar in whose custody the same was given on 14.12.2006. He arrested the accused Lalit Dixit and recorded the statement and further on 15.12.2006 he recorded the statement of Smt. Ram Khushi, Jitendra Kumar Gupta and further he raided the house of the accused for arresting them. On 28.12.2006, he took an order for initiating proceedings under Section 82/83 Cr.P.C against accused Nishu Dixit, Chandan Kumar Gupta and Chandan Tiwari. On 2.1.2007 he received an information that accused Nishu Dixit @

Brajesh Dixit, S/o Lalit Dixit who is wanted in Case Crime No.506 of 2006 under Section 392, 411 IPC who in collusion with his parents and younger brother conspired and got arrested Ishu in place of Nishu who has been sent to District Jail, Fatehgarh for which a report was obtained from in-charge Inspector Gursahai Ganj, district Kannauj for taking action, the same has been proved as Ext.Ka-12. He also recorded statement of Head Moharrir Dharmendra Kumar and A.S.I Omkar Shukla of police station Gursahai Ganj, district Kannauj. On 3.1.2007 he has got executed the order under Section 82/83 Cr.P.C. against Nishu Dixit and Chandan Kumar Gupta. On 4.1.2007 he arrested accused Chandan Tiwari and recorded his statement. On 19.1.2007 he arrested accused Nishu @ Brajesh Dixit and Chandan Gupta in a police encounter for which FIR of Case Crime No.67 of 2007 under Section 307 IPC which was registered against Nishu and Chandan Gupta and also Case Crime No.68 of 2007 and Case Crime No.69 of 2007 under Section 25/3 Arms Act was registered against both the accused and also made a recovery of country-made pistol which was involved in Case Crime No.541 of 2006 under Section 302, 384, 504, 506 IPC, 120-B IPC and 7 Criminal Law Amendment Act. After recording the statement of Ajay Gupta, Jitendra Kumar Gupta and Anil Kumar, Sudesh Chand Gupta and Pradeep Kumar on 12.2.2007 Charge Sheet No.30 of 2007 was submitted against accused Chandan Tiwari, Chandan Gupta, Lalit Dixit and Nishu Dixit @ Brajesh Dixit which he has proved as Ext.Ka-13. He has further proved the material Ext.1 and 2 which are blood-stained.

57. In his cross-examination the witness has stated that the distance of police station from the place of occurrence is 200 meters and while he was making spot inspection of the place of occurrence, he had interrogated the shop keepers whose shops were near the place of occurrence. In this regard he recorded the statement of shop keeper Anoop Singh and Roop Lal who have stated that at the time of incident they were present at their shop but have not witnessed the incident. The distance of the shops of Roop Lal and Anoop Singh was 8-10 paces from the place of occurrence. Prior to the registration of the present case at the police station he did not take any action. He was not present at the time of incident at police station as he was busy in some other place. He could not remember as to which place he had gone. He had conducted the panchayatnama of the deceased on 13.12.2006 at 6 p.m. and concluded by 7.35 a.m. While conducting the panchayatnama he did not ask the names of the accused. He has seen the injuries three in number. No money was found in the pocket of the deceased. At the time of conducting of panchayatnama, the deceased was only wearing underwear and found no other clothes on his body. On further cross-examination he has stated that on 12.12.2006, he has received an information about the incident at about 3-4 p.m. On receiving the information of firing, constable S.I. Yashpal Singh and Head Constable Shyam Singh and Constable Kunwar Singh were informed to have gone to the place of occurrence. In the night of 12.12.2006 he received an information that Head Constable Shyam Singh had gone to the injured in District Hospital, Mainpuri. This witness did not go to the hospital at Mainpuri and on 12.12.2006 he did not proceed with the investigation about the incident. In the night of 12.12.2006, he had reached the place of occurrence but did not remember the time. He did not remember whether any shop keeper had told the name of the injured or the accused. He further did not remember that on 12.12.2006 he

contacted S.I. Yashpal, Head Constable Shyam Singh and Constable Kunwarpal. During investigation he had recorded the statement of Head Constable Shyam Singh but did not record the statement of S.I. Ompal Singh and Constable Kunwarpal. He recorded the statement of Head Constable Shyam Singh on 13.12.2006. He stated that in the statement of Shyam Sing recorded u/s 161 Cr.P.C., it was not stated by him that he had admitted the injured. Head Constable Shyam Singh had given him the statement regarding registration of the FIR. Head Constable Shyam Singh has not given his statement that he had admitted the injured in the hospital or he was with him. He does not remember whether he interrogated Head Constable Shyam Singh that he was with injured or he had admitted him on 12.12.2006 in the hospital. After perusing the case diary he stated that he has not mentioned that Shyam Singh had admitted the injured. He also did not remember whether he had asked from Head Constable Shyam Singh that who was accused involved in the incident or the deceased in the injured condition or his father had disclosed the name of any accused or not. The statement of Head Constable Shyam Singh in this regard has not been mentioned in the case diary. The shop keepers of the nearby areas had not given an eye-witness account and they have only given hearsay evidence. He has not mentioned in the case diary whether the informant has stated in the statement u/s 161 Cr.P.C. for taking medicines from Dr. Pramod Gupta. In the statement recorded u/s 161 Cr.P.C. of informant Ghurai Lal Gupta and his wife does not find fact about taking the medicines from Dr. Pramod Gupta. He did not record the statement of Dr. Pramod Gupta under Section 161 Cr.P.C. He has given the supurdagi of the car which was used in the incident to the informant and he does not remember who is the owner of the said car. He did not remember whether he has seen the papers of registration or not. In the case diary he also could not mention about the registration of the vehicle. He has seen that blood-stains were found on the seat inside the car but did not take the same in his custody. He did not remember whether Ghurai Lal Gupta or Smt. Ram Khushi had shown blood-stained clothes or not. He further stated that if the blood-stains were found on their clothes then he did not think to be relevant to make a mention of the same. He did not remember whether he had made a query from the informant regarding the conspiracy hatched by Chandan Tiwari or not. He had seen the chik FIR and tehrir FIR in which it was written that the deceased was taken in an injured condition to District Hospital, Mainpuri for treatment and from where he was referred to Agra. The medical certificate of the deceased from District Hospital was not collected by him during investigation. He was not present at the time of the incident at the police station, hence he had not mentioned about the said fact in the G.D. He had met Head Constable Shyam Singh and in his presence the FIR was registered. He did not remember whether he had made any query from Head Constable Shyam Singh regarding the injured. The witnesses of the incident had told him that the injured was medically examined at District Hospital, Mainpuri. He did not collect any papers of the injured regarding his treatment at Agra. He stated that during the course of investigation it was necessary to collect the papers but he did not collect the same. He denied the suggestion that he deliberately did not collect the papers regarding his medical treatment. He had seen the place of occurrence and distance of the place of occurrence from the police station is 200

meters He has further seen the house of the informant. He could not tell approximate distance of the police station from the house of the informant. He visited the house of the informant on several occasions and the distance of the house of the informant from the place of occurrence is 300 meters towards North East. The place of occurrence from the police station is towards South-West. It is correct that the incident has taken place on old G.T. Road. He could not tell that from how much distance the fire shot can be heard. It is not necessary that the fire shot can be heard at the police station from the place of occurrence. He admitted the fact that on 12.12.2006 at 16.37 hours in the G.D. there is an endorsement of fire shot from the side of District Hospital. S.I. Ompal Singh on receiving the information of firing had left towards place of occurrence. The information was received at the police station by wireless and the higher officials were also informed about the incident from the police station by wireless. S.I. Ompal Singh and Head Constable Shyam Singh had not disclosed the names of the accused persons. He did not come to know about the medical examination of the injuries of the injured Ambarish at the time of the registration of the FIR and when he had recorded the statement of the informant he came to know about the said fact. He did not remember that when the deceased was injured, he was speaking or not and he did not ask any witness about the said fact. He further did not remember whether he had asked Head Constable Shyam Singh that whether the injured Ambarish while being admitted to the hospital was speaking or not. He did not go to the doctor who had medically examined the injured Ambarish while he was in District Hospital, Mainpuri. He further did not record the statement of the doctor who had medically examined the injured. He further did not remember whether any declaration was made by the injured to the doctor or not. He further did not take the statement of Anoop Kumar Gupta, the brother of the deceased. He did not remember that who were the persons who got the deceased medically treated while he was alive. It is a relevant fact that the informant and his wife had taken the deceased while being injured for medical examination. Blood-stains were found in the car but he did not take the same in his custody. He took the blood from the place of occurrence. The informant in his statement under Section 161 Cr.P.C. has stated that Nishu Dixit, Lalit Dixit, Chandan Kumar Gupta had got the car stopped. It was further stated by the informant that the deceased was dragged from the car and he did not got down himself. He did not remember that whether he made any query that who were the persons who had picked up the injured and kept him in the car. He did not remember whether he made a similar query at the place of occurrence. He had recorded the statement of Head Constable Shyam Singh under Section 161 Cr.P.C. on 13.12.2006. He admitted the fact that in the statement of Head Constable Shyam Singh it has not been mentioned that by which vehicle the injured was taken to the hospital. He further stated that it is correct fact that on each day the copy of the G.D is signed by the Station Officer and sent to the higher authorities and he was the Station Officer of the concerned police station. On 12.12.2006 also he must have countersigned the G.D. and sent to higher authorities. When the G.D. dated 12.12.2006 was shown to the witness then he identified and proved his signatures on the same. On 12.12.2006 he had read the G.D and then signed the same. He did not take the blood-stains on the seat of the

vehicle by cutting the same in his custody and further did not think it necessary for taking any documents. Rs.5,000/- per month was being demanded as Chauth (goonda tax) by the accused Chandan Gupta from the deceased on account of which his mobile was snatched. He denied the suggestion that at the behest of the informant he has not carried the impartial investigation. He further denied the suggestion that during the course of investigation the real culprits have not been brought to book.

58. P.W.6 Subodh Kumar has deposed before the trial court that as on date on 12.12.2006 he was posted in the District Hospital, Mainpuri as Surgeon and at 5 p.m. on the said day he had medically examined Ambarish Kumar Gupta who was brought by Head Constable Shyam Singh and he found following injuries on his person:-

" (I) Fire-arm wound of entry 0.5 cm x 1 cm x depth not probed present on left side of face just below left eye. Margins inverted, bleeding present over the wound, advised X-ray, tattooing present over the face.

(ii) Fire-arm wound of entry present on outer part of right fore-arm 0.5 cm x 0.5 cm x bone deep on the inner side 1 cm above right wrist. Margins inverted, fresh bleeding present, tattooing present around the wound, advised X-ray.

(iii) Fire-arm wound of exit present on radial side of right fore-arm 2 cm x 1.5 cm x bone deep. Margins averted. Wound through and through to injury no.2 (advised X-ray) bleeding present."

59. He has proved the medical examination report as Ext. Ka-14 and further advised X-Ray and he was bleeding. The general condition was critical. His nerves were weak and he was unconscious. As his condition was critical, he was referred to higher centre. The injuries were caused by gun-shot and kept under observation. X-Ray was advised. The injuries were fresh. He was referred to S.N. College, Agra. The said injuries can be caused on 12.12.2006 at 4.35 p.m. by country-made pistol.

60. In his cross-examination the witness was shown medical examination Ext.Ka-14 of the injured and he could not tell on which register said injury report was endorsed. The person who brings the injured, his name is mentioned in the medical examination report and the bed-head ticket on which medical examination of the patient was mentioned. On showing the medical examination he could not tell whether the same was written on Chitthi Majroobi or not. In his cross-examination he has further stated that the injured Ambarish Kumar Gupta was admitted by Head Constable Shyam Singh and Anoop Kumar Gupta. He was admitted on 12.12.2006 at 5 p.m. in the evening. The condition of the injured was mentioned in the bed head ticket and his condition was critical. The injured was referred to S.N. Hospital, Agra at 5.15 hours. On the bed head ticket paper no.87-A was marked as material Ext.Kha-1 and medical examination report paper no.88-A was marked as material Ext.Kha-1. On the bed head ticket, there is signature of Head Constable Shyam Singh and Anoop Kumar Gupta (brother of the injured) who had brought the injured and both of them have signed the same in his presence. The medical examination register which he had brought in the Court was an accidental register and it was not a police case register. The injured was brought by the

police personnel. Whether the police was informed or not can be only stated after seeing the police register. The injured was unconscious and in critical stage who was immediately referred to Agra, hence could not record his dying-declaration. He could not remember to ask by the police personnel whether it was a case of accident or a police case. After the medical examination of the injured and giving him medical treatment, he was referred to Agra. It is correct that any police personnel who brings the patient comes along with Chitthi Majrubi. Head Constable Shyam Singh has not brought Chitthi Majroobi and the medical examination was endorsed in the accidental register.

61. P.W.7 S.I. Virendra Kumar Singh has deposed before the trial court that on 18.01.2007 he was posed as S.I. at police station Bewar, district Mainpuri and vide G.D. No.41 time 21.10 hours of the said police station he along with S.I. Ompal Singh, S.I. Suleman Khan and three constables were on patrolling duty for the wanted accused and on 19.1.2007 while he was present in the morning at Vand hotel, they received an information from a police informer that accused for the murder of Ambarish Kumar Gupta few days before are present on crossing of G.T Road near P.C.O and waiting to go somewhere. On believing the said information, the police party proceeded towards it and also tried to take witnesses but no one was ready and they arrested the accused Nishu @ Brijesh Dixit on 19.1.2007 at 7.15 p.m. On his search a country-made pistol of 315 bore along with two empty cartridges in it was recovered from his right pocket and fresh smell of the same was coming out and other accused Chandan Gupta from whom identical recovery was made was also arrested and confessed their guilt about the murder of the deceased Ambarish Gupta. A country-made pistol and two cartridges which were recovered from them and recovery memo was prepared and case was registered against them. The charge-sheet was also submitted under Section 25-A of the Arms Act and put to trial in S.T. No.237 of 2007 under the Arms Act. The said weapons were sealed along with cartridges and the same was proved as material Ext.Ka-1 to Ka-4 and Case Crime No.67 of 2007 under Section 307 IPC and Case Crime No.68 of 2007 and 69 of 2007 under Section 3/25 Arms Act were also registered against two accused and the site-plan regarding recovery was also made by the witness.

62. The accused in their defence have examined Dr. P.K. Gupta as D.W.1 before the trial court who stated that he was running an Ortho and Fracture Clinic at Kutchehry Road, Mainpuri. He stated that he did not know Ghurai Lal personally. He further could not tell whether he had medically examined him or not and he only gives treatment to the patient who have suffered any injury or suffering from any ailment of bones and those patients only who prepares bed head ticket and he does not treat any general patient. In December, 2006 he has not made any bed head ticket of Ghurai Lal. The patients whose he had prepared the bed head ticket on 12.12.2006, he is not having the record of the same before the Court and on 12.12.2006 the patients in whose respect bed head tickets were prepared, their names he does not remember. On 12.12.2006 the patients who have been treated their names he does not remember. On 12.12.2006 the patients indoor and outdoor register he has not brought. He used to right prescriptions of small patients. The persons who complain the pain in bones he used to give

prescriptions and the patients who are known to him, he gives them sample medicines. Ghurai Lal Gupta was not familiar to him. Daily he used to see 10 to 20 patients and he could not tell their names after five years. There is none other doctor of his name as Orthodox Surgeon in district Mainpuri nor there is any doctor by the said name. He was not aware of the fact that the accused had any relationship with Kishan Dubey, Advocate. He denied the suggestion that at the instance of Kishan Dubey, Advocate he has come to the Court and stated that he has come on the summons and denied the suggestion that he is falsely deposing.

63. The trial Court after examining and considering the prosecution evidence and defence version, has convicted and sentenced the appellants for the offence in question. Being aggrieved by the same, the appellants have preferred the instant appeal.

64. Heard Sri R.K. Rathore, learned counsel for the appellant no.1, Sri S.K. Singh Yadav, learned counsel for the appellant no.2, Sri Amit Tripathi, learned counsel for the respondent no.3, Sri Vinay Saran, learned Senior Advocate assisted by Sri P.K. Mishra, learned counsel for the complainant and Sri Gaurav Pratap Singh, learned AGA for the State and perused the lower court record.

65. It has been argued by the learned counsel for the appellants that the FIR of the incident was lodged after an inordinate delay as the incident had taken place on 12.12.2006 at 4.35 p.m. but the F.I.R. of the same was lodged on 13.12.2006 at 4 a.m. It has been further argued that there are material omissions in the F.I.R. which affects the credibility of the prosecution witnesses, i.e., PW 1 & PW2 such as that in the F.I.R. it has been mentioned by PW1 about the conspiracy and involvement of the co-accused Chandan Tiwari for the murder of the deceased along with the appellants.

66. It was further pointed out that the story with respect to snatching of the mobile phone of the deceased by the appellants Nishu Dixit, Chandan Kumar and Chandan Tiwari has also not been mentioned in the F.I.R. and it has been subsequently developed during the course of investigation and trial.

67. It was next argued that PW1-Ghurai Lal Gupta and PW2-Smt. Ram Khushi who are eye witnesses of the occurrence and are the parents of the deceased, their presence at the place of occurrence is highly doubtful as is apparent from the evidence recorded before the trial Court. It this regard, it has been further pointed out that in the statement of PW1 before the trial Court it has been categorically stated by him that soon after the incident he rushed his son in an injured condition along with his wife to the Mainpuri Hospital, but as per the medical examination report of the deceased Ambarish conducted at Mainpuri Hospital shows that he was brought by Head Moharrir Shyam Singh (CP 59) of Police Station Bewar on 12.12.2006 at 5 p.m. and after giving some treatment he was referred to S.N.Medical College, Agra for further treatment.

68. Learned counsel for the appellants has also drawn the attention of the Court towards the statement of DW1-P.K.Gupta where it has been stated by PW1 Ghurai Lal Gupta that he had gone along with his son and wife for taking medical treatment

from the said doctor at Mainpuri and thereafter when they were returning from there, the incident had taken place. He argued that from the statement of DW1 it is not at all clear that PW1 along with his wife and son had actually gone to take medicine from him for pain in knee, neck and shoulder as he could not place any prescription or documentary evidence to show that he had visited Dr. Pramod Gupta.

69. It was further argued that there appears to be material contradiction in the statements of PW1 and PW2 with respect to the circumstances led to the incident. Though the incident had taken place in the busiest market place but not even a single independent witness has come to support the incident as has been stated by PW1 and PW2. In this regard, he has also drawn the attention of the Court towards the statements of PW1 and PW2 who have categorically stated that many shop keepers of the area had arrived at the place of occurrence but none had come to support the prosecution case, though the statements of some of the shop keepers who were the eye witnesses of the incident, were recorded by the investigating officer under Section 161 Cr.P.C.

70. It was next argued that the incident had taken place just 200 meters away from the police station and it appears from the evidence of PW4 Head Constable Shyam Singh that the police had arrived at the place of occurrence and had taken the injured to the hospital but PW1 and PW2 did not disclose the names and involvement of the appellants in the present case as the first opportune time to the Head Constable Shyam Singh and police personnel along with him who had arrived, which further goes to show that neither PW1 nor PW2 were present at the place of occurrence.

71. It is argued by the learned counsel for the appellants that Anoop Kumar who was the younger son of PW1 and PW2 was stated to be informed by them about the incident had also taken the injured Ambarish Kumar to Mainpuri Hospital, which is apparent from the Bed Head Ticket of the injured Ambarish Kumar of District Hospital, Mainpuri, was not produced by the prosecution before the trial Court to give evidence to support its case.

72. Learned counsel for the appellants further submitted that the recovery of Opel Astra Car on which the deceased along with PW 1 and PW2 were returning after taking medicine from Mainpuri, was shown to be recovered by the police on the next date, i.e., on 13.12.2006. He submitted that if the said car was present on the spot and recovered by the police on the next day, then it is not clear from the prosecution evidence as from which car the deceased while being injured, was taken by PW1 and PW2 to Mainpuri Hospital.

73. It was further argued by learned counsel for the appellants that three used cartridges of 315 bore were recovered from the place of occurrence and blood was also found at the place of occurrence, but the said recoveries were made on the next day of occurrence, i.e., on 13.12.2006, which itself appears to be doubtful as the place of incident was a busy road and it was not possible that such recoveries could have been made by the investigating officer PW5-Udai Bhan Singh.

74. It was also submitted by the learned counsel for the appellants that unnatural conduct of PW1 and PW2 who are parents of the deceased soon after the incident goes to show that they were not present at the place of occurrence as from

their evidence it is clear that neither they rushed to the victim nor, they catch-hold of their son and they even did not extend support to their son who fell on the ground after getting injured. It was also vehemently argued that though the injured Ambarish who was seriously injured was rushed to the Mainpuri Hospital in Opel Astra Car but no blood was found in the said car.

75. It was also pointed out by the learned counsel for the appellants that in the F.I.R. PW1 has categorically stated that he took the dead body of the deceased to the police station when he went to lodge the F.I.R. but the panchayatnama of the deceased was conducted at the house of the informant PW1 which goes to show that prosecution is not coming up with clean hands.

76. It has been argued by the learned counsel for the appellants that the Investigating Officer has given the supurdagi of Opel Astra Car on which the deceased had gone with his parents, i.e., PW1 & PW2 to take medicine for PW1at Mainpuri and while returning to their house the incident took place, was recovered by the Investigating Officer on the next date of the incident, i.e., on 13.12.2006 after preparing the recovery memo of it, was given in the custody of PW1 though it was stated that there were blood stain on the seat which was wiped off by the relatives of PW1. Further, PW2 has stated in her evidence that she had shown her blood stained clothes to PW5-Udai Bhan Singh, Investigating Officer, but it was not taken into custody by the Investigating Officer which all raises doubt about the prosecution case and the manner in which the incident has taken place.

77. Learned counsel for the appellants further submitted that the house of PW1 and PW2 was also at a close distance from the place of occurrence and the Police Station Bewar, as it transpires from their evidence. He argued that it appears that soon after the incident the police arrived at the place of occurrence and the injured Ambarish Kumar was rushed to the Mainpuri Hospital by PW4 HCP 37 Shyam Singh and the parents of Ambarish Kumar when came to know about the incident when they were present at their house as it had taken place in the market of Kasba Bewar they informed their son Anoop Kumar on mobile as it transpires from the evidence of PW2 Smt. Ram Khushi who also reached the Mainpuri Hospital. Thus, he argued that the presence of PW1 and PW2 at the place of occurrence is doubtful.

78. The learned counsel for the appellants argued that the story of conspiring of murder of the deceased before the co-accsued Chandan Tiwari and the appellants and also of snatching of mobile phone of the deceased by the appellants has not been found to be true. Moreover, co-accused Chandan Tiwari has been acquitted by the trial Court, hence, the conviction of the appellants by the trial Court is not at all sustainable on the basis of evidence of PW1 and PW2. Further, the appellant Nishu @ Brijesh Dixit and Chandan Tiwari have been acquitted by the trial Court under Section 25/3 of the Arms Act disbelieving the recovery of the country-made pistols of 315 bore and live cartridges from them at the time of their arrest on 19.1.2007.

79. Thus, on the basis of the aforesaid arguments, it is lastly argued that the prosecution has failed to prove its case beyond reasonable doubts against the appellants and they are liable to be acquitted by this Court by setting aside the judgment and order dated 30.10.2013 passed by the trial Court. Moreover, the

appellants, namely, Nishu Dixit and Chandan Kumar are languishing in jail for more than 13 years, i.e., since 19.1.2007.

80. *Per-contra*, on the other hand, Sri Vinay Saran, learned Senior Advocate, assisted by Sri P.K. Mishra, appearing on behalf of the complainant has vehemently opposed the arguments of learned counsel for the appellants and submitted that it is a broad day light murder which had taken place on 12.12.2006 at 4.35 p.m. in the market of Kasba Bewar and the deceased along with his parents, i.e., PW1 and PW2 was returning on his Opel Astra Car after getting his father medicines for his ailment from Mainpuri and the appellants who were demanding free essential commodities including kerosene oil from his fair price shop and further Rs.5000/- per month as Chauth (Gunda Tax) from the deceased who refused to give them, was dragged from his car after stopping the same by the appellants and shot dead by the appellants Nishu Dixit and Chandan Kumar with their respective firearm weapons on the exhortation of appellant Lalit Dixit. The deceased received two gun shot injuries on his person (i) on his forehead and (ii) two gunshot of wound of entry on medial aspect of right fore-arm and the other on right side of face. One metallic bullet was also recovered from his brain and the cause of death as per the post mortem report of the deceased was shock and hemorrhage as a result of ante mortem injuries.

81. He next argued that the presence of PW1 and PW2 who were accompanying the deceased at the time of the incident is quite natural as all of them were returning from Mainpuri after taking treatment from the Dr. Pramod Kumar Gupta where PW1 had gone alongwith his son and wife for his ailment in his body with respect to knee, neck and shoulder pain and their presence at the place of occurrence is well established as is apparent from their evidence before the trial Court. The medical evidence fully corroborates the evidence of PW1 and PW 2. There appears to be no discrepancy in their evidence which may caste doubt about their presence at the place of occurrence.

82. He next pointed out that the appellant Nishu Dixit in a pre-planned manner had conspired the murder of the deceased and has committed the murder of the deceased and from the evidence of PW5 Udai Bhan Singh, he has tried to demonstrate that the appellant Nishu @ Brijesh Dixit was wanted in Case Crime No.506 of 2006, under Sections 392, 411 I.P.C. and he along with his parents and younger brother Ishu had got his brother Ishu arrested in the said case in place of Nishu @ Brijesh Dixit at District Jail Fatehgarh to commit the murder of the deceased, who also filed a carbon copy of the report of Inspector In-charge of Gursahaiganj, District Kannauj as paper No.11A/6 which has been marked as Ext. Ka.12.

83. He further submitted that the argument of learned counsel for the appellants that there has been inordinate delay in lodging the F.I.R. is not at all sustainable because soon as after the incident when the deceased was seriously injured, PW1 rushed him to the hospital at Mainpuri from where he was referred to Agra for further medical treatment and PW1 along with his wife and other relatives rushed him to Agra and admitted the Ambarish to Kamayani Hospital, Agra where he was given medical treatment and at 12.30 a.m. in the night on 12.12.2006/ 13.12.2006 the deceased succumbed to his

injuries and from where he was brought back to his house and thereafter at 4 a.m. in the morning the informant PW1 had gone to lodge the F.I.R. at police Station Bewar, District Mainpuri, hence, it was quite natural conduct of PW1 to first save the life of his injured son instead of reporting the incident at the police station immediately.

84. He further submitted that the accused appellants have failed to state the reason for their false implication the present case by the informant (PW1) who is father of the deceased in the present case. He further pointed out that the recovery of empty cartridges, blood stained concrete chips from the place of occurrence and recovery of pistol from Nishu Dixit about which there is a report of Forensic Science Laboratory, Agra further proves that the prosecution has successfully established its case. He submitted that it is well established law that the F.I.R. is not an encyclopedia of the prosecution version. Non-mentioning of the conspiracy in the F.I.R. is not fatal as during investigation this conspiracy was fully unearthed. Further, prosecution witnesses from their deposition have fully established the conspiracy hatched and involvement of the accused Chandan Tiwari.

85. He next submitted that so far as the non-examination of independent witnesses are concerned, it is hardly of a significance as in a murder case it is general tendency of the independent witnesses not to come forward to invite them to any trouble, hence, they avoid the same and it is only the family members who come forward to bring book to the actual assailants who are involved in the present case, as has been done by PW1 and PW2.

86. On the basis of aforesaid argument, learned A.G.A. has also adopted the arguments of Sri Vinay Saran, learned Senior Advocate, appearing on behalf of the complainant, hence, for the sake of brevity it is not repeated again.

87. Having considered the rival submissions advanced by the learned counsel for the parties, we have gone through the entire evidence of the prosecution as well as defence version and other materials on record.

88. In the F.I.R. which has been lodged by PW1 Ghurai Lal Gupta, it is quite apparent that he has stated categorically that while he was returning along with his son and wife after taking medicines from Mainpuri and arrived at Kasba Bewar on 12.12.2006 at 4.35 p.m. and as soon as his car reached at Kasba Bewar near District Hospital, Mainpuri, the appellants Nishu Dixit, Lalit Dixit and Chandan Kumar came out with their country-made pistols, stopped the car and Nishu Dixit and Chandan Kumar dragged the deceased Ambarish from the car after abusing him and stating that he poses himself to be a big ration dealer and without ration card he has to supply the ration and kerosene along with Rs.5000/- per month to them which was resisted by the deceased Ambarish and he told that he would not give any Chauth (Gunda Tax) and at that moment the appellant Lalit Dixit started abusing him and stated that the deceased Ambarish poses himself to be a big leader and he would not concede to the demand and exhorted, on which appellants Nishu Dixit and Chandan Kumar who were carrying country-made pistols in their hands fired shot at him with an intention to kill him, on account of which Ambarish Kumar was seriously injured and on the alarm raised by the informant, all the three accused fired in the air and had fled away from the place of occurrence. Several shop keepers because of the terror and commotion created in the area started closing

down their shops.The informant and his wife took their son Ambarish Kumar in a seriously injured condition to the District Hospital Mainpuri where seeing his critical condition he was referred to Agra and at Agra they went to Kamayani Hospital and during treatment his son succumbed to his injuries. He further stated in the F.I.R. that he had brought the dead body of the deceased and had come to report about the incident.

89. The argument of learned counsel for the appellants that in the F.I.R. PW1 has not mentioned about the conspiracy which was hatched by the co-accused Chandan Tiwari along with the appellants as the Chandan Tiwari was a helper in the shop of the deceased who was running a fair price shop as because of some illegal activities of Chandan Tiwari, the deceased after noticing the same had ousted him and Chandan Tiwari was pressurizing the deceased along with the assistance of the appellants Nishu Dixit and Chandan Kumar for taking him back in his shop as a helper which was refused by him. Further, 2-3 days prior to the incident, appellants Nishu Dixit and Chandan Gupta had snatched the mobile phone of son of PW1 who went to the house of Lalit Dixit where he heard the conversation of Chandan Tiwari, Chandan Gupta, Nishu Dixit and Lalit Tiwari that if Ambarish Kumar would not pay any heed to their demands, hence, within 2-3 days he should be eliminated, on which PW1 opened the door and went inside the house and asked Lalit Dixit that his son had snatched the mobile phone of Ambarish Kumar and to return the same but he did not pay any heed and PW1 also paid Rs.5000 for returning the same. This conduct of PW1 goes to show that he tried to implicate co-accused Chandan Tiwari during the course of investigation in the present case falsely for conspiring the murder of the deceased, but the said fact was not disclose by him in the F.I.R. It is true that F.I.R. is not an encyclopedia of the prosecution case but the said conduct of PW1 definitely cast doubt about his credibility and trustworthiness stating about the incident raising suspicion about his testimony relating to the prosecution case.

90. Another circumstance which goes to show regarding reliability of PW1 with respect to the prosecution version given by him that he was returning from Mainpuri to Bewar to his house after taking medicine from Dr. Pramod Gupta on the day of incident, if tested in the light of the evidence of DW1, it creates doubt that PW1 along with his wife and son had gone to him for taking medicines regarding ailment of knee, neck and shoulder of PW1. No documentary evidence has been produced by PW1 to show that he had actually visited DW1 Dr. Pramod Gupta for his ailment.

91. Moreover, it is apparent from the statements of PW1 and PW2 that it was for the first time that they had gone to DW1 on the day of the incident for getting medicines of PW1 and PW2 casually stated that one year prior to the incident her grand-son (Nati) had got fractured his hand and was also treated by DW1, but there appears to be no documentary evidence regarding the same. Thus, the version given by the PW1 that he had gone along with his wife and son to take medicines at Mainpuri to Dr. Pramod Gupta (DW1) is not established from the evidence of PW1 and PW2.

92. So far the fact that PW1 and PW2 had actually seen the incident and were present at the place of occurrence, as has been argued on behalf of the appellants

vehemently, appears to be highly doubtful, firstly, on the count that it has been categorically stated by PW1 in his evidence before the trial Court as well as apparent from the F.I.R. that soon after the incident he along with his wife had rushed his son in a seriously injured condition to District Hospital, Mainpuri but from the medical examination report of the injured Ambarish Kumar dated 12.12.2006 conducted at 5 p.m. shows that he was brought by Head Constable Shyam Singh (HC 37) and PW1 in his cross-examination has categorically stated as under:-

"मैं लड़के को चुटैल हालत में लेकर मैनपुरी अस्पताल करीब 5 बजे पहुंचा था। हम व मेरी पत्नी थी, उसके अलावा कोई नहीं था। जिला अस्पताल में 10–15 मिनट रूके होंगे। जिला अस्पताल बोतल औतल लगाई थी आगरा के लिये रैफर कर दिया था।"

93. It further transpires from the evidence of PW1 and PW4 Head Constable Shyam Singh of Police Station Bewar that he had arrived at the place of occurrence and younger son of PW1, namely, Anoop Kumar had also arrived there and in the Bed Head Ticket it has been mentioned that Ambarish Kumar was brought by Constable Shyam Singh and Anoop Kumar but the said Anoop Kumar was not produced by the prosecution to support its case, which further raises doubt about the fact that PW1 and PW2 (wife of PW1) had actually took Ambarish Kumar to District Hospital, Mainpuri.

94. The unnatural conduct of PW1 and PW2 soon after the incident further reflects that their presence at the place of occurrence is not established on account of the fact that when the deceased was dragged from the car by the appellants and was shot with their respective firearms weapons, they have stated that they were witnessing the incident while they were sitting in the car and did not come out immediately coupled with the fact that after the incident when the deceased Ambarish Kumar was lying in a seriously injured condition, no effort was made by PW1 and PW2 to touch him or to help the other persons who had picked the injured in the Opel Astra Car of PW1 as no blood stains were found either on the clothes of PW1 or PW2 nor, the same was found in the Opel Astra Car. It appears that the prosecution was conscious of the fact that if it comes with a case that the deceased was taken in lap of PW2 or PW2 had helped the other persons to keep the injured in the car then definitely their clothes would have been blood stained because the blood was oozing from the body of the injured but as no blood stained clothe was either shown or taken in to custody by the investigating officer PW5. The prosecution thought it more proper to ensure that the deceased while being injured was not picked or touched by PW1 or PW2 though the learned counsel for the complainant pointed out that the blood stain which was found in the car, in the cross-examination questions were put to the witnesses regarding the same and it was stated by PW1 and PW2 that their relatives had wiped off blood in the car while the injured was taken to the hospital from Mainpuri to Agra in an Ambulance, but from this circumstance the prosecution cannot escape the responsibility of proving its case beyond reasonable doubts against the appellants.

95. It further transpires from the recovery of the three empty cartridges from the place of occurrence on 13.12.2006 by the police, out of which one cartridge recovered was tallied with the weapon which was recovered from the appellant

Nishu Dixit as is apparent from the Forensic Science Laboratory dated 6.1.2007. In this regard it would be necessary to take into account that the accused appellant Nishu Dixit @ Brijesh Dixit was arrested by the police after more than one month of the incident on 19.1.2007 and country-made pistol of 315 bore was recovered from him, it would be highly improbable and beyond imagination to think that the said accused would carry the said country-made pistol with him which was used in the crime, hence, the recovery of said country-made pistol appears to be doubtful.

96. Similarly, appellant Chandan Kumar was also arrested on the same day, i.e., on 19.1.2007 along with the co-accused Nishu Dixit with country-made pistol of 315 bore and some live cartridges and both the accused have been acquitted by the trial Court for the offence under Section 25/3 of Arms Act. Thus, the recovery of two weapons from the said accused after one month of the incident has been disbelieved by the trial Court when they were put to trial under the Arms Act.

97. It is noteworthy to mention here that the metallic bullet was recovered from the occipital region of the deceased but the same was not sent to the Forensic Science Laboratory in order to ensure whether the same was shot by the respective weapons which were recovered from the two appellants, namely, Nishu Dixit @ Brijesh Dixit and Chandan Kumar.

98. Another circumstance which further raises doubt about the prosecution case is that in the F.I.R. it has been categorically mentioned by PW1 that he had brought the dead body of the deceased when he went to the police station to report the matter on 13.12.2006 at 4 a.m. but from the panchayatnama of the deceased it is apparent that inquest proceedings were conducted at the house of the deceased. In this regard, the statement of PW1 in his cross-examination before the trial Court is necessary to be taken into note, which is reproduced here-in-below:

''रिपोर्ट मैंने सही लिखा था कि थाने में लाश लेकर आया हूँ।''

99. Thus, it is clear that the prosecution is not coming with clean hands and is concealing the origin of the incident. The defence has categorically given the suggestions to PW1 and PW2 questioning their presence at the place of occurrence and they being not the eye witness of the occurrence were falsely deposing against the appellants though they have denied the same.

100. It is true that no independent witness has come forward to support the prosecution case though it appears from the evidence of PW1 and PW2 that several persons had arrived at the place of occurrence soon after the incident as it was a busy market place. The evidence of PW1 and PW2 who are parents of the deceased simply because they being highly interested and partisan witnesses cannot be thrown out by this Court in view of the settled principle of law laid by the by the Apex Court in *catena* of decisions. In this regard, it is equally true that the evidence of the family members of the deceased should be examined by the Court carefully and put to strict scrutiny and if from the evidence it is established that the same is worthy of credence and support the prosecution case, then their evidence should not be thrown out on the count that they being highly

interested and partisan witness being related to the deceased.

101. In the instant case, it is no doubt that PW1 and PW2 are the parents of the deceased and claimed themselves to be the eye witness of the occurrence, but after going through their testimony they can be put in the category of neither wholly reliable nor wholly unreliable witness as their evidence does not conclusively prove the guilt of the accused appellants beyond reasonable doubt though their evidence examined by the Court for corroboration in material particulars by direct and circumstantial testimony.

102. In this regard, a reference may be made to a decision of the Apex Court in the case of **Vedivelu Thevar Vs. State of Madras, reported in AIR 1957 SC614**, wherein the Apex Court has classified the testimony of a witness into three categories viz. (i) wholly reliable (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable and observed that though in the first two categories of classification, there may not be any difficulty in coming to conclusion neither accepting or rejecting the testimony, but it is in the third category of cases that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony either direct of circumstantial.

103. It was also argued on behalf of the learned counsel for the complainant that the appellant Nishu @ Brijesh Dixit in collusion with his parents had got his younger brother Ishu arrested and sent to jail at Fatehgarh in his place in Case Crime No.506 of 2006, under Sections 392, 411 I.P.C. in which he was involved to commit the murder of the deceased as he has raised the said argument from the evidence of PW5-Udai Bhan Singh, the Investigating Officer of the case, but he has failed to demonstrate before the Court by cogent evidence the said argument. Further, there appears to be no evidence to show that the appellant Nishu @ Brijesh Dixit who was wanted in Case Crime No.506 of 2006 managed escaped his arrest in the said case to commit the murder of the deceased in the present case and no further evidence was led in this regard before the trial Court against the appellant Nishu @ Brijesh Dixit in this context. Only a casual reference of Case Crime No.506 of 2006, under Sections 392, 411 I.P.C. was made from the evidence of PW5 without there being any material to corroborate the same by any other circumstances or evidence. Hence, the said argument of learned counsel for the complainant does not appear to be sound one and cannot be accepted.

104. The argument of learned counsel for the complainant that the accused appellants could not demonstrate before this Court the reason for their false implication in the present case by PW1 as he was having no enmity with them, but in this regard it is to be noted that it is first duty of the prosecution to establish its case beyond reasonable doubt against the accused than to question the accused for their false implication which the prosecution has failed to prove its case beyond reasonable doubt against the appellants. Thus, the said argument of counsel for the complainant does not hold good in our considered opinion.

105. The learned counsel for the complainant further failed to reply as to what was the reason for implicating the appellant Lalit Dixit who is the father of the appellant Nishu @ Brijesh Dixit by giving an

ornamental role of exhortation to him on which the other two appellants are stated to have fired at the deceased, though as per the prosecution case the dispute, if any, was between the appellant Nishu Dixit and Chandan Kumar and the deceased.Thus, this circumstance further shows that PW1 Ghurai Lal Gupta was being guided by some one for falsely implicating persons for oblique motives and one of the co-accused Chandan Tiwari who was further implicated by him during the course of investigation and arrayed as an accused during the investigation, was put to trial and ultimately acquitted by the trial Court finding his involvement to be false.

106. Thus, in view of the aforesaid foregoing discussions, the Court after scanning and scrutinizing the prosecution evidence and findings recorded by the trial Court in convicting and sentencing the appellants finds that the conviction and sentence of the appellants recorded by the trial Court is not sustainable on the basis of the evidence on record. The appellants are entitled for the benefit of doubt, as this Court has found evidence of PW1 and PW2 neither wholly reliable nor unreliable as from their evidence the guilt of the appellants is not fully established beyond reasonable doubt and it would be quite unsafe to hold them guilty. Hence, in view of the same, the judgement and order dated 30.10.2013 passed by the trial Court is liable to be set aside by this Court. It is, accordingly, set aside and the appellants are acquitted of the charges. The appeal stands **allowed**.

107. The appellant no.1-Nishu @ Brijesh Dixit and appellant no.3-Chandan Kumar are stated to be in jail, they shall be released forthwith, unless otherwise wanted in any other criminal case.

108. The appellant No.2-Lalit Dixit is stated to be on bail. His bail bonds and sureties are discharged. He need not surrender.

109. It is further directed that the appellants shall furnish bail bond with surety to the satisfaction of the Court concerned in terms of the provision of Section 437-A of Cr.P.C.

110. The Registrar General of this Court is directed to ensure that the certified copy of this order along with the lower court record be transmitted to the trial Court concerned for its information and compliance forthwith.

(2020)06ILR A560
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Jail Appeal No. - 7338 of 2010

Shravan ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Manoj Kumar Srivastava, Sri Birendra S. Pandey, Sri Mohd. Farooq Ansari

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

Criminal Law - Indian Penal Code,1860- Exception 4 to Section 300 of the IPC - Applies in the absence of any premeditation. The help of

Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

In order to come within the purview of Exception 4 to Section 300, it is equally important to show that the offender/ accused has not taken " undue advantage" or acted in a cruel or unusual manner.

Criminal Law - Indian Penal Code- Section 304 - Culpable Homicide not amounting to Murder- whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

If the facts proved by the prosecution do not bring the case within the ambit of any of the four clauses to Section 300 IPC, then the offence would be of " Culpable Homicide not amounting to Murder" being punishable under the First or Second Part of Section 304 IPC.

Criminal Law - Indian Penal Code, 1860- Section 304 Part II- Sudden fight- No pre-meditation- Absence of intention-The case in hand is of a sudden fight without any premeditation or overreacted while committing the crime in question, and without there being any intention on the part of the appellant and, accordingly, Exception 4 to Section 300 of IPC would be attracted in the facts and circumstances of the case. The crime committed by the accused-appellant, as such, does not travel beyond an offence described under Section 304 Part II of Indian Penal Code.

In the facts of the present case, there was a heated altercation initially between the deceased and the accused persons when suddenly one accused assaulted the deceased with a knife. Hence, the case is one of sudden quarrel without any premeditation and intention on part of the accused and will come within the ambit of Section 304 Part II of the IPC. Sentence reduced to period already undergone by the appellants in jail and fine enhanced to Rs. 50,000/-.

(Para 19, 20, 21, 25, 26, 27, 28, 29)

Criminal Appeal partly allowed. (E-3)

Case Law relied upon/ Discussed:-

1**.** St. of A. P Vs Rayavarapu Punnayya & anr.,(1976) 4 SCC 382

2. Budhi Singh Vs St. of H.P (2012) 13 SCC 663

3. Kikar Singh Vs St. of Raj. (1993) 4 SCC 238

4. Surain Singh Vs.St. of Punj. (2009) 4 SCC 331

5. Ankush Shivaji Gaikwad Vs St. of Maha (2013) 6 SCC 770

6. Kumaran Vs St. of Kerala & anr. (2017) 7 SCC 471

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Instant Jail Appeal arises out of impugned judgment and order dated 09.09.2010 passed by the Additional Sessions Judge, Court No.12, Aligarh in Sessions Trial No.1019 of 2008, convicting the appellant under Section 302/34 of Indian Penal Code and sentencing him to undergo imprisonment for life with a fine of Rs.10,000/-; in default thereof, three months additional simple imprisonment.

2. The entire case, in a nutshell is, that complainant Smt. Rani (PW-1) w/o Kalyan Singh, lodged a complaint (Ex Ka.1) on 07.03.2008 at 00.15 am, alleging that on 06.03.2008 at 10.30 pm, her son Santosh was repairing electric wire from an electric pole adjoining wall of the accused on which accused Raju came and had hot talk to deceased Santosh. After hearing noise, complaint (PW-1), her husband Kalyan Singh (PW-2) and her brother-in-law (Devar) [not examined], reached to the place of incident; they saw Raju caught hold her son Santosh; appellant Shravan was assaulting to the deceased with knife and when they saw their son, then accused Raju and Shravan fled away. The deceased brought to the hospital by his parents for treatment, but the doctor declared him dead.

3. On the basis of aforesaid written complaint, a First Information Report (Ex. Ka.3) was registered as Crime No.91 of 2008 contemplating offences punishable under Section 302 of IPC against the accused persons.

4. Immediately after registration of the FIR, investigation was undertaken by Sub Inspector Sansar Singh Rathi (PW-6); he prepared Inquest Report (Ex Ka-5) and sent the dead body of deceased Santosh in a sealed cover for post-moretm in the custody of Constable Jai Prakash Yadav and Surajpal. Blood-stained earth as well as simple earth and one knife (Ex Ka.2) dated 26.04.2010 were recovered from the place of occurrence. The Investigating Officer also recorded the statements of eye witnesses.

5. Post-mortem of deceased Santosh was conducted on 07.03.2008 at about 4.00 pm by Dr. L.K. Saxena (PW-3), ENT Surgeon, District Malkhan Singh Hospital, Aligarh. He prepared post-mortem report (Ex Ka.2 dated 21.05.2010) and noticed the following injuries on the dead body of the deceased:

"(i) Incised wound 3.0 cm x 1.0 cm x bone deep on front of upper part of right thigh. Horizontal in place. Margie clean cut right femoral arty and vain are both ruptured 4.5 cm lateral to scrotum.

(ii) Abrasion 3.0 cm x 2.0 cm on right side fold lateral malleolus."

As per post-mortem report, cause of death of deceased Santosh was "haemorrhage and shock due to anti-mortem injuries".

6. Investigating Officer, after completing the investigation, submitted charge sheet (Ex Ka-11) against the accused persons under Section 302/34 of IPC.

7. The case, being a Sessions Triable, was committed to the Court of Sessions Judge. On 03.11.2009, the Sessions Judge heard the arguments and after considering the entire material available on record, framed charge against the accused persons under Section 302/34 of IPC. The aforesaid charge was read over and explained to the

accused persons. On denial of the same, trial commenced.

8. During the course of trial, prosecution supported its case with the aid of seven witnesses. After completing the prosecution evidence, the accused persons were examined under Section 313 Cr.P.C. in which, they have pleaded their innocence and false implication and claimed trial.

9. Learned trial Court, relying upon the statements of PWs, recorded the conviction of the accused persons for the offence punishable under Section 302/34 of IPC and sentenced them, as mentioned in paragraph no.1 of this judgment. Hence, this appeal.

10. Contention of learned counsel for the appellant is as under:

(i) that the incident took place suddenly and there was no premeditation on the part of the accused-appellant, therefore, it falls under Exception 4 to Section 300 of IPC.

(ii) that even if the entire case of prosecution is taken as it is, offence under Section 302/34 of IPC is not made out against the appellant and he is liable to be convicted under Section 304 Part I or Part II of IPC.

11. Per contra, in support of the impugned judgment, learned AGA, inter-alia, submitted that the conviction of the appellant is strictly in accordance with law. He further submitted that the trial Court has rightly convicted the appellant after due and proper consideration of the evidence available on record; hence, the order impugned does not warrant any interference.

12. We have heard Mr. Manoj Kumar Srivastava, learned counsel for the appellant and Sri Amit Sinha, learned AGA for the State and perused the material available on record.

13. Smt. Rani (PW-1), is the mother of deceased Santosh, who is an eye witness to the incident. She has stated that on the fateful day, while deceased was repairing electric wire from the electric pole on which, some altercation took place between deceased Santosh and accused Raju. Accused Raju caught hold the deceased and Shravan s/o Raju was assaulting him with knife. After hearing noise of quarrel, she and her husband Kalyan Singh (PW-2) and brother-in-law Vijay came there, then accused Raju and Shravan fled away. She has further stated that she saw the incident in the electrical right and she had identified the accused.

14. Sri Kalyan Singh (PW-2), is the father of deceased Santosh, who is also an eye witness to the incident. He has stated that after hearing noise of quarrel between his son and accused, he reached to the place of incident and saw that Raju caught hold his son and Shravan was assaulting to the deceased with knife, thereafter, the accused persons fled away from the spot.

15. In the present case, the incident took place on 06.03.2008 at 10.30 pm. There was some hot talks between accused persons and the deceased and then appellant has caused injuries to deceased Santosh with knife. After sustaining injuries, the injured was taken to hospital by Smt. Rani (PW-1) and Sri Kalyan Singh (PW-2), mother and father of the deceased, wherein doctor declared him dead. Both the eye-witnesses have duly supported the prosecution case and have categorically

stated as to the manner in which the incident occurred. Eye-witnesses of the incident, namely, Smt. Rani (PW-1) and Sri Kalyan Singh (PW-2), mother and father of the deceased, have been cross-examined at great length, but except some minor variations and natural contradictions, nothing useful to the defence has come out.

16. A close scrutiny of the depositions of the eye-witnesses, would go to show that on fateful day, while deceased was repairing electric wire from electric pole, some heated altercation took place between deceased Santosh and the accused persons. Co-accused Raju caught hold the deceased and the deceased was assaulted all of a sudden by the appellant with knife, as a result of which, he died.

17. Considering all these aspects of the case, we are of the view that the complicity of the accused persons in commission of offence has been duly proved by the prosecution.

18. Now the next question, which arises for consideration of this Court is, as to whether the act of accused-appellant would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'.

19. Before proceeding further, it is relevant to refer to the provisions of Section 300 of IPC, which read as under:

*"**300. Murder.**- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-*

Secondly.- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly.- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

*Exception 1.- **When culpable homicide is not murder.**-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above Exception is subject to the following provisos:-

First.- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power

given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this

case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

20. Considering all the aspects of the case, we are of the view that there was no premeditation on the part of the accused-appellant to kill the deceased.

21. The Apex Court in ***State of Andhara Pradesh vs. Rayavarapu Punnayya and Another1***, while drawing a distinction between Section 302 and Section 304 of IPC, held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the

second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

22. In ***Budhi Singh vs. State of Himachal Pradesh2***, the Supreme Court, held as under:

18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder.…."

23. In ***Kikar Singh vs. State of Rajasthan3***, the Apex Court held as under:

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying

him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4.…"

24. All the above three cases were considered by the ***Apex Court in Surain Singh vs. The State of Punjab4*** and ultimately, it has been held by the Apex Court in that particular case, that the accused was liable to be convicted under Section 304 Part II of IPC and not under Section 302 of IPC.

25. As a matter of fact, thus, the case in hand is of a sudden fight without any premeditation or overreacted while committing the crime in question, and without there being any intention on the part of the appellant and, accordingly, Exception 4 to Section 300 of IPC would be attracted in the facts and circumstances of the case.

26. In totality of the facts available, the crime committed by the accused-appellant, as such, does not travel beyond an offence described under Section 304 Part II of Indian Penal Code.

27. In view of the above, we are of the considered opinion that the trial Court has erred in law, while convicting the accused appellant under Section 302 of IPC. The judgment and order impugned dated 09.09.2010, hence, is set aside. The accused appellant is held guilty for commission of an offence punishable under Section 304 Part II of Indian Penal Code.

28. So far as sentence part is concerned, the accused-appellant has already remained in jail for about 11 years and 11 months. According to us, ends of justice would be served, if his sentence is reduced to the period already undergone by him order accordingly. As the appellant is reported to be in jail, he be set free forthwith, if not required in any other case.

29. However, considering the provisions of Section 357 of Cr.P.C. and judgment of the Apex Court in ***Ankush Shivaji Gaikwad vs. State of Maharashtra5***, we are of the view that the accused-appellant is liable to compensate Smt. Rani (PW-1) and Sri Kalyan Singh (PW-2), mother and father of the deceased by paying a total compensation of Rs.50,000/- (Fifty Thousands). Accordingly, accused-appellant is directed

to deposit Rs.50,000/- within a period of three months, after being released from jail before the trial court and, in turn, the trial court shall disburse the said amount to Smt. Rani (PW-1) and Sri Kalyan Singh (PW-2), mother and father of the deceased respectively. In case, the appellant fails to deposit the said compensation amount within the stipulated time, the court below shall proceed against him in the light of judgment of the Apex Court reported in ***Kumaran vs. State of Kerala and another, (2017) 7 SCC 471.***

30. The appeal is ***partly allowed.***

31. Let a copy of this judgment be sent to the concerned trial Court forthwith for compliance.

(2020)06ILR A569
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Crl. Misc. Writ Petition No. - 10661 of 2016

Vijay Kumar Pandey ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Neeraj Pandey, Sri Raj Kumar Sharma

Counsel for the Respondents:
A.G.A., A.S.G.I.2016/0057, Sri R.P.S. Chauhan

Section 197 (1) Cr.P.C.-Constitutional validity of section 197 (1) Cr.P.C. challenged-as it is discriminatory by excluding such public servants -who are not removable with sanction of State Government -Petitioner-Deputy Jailor-be appointed or removed without sanction of State Government-section 197 Cr.P.C. purpose-State also concerned with such offence by public servants-not discriminatory-Mandamus to State for ammending section 197 Cr.P.C. -cannot be issued-being of legislative character.

Writ Petition dismissed. (E-9)

List of cases cited:-

1.State of Orissa through Kumar Raghvendra Singh and Ors. vs. Ganesh Chandra Jew, 2004(8) SCC 40;

2. D.T. Virupakshappa vs. C. Subhash, 2015(12) SCC 231;

3. R.S. Nayak vs. A.R. Antulay, AIR 1984 SC 684;

4. Ram Krishna Dalmia vs. Shri Justice S.R. Tendolkar and Ors., 1959 SCR 279;

5.The State of West Bengal vs. Anwar Ali Sarkar, 1952 SCR 284;

6. Western M.P. Electric Power and Supply Company Ltd. vs. State of U.P. and Anr., 1969(3) SCR 865

7. Hanumant Shrinivas Kulkarni Versus Emperor, (31) 1930 Crl.L.J. 353

8. E Versus G. Sadagopan, 1953 Crl.L.J.1929

9.Indu Bhushan Chatterjee Versus State, AIR 1955 Cal.430

10.Gurbachan Singh Versus State, AIR 1970 Delhi 102

11. R. Bala Krishna Pillai Vs. State of Kerala, (1996) 1 SCC 478

12.P.V. Narsimha Rao Versus The State, AIR 1998 SC 2120

13.Gauri Shankar Prasad Vs. State of Bihar, 2000 SCC (Cri) 872

14.State of Himachal Pradesh Vs. M.P. Gupta, 2004(2) SCC 349

15. State of Orissa and others Vs. Ganesh Chandra Jew, AIR 2004 SC 2179

16. Rakesh Kumar Mishra Versus State of Bihar, JT 2006 (1) SC 1

17. Devinder Singh and others vs. State of Punjab through CBI, (2016) 12 SCC 87

18.S.A. Venkataraman Versus State, 1958 SCR 1040

19. Dilawar Singh Versus Parvinder Singh @ Iqbal Singh & another, (2005) 12 SCC 709

20. Union of India & ors Vs. Parul Debnath & ors JT 2009 (9) SC 134

21. Maharastra State Road Transport Corporation & Anr Vs. Casteribe Rajya P. Karmchari Sanghatana JT 2009 (11) SC 609

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

1. Heard Sri Raj Kumar Sharma, Advocate for petitioner and Sri Udit Chandra, learned A.G.A. as well as Sri R.P.S. Chauhan, Advocate for respondents.

2. Petitioner has assailed constitutional validity of Section 197(1) of Criminal Procedure Code, 1973 *(hereinafter referred to as "Cr.P.C.")* as violative of Articles 14 and 16 of Constitution of India to the extent those public servants are excluded who are not removable by State Government. It has also sought a mandamus commanding Respondents-1 and 2 to amend Section 197(1) so as to include petitioner as well as those public servants who are not removable by State Government or Central Government. Petitioner has further sought a writ of certiorari to quash entire criminal proceedings in Criminal Case No. 5375 of 2005 as also order dated 10.12.2015 passed by Chief Judicial Magistrate, Ghazipur taking cognizance upon charge sheet No. 41A/14 dated 30.08.2014, arising out of Case Crime No. 244 of 2014, under Sections 323, 504, 325, 302 IPC, Police Station Kotwali Ghazipur, District Ghazipur. Petitioner has also sought a writ of mandamus commanding respondents to obtain sanction from appropriate authority before prosecuting petitioner.

3. Facts, in brief, giving rise to present writ petition are that petitioner was appointed as Deputy Jailer in 2001 and initially posted at District Jail, Pratapgarh wherefrom he was transferred to different District Jails and in 2014 posted at District Jail Ghazipur. On 14.02.2014 petitioner was discharging his duties as Deputy Jailer as also Jailer Incharge of District Jail, Ghazipur since the post of Jailer was vacant and Jail Superintendent was on leave. On the said day petitioner alongwith other Jail Officials made search operations to find out use of illegal means for communication, i.e., Mobile Phones etc., when some inmates resisted and even attacked petitioner and his colleagues in planned manner so as to escape from Jail. They also started pelting stones forcing petitioner and his team to return to barracks. Aforesaid inmates while causing violence on petitioner and his team also caused destruction of Government property in order to break main gate of Jail. In respect of above destruction of public property and violence caused by some prisoners, petitioner lodged First Information Report *(hereinafter referred to as "FIR")* dated 14.02.2014 as Case Crime No. 243 of 2014 for the offences under Sections 353, 332, 147, 148, 149,

307, 336, 436, 436, 427 IPC at Police Station Kotwali Ghazipur. The violence also caused injury to petitioner and his colleagues. Petitioner sustained injury in his left hand leading to fracture of second metacarpal bone of left index finger, besides other injuries. The miscreants in Jail also attacked jail vehicles parked in jail campus. The said incident caused death of one, Vishwanath Prajapati, a prisoner, due to gun shot injury, he sustained on his left thigh, and later succumbed due to excessive bleeding.

4. Prisoners in Jail also lodged FIR against petitioner and five other Jail Warders, registered as Case Crime No. 244 of 2014, under Sections 147, 323, 504, 307 IPC, Police Station Kotwali Ghazipur, District Ghazipur. During investigation, Sections 148, 149, 109, 120B IPC were added and Section 307 IPC was converted into Section 302 IPC.

5. Petitioner also moved a Criminal Misc. Bail Application No. 10730 of 2014, which was allowed by this Court on 17.04.2014.

6. Police after making investigation submitted charge sheet No. 41A/14 dated 30.08.2014 and another charge sheet No. 41/14 dated 11.05.2014 in Case Crime No. 244 of 2014. Charge sheet No. 41/14 was filed against 11 prisoners and charge sheet No. 41A/14 was filed against petitioner and other jail officials.

7. Respondent-5 before filing charge sheet against petitioner opined that sanction from Government under Section 197 Cr.P.C. be obtained whereupon Respondent-4, i.e., Inspector General, Prison Administration and Reforms, U.P., Lucknow opined, vide letter dated 26.08.2014, that petitioner is a "Deputy Jailer" and for his removal sanction of State Government is not required, therefore, he is not a public servant, who is within the ambit of Section 197(1) Cr.P.C., hence no sanction under Section 197 is admissible.

8. Learned counsel for petitioner contended that making Section 197 Cr.P.C. inapplicable to petitioner is arbitrary. Statutory duties of petitioner as Deputy Jailer are at par with that of Jailer and for this purpose he placed reliance on Paras 838 to 840 of U.P. Jail Manual, which read as under:

*"**838. Duties of Jailors or Deputy Jailors before arrival of Superintendent:-**Pending the arrival of the Superintendent, the jailor or the deputy jailor shall act in accordance with the following instructions:*

(1) He shall post sentries above the main gate to observe and report the movement of the prisoners and detail a parity of warders of duty around the main wall of the jail.

(2) If the sentries on the main gate roof report that the main gate is clear, he shall take the remainder of the guard inside the jail, and in the event of an outbreak proceed to the scene, and if the circumstances are such as a necessitate immediate action, he shall warn the prironers three times in a loud voice that if they do not atonce submit and peacefully disperse, they shall be fired upon. If the circumstances are such delay the warning need not be repeated. If upon being warned, the prisoners do not submit and disperse, and if there appear to be no other immediate means of quelling the disturbance, he shall order the guard to fire upon them. But the firing shall cease the moment the prisoners disperse or yield.

839. Superintendent to assume charge of operations.--*The Superintendent shall on arrival assume charge of the operations.*

840. Use of arms at outbreaks or attempted escape-*The following rules have been made under clause (6), Section 59 of the Prisons Act, 1894 (Act IX of 1894), regulating the use of arms against any prisoners or body of prisoners in the case of an outbreak of attempt to escape:*

(1) Any officer of the prison may use a sword, baynot, firearm or any other weapon against any prisoner escaping or attempting to escape; provided that resort shall not be had to the use of any such weapon unless such officer has reasonable ground to believe that he cannot otherwise prevent the escape.

(2) Any officer of the prison may use a sword, baynot, firearm or any other weapon on any prisoner engaged in any combined outbreak or any attempt to force or break open the outer gate or enclosure wall of the prison, and may continue to use such weapon so long as such combined outbreak or attempt is being actually prosecuted.

(3) Any officer of the prison may use a sword, bayonet, firearm or any other weapon against any prisoner using violence to any offfice of the prisoner or other person; provided that the such officer of the prison or other person is in danger of life or limb, or that other grievous hurt is likely to be caused to him.

(4) Before using firearm against a prisoner under this paragraph, the officer of the prison shall, except where circumstances make such course impossible, give a warning to the prisoner that he is about to fire on him.

(5) No officer of the prison shall, when a superior officer is present, use any arms against a prisoner under this paragraph except under the orders of such superior officer."

9. It is contended that confining the scope of sanction under Section 197 Cr.P.C. only to such public servants who are not removable except by sanction of State Government and thereby creating two classes of public servants, i.e., those who are removable and those who are not so, is arbitrary creating an artificial discrimination, hence violative of Articles 14 and 16 of the Constitution o India. Reliance is placed by petitioner in this regard on **State of Orissa through Kumar Raghvendra Singh and Ors. vs. Ganesh Chandra Jew, 2004(8) SCC 40; D.T. Virupakshappa vs. C. Subhash, 2015(12) SCC 231; R.S. Nayak vs. A.R. Antulay, AIR 1984 SC 684; Ram Krishna Dalmia vs. Shri Justice S.R. Tendolkar and Ors., 1959 SCR 279; The State of West Bengal vs. Anwar Ali Sarkar, 1952 SCR 284;** and, **Western M.P. Electric Power and Supply Company Ltd. vs. State of U.P. and Anr., 1969(3) SCR 865.** He further submits that under Section 6 of Prevention of Corruption Act, 1947 *(hereinafter referred to as "Act, 1947")* there is no such classification in respect of public servants as has been carved out in Section 197 Cr.P.C. and this also shows that classification under Section 197 Cr.P.C. is artificial and illegal, has no rationale with object sought to be achieved.

10. On the contrary, learned A.G.A. submitted that petitioner is basically challenging entire proceedings on the ground of lack of sanction under Section 197 Cr.P.C. but this is in accordance with law since Section 197 Cr.P.C. is not attracted in the case of petitioner. Validity of Section 197 Cr.P.C. has already been upheld by Supreme Court and, therefore, it

is not open to petitioner to re-agitate the same issue, hence writ petition is liable to be dismissed.

11. Learned counsel for petitioner submitted that validity of Section 197 Cr.P.C. is upheld when it was challenged on the classification of treating public servants as one class vis-a-vis other common offenders but he submits that it has never been examined that Section 197 Cr.P.C. is creating two classes of public servants, i.e., those who are removable with sanction of State Government and those who are not so and this classification made is illogical and arbitrary, hence this Court can examine validity of Section 197 Cr.P.C. in the light of aforesaid ground.

12. The submissions advanced by learned counsel for petitioner, in fact, raise following issues:

(i) Whether exclusion of petitioner or alike public servants is a reasonable classification founded on an intelligible differentia which distinguishes the public servants that are grouped together on the basis of "removable by State Government" from the others left-out of the group, "who are not removable by State Government".

(ii) Whether the above differentia/classification created by law has a rational relation to the object of Section 197 Cr.P.C. (safeguard from unnecessary harassment of public servant).

(iii) Whether petitioner be treated equally to those public servants, who avail protection under Section 197(1) Cr.P.C. and does he stand in equal circumstance to those public servants, who avail protection under Section 197(1) Cr.P.C.

13. Though we have noted the submission by framing three issues but we find that all the issues are interconnected and can be examined collectively.

14. Since entire controversy is centered around Section 197 Cr.P.C., it would be appropriate to reproduce the same as under:

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

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

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

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

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or

purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

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

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

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

15. Section 197 Cr.P.C. has referred to two terms. One is the "public servant" and another "offence".

16. The term "offence" has been defined in Section 2(n) of Cr.P.C. and Section 40 IPC and both may be reproduced as under:

"(n) "Offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1891 (1 of 1871)."

"40. "Offence"-Except in the Chapters and Sections mentioned in clauses 2 and 3 of this Section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter V-A and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

17. Term "public servant" has not been defined in Cr.P.C. but is defined in Section 21 IPC. We may refer the definition of "public servant" at a later stage whenever it is necessary.

18. At this stage suffice it to mention that learned counsel for parties have admitted that Rules governing recruitment and conditions of service of "Deputy Jailer" have been framed under proviso to Article 309 of Constitution are U.P. Jail Executive Subordinate (Non Gazetted) Service Rules, 1980 *(hereinafter referred to as "Rules, 1980").* Under the Rules, initially framed in 1980, as per Rule 3(a), "appointing authority" means Inspector General of Prisons, Uttar Pradesh. Said Rules, 1980 have been amended by U.P. Jail Executive Subordinate (Non Gazetted) Service (First Amendment) Rules, 2006 *(hereinafter referred to as "Rules, 2006")* published in U.P. Gazette (Extraordinary) dated 22.06.2006 and thereby Rule 3(a) has been substituted and now "appointing authority" means Director General of Prison Administration and Reforms Services, U.P.

19. Rules, 1980 has further been amended by U.P. Prison Administration and Reforms Executive Subordinate (Non-Gazetted) Service (Second Amendment) Rules, 2014 *(hereinafter referred to as "Rules, 2014")* published in U.P. Gazette (Extraordinary) dated 27.06.2014 and thereby cause title of Rules has been changed. Earlier Rules comprised of only Group C posts and now includes Group B posts also, but the same remained to be in the status of Non-Gazetted Subordinate Services.

20. Since in the present case, incident is of 2014, learned counsel for parties admitted that petitioner, a Deputy Jailer, can be appointed by Director General of Prison Administration and Reforms Services, U.P. and also can be removed by him and sanction of State Government is not required.

21. Now we proceed to consider applicability of Section 197 Cr.P.C. providing sanction of criminal prosecution and the purpose and objective of aforesaid provision.

22. Section 197 Cr.P.C. was also available in Code of Criminal Procedure, 1898. It came up for consideration before Bombay High Court in **Hanumant Shrinivas Kulkarni Versus Emperor, (31) 1930 Crl.L.J. 353**. Court observed that object of sanction is to guard against vexatious proceedings against public servants and to secure the well considered opinion of a superior authority before their prosecution.

23. In **E Versus G. Sadagopan, 1953 Crl.L.J.1929** Madras High Court said that the object of sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolite prosecution.

24. In **Indu Bhushan Chatterjee Versus State, AIR 1955 Cal.430** Calcutta High Court said that provision for sanction is a most salutary safeguard. The sanctioning authority is placed somewhat in the position of a sentinel at the door of Criminal Courts in order that no irresponsible or malicious prosecution can pass the portals of the Court of Justice.

25. In **Gurbachan Singh Versus State, AIR 1970 Delhi 102** Delhi Bench of Punjab High Court said that intention of legislature in providing for a sanction in respect of offences covered by Section 6 of

Act, 1947 is merely to afford a reasonable protection to public servants in discharge of their official functions. It is not the object of section that a public servant who is guilty of the particular offence mentioned in that section should escape the consequences of his criminal act by raising the technical plea of invalidity of sanction. The sanction is a safeguard for innocent and is not a shield for guilty.

26. In **R. Bala Krishna Pillai Vs. State of Kerala, (1996) 1 SCC 478** Supreme Court while referring to the Law Commission's 41st Report with respect to Section 197 quoted the following observations of Law Commission:

"The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. ***The ultimate justification for the protection conferred by section 197 is the public interest in seeking that official acts do not lead to needless or vexatious prosecutions."*** *(emphasis added)*

27. In **P.V. Narsimha Rao Versus The State, AIR 1998 SC 2120** Supreme Court said:

"The requirement of sanction under Section 19(1) is intended as ***a safeguard against criminal prosecution of a public servant on the basis of malicious or frivolous alleging by interested persons.*** *The object underlying the said requirement is* ***not to condone the commission of an offence by a public servant."*** *(emphasis added)*

28. In **Gauri Shankar Prasad Vs. State of Bihar, 2000 SCC (Cri) 872** Supre Court held:

"The object of the section is ***to save officials from vexatious proceedings*** *against Judges, magistrates and public servants but it is no part of the policy to set an official above the common law. If he commits an offence not connected with his official duty he has no privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction. Section 197 embodies one of the exceptions to the general rules laid down in Section 190 Cr.P.C., that any offence may be taken cognizance of by the Magistrates enumerated therein. Before this section can be invoked in the case of a public servant two conditions must be satisfied i.e.(1) that the accused was a public servant who was removable from his office only with the sanction of the State Government or the Central Government; and (2) he must be accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty." (Emphasis added)*

29. In **State of Himachal Pradesh Vs. M.P. Gupta, 2004(2) SCC 349** it was said:

"The protection given under Section 197 ***is to protect responsible public servants against the institution of possible vexatious criminal proceedings*** *for offence alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties*

without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution." (Emphasis added)

30. In **State of Orissa and others Vs. Ganesh Chandra Jew, AIR 2004 SC 2179** it was held:

*"The protection given under Section 197 is **to protect responsible public servants** against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution."*

(Emphasis added)

31. Supreme Court has again reiterated in **Rakesh Kumar Mishra Versus State of Bihar, JT 2006 (1) SC 1** as under:

*"The protection given under Section 197 is to protect **responsible public servants** against the institution of possibly vexatious criminal proceedings...." (emphasis added)*

32. The above authorities have also been followed in **Devinder Singh and others vs. State of Punjab through CBI, (2016) 12 SCC 87.**

33. The object of the legislature for making provision pertaining to sanction seems to be clear. Where a public servant is prosecuted for an offence, which challenges his honesty and integrity, the issue in such a case is not only between the prosecutor and the offender but the State is also vitally concerned in it as it affects the morale of the public servants and also the administrative interests of the State. For these reasons, the discretion to prosecute appears to be taken away from the prosecuting agency and is vested in departmental authorities, i.e., the employer probably with the view that they may assess and weigh the accusation in a far more dispassionate and responsible manner. The ultimate justification is public interest. It, however, does not condone the commission of an offence by a public servant or to use it as shield to escape from legal proceedings on mere technicalities.

34. The observations of Supreme Court in **State of Himachal Pradesh Vs. M.P. Gupta (supra); State of Orissa and others Vs. Ganesh Chandra Jew (supra);** and, **Rakesh Kumar Mishra Versus State of Bihar (supra)** clearly shows that protection provided in Section 197 is for "responsible public servants" who are mainly involved in superior duties including policy decision so that such superior officials may not be harassed in taking policy decision etc. This protection is not available to every public servant. When State itself has made a distinction based on degree of responsibility, nature of duties, nature of functions etc., and that is why the public servants who are removal with sanction of Government and those who are not, are treated in a two different classes, it cannot be said that distinction is artificial and has no nexus to the object sought to be achieved. The very distinction in the category of two government servants, namely, those who are supposed to take responsible decisions and those who are not, shows that neither it is artificial nor

irrational nor lack nexus to the object sought to be achieved.

35. Parity sought to be drawn by learned counsel for petitioner with reference to the provisions of Act, 1947 and Prevention of Corruption Act, 1988 *(hereinafter referred to as "Act, 1988")* is misconceived since both statutes, i.e., Prevention of Corruption Act and Cr.P.C. have different ambit and scope.

36. Section 6 of Act, 1947 and Section 19 of Act, 1988 is much wider comparing to Section 197 Cr.P.C. The definition of "public servant" under Act, 1988 is wider than Section 6 of Act, 1947 and, therefore, scope of Section 6 of Act, 1947 and Section 19 of Act, 1988 is much different than Section 197 Cr.P.C. Section 197 Cr.P.C. is a part of procedural law since Cr.P.C. is procedural law while Act, 1947 and Act, 1988 is special enactment having its own independent procedural provisions.

37. Further while considering Section 6 of Act, 1947 and Section 197 Cr.P.C. Supreme Court in **S.A. Venkataraman Versus State, 1958 SCR 1040** has observed that Section 6 of Act, 1947 must be considered with reference to the words used in the Section independent of any construction which may have been placed by the decisions on the words used in Section 197 Cr.P.C.

38. In this regard reference may be made to Supreme Court's decision in **Dilawar Singh Versus Parvinder Singh @ Iqbal Singh & another, (2005) 12 SCC 709** wherein Court said:

*"**The Prevention of Corruption Act is a special statute** and as the preamble shows this Act has been enacted to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith. Here, the principle expressed in the maxim Generalia specialibus non derogant would apply which means that if a special provision has been made on a certain matter, that matter is excluded from the general provisions. (See Venkateshwar Rao V. Govt. of Andhra Pradesh, AIR 1966 Supreme Court 828, State of Bihar Vs. Yogendra Singh AIR 1982 Supreme Court 882 and Maharashtra State Board of Secondary Education V. Paritosh Bhupesh Kumar Sheth AIR 1984 Supreme Court 1543. **Therefore, the provisions of Section 19 of the Act will have an overriding effect over the general provisions contained in Section 190 or 319 Cr.P.C.** A Special Judge while trying an offence under the Provisions of Corruption Act, 1988, cannot summon another person and proceed against him in the purported exercise of power under Section 319 Cr.P.C. if no sanction has been granted by the appropriate authority for prosecution of such a person as the existence of a sanction is sine quo non for taking cognizance of the offence qua that person."* (Emphasis added)

39. Therefore, the submission that Section 197 Cr.P.C. is discriminatory by excluding such public servants who are not removable with sanction of State Government, has no substance and has to be rejected.

40. Petitioner has further sought a writ of mandamus commanding respondents to amend Section 197 Cr.P.C. but I am afraid that such a mandamus cannot be issued since it is within the realm of policy and legislative in character, in respect whereto no mandamus can be issued. This aspect has been settled in

Union of India & ors Vs. Parul Debnath & ors JT 2009 (9) SC 134 wherein Court has held as under:

"....Court cannot direct the creation of posts since the same is prerogative of the executive or the legislative authorities and the Court could not arrogate to itself this purely executive or legislative function and direct creation of the posts in the organization. It was also observed that this Court has, time and again, pointed out that the creation of a post is an executive and legislative function as it involves economic factors". (emphasis added)

41. The same view has been reiterated in **Maharastra State Road Transport Corporation & Anr Vs. Casteribe Rajya P. Karmchari Sanghatana JT 2009 (11) SC 609.**

42. Next prayer that respondents be directed not to proceed unless sanction is granted by State Government also cannot be accepted for the reason that, whether sanction can be granted or not is within the authority of State Government. This Court can only examine whether sanction is necessary or not and if necessary, whether it has been granted before taking cognizance but no mandamus can be issued to competent authority to act in a particular manner.

43. In the entirety of facts and circumstances, we find no merit in the writ petition. Dismissed accordingly. Interim order, if any, stands vacated.

(2020)06ILR A579

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Crl. Misc. Writ Petition No. - 33609 of 2018

Prof Chandra Shekhar Upadhyay & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Aishwarya Pratap Singh, Sri Girijesh Kumar Gupta, Sri Gopal Swarup Chaturvedi, Sri Ratnesh Kumar Shukla

Counsel for the Respondents:
A.G.A., Sri Anoop Trivedi, Sri Anupam Kumar, Sri T.P. Singh

A. Quashing of FIR-Comment or taunting on specialization of knowledge in a close door meeting-is not publication which affects the reputation -provision of section 500 IPC-not attracted;

Section 66 D of Information Technology (Ammendment)Act, 2008 applies if cheating by personation -No offence under sections in which FIR registered are made out-F.I.R. quashed.

Writ Petition allowed. (E-9)

Held, Comments or taunting of a person in respect of his 16 specialization of knowledge in a close door meeting i.e. during the course of interview cannot be said to be a publication of something which affects the reputation of any person and such observations or comments, in our view, will not attract Section 500 IPC. This situation, if accepted, may result in everyday complaints against the member of interview board or the persons performing judicial or quasi judicial functions whenever they make any observation with regard to understanding or knowledge of another person. (para 26)

So far as publication of E-mail is concerned, complaint itself shows that it was sent by some unknown person and there is nothing to show

that E-mail was sent by any of these petitioners and, therefore, for the said E-mail, Section 500 IPC cannot be attracted against petitioners. (para 27)

List of cases cited:-

1. Smt. Kiran Bedi v. Committee of Inquiry and another 1989 (1) SCC 494

2. D.F. Marion v. Davis 10 55 ALR 171

3.Board of Trustees of the Port of Bombay vs. Dilipkumar Raghavendranath Nadkarni and Others (1983) 1 SCC 124

4.Vishwanath S/o Sitaram Agrawal v. Sau. Sarla 15 Vishwanath Agrawal 2012 (6) SCALE 190

5.Kishore Samrite Vs. State of U.P. and Others 2013 (2) SCC 398

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

1. Heard Sri Gopal Swarup Chaturvedi, learned Senior Counsel assisted by Sri Aishwarya Pratap Singh, learned counsel for petitioners, Sri T.P. Singh, learned Senior Counsel assisted by Sri Anupam Kumar, learned counsel for respondent-4 and learned AGA for respondents-1, 2 and 3.

2. This writ petition under Article 226 of Constitution of India has been filed by petitioners, Professor Chandra Shekhar Upadhyay, Professor Sanjay Mittal, Professor Rajiv Shekhar and Professor Ishan Sharma all working in Indian Institute of Technology *(hereinafter referred to as "IIT")* with a prayer to issue a writ of certiorari to quash First Information Report *(hereinafter referred to as "FIR")* registered as Case Crime No.1283 of 2018, under Sections 500 IPC, Section 66D of Information Technology Act, 2000 *(hereinafter referred to as "Act, 2000")* amended by Information Technology (Amendment) Act, 2008 *(hereinafter referred to as "Amendment Act, 2008")* and Section 3(2)(va) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended in 2015 *(hereinafter referred to as "Act, 1989")*, at Police Station Kalyanpur, District Kanpur Nagar.

3. Sri Gopal Swarup Chaturvedi, learned Senior Counsel contended that even if allegations contained in FIR are taken to be true, offences under aforesaid sections are not made out and, therefore, entire proceedings against petitioners pursuant to aforesaid FIR, are wholly illegal and amounts to gross abuse of process of law.

4. Thus, we have to consider "whether offences under the provisions wherein FIR has been registered are made out or not". For this purpose, it will be appropriate to reproduce the contents of FIR as under:-

*"सेवा में, श्रीमान जी थाना प्रभारी महोदय थाना–कल्याणपुर कानपुर नगर उत्तर प्रदेश 208016 विषय–सुब्रमण्यम असिस्टेंट प्रोफेसर एयरोस्पेस विभाग आई आई टी कानपुर को बदनाम करने के लिए अज्ञात व्यक्ति द्वारा फर्जी दस्तावेज सहित तारीख 15.10.2018 के ई–मेल के सम्बन्ध में सूचना तथा एफ आई आर दर्ज करने के निवेदन हेतु प्रार्थना पत्र महोदय 1– मेरा नाम सुब्रमण्यम सदरेला है एवं मेरी नियुक्ति आई आई टी कानपुर के एयरोस्पेस विभाग में तारीख 28 दिसम्बर 2017 की गयी। 2– इसके पूर्व जुलाई 2017 मे आई आई टी कानपुर ने सभी विभागों के लिए एससी/एसटी/ओबीसी/पीडब्ल्यूडी श्रेणियों से संबंधित संकाय की भर्ती के लिए विशेष अभियान की विज्ञप्ति की और मैंने इस अभियान के तहत आवेदन किया था। मैंने आई आई टी कानपुर से अपना परास्नातक और पीएचडी भी पूरा किया है। 3– आई आई टी कानपुर की भर्ती प्रकिया के एक हिस्से के रूप में, मुझे अक्टुबर 2017 में एयरोस्पेस इंजीनियरिंग विभाग में संगोष्ठी के लिए बुलाया गया। **इस संगोष्ठी के दौरान, डा0 ईशान शर्मा (केमिकल इंजीनियरिंग विभाग) ने उनके उपहास के***

दौरान एक समूह का नेतृत्व किया और व खुलेआम मेरे (डा0 सैदरला) के बारे में टिप्पणी करते रहे। उन्होंने अपने वक्तव्यों के माध्यम से मुझे निम्न बुद्धि का बताया, मैंने अपने आप को भयभीत और अपमानित महसूस किया लेकिन फिर भी मैने उनके सवालों का जबाब देने की कोशिश की क्योंकि मेरे पास विषय पर विशेषज्ञता और ज्ञान था *और जिनका मैंने राष्ट्रीय / अंतराष्ट्रीय मंचो पर प्रस्तुतीकरण भी किया था। 4–* ***डा ईशान शर्मा के नीचा दिखाने की कोशिश के बावजूद मुझे विभाग एवं संस्थान ने मेरी उम्मीदवारी की सिफारिश की।*** *उसके बाद इस सम्बन्ध में 26 जनवरी 2017 को बाहरी विशेषज्ञों की एक समिति ने जांच की और मेरी नियुक्ति के लिए सिफारिश की। बोर्ड के अध्यक्ष द्वारा अनुमोदन के बाद मुझे नियुक्ति पत्र 28 दिसम्बर 2017 को जारी किया गया। मैंने 1 जनवरी 2018 को अपना पदभार संभाला। 5– दिनांक 04. 01.2018 को विभाग मे शामिल होने के तुरंत बाद,* ***विभाग की एक संगोष्ठी में मेरे खिलाफ श्री संजय मित्तल ने व्यंग्यात्मक और अपमानजनक टिप्पणी की, कि नए संकाय के शामिल होने के कारण विभाग के मानकों में कमी आ रही है।*** *इसके बाद 9.01.2018 को डा संजय मित्तल ने मुझे और डा राघवेन्द्र को छोडकर एयरोस्पेस इंजीनियरिंग विभाग के सभी संकाय सदस्यों को ईमेल भेजा, और उन्होंने 10.10.2018 को एक संकाय बैठक बुलाई। 6– बैठक के दौरान एरोस्पेश इंजीनियरिंग विभाग के अधिकांश संकाय सदस्य उपस्थित थे जहॉ मेरी नियुक्ति के संबंध में तीन घंटे से अधिक समय तक एक चर्चा चली। यह पता चला है कि बैठक के दौरान, डा0 संजय मित्तल, डा0 चन्द्रशेखर उपाध्याय और डा0 दबोपाम दास, एरोस्पेस इंजीनियरिग विभाग के सभी वरिष्ठ प्रोफेसरों ने जूनियर प्रोफेसर को जूनियर प्रोफेसरों को यह समझाने के प्रयास किए कि* ***मेरी नियुक्ति इस विभाग के लिए अनुपयुक्त है तथा मैं मानसिक रूप से भी अयोग्य हूँ। 7– इस सबके दौरान डा0 सी.एस. उपाध्याय ने मेरे शैक्षणिक प्रमाण पत्रों को गलत तरीके से प्रस्तुत करने के लिए एक अभियान शुरू किया,*** *जिसमें यह बताया गया कि* ***मैं एक संकाय के रूप में नियुक्त किए जाने के लिए उपयुक्त नहीं हूँ।*** *8– इन सब बातों से परेशान होकर मैंने 12.01.2018 को एक ई मेल निदेशक महोदय को और अपने विभागाध्यक्ष को कापी (ब्ब) में भेजते हुए अपनी व्यथा बताई की* ***मैं एवं मेरा परिवार इस दुष्प्रचार से मानसिक रूप से उत्पीडन का शिकार हुए हैं और यह सब इसलिए है की मैं अनुसूचित जाति समुदाय से संबंधित हूँ।*** *9– मेरे प्रार्थना पत्र का संज्ञान लेते तुए एवं बोर्ड ऑफ गवर्नर ;ठव्ळद्ध के परामर्श पर निर्देशक महोदय ने एक कमेटी ;थ्बज थ्दकपदह ब्वउउपजजममद्ध का गठन किया जिसे निम्नलिखित तथ्य सामने लाने का निर्देश दिया गया। (क) ''मेरे डॉ सैदरला'' प्रति किया गया भेदभाव एवं उत्पीडन को स्थापित करना (ख) सही पाएं जाने पर इन व्यक्तियों की पहचान व उनके द्वारा उठाये गये कदमों को स्थापित करना। 10– डा0 उपाध्याय द्वारा दुष्प्रेरित प्रचार अभी थमा भी नहीं था की 01.02.2018 को डा0 राजीव शेकर ने सभी सेनेटरों को एक ई–मेल प्रेषित किया जिसमें लिखा था कि दस साल पहले की घटना फिर से घटित हुई है जिसने शैक्षिक नींव को पूरी तरह से हिला दिया है उन्होंने आगे लिखा की अभिषाप ने फिर से प्रभावित किया है यहां इसका उल्लेख करना चाहूंगा की सेनेटरों में केवल आई आई टी कानपुर के ही नहीं वरन बाहर के शिक्षण संस्थानों के प्रध्यापक भी आते हैं। और डा0 राजीव शेखर ने उन सभी को इस दुष्प्रचार में घसीटने की कोशिश की है। 11–* ***डा0 राजीव शोखर का उक्त ई–मेल मेरे संज्ञान में आया और इससे मैं और मेरा परिवार व्यथित हुए।*** *दिनांक 01.02.2018 को मैंने निर्देशक महोदय को पत्र लिखकर इस घटना को राष्ट्रीय आयोग अनुसूचित जाति में ले जाने की अनुमति मांगी। 12– कमेटी (फैक्ट फाइडिंग कमेटी) ने अपनी रिपोर्ट निर्देशक महोदय को 08 मार्च 2018 को सौंपी। जांच में कमेटी ने मेरी नियुक्त पर सही पाया ओर डा0 ईशान, डा0 संजय मित्तल, डा0 राजीव शेखर और डा0 चन्द्रशेखर उपाध्याय को उनके द्वारा किये गए मेरे उत्पीडन के लिए दोषी पाया। कमेटी ने एस सी / एस टी के तहत कार्यवाही की भी सिफारिश की। 13– उक्त घटना का संज्ञान लेते हुए राष्ट्रीय आयोग अनुसूचित जाति (एस सी एस सी) ने 13 मार्च 2018 को निदेशक महोदय को एक नोटिस जारी किया और उन्हें व्यक्तिगत तौर पर शिकायतकर्ता व विभागाध्यक्ष के साथ आयोग में 10 अप्रैल 2018 को सम्पन्न हुई। मीटिंग में संपूर्ण घटना की गंभीरता का संज्ञान लेते हुए एक विभागीय जांच उन चारों प्राध्यापकों को खिलाफ शुरू करने की संस्तुति की गयी। 15– 10 अप्रैल 2018 को माननीय आयोग के अध्यक्ष प्राध्यापक डा0 राम शंकर कथेरिया जी की अध्यक्षता में सुनवाई हुई और उसी दिन आयोग ने अपना*

आदेश दे दिया जिसको संस्थान को 13 अप्रैल 2018 को दे दिया गया। 16– उसके पश्चात चारों संकाय सदस्य अर्थात डा0 संजय मित्तल, डा0 चन्द्रशेखर उपाध्याय डा0 ईशान शर्मा तथा डा0 राजीव शेखर इलाहाबाद हाईकोर्ट गए और कोर्ट ने चारो को राष्ट्रीय आयोग अनुसूचित जाति के दिशा निर्देश के विरूद्ध ''स्टे'' स्थगन दे दिया। 17– स्थगन के पश्चात भी इसकी अनुमति दी गयी कि संस्थान अपनी तरफ से इन विषय पर जांच करा सके। माननीय जस्टिस सिद्दीकी ''अवकाश प्राप्त'' को संस्थान ने बतौर जांच अधिकारी 05 ई 2018 को आदेश संख्या IITK/DC-125/LC-43 के तहत जांच की जिम्मेदारी सौंपी। एक अन्य प्रतिष्ठित संकाय ''संकाय ''अवकाश प्राप्त'' सदस्य को भी जस्टिस श्री सिद्दीकी के सहायक के तौर पर नियुक्त किया गया। 18– माननीय जस्टिस श्री सिद्दीकी ने अपनी जांच रिपोर्ट बी ओ जी को संलग्नक के रूप में 17.08.2018 को सौंपी। रिपोर्ट के मुख्य रूप से निम्नलिखित तथ्यों को स्थापित किया गया। (ए) **मेरे आई आई टी में नियुक्ति की प्रकिया को पूर्ण रूप से सही पाया गया।** (बी) जांच में चारों संकाय सदस्य अर्थात डा. संजय मित्तल, डा0 चन्द्रशेखर उपाध्याय डा0 ईशान शर्मा तथा डा0 राजीव शेखर को Conduct Rule (Schedule-B) rule 3 (a) and (b) Under Status 13 (17) of IIT status के **अन्तर्गत गंभीर दुर्व्यवहार का दोषी पाया गया।** (सी) सभी चारों संकाय सदस्य डॉ0 संजय मित्तल, डा0 चन्द्रशेखर उपाध्याय डा0 ईशान शर्मा तथा डा0 राजीव शेखर को अनुसूचित जाति से सम्बन्धित व्यक्ति का सेक्शन 3 आफ ए एक्ट नं0–33 आफ 1989 में **सार्वजनिक तौर पर उपहास करने व प्रताडित करने का दोषी पाया गया।** 19– दिनांक 06.09.2018 को बी ओ जी की मीटिंग में सुनने में यह आया कि दो संकाय प्रतिनिधियों, डा0 देवोपम दास व डॉ0 एमएलएन राव के दबाव के कारण बोर्ड ने केवल सीसीएस उल्लंघन को माना तथा सेक्शन 3 आफ ए एक्ट नं0 33 आफ 1989 ''प्रेवेन्शन आफ एट्रोसिटीज एक्ट'' के अन्तर्गत होने वाले अपराध को नकार दिया। 20– इस बीच राष्ट्रीय अनुसूचित जाति ने डा0 सदरेला डा0 ए के घोष, आई आई टी कानपुर के निर्देशक, महोदय ने माननीय जस्टिस श्री सिद्दीकी के रिपोर्ट के संदर्भ में दिनांक 10.09.2018 को अपनी नई दिल्ली के आफिस में बुलाया। वहां चली बैठक में बी ओ जी (आई आई टी के) में लिए गये निर्णय पर तथा सेक्शन 3 आफ ए एक्ट नं0 33 आफ 1989 **''प्रेवेन्शन आफ एट्रोसिटीज एक्ट'' के अन्तर्गत होने वाले अपराध को नकारने पर गंभीर असंतोष प्रकट किया गया एवं आयोग ने पुनः निर्देश दिये।** 21– इस निर्देश के विपक्ष में चारों आरोपियों ने पुनः 26.09.2018 को रिट पिटीशन 32585/2018 के तहत इलाहाबाद हाईकोर्ट से स्टे ले लिया। 22– बीओजी सदस्यों की मीटिंग से पहले बी ओ जी पर प्रभाव डालने हेतु दिनांक 15.10.2018 को एक अज्ञात व्यक्ति के द्वारा studentiitk@gmail.com ईमेल आई डी से एक मेल बड़ी संख्या में वरिष्ठ संख्यायें सदस्यों में प्रसारित करके **यह दिखाने की कोशिश की गई, कि मैंने (डा0 सदरेला) अपनी पी.एच.डी. दूसरे से नकल करके पूरी की है। इस ई मेल में यह भी दावा किया गया कि मेरी डा0 सदरेला की, पीएचडी डिग्री वापस लेने चाहिए।** (जिससे मेरी नौकरी चली जाएगी) **यह ई मेल आई डी अब उपलब्ध नहीं है।** इससे लगता है कि **इस आईडी का निर्माण सिर्फ मुझे नीचा दिखाने के लिए किया गया था। यह सब कुछ यह साबित करने के लिए किया गया कि मैं अनुसूचित जाति का हूँ एवं मेरी बौद्धिक स्तर आई आई टी में पढ़ाने लायक नहीं है।** इससे मेरे **स्वाभिमान को व सामाजिक सम्मान को गंभीर क्षति पहुँची है और मुझे गंभीर मानसिक अवसाद झेलना पड़ा है।** मुझे संदेह है कि यह ई मेल उन चारों संकाय सदस्यों को बचाने के उद्देश्य से अज्ञात व्यक्ति द्वारा उनके कहने से फेलाया गया है, जो माननीय जस्टिस श्री सिद्दीकी जी की जांच में एक अनुसूचित जाति के व्यक्ति को ''सेक्शन 3 एक्ट नं0 33 आफ 1989 ''प्रवेन्शन आफ एट्रोसिटीज एक्ट'' के तहत दोषी पाए गये। उस अज्ञात ई मेल की छायाप्रति माननीय जस्टिस श्री सिद्दीकी जी की जांच रिपोर्ट की कापी एवं ई मेल studentiitk@gmail.com अकाउंट के बाद होने की सूचना एवं समस्त तथ्य मेरे पास उपलब्ध है । जांच के दौरान मैं ये सभी तथ्य जांच अधिकारी को उपलबध करा दूंगा। श्रीमान् जी से निवेदन है कि **फर्जी तथ्यों पर आधारित ई–मेल एवं सम्बन्धित व्यक्तियों के खिलाफ मुकदमा दर्ज करके आवश्यक कार्यवाही करने की कृपा करें।''**

Sir, 1-My name is Subramanyam Sadrela and my appointment was made in the Aerospace Department, IIT Kanpur on 28th December, 2017. 2- Before this, the IIT Kanpur had advertised the special drive

for recruitment related to SC/ST/OBC/PWD category faculties in all departments, and I had applied under the drive. I have done my post graduation and PhD from IIT Kanpur. 3-As a process of the recruitment by IIT Kanpur, I was called in October, 2017 to participate in a seminar at the Aerospace Engineering Department. During the seminar, Dr. Ishan Sharma, Chemical Engineering Department, made comment against me, and while leading a group, he kept making comments against me. Through statements, he declared me a person of low intelligence; I felt frightened and disgraced. Despite this, I tried my best to give replies to the questions, because I had knowledge and speciality on the subject, of which I had given my presentation at national and international level. 4-Despite attempt of Dr. Ishan Sharma to show me in poor light, the Department and the Institution had recommended my candidature. Thereafter, a committee of the external specialists conducted, in this respect, an examination on 26th January, 2017 and recommended for my appointment. After recommendation by Chairman of the Board, appointment letter was issued to me on 28th December, 2017. I took charge on 1st January, 2018. 5-On 04.01.2018, immediately after I joined the department, Sri Sanjay Mittal made sarcastic and derogatory remarks against me in a seminar that as the result of joining of new faculty, the standards of the department are not maintained properly. Thereafter on 09.01.2018 Dr. Sanjay Mittal sent an e-mail to all faculty members of the Department of Aerospace Engineering except me and Dr. Raghavendra, and he convened a meeting of faculty. 6- Maximum faculty members of the Department of Aerospace Engineering were present during the meeting where discussion in respect of my appointment held for more than three hours. During the meeting, it has been found that Dr. Sanjay Mittal, Dr. Chandrashekar and Dr. Dabopam Das, all the senior professors of the Department of Aerospace Engineering, tried to convenience the junior professors to the effect that my appointment is not suitable for this department and I am mentally ineligible also. 7- During it all, Dr. C.S. Upadhaya initiated a movement to wrongly present my educational certificates wherein it has been stated that I am not eligible to be appointed as Faculty. 8-Being vexed with these things, on 12.1.2018 I intimated my agony to the Director and Head of Department through an e-mail that I and my family have been subject to mental torture by this propaganda and this is all because I belong to the Scheduled Caste Community. 9-Taking cognizance of my application and on the advice of the Board of Governor (BOG), the Director constituted a committee (Fact Finding Committee) that was directed to bring out the following facts - (a) to establish discrimination and torture against "me i.e. Dr. Saidrala" (b) on finding it to be correct, identification of these persons and to establish steps taken by them. 10- Hardly had the abetted propaganda by Dr. Upadhyaya not stopped still when on 01.02.2018 Dr. Rajiv Shekar sent an e-mail to all the Senators wherein it was written that incident that occurred 10 years before has reoccurred which has completely jolted the educational foundation. He further wrote that curse has again effected. I would like to mention here that not only Professors of IIT Kanpur, but also those of other educational institutions attend Senators. Dr. Rajiv Shekhar has tried to drag all those in this propaganda. 11- I came to know about Dr. Rajeev Shekhar's aforesaid e-mail and due to this, my family

and I became upset. On 1.2.2018, I requested permission to take this incident to National SC/ST Commission through a written-application addressing to the Director. 12- The committee (fact Finding Committee) submitted its report before the Director on 8.3.2018. In the enquiry, the committee found me right on my appointment and held Dr. Ishan, Dr. Sanjay Mittal, Dr. Rajeev Shekhar and Dr. Chandrashekhar Upadhyay guilty for my harassment committed by them. The committee also recommended for action under SC/ST Act. 13- Taking cognizance of the aforesaid incident, the National SC/ST Commission issued a notice to the Director on 13.03.2018 and recommended him individually to initiate a departmental enquiry against those four professors in the meeting with the complainant and head of the department held in the commission on 10.4.2018 by taking cognizance of the gravity of the whole incident. 15-10.4.2018, hearing took place in chairmanship of hon'ble chairman of the commission Dr. Ram Shankar Katheria and on the same day, the commission passed its order which was handed over to the institution on 13.4. 2018. 16-Thereafter, the four faculty members namely Dr. Sanjay Mittal, Dr. Chandrashekhar Upadhyay, Dr. Ishan Sharma and Dr. Rajeev Shekhar approached Allahabad High Court and the Court passed stay order against the guidelines of the National Commission for Scheduled Castes. 17- Even after the stay order, it was allowed that the institution itself may get the enquiry conducted on these subjects. The charge to conduct enquiry was handed over to the Hon'ble Justice Siddiqui as an Enquiry Officer through order No. IITK/DC-125/LC-43 on 05 E. 2018. One respected faculty member (retired) was also appointed as an Assistant to Justice Shri Siddiqui. 18-On17.08.2018, Hon'ble Justice Shri Siddiqui submitted his enquiry report BOG as an enclosure. In the report, the following facts were mainly established. (A) The procedure of my appointment in IIT was found absolutely correct. (B) The four faculty members namely Dr. Sanjay Mittal, Dr. Chandrashekhar Upadhyay, Dr. Ishan Sharma and Dr. Rajeev Shekhar were found guilty of serious misconduct under Conduct Rule (Schedule-B) rule 3 (a) and (b) Under Status 13 (17) of IIT Status. (C) The four faculty members namely Dr. Sanjay Mittal, Dr. Chandrashekhar Upadhyay, Dr. Ishan Sharma and Dr. Rajeev Shekhar were found guilty to publicly mock at and harass the person related to the Scheduled Caste under Section 3 of A Act No.-33 of 1989. 19-It has been learnt from the B.O.G meeting held on 06.09.2018 that due to pressure from two faculty representatives namely Dr. Devopam Das and Dr. M.L.N Rao, only CCS violation has been accepted while offence under Sec. 3 of A Act No. 33 of 1989 " Prevention of atrocities Act" has been rejected. 20- In the meantime, Dr. Sadrela, De. A.K. Ghosh, IIT Kanpur Director were summoned by National Scheduled Caste Commission on 10.9.2018 in context of report by Hon'ble Justice Siddhiqui At their New Delhi Office. In the meeting held there, serious resentment was expressed on the decision taken in B.O.G.(IITK) as well as on the negation of offence made under Sec. 3 of A Act No. 33 of 1989 "Prevention of Atrocities Act" and commission again passed the directions. 21-All four accused persons again got these directions stayed on 26.09.2018 vide Writ Petition 32585/2018. 22-Prior to the meeting of the members of BOG, in order to influence the BOG, one mail dt:15.10.2018, by some unknown person, through the e-mail ID -

studentiitk@gmail.com was sent to the members in a large numbers, to show that I (Dr. Sadrela) completed my Ph.D by copying others. Further, it has also been claimed in the said e-mail that this degree of mine (Dr. Sadrela) of PhD should be withdrawn (and which will cause me loose my job). This mail ID is now not functional. It shows that this e-mail was created only in order to humiliate me. It has all been done in order to establish that I belong to the scheduled caste and that my mental level is not adequate enough to teach in I.I.T. It has hurt my self-respect and caused damage to my position in society, and I had to go through excessive mental depression. I doubt that this e-mail has been sent/spread by some unknown person under the direction of those four faculty members and in order to protect them, who were found guilty by Hon'ble Justice Mr. Siddiqui u/s 3 Act-33 of 1989 'Prevention of Atrocities Act'. I have a copy of that anonymous mail, a copy of the inquiry report by Hon'ble Justice Siddiqui and the information after the e-mail account studentiitka@gmail.com (?) and all other facts. I will provide all the relevant facts to the inquiry officer during the inquiry.

You are hereby requested that a case be lodged against the concerned persons on the basis of the e-mail containing false information, and necessary action be taken up."

(English Translation by Court)

5. A perusal of aforesaid report shows that Informant Dr. Subramanyam Sadrela stated that a Special Recruitment Drive was conducted in the Aerospace Department of IIT Kanpur for making recruitment of SC/ST, OBC and other reserved category candidates. Informant had completed his Post Graduation and Ph.D., from IIT, Kanpur itself. He applied for appointment in Aerospace Department. He was called in October, 2017 for interview. During interview, Dr.Ishan Sharma, Mechanical Engineering Department, IIT Kanpur led group and made comments and taunts upon Informant stating that he is a person of low IQ. Informant fell frightened and dishonored, still made attempt to reply the questions put to him by Dr.Ishan Sharma since he had good knowledge of subject as he had represented at National and International Forum. Despite Dr. Ishan Sharma's comment, Department/Institution recommended Informant's candidature for appointment. On 26.12.2017, an Outside Expert examined Informant and recommended his appointment. Consequently, Chairman of Board approved candidature of Informant and letter of appointment was issued to him on 28.12.2017. Informant joined on 01.01.2018. Thereafter, in a meeting, Dr. Sanjay Mittal made comments in a taunting manner and ridiculed Informant stating that due to engagement of new faculty member, Department's standards have gone down. On 09.01.2018, Dr. Sanjay Mittal sent an E-mail to all faculty members in Aerospace Engineering Department except Informant and Dr. Raghvendra and called a meeting on 10.01.2018. In the said meeting, matter of appointment of Informant was discussed for about three hours and Dr. Sanjay Mittal, Dr. Chandra Shekhar Upadhyay and Dr.Dabopam Das all tried to explain to Junior Professors that appointment of Informant in the Department of Aerospace was not justified and he was not suitable. Dr. Chandra Shekhar Upadhyay also presented Informant's testimonials in a wrongful manner and tried to explain that he was not suitable for appointment as Faculty Member. Informant got disturbed and expressed his predicament and embarrassment to Head of the Department

through an E-mail and said that he and his family has suffered mental exploitation due to malicious conversation and it is all since Informant belongs to Scheduled Caste community.

6. Taking note of the complaint, on the advice of Board of Governors, a Fact Finding Committee was constituted which was entrusted to find out alleged discrimination, and harassment of petitioner; and identification of guilty persons and also to find out misconduct, if any committed and if so, by whom.

7. On 01.02.2018, Dr. Rajeev Shekhar sent an E-mail stating that incident occurred 10 years back has happened again. Rumors and false conversation by Dr. Rajeev Shekhar caused mental disturbance to Informant and his family. Again, Informant sent a letter to Director and seeks permission to raise the matter in National Commission of Scheduled Castes *(hereinafter referred to as "NCSC")*. Fact Finding Committee submitted report on 08.03.2018 to Director and found appointment of Informant to be correct; that Dr. Ishan Sharma, Dr. Sanjay Mittal, Dr. Rajeev Shekhar and Dr. Chandra Shekhar Upadhyay, guilty to suppression of Informant, and recommended action against said persons under SC/ST Act. Taking note of said incident, NCSC also issued a notice on 13.03.2018 and summoned them in Commission on 10.04.2018. On the issue of Informant's exploitation, a meeting was held by Board of Directors on 19.03.2018 wherein Departmental enquiry was recommended against four erring Faculty Members.

8. NCSC heard the matter and passed an order against four Faculty Members who challenged the same before Court and obtained stay order.

9. A retired Judge was appointed as Enquiry Officer who submitted report dated 17.08.2018 holding appointment of Informant, correct and prima facie holding four Faculty Members of guilty of violating Rule 3(a) and (b) of Conduct Rules (Schedule-B) framed under the Statute 13(17) of IIT, Kanpur Statute and also committing offence under Section 3 of Act No.33 of 1989. However, in the Board of Governor's meeting, two Faculty Members impressed upon that four Faculty Members were guilty of violating Conduct Rules only and not offence under Act, 1989. In the meantime, an unknown person forwarded an E-mail wherein it was attempted to show that Informant has completed Doctorate by copying some others thesis and it should be withdrawn. It appears that said E-mail was forwarded just to belittle Informant and this shows that Informant being Members of Scheduled Castes, is not upto mark to be a Faculty Member of IIT, Kanpur. This all has caused serious damage to self-respect and social status of Informant and has caused serious mental torture to Informant.

10. Having given anxious thoughts, we find that basic grievance of Informant is that he has not been given a good treatment by petitioners. They have taunted, commented and ridiculed him time to time. He has not stated anywhere that whatever has been done by petitioners is after knowing it that he is a member of Scheduled Caste, to insult or intimidate or humiliate as such but what he has said that certain acts and omissions have been done by petitioners and according to Informant,

same has been done as Informant is a member of Scheduled Caste.

11. In order to find out "whether offence under the provisions wherein FIR has been registered are made out or not", we first proceed to consider "whether offence under Section 3(2)(va) of Act, 1989 has been made out or not".

12. Section 3(2)(va) of Act, 1989 is reproduced as under:-

*"3(2)(va) commits any offence specified in the Schedule, against a person or property, **knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member**, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine."*

13. The gravamen of Section 3(2)(va) of Act, 1989 is pre information and knowledge of accused that person being offended is a member of a Scheduled Castes and Scheduled Tribes or property concern belongs to such member. Therefore, it is not sufficient that offended person is a member of scheduled castes or property belongs to a member is a scheduled castes but knowledge of offender that such person is a Scheduled Castes or Scheduled Tribes is the basic ingredient to attract Section 3(2)(va) of Act, 1989.

14. In the entire complaint we have reproduced above, we do not find even a whisper that accused-petitioners were knowing that Informant/Complainant is a member of Scheduled Castes and with this knowledge, they committed offence specified in the Schedule.

15. Thus, the basic ingredient to attract Section 3(2)(va) of Act, 1989 is not present, hence, it cannot be said that aforesaid provision is attracted even if whatever stated in FIR is treated to be correct. We further required counsel for respondent-4 to show as to which offence mentioned in the Schedule of Act, 1989 has been committed by offenders i.e. accused-petitioners but despite repeated query, Sri T.P.Singh, learned Senior Counsel appearing for respondent-4 could not referred to any section of IPC mentioned in the Schedule of Act, 1989 which is said to have attracted in the case in hand. He said that it is Section 500 IPC which is attracted but we find that Section 500 IPC is not one of the provisions mentioned in Schedule of Act, 1989, therefore, Section 3(2)(va) of Act, 1989 is not at all attracted and it cannot be said that even if what is alleged in FIR is taken to be true, any offence under Section 3(2)(va) of Act, 1989 is made out.

16. Now, we come to Section 500 IPC. Section 500 IPC is an offence of "defamation" as defined in Section 499 IPC.

17. Section 499 IPC provides as to what is "defamation" and reads as under:-

***"499. Defamation.--Whoever, by words either spoken** or intended to be read, or by signs or by visible representations, **makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person,** is said, except in the cases hereinafter expected, to defame that person."*
(Emphasis added)

18. There are four Explanations and ten Exceptions in Section 499 IPC which I have not quoted.

19. Explanations covers some shades of the words, spoken or intended to be read etc., which may amount to "defamation" while exceptions give the illustrations of what will not constitute "defamation". To be more particular, Explanations-1, 2 and 3 provide certain aspects which would amount to defamation and Explanation-4 explains the words "will harm the reputation of such person" which is a necessary and integral part of Section 499 IPC so as to constitute defamation. Offence of defamation, therefore, consists of three essential ingredients. (i) making or publishing an imputation concerning a person; (ii) such imputation must have been made by words either spoken or intended to be read or by signs or by visible representations; and, (iii) the said imputation must have been made with the intention of harming or with the knowledge or having reason to believe that it will harm the reputation of the person concerned.

20. Thus, to bring an offence under Section 500 IPC, prosecution has to show, (a) that an imputation was made consisting of words spoken or written or intended to be read or made by signs or by visible representations; (b) that the imputation concerned the complainant i.e. the person defamed and the person who has come forward qua complainant alleging that defamation concerned him, are identical persons; (c) that the accused made or published the incriminating imputation; and, (d) that the intention behind making and publishing words causing harm to the reputation of such person.

21. Offence punishable under Section 500 IPC, therefore, is to protect a fundamental right of a person i.e. 'reputation' which is part of right to enjoyment of life and liberty and property having an ancient origin as explained by Supreme Court in **Smt. Kiran Bedi v. Committee of Inquiry and another 1989 (1) SCC 494** wherein Court reproduced the observations from **D.F. Marion v. Davis 10 55 ALR 171** as under:-

*"The **right to enjoyment of a private reputation,** unassailed by malicious slander **is of ancient origin**, and is **necessary to human society. A good reputation is an element of personal security,** and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. " (emphasis added)*

22. In **Board of Trustees of the Port of Bombay vs. Dilipkumar Raghavendranath Nadkarni and Others (1983) 1 SCC 124**, Court said that "right to reputation" is a facet of right to life of a citizen under Article 21 of Constitution.

23. In **Vishwanath S/o Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal 2012 (6) SCALE 190**, Court dealt with the aspect of "reputation" though in a different context, and said:-

*".....**reputation** which is not only the salt of life, but also the **purest treasure and the most precious perfume of life.** It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. " (emphasis added)*

24. In **Kishore Samrite Vs. State of U.P. and Others 2013 (2) SCC 398**, Court said:-

*"The term **'person' includes not only the physical body and members but also every bodily sense and personal attribute among which is the reputation a man has acquired.** Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem, and character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. **'Reputation' is an element of personal security and is protected by Constitution equally with the right to enjoyment of life, liberty and property.** Although 'character' and 'reputation' are often used synonymously, but these terms are distinguishable. 'Character' is what a man is and '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. " (emphasis added)*

25. Offence under Section 500 IPC, therefore, covers a very important aspect involving a person's right to life and liberty, hence when a complaint is made that a person's reputation has been jeopardized, and Magistrate, if has taken cognizance in the matter by initiating proceedings, Court under Section 482 Cr.P.C. or in writ jurisdiction under Article 226 of Constitution should not interfere lightly unless a clear case of abuse of process of law is made out. I, therefore, would examine the matter in question, whether a case of abuse of process has been made out or not.

26. Comments or taunting of a person in respect of his specialization of knowledge in a close door meeting i.e. during the course of interview cannot be said to be a publication of something which affects the reputation of any person and such observations or comments, in our view, will not attract Section 500 IPC. This situation, if accepted, may result in everyday complaints against the member of interview board or the persons performing judicial or quasi judicial functions whenever they make any observation with regard to understanding or knowledge of another person.

27. So far as publication of E-mail is concerned, complaint itself shows that it was sent by some unknown person and there is nothing to show that E-mail was sent by any of these petitioners and, therefore, for the said E-mail, Section 500 IPC cannot be attracted against petitioners.

28. Now, we come to Section 66-D of Amendment Act, 2008. Section 66-D inserted in Act, 2000 which came into force on 05.02.2009 i.e. the date on which it was published in the Official Gazette. Section 66-D of Amendment Act, 2008 reads as under:-

"66D Punishment for cheating bypersonationby using computer resource---

Whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees."

29. It applies where there is any cheating by personation but the entire contents of FIR make no allegation of cheating of Informant/Complainant by personation, therefore, Section 66-D of Amendment Act, 2008, ex facie has no application.

30. We may also place on record that Amendment Act, 2008 has been enforced with effect from 27.10.2009 by notification issued by Central Government under Section 1(2) of Amendment Act, 2008.

31. Learned Senior Counsel appearing for respondent-4 however, contended that in an internationally recognized temple of a professional education, the faculty members of higher caste have ill-treated and ridiculed colleague faculty member of outburst caste i.e. Scheduled Castes, hence, in such a matter, this Court should not interfere in Criminal Misc. Writ Petition under Article 226 and the matter should be left for trial.

32. We do not find that the above submission is correct for the reason that if no offence is made out, even if what is stated in the FIR is treated to be correct then no person can be allowed to unnecessarily suffer the trauma of criminal trial.

33. In view thereof, we are satisfied that no offence under the sections in which report has been registered are made out even if allegations stated in FIR are taken to be correct ex facie and that being so, criminal proceedings initiated against petitioners cannot be said to be justified.

34. In the result, writ petition is allowed. FIR dated 18.11.2018 registered as Case Crime No.1283 of 2018, under Sections 500 IPC, Section 66D of Amendment Act, 2008 and Section 3(2)(va) of Act, 1989, at Police Station Kalyanpur, District Kanpur Nagar and also subsequent proceedings thereto are hereby quashed.

(2020)06ILR A590
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Matters Under Article 227 No. - 1148 of 2020 (Criminal)

Nathoo Das ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar Pal

Counsel for the Respondents:
G.A., Sri Adya Prasad Tewari, Sri Pradeep Kumar Rai, Sri Sheo Shankar Tripathi

Criminal Law- Code of Criminal Procedure- Section 145 -Proceedings u/s 145 Cr.P.C. -been dropped by Court below-alleged likelihood of breach of peace-since begining no likelihood of breach of peace or dispute regarding possession -as agricultural land duly recorded and the possession is with the recorded holders since 2014-no dispute since 2014 till 2018- Court below rightly dropped the proceedings

Writ Petition dismissed. (E-9)

List of cases cited:-

1. Amresh Tiwari vs. Lalta Prasad Dubey and others, reported in 2000 (2) J.I.C. 44 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This petition, under Article 227 of the Constitution of India, has been filed by

the petitioner, Nathoo Das, with a prayer for setting aside impugned order of the court of Sub Divisional Magistrate, Nichlaul, Maharajganj, dated 30.7.2018, passed in a proceeding, under Section 145 of Code of Criminal Procedure (Hereinafter, in short, referred to as Cr.P.C.) as well as, order, dated 09.01.2018 of learned Sessions Judge, Maharajganj, passed in Criminal Revision No.43 of 2019.

2. Learned counsel for the petitioner argued that the impugned order by the Sub Divisional Magistrate, Nichlaul, District Maharajganj, was passed over an application, moved by Mutur Das, dropping proceeding, under Section 145 of Cr.P.C., whereas, there is every likelihood of breach of peace, but, proceeding, under Section 145 of Cr.P.C., has been dropped.

3. This order of Sub Divisional Magistrate, Nichlaul, Maharajganj, was challenged in a Criminal Revision before the Sessions Judge, Maharajganj, as Criminal Revision No.43 of 2019, and it was rejected vide order, dated 9.1.2020.

4. Both of the courts below have failed to appreciate facts and law placed before them. It was failure of observance of settled position of law. Hence, for invoking power of general superintendence, conferred upon the High Court, by Article 227 of the Constitution of India, over its subordinate court, this petition has been preferred by the petitioner, with above prayer.

5. Learned counsel for other side has vehemently opposed this petition with this contention that this proceeding was pending since 2004 and there was a judgment of revenue court, in a suit, filed by the applicant, for ownership and possession over disputed land and after its decision nothing remained there for likelihood of breach of peace. Hence this proceeding was dismissed by the learned Magistrate. Impugned order was challenged before the revisional court, where too, it was dismissed.

6. Section 145 of Cr.P.C. provides procedure where dispute concerning land or water is likely to cause breach of peace, which says that *"whenever an Executive Magistrate is satisfied from a report of a Police Officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute"*.

7. Meaning thereby, the Executive Magistrate is to satisfy about existence of any likelihood of breach of peace. This satisfaction may be either on the report of the Police Station, concerned, or by otherwise, but, the condition precedent for exercising power, under this power, conferred by Section 145 of Cr.P.C., is the satisfaction of the Executive Magistrate, regarding existence of any likelihood of breach of peace and this was reported by the Station Officer of the Police Station, concerned, that there remained some dispute over agricultural land, detailed in the report, in between Mutur Ddas and Nathoo Das, wheresas, land is recorded in the revenue record, in the name of Mutur

Das and one other persons, who are in possession over the land in question. They have sown the crop and had harvested the same, but, Nathoo Das, applicant herein, had filed a case, regarding ownership, in the revenue court as well as in Civil court and he claimed possession over it, thereby, creating a likelihood of breach of peace. Upon this report, proceeding, under Section 145 of Cr.P.C., was initiated, wherein, opportunity to both sides was afforded and this proceeding was pending since 2004, and ultimately, the Magistrate opined that there is no likelihood of breach of peace, hence, proceeding was dropped.

8. A criminal revision, against this order, was filed, wherein, revisional court has directed for proceeding, in above proceeding, thenafter, proceeding was initiated, but, an application by Mutur Das was filed mentioning therein that the judgment of revenue court, in pending suit, is there and there is no likelihood of breach of peace. On the basis of it, Magistrate, passed impugned order, whereby, proceeding, under Section 145 of Cr.P.C., was dropped.

9. This order was challenged before the court of Sessions, i.e., revisional court, wherein, learned revisional Judge opined that even in Police report, it was specifically mentioned that Mutur Das and Shiv Mangal were entered in the revenue record as owners of the agricultural land, in question, and they have sown the crop and had harvested it. Meaning thereby, there is no likelihood of breach of peace, regarding possession over the immovable property at that point of time. It was Nathoo Das, applicant herein, who was claiming his right over the agricultural land in question and for which, he had filed suit in revenue court as well as in civil court, wherein, judgment of revenue court was passed.

10. As per law laid down by the Apex Court, in the case of **Amresh Tiwari vs. Lalta Prasad Dubey and others, reported in 2000 (2) J.I.C. 44 (SC)**, if a civil suit is pending or proceeding for determination of right and possession, in between the parties, has been instituted and is pending, then, proceeding, under Section 145 of Cr.P.C., is not to be taken course.

11. In present case, since beginning, there was no likelihood of breach of peace or a dispute, regarding possession, because agricultural land, in question, was reported to be recorded in the name of Mutur Das and Shiv Mangal, who are in possession and since 2004 till 2018, there occurred no breach of peace at any point of time, rather, case in revenue court was decided by the court, concerned. Hence, both of the courts below have rightly and appropriately appreciated facts and law placed before them. There is no failure of justice, requiring any indulgence of this Court, in exercise of power of general superintendence by the High Court over its subordinate courts, conferred by Article 227 of the Constitution of India.

12. Accordingly, in view of what has been discussed above, this petition, under Article 227 of Constitution of India, being devoid of merits, fails and is **dismissed**.

(2020)06ILR A593
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Matters Under Article 227 No. - 1513 of 2020 (Criminal)

Sarfaraz & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri M.P.S. Chauhan

Counsel for the Respondents:
A.G.A.

A. Initially- Non Cogniable Report filed u/s 323, 504 I.P.C., subsequently, without moving an Application u/s 155 (2) Cr.P.C.-same occurance-registered u/s 323, 504, 308 IPC-alleged illegal-initially injuries opined to be simple-but later-he was taken to another hospital-subsequent report makes clear-injuries grave-chargesheet rightly filed u/s 308 IPC-Magistrate rightly took cognizance.

Writ Petition dismissed. (E-9)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This petition, under Article 227 of the Constitution of India, has been filed with a prayer for setting aside impugned order dated 10.12.2019 of court of Additional Sessions Judge, Court No. 4, Aligarh, passed in Criminal Revision No. 375 of 2019 along with cognizance taking order dated 02.07.2019, passed by court of Additional Chief Judicial Magistrate, Court No. 4, Aligarh in Criminal Case No. 1034 of 2019, under Section 323, 504, 308 I.P.C., Police Station Akarabad, District Aligarh.

2. Heard learned counsel for the petitioners and learned A.G.A. for State.

3. Learned counsel for petitioners argued that it was failure of appreciation of facts and law, placed before both the courts below. Initially a report of non-cognizable offence was filed under Sections 323, 504 I.P.C. Subsequently, without moving an application under Section 155(2) Cr.P.C., the same occurrence was registered for offence punishable under Sections 323, 504, 308 I.P.C., wherein investigation resulted submission of charge sheet, as above, but injuries were found to be simple in first medico legal report, followed by subsequent medico legal report as well as C.T. Scan, whereas a cross case on behalf of present petitioners are there against present opposite side. This cognizance was taken for offence punishable, as above, whereas no evidence for offence punishable under Section 308 I.P.C. was there. This cognizance taking order was challenged before court of revision, which was decided by revisional court, as above, wherein revision was dismissed. Hence, both the courts below failed to appreciate facts, placed on record. Hence, under power of General Superintendence of High Court over Subordinate Courts in Uttar Pradesh, this petition is with above prayer.

4. Learned A.G.A. has vehemently opposed the petition with this contention that injured was having injuries, written in medico legal report, and still he is under treatment for it.

5. From the very perusal of first information report, lodged on 22.05.2018, as non-cognizable offence information report, under Section 155 Cr.P.C., it is apparent that present petitioners were accused in it and they have been assigned role of giving assault to Noor Hassan on 11.05.2018 at about 1 P.M., under joint

mens rea, with common intention. When Irfan tried to intervene. He too was badly beaten by them. He was under medical treatment. Meaning thereby, at that very time, it was written that accused persons have badly assaulted them, causing grievous hurt on 11.05.2018 and Irfan was under treatment in hospital till above date of 22.05.2018. Meaning thereby, for about 10 days, he was under treatment in the hospital, even then, this non-cognizable report was lodged, which shows the error apparent in registering of above case crime number. However, it is not to be commented by this Court, because subsequently this was cured by registering first information report for offence punishable under Sections 323, 504, 308 I.P.C. on the information of same day on 24.01.2019. The medico legal report of Irfan Khan, medically examined on 11.05.2018 at 4.30 P.M., was there, wherein injuries were (i) Lacerated wound 4cm x 1.5cm middle part of right and left M deep V type parietal region (ii) Lacerated wound 2.5cm x 0.5cm left side of occipital region 8.5cm far from lateral ear (iii) complaint of pain over back side (4) Traumatic swelling 3cm x 2cm just below left eyebrow (v) Lacerated wound 1.0 x 2cm front part of middle finger. Though, these injuries were opined to be simple, but it was a medical report of hospital, where he was under treatment i.e. J.N. Medical College Hospital, Aligarh Muslim University, Aligarh, when general condition of patient was unstable with his condition, written in this report, and thereafter in his local examination, those lacerated wounds over forehead fronto parietal region were found, resulting unconsciousness and agitated, which was confirmed by CT scan and X-ray, thereafter, he was referred for Neurosurgeon. The other injuries too over occipital region and suspected to be grievous, for which C.T. Scan was referred. In C.T. Scan the large extra-axial hyper density with CT value of blood overlying the right fronto parietal lobe 8/0 extra-axial bleed (maximum thickness 1.6cm) with mass effect in the form of effacement of cortical sulei of B/L (R>L) Cerebral Hemisphere and midline shift of 8mm towards left was there. Meaning thereby, there was abnormality in above hemisphere and it was under above injury, for which C.T. Scan was referred. Hence seat, size and nature of injuries found in C.T. Scan was fully sufficient, for filing of charge sheet, for offence punishable under Section 308 I.P.C. Accordingly, charge sheet was filed and Magistrate has taken cognizance for these offences, on the basis of evidence in case diary, because of which, learned revisional court has dismissed revision and it was with full reason.

6. There seems to be no illegality or irregularity in either of order of lower court. Accordingly, this petition merits its dismissal. The petition is **dismissed** as such.

(2020)06ILR A594
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 1518 of 2020
(Civil)

Smt. Phoola Devi & Ors. ...Petitioners
Versus
Smt. Bhagwan Dei & Anr. ...Respondents

Counsel for the Petitioners:
Sri Nasiruzzaman, Sri Mohit Kumar Jaiswal

Counsel for the Respondents:
Sri Manish Tandon, Sri Atul Dayal

Indian Evidence Act, 1877-Section 116 - Tenant cannot deny title of the landlord-howsoever defective it is-he must surrender possession to landlord before challenging-Nothing on record-that Petitioners have surrendered possession-before challenging title of landlord-Petitioners are estopped in challenging the title.

Writ Petition dismissed. (E-9)

List of cases cited:-

1. Prahlad Singh and Others Vs. Union of India and Others 2011 (4) AWC 3650

2.State of A.P. and Others Vs. D. Raghukul Pershad (D) by L.Rs. & Others 2012 (5) AWC 4378 (SC).

3.Raju Savita Vs. Amarnath 2018 (2) ARC 533

4. Sheela Jawarlal Nagori & Another Vs. Kantilal Nathmal Baldota & Others 2014 (3) ARC (5)

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard learned counsel for the petitioners and Sri Atul Dayal, learned Senior Advocate assisted by Sri Manish Tandon, learned counsel for the respondents.

2. The petitioners are defendants in Suit No.225 of 2007 and have assailed the judgement and order dated 10.12.2019 passed by Additional District Judge, Court No.14, Kanpur Nagar whereby he has allowed the SCC Revision No.37 of 2017 and decreed the Suit No.225 of 2007 of respondents (plaintiffs in the suit) against petitioners for eviction.

3. The facts of the case, in brief, are that respondents no.1 Smt. Bhagwan Dei (since deceased) and respondent no.2/1 Smt. Renu Gupta instituted Suit No.225 of 2007 (hereinafter referred as 'Suit') against petitioners praying for a decree of eviction from House No.5/167, Purana Kanpur Nagar Road, Kanpur Nagar (hereinafter referred to as 'suit property'), and for recovery of arrears of rent and damages. The case of the respondents in the plaint was that the maternal uncle of respondent no.1 was the owner of the suit property. After his death, his sister Smt. Rani Devi and respondent no.1 became joint owner of the suit property. Smt. Rani Devi died on 20.06.2005 and after her death, her share devolved upon respondent no.2/1. One Shiv Mangal Gupta was the tenant of one room facing Ganga river @ Rs. 5/- per month and two rooms facing roadside @ Rs. 100/- per month. It was further pleaded that Shiv Mangal Gupta tried to encroach upon the land appurtenant to the suit property which led to the institution of another Suit No.610 of 1999 by respondents against Shiv Mangal Gupta in which temporary injunction was granted.

4. In the said suit, Shiv Mangal Gupta filed written statement admitting the tenancy of one room towards river Ganga but denied the tenancy of two rooms towards the roadside. Shiv Mangal Gupta died on 16.02.2007. After his death, Petitioners being legal heirs of Late Shiv Mangal Gupta became the tenant of the suit property. It was further stated that neither Shiv Mangal Gupta nor his heirs paid rent of the suit property. Consequently, a notice dated 12.06.2007 was sent to the petitioners terminating the tenancy which returned unserved on 21.06.2007 with the endorsement 'not claimed'. It is further averred that the tenancy of the petitioners came to an end on expiry of 30 days from 21.07.2007; the petitioners are in unauthorized occupation of the suit property since 22.07.2007. Since the major portion of the rent had become time-barred, therefore, respondents prayed for a decree of rent of three years before the institution of the suit beside the decree for eviction.

5. The suit was contested by all the petitioners by filing two written statements, one by petitioner nos.2, 3 and 5 jointly and the other by petitioner nos.1 & 4.

6. The petitioner no. 2, 3 & 5 averred in their written statement that Late Shiv Mangal Gupta was the tenant of one room of the suit property since last 40-45 years. They further pleaded that suit property has been acquired by Kanpur Development Authority (hereinafter referred to as 'K.D.A.') for construction of Ganga road, therefore, the respondents had no title or interest in the suit property and on the acquisition of the suit property, relationship of tenant and landlord between the parties came to an end due to which no rent was paid to the respondents. It was further stated in the written statement that the two rooms have been constructed by the petitioners and they are the owner of the two rooms. It was further stated that respondents have instituted another Original Suit No.814 of 2000 against K. D.A., which is pending in the court of Civil Judge (Senior Division), Kanpur Nagar, seeking a decree of declaration in respect of the suit property.

7. The stand of petitioner nos.1 & 4 in the written statement was similar to the stand taken by the petitioner nos.2, 3 & 5 in their written statement. The petitioner nos.1 & 4 also admitted the tenancy of the suit property in their written statement.

8. The trial court framed four issues based on pleadings between the parties. The issue no.1 was concerning the relationship of landlord and tenant between respondents and petitioners. Issue no.2 was in respect of default in payment of rent by the petitioners. Issue no.3 was as to whether tenancy of the petitioners has been terminated by a valid notice, and the issue no.4 was in respect of relief which the respondents are entitled to.

9. The trial court, after appreciating the facts and evidence on record, held that though, in a suit for eviction, the relationship of landlord and tenant is to be seen, but the question of title is also involved incidentally in such suit, therefore, it can also be looked into. The trial court found that respondents had instituted the Suit No.814 of 2000 (Smt. Rani Devi Vs. Kanpur Development Authority) against KDA, and there are material and evidence on record in the said suit that suit property had been acquired by KDA, therefore, the respondents had failed to demonstrate that they are the owner and the petitioners are the tenant of the suit property. It further held that as admittedly, rent was not paid by the petitioners to the respondents, therefore, there was no relationship of landlord and tenant between respondents and petitioners. Consequently, it decided issue no.1 against the respondents.

10. As issue no.1 was decided against respondents, accordingly, the trial court decided the issue nos.2 & 3 also against the respondents because of the finding on issue no.1.

11. Feeling aggrieved by the order of the trial court, respondents preferred SCC Revision No.37 of 2017 which was allowed by the revision court by recording a finding that even if suit property had been acquired, the suit for eviction and arrears of rent instituted by the respondents was maintainable. The revision court held that in a suit for eviction, only the relationship of landlord and tenant is to be seen between the parties. By recording the aforesaid

finding, it set aside the finding of the trial court that question of the title being incidental can also be considered in a suit for eviction.

12. The revision court further held that if there was any dispute between the petitioners and KDA, petitioners cannot take advantage of the said dispute until they prove that they were inducted as a tenant in the suit property by the KDA. It further held that petitioners did not file any evidence on record in the suit to prove that possession of the suit property had been taken over by the KDA. The revision court further found that petitioners have admitted the tenancy of the suit property, and thus, the relationship of landlord and tenant between respondents and petitioners is proved. It further found that notice terminating the tenancy was valid and petitioners had defaulted in payment of rent. Consequently, it decreed the suit of the respondents.

13. Challenging the aforesaid order, learned counsel for the petitioners has contended that with the acquisition of Suit Property, the respondent ceased to be the owner of the suit property and there was no relationship of landlord and tenant between the respondent and the petitioner, therefore, the suit was not maintainable. He further submits that the KDA had taken the symbolic possession of the suit property is evinced from the Possession Memo (Dakhalnama) dated 28.02.1973, therefore, finding of the revision court that petitioners had failed to prove that possession of the suit property had been taken by the KDA is illegal and perverse. Thus, his submission is that revision court has committed manifest illegality in allowing the revision and decreeing the suit. He has placed reliance upon paragraph 16 (iv) of the judgement of Apex Court in the case of ***Prahlad Singh and Others Vs. Union of India and Others 2011 (4) AWC 3650.***

14. Refuting the aforesaid submission, learned Senior Counsel for the respondents by placing reliance upon Section 116 of the Evidence Act, 1872 has contended that petitioners have admitted in their written statement that their father was the tenant of the suit property through whom they have acquired tenancy, therefore, they are estopped in law in denying and challenging the relationship of landlord and tenant. In respect of the said submission, he has placed reliance upon the judgement of Apex Court in the case of ***State of A.P. and Others Vs. D. Raghukul Pershad (D) by L.Rs. & Others 2012 (5) AWC 4378 (SC).***

15. He further contends that in a suit for eviction, the relevant issue which calls for determination by the court is as to whether there exists relationship of landlord and tenant between the parties, and in the present case, revision court found that there exist relationship of landlord and tenant between the parties, therefore the Suit is maintainable. His further submission is that finding of revision court on the issue of the relationship of landlord and tenant is based upon the proper appreciation of evidence on record and sound principals of law, and as such is not liable to be interfered with by this court. He further submits that trial court has committed gross illegality in recording a finding that suit was not maintainable as respondents have failed to prove their title over the suit property, and said finding has rightly been corrected by the revision court in the exercise of its revision jurisdiction under Section 25 of Provincial of Small Cause Courts Act,

1887. In support of his aforesaid submission, he has placed reliance upon the judgement of this Court in the case of ***Raju Savita Vs. Amarnath 2018 (2) ARC 533.***

16. He further contends that the actual physical possession was not taken by the KDA and is with the respondents. He has also placed reliance upon paragraph 16 (iii) of the judgement of the Apex Court in the case of ***Prahlad Singh (supra).***

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

18. In the present case, petitioners have denied the relationship of tenant and landlord on the ground that the suit property had been acquired by KDA and award had been passed in respect of the suit property. However, the petitioners have admitted in their written statements that their father was the tenant of the suit property. Further, DW-1 Munish Chandra Gupta in his testimony has admitted that his father was the tenant of the suit property and had paid the rent of the suit property last time in the year 1960. Thus, it is established from the own case of the petitioners that suit property was taken on rent by their father and their father was the tenant of the suit property.

19. At this point, it would be relevant to refer Section 116 of the Indian Evidence Act, 1877 which reads as under :

''Estoppel of tenant; and of licensee of person in possession-

No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

20. This section precludes tenant of an immoveable property during the continuance of tenancy to deny the title of the landlord at the beginning of the tenancy, howsoever defective it may be. Therefore, it implies that if the tenant wishes to deny the title of the landlord, he must first surrender the possession of the property back to him. The Apex Court in the case of ***State of A.P. (supra)*** has held that the tenant will have to surrender possession of the property to the landlord before he can challenge the title of the landlord. Paragraph 6 of the judgment in the case of ***State of A.P. (supra)*** is extracted hereinbelow:-

"6. The law is settled by this Court in D. Satyanarayana vs. P. Jagdish 1987(4) SCC 424 that the tenant who has been let into possession by the landlord cannot deny the landlord's title however defective it may be, so long as he has not openly surrendered possession by surrender to his landlord. Although there are some exceptions to this general rule, none of the exceptions have been established by the appellants in this case. Hence, the appellants who were the tenants of the respondents will have to surrender possession to the respondents before they can challenge the title of the respondents."

21. Thus, to get out of the rigour of Section 116 of the Evidence Act and the law laid down by the Apex Court in the above-referred case, the tenant has to

surrender the possession of the property before he can challenge the title of the landlord. However, in the instant case, nothing transpires from the record which could demonstrate that petitioners have surrendered the possession of the suit property before challenging the title of the respondent. Consequently, the petitioners are estopped in law in challenging or denying the title of respondents, howsoever defective it may be in view of Section 116 of the Indian Evidence Act, 1877.

22. It would also be pertinent to refer to the judgment of the Apex Court in the case of ***Sheela Jawarlal Nagori & Another Vs. Kantilal Nathmal Baldota & Others 2014 (3) ARC (5)*** wherein Apex Court has held that landlord can maintain a suit for eviction against tenant even if the tenanted property has been acquired and an award has been passed in respect thereof under the provision of the Land Acquisition Act, 1894. Further, this court in the case of ***Raju Savita (supra)*** has held that in a suit for eviction, only the relationship of landlord and tenant is to be seen.

23. It is evident from the aforesaid discussion that the relationship of landlord and tenant is established between the respondent and the petitioner, therefore, the suit of the respondent was maintainable. Consequently, this court does not find any merit in the submission of the counsel for the petitioner that the suit was not maintainable as on the acquisition of the suit property by KDA, the tile of respondent over suit property had vanished and the relationship of landlord and tenant had ceased to exist between the parties.

24. To appreciate the other contention of the counsel for the petitioners that the symbolic possession of the suit property was taken by the KDA, it would be apt to refer the judgement of Apex Court in the case of ***Prahlad Singh (supra)*** relied upon by both the parties wherein Apex Court has considered the question as to whether acquired land can be treated to have vested in the State Government under Section 16 of the Land Acquisition Act, 1894 on the making of an award with the Collector though, the actual and physical possession continues with the landowner. Paragraphs 10 and 16 of the said judgement being relevant are extracted hereinbelow:-

"10.We have given our serious thought to the entire matter and carefully examined the records. Section 16 lays down that once the Collector has made an award under Section 11, he can take possession of the acquired land. Simultaneously, the section declares that upon taking possession by the Collector, the acquired land shall vest absolutely in the Government free from all encumbrances. In terms of the plain language of this section, vesting of the acquired land in the Government takes place as soon as possession is taken by the Collector after passing an award under Section 11. To put it differently, the vesting of land under Section 16 of the Act presupposes actual taking of possession and till that is done, legal presumption of vesting enshrined in Section 16 cannot be raised in favour of the acquiring authority.

16. The same issue was recently considered in C.A. No. 3604 of 2011 - Banda Development Authority, Banda v. Moti Lal Agarwal decided on 26.4.2011. After making reference to the judgments in Balwant Narayan Bhagde v. M.D. Bhagwat (supra), Balmokand Khatri Educational and Industrial Trust v. State of Punjab (supra), P.K. Kalburqi v. State of Karnataka (supra), NTPC v. Mahesh Dutta

(supra), Sita Ram Bhandar Society v. Govt. of NCT, Delhi (supra), Omprakash Verma v. State of Andhra Pradesh (supra) and Nahar Singh v. State of U.P. (1996) 1 SCC 434, this Court laid down the following principles:

"(i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the concerned State authority to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the concerned authority will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken."

25. The principles underlined by the Apex Court in the case of ***Prahlad Singh (supra)*** are to be kept in mind while adverting the issue as to whether possession of the suit property was taken over by the KDA.

26. In the present case, the trial court has relied upon the written statement and the award No.24 dated 27.09.1961 filed by KDA in Original Suit No.814 of 2000 in returning a finding that possession of the suit property had been taken by the KDA. The revision court found that there was no evidence on record in the present suit to demonstrate that the actual physical possession of the suit property had been taken by the KDA; accordingly, it set aside the finding of possession recorded by the trial court on the ground that the approach of the trial court was erroneous in relying upon the written statement and evidence filed by KDA in Original Suit No.814 of 2000 in absence of any evidence on record in the present suit wherefrom it can be evinced that the possession of the suit property had been taken by KDA.

27. According to the petitioner, the acquisition was of a large tract of land in the instant case is evident from the written statement and the award No.24 dated 27.09.1961 filed by KDA in Original Suit No.814 of 2000, and the symbolic possession of the suit property had been taken by the authority is also evident from the possession memo dated 28.02.1973, therefore, the present case falls within the ambit of paragraph 16 (iv) of the judgement of the Apex Court in the case of ***Prahlad Singh (supra)***, and as such, the finding of

revision court that the petitioners have failed to prove that the KDA had taken the possession of the suit property is illegal and contrary to the record.

28. To determine that the present case falls within the ambit of paragraph 16 (iv) of the judgement of ***Prahlad Singh (supra)***, the first issue which crops up for determination is whether the large tract of land was acquired by the authority and if so, the possession of the land has been taken in the manner envisaged by the Apex Court in Paragraph 16(iv) of ***Prahlad Singh (supra)***. In the instant case, it is explicit from the perusal of the two written statements filed by the petitioners that no factual foundation has been laid by the petitioners that large tract of land was acquired by the KDA and the possession of the land was taken by the KDA in the manner prescribed in paragraph 16(iv) of the judgment of the Apex Court in the case of ***Prahlad Singh (supra)***. The said issue being an issue of fact can be decided only on the basis of pleading and evidence on record which in the instant case is lacking. Further, it also transpires from the record of the writ petition that the certified copy of possession memo dated 28.02.1973 filed as Annexure No. 8 is obtained from the record of Original Suit no.252 of 2000 which is yet to be proved by the KDA as per law in that suit, and the issue as to whether possession of the suit property had been taken by the KDA is yet to be adjudicated upon by the competent court in Original Suit No.252 of 2000, consequently, the possession memo cannot be relied upon in the present suit to consider the issue that possession of the suit property is with KDA.

29. In the case in hand, indisputably building exist on the land alleged to have been acquired by KDA. Therefore, the procedure provided in Paragraph 16(iii) of ***Prahlad Singh's case (supra)*** is to be complied with for taking possession of the land. No evidence or material on record was brought to the notice of the court which indicates that any notice was given by the KDA to the respondents and possession of the land was taken in the presence of independent witnesses and panchanama was prepared taking the signatures of the independent witnesses, therefore, it is not established from the record of the case that the procedure envisaged in Paragraph 16(iii) of ***Prahlad Singh's case (supra)*** for taking possession was complied with. Consequently, this court finds that the finding of the revision court on the issue that possession of suit property had been taken by KDA is not proved is correct and based on the proper appreciation of material on record. However, it is clarified that the observation made hereinabove about possession of the suit property would not prejudice the rights of the parties in Original Suit No. Original Suit No.252 of 2000.

30. Accordingly, given the above discussion, this court does not find any substance in the submission of counsel for the possession that the present case falls within the compass of Paragraph 16(iv) of ***Prahlad Singh's case (supra).***

31. Thus, for the reasons given above, this Court does not find any good ground to interfere with the judgement of the revision court. Consequently, the writ petition lacks merit and is ***dismissed*** with no order as to costs.

(2020)06ILR A602
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.06.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 9650 of 2019
(Civil)

Yupender Kalra ...Petitioner
Versus
Pradeep Saigal ...Respondent

Counsel for the Petitioner:
Sri Vinayak Mithal

Counsel for the Respondent:
Sri Sumit Daga

A. Respondent landlord-filed suit for eviction as material alteration has been caused -to the property-and arrears of rent-Argument of respondent landlord was concluded-date was fixed for Petitioner's arguement-Petitioner filed Application 123 Ga- rent agreement-after delay of 8 years-no reasonable and satisfactory explanation for delay-and also not admissible evidence-since it is insufficiently stamped and an unregistered document-application 123 Ga rejected-instead challenging it-Application 155 Ga filed-righty rejected being barred by the principle of Res Judicata.

Held, From the facts detailed above, it is apparent that it is not the case of the petitioner in the written statement that he has made material alteration in the disputed shop in terms of rent deed, therefore, the rent deed cannot be read in evidence in the absence of any pleading by the petitioner in the written statement. So, the petitioner cannot take the help of rent deed to negate the case of the respondent of material alteration of the petitioner. Further, the fact that the Petitioner acknowledges that the rent deed is insufficiently stamped is manifest from the act of the petitioner as he did not challenge the order of the court below dismissing the application 123GA rather he filed an application 155Ga with a prayer to impound the rent deed and direct the authorities to accept deficient stamp duty, compounding fee and penalty from him. The aforesaid fact reflects that the purpose of filing the application123Ga that too after eight years is to delay the disposal of the suit. Thus, this Court does not find any error or illegality in the order dated 27.09.2017 rejecting the application 123Ga and the order of revision court dated 20.03.2018 affirming the order of the trial court dated 27.09.2017. (Para 26)

Writ Petition dismissed. (E-9)

List of cases cited:-

1. SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited 2011 (11) SCC 66

2. Darayo & Others Vs. State Of U.P. (1962) 1 SCR 574

3. Asha Agarwal (Smt.) and Others Vs. M/S Arvind & Co. and Others 2015 All. C.J. 552

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Vinayak Mithal, learned counsel for the petitioner and Sri Sumit Daga, learned counsel for the respondent.

2. The petitioner-tenant (hereinafter referred as 'Petitioner') by means of the present petition under Article 227 of Constitution of India has assailed four orders; (i) order dated 27.09.2017 passed by Additional Small Causes Court, Meerut in SCC Suit No.41 of 2010 whereby it rejected the application 123Ga of the petitioner for taking the rent deed dated 26.12.1986 and F.I.R. dated 17.11.1996 on record, (ii) order dated 20.03.2018 passed by the District Judge, Meerut in SCC Revision No.8 of 2018 dismissing the

revision of petitioner against the order dated 27.09.2017, (iii) order dated 12.02.2019 passed by Additional Small Causes Court, Meerut rejecting the application 155Ga of the petitioner praying for impounding the rent deed dated 26.12.1986 and further direction to the District Magistrate to accept the deficient stamp duty alongwith penalty and compounding charges from the petitioner and send the rent deed back to the court, (iv) order dated 07.11.2019 passed by Additional District Judge, Court No.1, Meerut dismissing the SCC Revision No.44 of 2019 preferred by the petitioner against the order dated 12.02.2019.

3. The facts, in brief, are that respondent-landlord (hereinafter referred as 'Respondent') instituted SCC Suit No.41 of 2010 contending inter-alia that the petitioner is the tenant of Shop No.4B situated in building no.171/B-E Abu Lane, Meerut Cantt. (hereinafter referred to as 'disputed shop') on the monthly rent of Rs.5,000/- per month. The eviction of the petitioner has been sought mainly on two grounds; the petitioner was in arrears of rent w.e.f. 01.09.2010 to 02.09.2010. Secondly, the petitioner has willfully caused substantial damage to the building and made material alteration in the disputed shop by raising construction. The plea as regards the material alteration have been stated in detail by the respondent in paragraphs 7 to 10 of the plaint.

4. The petitioner contested the suit by filing written statement on 01.01.2011 contending inter-alia that father of the respondent instituted SCC Case No.8 of 1994 for eviction against the petitioner contending that he had not paid the rent @ Rs.1050/- per month in terms of rent deed dated 26.12.1986. The suit was dismissed by Additional District Judge, Court No.8, Meerut by judgement and order dated 30.03.2002 with the cost of Rs.3,000/-. The petitioner denied the factum of alteration and construction alleged to have been raised by him. Besides above, several other pleas have been taken the reference of which are not relevant for the present case.

5. It transpires from the record that the final argument of the respondent in SCC Suit No.41 of 2010 was concluded and the case was fixed for the argument of the petitioner. On the date fixed for the arguments of the petitioner, he filed an application 123Ga dated 09.08.2017 with a prayer for accepting on record the two documents; (i) F.I.R. Dated 17.11.1996, (ii) Rent deed dated 26.12.1986. It was averred in the application that petitioner while preparing the case could lay hands to the aforesaid documents. On discovery of the aforesaid documents, he filed an application for taking those documents on record without any delay, and if the aforesaid documents are not admitted on record, it would cause irreparable injury and injustice to the petitioner.

6. The aforesaid application 123Ga was contested by the respondent by filing objection 128Ga denying the execution of rent deed dated 26.12.1986. The respondent further stated that petitioner did not file the aforesaid two documents alongwith evidence filed by him in the year 2012 and 2013. It was further stated that the suit is being fixed for hearing for the last 3 years, and if the documents are accepted, the trial would start de novo. There is an inordinate delay of about 8 years in filing the application 123Ga by the petitioner without there being any proper and cogent explanation for the delay in filing the said application. The respondent further stated

that application 123Ga has been filed only to delay the disposal of the suit. It was also stated that the petitioner has not elaborated the details of alleged rent deed dated 26.12.1986 in paragraph 16 & 17 of the written statement, and in fact, he has denied the fact of making any material alteration in the disputed shop in paragraphs 25 & 27 of the written statement.

7. The trial court by order dated 27.09.2017 dismissed the application on the ground that application 123Ga has been filed only to delay the disposal of the suit.

8. The order dated 27.09.2017 was assailed by the petitioner in SCC Revision No.8 of 2018 which was also dismissed by the court of District Judge, Meerut on the ground that alleged rent deed is written on stamp paper of Rs.7/- and is insufficiently stamped, therefore, it is inadmissible in evidence because of Section 35 of Indian Stamp Act, 1899 (hereinafter referred to as 'Act, 1899') till the time proviso (a) appended to Section 35 are complied with. Consequently, it held that the rent deed cannot be taken on record. The revision court refused to take the other document i.e. F.I.R. on record on the ground that said documents has no bearing in the present case.

9. The record reflects that after the dismissal of the Revision no.8 of 2018, the petitioner filed another application 155Ga on 01.01.2019 after about 8 months. The petitioner averred in the said application that he had filed rent deed with application 123Ga with a prayer to take the same on record which was rejected by the trial court. It is further stated that the revision court in affirming the order of the trial court observed that the rent deed is insufficiently stamped and is inadmissible in evidence and can be impounded under Section 33 of the Act, 1899. Accordingly, the petitioner prayed in the said application that the rent deed may be impounded and send to the District Magistrate with direction to accept the deficient stamp duty alongwith penalty and compounding charges and send the rent deed back to the court.

10. The aforesaid application 155Ga was dismissed by the trial court by order dated 12.02.2019 holding that application 123Ga of petitioner for taking the rent deed dated 26.12.1986 on record was rejected by this Court by order dated 27.09.2017 affirmed in revision, since the order passed in Revision No.8 of 2018 has not been assailed by the petitioner and same has attained finality, therefore, application 155Ga is misconceived and same has been filed only to delay the disposal of the suit.

11. The petitioner, thereafter, preferred SCC Revision No.44 of 2019 against the order dated 12.02.2019 which was also dismissed by the revision court affirming the finding of the trial court in rejecting the application 155Ga.

12. Learned counsel for the petitioner has contended that the court below has committed manifest illegality in rejecting the application 123Ga for taking the rent deed dated 26.12.1986 on record and also the application 155Ga for impounding the rent deed dated 26.12.1986. He submits that delay cannot be a ground to reject the application 123Ga since it is settled in law that court should be liberal in accepting the evidence to do the substantial justice. He further submits that rent deed dated 26.12.1986 belies the case of the respondent regarding the material alternation by the petitioner, therefore, in

the interest of justice, the court below ought to have taken the said document on record.

13. He further submits that once it has come to the notice of the court that a document is insufficiently stamped, a duty is cast upon the court under Section 33 of the Act, 1899 to impound the same and send it to the competent authority to proceed following the procedure contemplated under Section 35 of the Act, 1899. In support of his contention, he has placed reliance upon the judgement of Apex Court in the case of ***SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited 2011 (11) SCC 66.***

14. Per contra, learned counsel for the respondent contends that no explanation of inordinate delay of eight years in filing the application 123Ga has been given by the petitioner. He further submits that the revision court in affirming the order of the trial court rejecting the application 123Ga considered the consequences of taking the rent deed on record and after appreciating the law on the subject found that rent deed is insufficiently stamped and is an unregistered document, and as such, is inadmissible in evidence, therefore, it cannot be taken on record and admitted in evidence.

15. He further submitted that it is not the case of the petitioner that he had carried out material alteration in the disputed shop because of conditions stipulated in the rent deed authorising the petitioner to carry out alternation rather a perusal of the written statement discloses that he has denied the fact of material alteration in the disputed shop. He further submits that petitioner though has referred to the alleged rent deed dated 26.12.1986 in paragraph 17 of the written statement but has not elaborated the details of the rent deed in the written statement. Thus, the submission is that in the absence of any pleading that the alleged rent deed permitted the petitioner to carry out modification or alteration in the disputed shop in the written statement, the alleged rent deed cannot be read in evidence, therefore, the aforesaid facts make it obvious that the application 123Ga has mischievously been filed to delay the disposal of the suit.

16. He further submits that the order of the revision court dated 20.03.2018 affirming the order dated 27.09.2017 has not been assailed by the petitioner and same has attained finality, therefore, application 155Ga was not maintainable. He submits that the question of impounding a document would arise only after the same has been accepted on record by the orders of the court whereas in the present case, the application 123Ga of the petitioner for taking the rent deed dated 26.12.1986 on record has already been rejected by the trial court which order has been affirmed by the revision court, accordingly, he submits that the court below has not committed any illegality in rejecting the application 155Ga.

17. He further submits that the application 155Ga is barred by the principle of constructive resjudicata since the plea sought to be raised in application 155Ga could have been raised by the petitioner in application 123Ga, as such, the application 155Ga is nothing but an abuse of the process of the law and has been rightly dismissed by the court below.

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

19. I will first deal with the argument of the learned counsel for the petitioner in respect to the order of the court below on application 123Ga.

20. The facts as emerging out from the record are that the suit has been instituted in the year 2010. One of the grounds on which the eviction has been sought is that the petitioner has made material alteration in the disputed shop. The petitioner has filed written statement in January 2011 wherein he has referred the rent deed dated 26.12.1986 in paragraph 17 in reference to the institution of suit No.8 of 1994 by the father of respondent Roshan Lal Saigal against petitioner for eviction on the ground of arrears of rent. The petitioner has not detailed about the terms and conditions of the rent deed which permitted him to carry out modification or alternation in the disputed shop in the written statement. The petitioner in paragraphs 25 to 27 of the written statement has denied carrying out any material alteration in the disputed shop. It would be worth to extract paragraphs 17 and 25 to 27 of the written statement hereinbelow:-

"17. यह कि इसके बाद वादी के पिता मृतक रोशनलाल सहगल ने उत्तरदाता प्रतिवादी को तंग व परेशान करने के उद्देश्य से एक लघुवाद संख्या 8 सन 94 रोशनलाल सहगल बनाम यूपेंद्र कुमार कालरा बाबत किराया बेदखली न्यायालय जिला जज मेरठ में इस कथन के साथ योजित किया कि दिनांक 26.12.86 को हुए इकरारनामा द्वारा किराया दिनांक 1.12.91 से अंकन 1045/- रु० तय पाया गया जो प्रतिवादी ने अदा नहीं किया तथा प्रतिवादी के विरुद्ध झूठे व् आधारहीन आरोप लगाते हुए वाद योजित किया. इस वाद में उत्तरदाता प्रतिवादी ने अपना प्रतिवादपत्र प्रस्तुत करते हुए किराया अंकन 1045/- रु० में टैक्स आदि जोड़ते हुए ताकि भविष्य में कोई विधिक व्यवधान उत्पन्न न हो अंकन 1111/- रु० प्रतिमाह की दर से मय ब्याज आदि खर्चा न्यायालय में जमा किया तथा वाद के निस्तारण तक इसी दर से किराया न्यायालय में जमा करता रहा. तदुपरांत उक्त वाद दिनांक 30.3.2002 को न्यायालय अपर जिला जज कोर्ट न. 8 मेरठ द्वारा विशेष व्यय अंकन 3000/- रु०. सहित खंडित हुआ. जो मृतक रोशनलाल अथवा उनकी मृत्युपरांत वादी ने आज तक भी अदा नहीं किया.

25. यह की वादी का कथन कि उत्तरदाता प्रतिवादी ने दुकान विवादित में जानबूझकर सुब्स्टेन्शल डैमेज करते हुए धारा 7 वादपत्र में कॉलम (i), (ii), (iii), (iv) दिए गये वर्णानुसार दूकान में छति कारित की है गलत है बल्कि उत्तरदाता प्रतिवादी ने दुकान विवादित में कोई छति किसी प्रकार की जैसा वादी ने अपने वादपत्र में उल्लेखित किया है नहीं की. वादी ने उत्तरदाता प्रतिवादी के विरुद्ध झूठे व् आधारहीन आरोप लगाकर उक्त वाद योजित कर दिया है. वास्तव में वादी के पिता मृतक रोशनलाल ने उत्तरदाता प्रतिवादी को जैसी दुकान किराया पर दी वैसी ही दुकान अब तक चली आ रही है. उत्तरदाता प्रतिवादी ने दुकान विवादित में दुकान किराये पर लेने के दिनांक से आज तक ऐसा कोई कार्य नहीं किया जिससे दूकान की उपयोगिता अथवा बाजारी कीमत में कोई कमी आई

हो न ही प्रतिवादी ने दुकान विवादित में कोई छति कारित की. समस्त कथन वादी झूठा व् बेबुनियाद है जो उसने वाद योजित करने के उद्देश्य से लिखा है और उसका वादी कोई लाभ प्राप्त करने का अधिकारी नहीं है.

26. यह की वादी का कथन कि उत्तरदाता प्रतिवादी ने वादी की बिना अनुमति प्राप्त किये दुकान विवादित में सुब्स्टेन्शल डैमेज करते हुए कथित निर्माण कर सार्वभूत परिवर्तन करते हुए दुकान को डिसफिगर कर दिया जिससे दुकान की कीमत व् उपयोगिता में कमी हुई है और प्रतिवादी धारा 20 (2) सी अधिनियम 13 सन 72 के तहत काबिले बेदखली है गलत है. जब उत्तरदाता प्रतिवादी ने दुकान किराये पर लेने के दिनांक से आज तक दुकान में कुछ किया ही नहीं तो उत्तरदाता प्रतिवादी का धारा 20 (2) सी अधिनियम 13 सन 72 का उलंघन करने अथवा उसके तहत बेदखल होने का कोई प्रश्न उत्पन्न नहीं होता. समस्त कथन वादी झूठा तथा बेबुनियाद है को उसने अपने वादपत्र को रंगत देने के उद्देश्य से लिखा है और उत्तरदाता प्रतिवादी को स्वीकार नहीं है.

27. यह कि वादी ने अपने वादपत्र की धारा 8 में कॉलम (i) व् (ii) में जिस कथित विवरण का उल्लेख किया है वह झूठा तथा बेबुनियाद है. वास्तव में उत्तरदाता प्रतिवादी ने दुकान विवादित में कोई छति किसी प्रकार की नहीं पहुचाई है. न ही वादी द्वारा किये गये कथित विवरण के अनुसार कोई डैमेज किया न अल्टरेशन किया न परिवर्तन किया न निर्माण किया. न ही ऐसा कोई कार्य किया जिससे दुकान की उपयोगिता अथवा कीमत में कोई कमी उत्पन्न हो. न दुकान को डिसफिगर किया. समस्त कथन वादी झूठा व बेबुनियाद है जो उत्तरदाता प्रतिवादी को स्वीकार नहीं है."

21. It is also evident from the application 123Ga that the argument of the respondent was concluded and the suit was fixed for the argument of petitioner, and at that point of time, the application 123Ga was filed after a delay of about eight years. The only explanation for the delay tendered by the petitioner in the application is that during the course of preparation of the case, he found the rent deed in the record and filed application 123Ga without any delay. The trial court found the explanation for the delay of eight years in filing the application unacceptable, accordingly, it dismissed the application holding that the application 123Ga has been filed only with the purpose to delay the disposal of the suit.

22. The revision court also found no illegality in the order of the trial court dated 27.09.2017 dismissing the application 123Ga and held that the rent deed is insufficiently stamped and is an unregistered document, therefore, it is inadmissible in evidence. It, accordingly, rejected the revision of the petitioner.

23. It is pertinent to notice that petitioner had filed evidence in the year 2012 and 2013, but he did not file the rent deed. There is no averment in the application 123Ga about his endeavours in finding out the rent deed in the last eight years. The explanation tendered by the petitioner for the delay in filing the application 123Ga is not believable for the reason that the case was pending for the last eight years and several dates had been

fixed in the case on which petitioner must have flipped through the record of the case, it is very strange that he could not lay his hands to the rent deed while preparing the case in the last eight years and he surreptitiously got it just before the date fixed for his argument. In this view of the fact, the petitioner has failed to give a reasonable and satisfactory explanation for the inordinate delay of eight years in filing the application.

24. Further, the revision court while affirming the order of trial court rejecting application 123Ga found the rent deed is inadmissible in evidence since it is insufficiently stamped and an unregistered document.

25. The petitioner in application 123Ga has stated that he has carried out alteration in the disputed shop in terms of rent deed dated 26.12.1986, therefore, in the interest of justice and for proper adjudication of the case, the rent deed may be taken on record, but no such case has been set up by the petitioner in the written statement. Petitioner has referred the rent deed in paragraph 17 of the written statement in a different context and not in reference to the terms and conditions of the rent deed under which he had carried out alternation in the disputed shop. The petitioner has denied the fact of material alteration which is evident from paragraph no. 25 to 27 of the written statement extracted above.

26. From the facts detailed above, it is apparent that it is not the case of the petitioner in the written statement that he has made material alteration in the disputed shop in terms of rent deed, therefore, the rent deed cannot be read in evidence in the absence of any pleading by the petitioner in the written statement. So, the petitioner cannot take the help of rent deed to negate the case of the respondent of material alteration of the petitioner. Further, the fact that the Petitioner acknowledges that the rent deed is insufficiently stamped is manifest from the act of the petitioner as he did not challenge the order of the court below dismissing the application 123GA rather he filed an application 155Ga with a prayer to impound the rent deed and direct the authorities to accept deficient stamp duty, compounding fee and penalty from him. The aforesaid fact reflects that the purpose of filing the application123Ga that too after eight years is to delay the disposal of the suit. Thus, this Court does not find any error or illegality in the order dated 27.09.2017 rejecting the application 123Ga and the order of revision court dated 20.03.2018 affirming the order of the trial court dated 27.09.2017.

27. Now, I will consider the legality of orders on application 155Ga. The court below in deciding application 155Ga observed that the petitioner's application 123Ga to accept the rent deed on record has been rejected by the trial court which order was affirmed by the revision court, and those two orders have not been assailed by the petitioner, therefore they have attained finality. Accordingly, it concluded that since the rent deed has not been accepted on record, it cannot be impounded.

28. This Court has upheld the order of the trial court and revision court rejecting the application 123Ga of the petitioner. The court can impound an insufficiently stamped document and direct to proceed in the manner provided under Sections 33, 35 & 38 of the Act, 1899 as held by the Apex Court in the case of ***SMS Tea Estates Private Limited (supra)*** when the

document has been accepted on record which is not the case here. Thus, the argument of counsel for the petitioner on the strength of the judgement of the Apex Court in the case of ***SMS Tea Estates Private Limited (supra)*** is not sustainable and rejected.

29. About the submission of the respondent that application 155Ga is barred by principles of resjudicata as provided in Section 11 of Civil Procedure Code,1908, it is to be noted that the provision of res-judicata is based upon the principle that there shall be no multiplicity of proceedings and there shall be the finality of proceedings. It is apt to refer to the decision of the Apex Court in the case of ***Darayo & Others Vs. State Of U.P. (1962) 1 SCR 574*** wherein it has been held that the principles of re-judicata will apply to proceedings under Article 32 & 226 of the Constitution of India. Paragraph No.9 of the judgment of Darayo is reproduced hereunder :

" 9. But, is the rule of res judicata merely a technical rule or is it based on high public policy ? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32.

30. It would also be appropriate to refer paragraph no.39 of ***Asha Agarwal (Smt.) and Others Vs. M/S Arvind & Co. and Others 2015 All. C.J. 552*** which reads as under:

"39. It is well established that the principle of resjudicata enshrined under Section 11 C.P.C. is equally applicable in respect of the decisions rendered at successive stages of the suit. Thus, even interlocutory orders passed at different stages of a suit have the binding effect provided the decision is rendered on merits."

31. In the present case, the petitioner has filed application 123Ga with a prayer to accept the rent deed on record which was rejected by the trial court. The order of the trial court was affirmed by the revision court on the ground that the rent deed is inadmissible in evidence as it is insufficiently stamped and is an unregistered document. Instead of challenging, the aforesaid two orders, petitioner acquiesced to the finding of the revision court that the rent deed is insufficiently stamped and preferred another application 155Ga with a prayer that the rent deed may be impounded and send to the authorities with a direction to accept the deficient stamp duty, compounding fee and penalty from the petitioner. The prayer made by the petitioner in Application155Ga could have

been made by him in application 123Ga since the petitioner knew that the document is insufficiently stamped and is not admissible in evidence. Therefore, applying the ratio laid down in the above-referred cases, this court finds that Application155Ga is barred by principles of constructive res-judicata.

32. Thus, given the above discussion, this court does not find any illegality in the orders passed by the trial court as well as revision court in rejecting application 155Ga.

33. Consequently, 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)06ILR A610
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters Under Article 227 No. 9782 of 2019
(Civil)

Shamshul Hasan ...Petitioner
Versus
Saleem Khan & Anr. ...Respondents

Counsel for the Petitioner:
Sri Manish :Tandon

Counsel for the Respondents:
Sri Siya Ram Verma, Sri Prateek Sinha

U.P. Act No. 13 of 1972 -Section 21 (1) (a) -Landlord-Respondents filed suit for release of suit property-against Petitioner-tenant-It is barred by mandatory provision of section 21 (1) (a) of U.P. Act No. 13 of 1972-not complied-as 6 months mandatory notice not given to Petitioner-Impugned orders of Court below-illegal.

Writ Petition allowed . (E-9)

List of cases cited:-

1. Lakshmi Shankar Mishra Vs. Smt. Vineeta Richhriya 2017 (2) ARC 754

2. Abdul Jabbar Vs. VIIth ADJ, Gorakhpur 1989 (1) ARC 277

3. Writ A No.72134 of 2010 (Anoop Kumar and Others Vs. Doongermal Singodiya and Another)

4. Writ A No.12289 of 2019 (Pradeep Kumar @ Pradeep and Another Vs. Smt. Meena Devi Sahu and Another).

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard learned counsel for the petitioner and Sri Prateek Sinha, Advocate holding brief of Sri Siya Ram Verma, learned counsel for the respondent.

2. Petitioner is a tenant of Aahata No.565 Quarter No.3 (565/3), Rail Bazar, Meerpur Cantt., Kanpur Nagar (hereinafter referred to as 'suit property') at Rs.60/- per month. The petitioner has assailed the judgement and order dated 14.12.2017 passed by Prescribed Authority/Civil Judge (Senior Division), Kanpur Nagar allowing the release application instituted by respondent nos.1 & 2 registered as Rent Case No.16 of 2013 (Saleem Khan and Another Vs. Shamshul Hasan) and order dated 06.09.2019 passed by Additional District Judge, Court No.12, Kanpur Nagar dismissing the Rent Appeal No.4 of 2018. 3. The respondent nos.1 and 2 being owner and landlord of the suit property filed an application under Section 21 (1)(a) of U.P. Act No.13 of 1972 for release of the suit property. It is stated in the release application that the respondents have

purchased the suit property from its erstwhile owner Smt. Akeela Jamal by registered sale deed dated 23.06.2010. It is further averred that family of respondents/landlord is big, details of which have been stated in paragraph 5 of the release application, therefore, suit property is needed for their personal use and occupation. It is also stated in the release application that notice has been sent to the petitioner-tenant for vacating the suit
property. The said notice was replied by the petitioner-tenant on 24.07.2012.

4. In the aforesaid case, petitioner-tenant filed objections. Besides taking other plea, petitioner-tenant stated in paragraph 23 of the objection that the release application is barred by the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972 as six months mandatory notice has not been given to the petitioner by the respondents-landlord which is mandatory requirement for filing release application by the landlord as the petitioner is the tenant of the suit property since before its purchase by the respondents-landlord.

5. On the basis of aforesaid pleadings, the Prescribed Authority framed three issues. The issue no.1 was as to whether notice given by the respondent-landlord was valid; issue no.2 as to whether there was any relationship of landlord and tenant between the parties; issue nos.3 & 4 in respect of bona fide need and comparative hardship.

6. On the issue no.1 the Prescribed Authority held that notice was given on 10.07.2012 and six months notice period has elapsed before filing the release application, therefore, requirement of proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972 is fulfilled and release application is maintainable. The trial court after appreciating the evidence and material on record decided the issue of bona fide need and comparative hardship in favour of respondent-landlord.

7. The petitioner-tenant, thereafter, preferred Rent Appeal No.4 of 2018 under Section 22 of U.P. Act No.13 of 1972 which was also dismissed by the Additional District Judge, Court No.12, Kanpur Nagar by judgement and order dated 06.09.2019 whereby he has affirmed the finding of Prescribed Authority.

8. Challenging the aforesaid orders, learned counsel for the petitioner has contended that notice dated 10.07.2012, copy of which is annexed as Annexure 1 to the writ petition, does not meet the requirement of proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972 inasmuch as the said notice does not state the fact that respondents-landlord want release of the suit property for their personal use and for which they would initiate legal proceedings. In support of his submission, he has placed reliance upon the judgement of this Court in the case of ***Lakshmi Shankar Mishra Vs. Smt. Vineeta Richhriya 2017 (2) ARC 754*** and also in the case of ***Abdul Jabbar Vs. VIIth ADJ, Gorakhpur 1989 (1) ARC 277***.

9. The submission is that the court below while returning the finding on issue no.1 against the petitioner has failed to consider this relevant aspect of the matter, and as notice dated 10.07.2012 was invalid, therefore, mandatory requirement of notice as contemplated in proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972 has not been complied with, therefore, the release application was not maintainable. He further contends that finding of Prescribed Authority on the

issue of bona fide need is also not correct inasmuch as respondents-landlord have got released one house adjacent to the suit property and some portion of that house has been demolished by the landlord, therefore, need set up by the landlord-respondents is not genuine and bona fide.

10. Per contra, learned counsel for the respondents-landlord contends that objection raised by the petitioner that notice does not state the fact that respondents-landlord need the suit property for their personal use has been waived by the petitioner inasmuch as no such case has been set up by the petitioner in his written statement. He submits that the only objection which has been raised by the petitioner in the written statement was that six months mandatory notice has not been given, and thus, in view of the said fact, the finding returned by the court below on issue no.1 that release application is not barred by proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972 is correct and based upon proper appreciation of evidence and material on record. In support of his aforesaid submission, he has placed reliance upon the judgement of this Court in ***Writ A No.72134 of 2010 (Anoop Kumar and Others Vs. Doongermal Singodiya and Another)*** & ***Writ A No.12289 of 2019 (Pradeep Kumar @ Pradeep and Another Vs. Smt. Meena Devi Sahu and Another).***

11. On the issue of bona fide need, he contends that finding of the courts below is a finding of fact as the same has been recorded after appreciating the evidence and material on record and as the petitioner has failed to point out any perversity in the finding of courts below, this Court may not interfere with the findings of courts below in exercise of supervisory jurisdiction under Article 227 of Constitution of India on the issue of bona fide need and comparative hardship.

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

13. Before adverting to the first submission of learned counsel for the petitioner as to whether notice dated 10.07.2012 meets requirement of a valid notice contemplated under the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972, it would be relevant to refer the judgement of ***Lakshmi Shankar Mishra (supra)*** relied upon by the learned counsel for the petitioner. This Court after noticing the various pronouncements of this Court has laid down as to what a notice should contain in order to meet the requirement of substantial compliance of proviso to Section 21 (1) (a) of U.P. Act No.13 of 1972. Paragraph 16 of the said judgement is extracted hereinbelow:-

"16. A careful reading of the statutory provision and the object it seeks to achieve, when seen in the light of the aforesaid decisions, leads the court to irresistible conclusion that for substantial compliance of the requirement of the proviso to sub section (1) of section 21 of the Act, the purchaser landlord must: (a) give a written notice to the tenant about purchase of the building; (b) the notice must indicate that the building is bona fide required either in its existing form or after demolition and new construction for occupation by himself or any member of his family in which connection he would bring proceeding; and (c) the application under section 21 (1) (a) should be filed after six months of the service of notice. The provision does not require that the

notice must by itself provide six months time to vacate. What it needs to do is to inform the tenant that the accommodation is required by the landlord for the purpose enumerated in clause (a) of sub section (1) of section 21 of the Act in which connection he intends to bring proceeding. The proviso does not prohibit issuance of a composite notice which seeks arrears of rent as well as terminate tenancy in addition to giving information of purchase and the bona fide requirement of the purchaser landlord as well as intention to bring proceeding in that behalf. Therefore even a composite notice seeking to terminate the tenancy upon expiry of one month's period coupled with information to the tenant about the purchase and purchaser landlord's requirement for the premises with intent to bring proceeding in that behalf would not render the proceeding drawn under section 21 (1) (a) bad. Because the purpose of the notice stands achieved once sufficient information is given to the tenant that the premises in question has been purchased and the same is bona fide required for the use and occupation of the landlord or his family members and that in due course proceeding would be drawn in that behalf."

14. In the case of ***Abdul Jabbar (supra)***, this Court has held the notice to be invalid on the ground that such notice did not state the intention of the landlord that he wants the property for his personal use for which he would file an application for release against the petitioner under Section 21(1)(a) of U.P. Act No.13 of 1972. Paragraph 14 of the judgement is extracted hereinbelow:-

"14. I have examined the notice, which has been annexed as Annexure 4 to this petition. The property as stated above, was purchased on 6th October, 1975. This notice was given on 9th February, 1976. <u>This notice does not state at all as to any intention on part of the landlord to file an application for release against the petitioner under Section 21 (1) (a) of the Act nor does it ask the petitioner to vacate the premises but it is only a notice intimating the petitioner that the landlord has purchased the property by a sale-deed, dated 6th October, 1975. In the circumstances, clearly, this notice cannot be construed to be a notice under the proviso to Section 21 (1) (a) of the Act.</u> There is no sufficient compliance of the mandatory requirement of law."

15. It is explicit from the aforesaid two judgements that for a notice to be valid and to meet the substantial requirement of compliance of proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972, a notice must indicate clear intendment of the landlord that he wants the property for his personal need and for release of which he may file an application under Section 21 (1)(a) of U.P. Act No.13 of 1972.

16. In the light of above principles laid down by this Court, it is to be seen that the notice of landlord in the present case meets the requirement of a valid notice. It is manifest from the notice that it does not state that the suit property is bone fide required for the personal use of the landlord or any member of the family and the application under Section 21 (1) of the U.P. Act No.13 of 1972 shall be filed after the expiry of six months of the notice.

17. Learned counsel for the respondents-landlord also also could not point out from the notice that the notice

recites any fact wherefrom it can be inferred that the landlord wants suit property for his personal use and occupation, and for release of suit property, he may file release application under Section 21 (1) (a) of U.P. Act No.13 of 1972. Thus, in view of the law laid down by this Court in the case of ***Lakshmi Shankar Mishra (supra) & Abdul Jabbar (supra)***, this Court finds that the notice in the present case does not meet the requirement of a valid notice.

18. Now, the Court proceed to consider the judgements relied upon by the learned counsel for the respondents. This Court in the case of ***Pradeep Kumar @ Pradeep (supra)*** has held that tenant may waive protection provided to him under the first proviso to Section 21 (1) of the U.P. Act 1972 and if the tenant has waived such protection, the release application is maintainable. The proposition of law as has been laid down by this Court in the aforesaid case is not applicable in the present case as it is not the case of respondent-landlord that tenant has waived the protection available to him under the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972.

19. In the case of ***Anoop Kumar (supra)*** this Court found that defendants have not raised any objection that the release application is barred by the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972, and accordingly, it held that release application is maintainable as the defendants have waived the protection available to them under the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972.

20. Thus, in view of the foregoing discussion, this Court finds that both the courts below have acted illegally in holding that the notice of termination of tenancy is a valid notice and release application is not barred by the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972.

21. Since, this Court has held that release application is barred by the proviso to Section 21 (1)(a) of U.P. Act No.13 of 1972, therefore, in the facts of the present case, the other contention advanced by learned counsel for the parties are not dealt with.

22. For the reasons given above, both the orders impugned are set aside. The writ petition is ***allowed*** with no order as to costs.

(2020)06ILR A614
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.06.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

S.C.C. Revision No. 124 of 2018

Sri Surendra Nath Garg
...Revisionist (Defendant in Suit)
Versus
Sri Balbir Sharan Garg
...Respondent (Plaintiff in the suit)

Counsel for the Revisionist:
Sri Pramod jain, Sri Ashutosh Srivastava

Counsel for the Respondent:
Sri Madhav Jain, Sri Swapnil Kumar

A. Civil Law - Code of Civil Procedure, 1908-Section 115 - The Provincial Small Cause Courts Act,1887- Section 25- eviction and arrears of rent-notice terminating the tenancy was served on the ground of a

material alteration in the shop-receipts for paying rent was controverted-trial court found the signature and thumb impression are forged and fabricated-trial court found that the expert report of the applicant is not credible-thus, the judgment of the trial court is not perverse.(Para 3 to 37)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. U.O.I & ors. Vs Devendra Kumar Chaudhary (2018) 9 ADJ 570

2. U.O.I Vs Ibrahim Uddin & anr. (2012) 8 SCC 148

3. Trilok Singh Chauhan Vs Ram Lal (dead) thru Legal Represntatives & ors. (2018) 2 SCC 566

4. U.O.I Vs Murari Lal 1980 (1) SCC 704

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Pramod Jain, learned Senior Counsel assisted by Sri Ashutosh Srivastava, learned counsel for the revisionist and Sri Swapnil Kumar, learned counsel for the respondent.

2. The revision-applicant (hereinafter referred to as 'applicant') is the defendant and has assailed the judgement and decree dated 27.8.2018 passed by 4th Additional District Judge, Agra in S.C.C. Suit No. 32 of 2013 (CNR No. UPAG01-005993-2013) whereby the Trial Court has decreed the suit.

3. The brief facts of the case are that the respondent-plaintiff (hereinafter referred to as 'respondent') has instituted S.C.C. Suit No. 32 of 2013 against the applicant praying for a decree of eviction, arrears of rent, mesne profit and taxes. The plaint case was that the respondent is the owner and landlord of shop No. 1/31/C (hereinafter referred to as 'shop') situated on the ground floor in Amar Market, Johari Bazar, Agra. The respondent let out the shop to the applicant at a rent of Rs.5,000/- plus taxes @31% i.e. Rs.6,550/- per month. The applicant without the consent of the respondent joined two shops i.e. shop No. 1/31/C under his tenancy and shop No. 1/31/C-1 under the tenancy of one Raj Kumar Garg, nephew of the applicant, by removing the Pucca partition wall standing between the two shops. Consequently, the respondent sent a notice on 29.5.2012 terminating the tenancy which was duly served upon the applicant. The applicant after receiving the aforesaid notice approached the respondent and admitted his fault in making material alteration in the shop and requested the respondent not to take any legal action against him and in lieu thereof, he offered rent of Rs. 5,000/- plus taxes per month of the shop to the respondent with effect from 1.4.2011 and assured him to restore the shop in original shape. The respondent accepted the aforesaid offer of the applicant on 15.6.2012. The applicant, thereafter, made payment of rent of Rs. 19,650/- of three months with effect from 1.4.2011 to 30.6.2011 @ Rs. 6,650/- per month (rent Rs. 5,000/- and taxes @ Rs. 1550/-). The respondent issued the receipt of payment of rent which was duly acknowledged by the applicant.

4. Further, the case of the respondent was that on 22.6.2012, he received a reply of notice dated 29.5.2012 sent by the respondent. On receiving the aforesaid reply, he immediately called the applicant on 22.6.2012 and informed him about the reply to the notice sent by the

applicant. The applicant informed the respondent that the said reply was sent by his counsel due to lack of communication as he could not intimate his counsel about the compromise between them. The applicant requested the respondent to ignore the reply. On the same day i.e. on 22.6.2012, he made payment of Rs. 19,650/- of rent for three months for the period from1.7.2011 to 30.9.2011. The respondent issued a proper receipt of the payment of rent duly acknowledged by the applicant.

5. It is further stated that the respondent has instituted S.C.C. Suit No. 59 of 2012 against Raj Kumar for eviction, recovery of arrears of rent and taxes. The applicant upon hearing about the filing of the aforesaid suit approached the respondent on 23.10.2012 and made payment of Rs. 19,650/- towards rent and taxes for three months for the period of 1.10.2011 to 31.12.2011; the proper receipt was issued by the respondent in respect of the aforesaid payment which was duly acknowledged by the applicant. The applicant has not paid rent and taxes since 1.1.2012 despite repeated demands. Accordingly, the respondent sent a notice dated 11/12.01.2013 terminating the tenancy and demanding the arrears of rent, taxes etc. on the correct address of the respondent which was duly served upon the applicant on 14.1.2013. As the applicant failed to comply with the notice dated 11.1.2013, the respondent instituted the aforesaid suit for eviction and recovery of rent, taxes etc.

6. The suit was contested by the applicant by filing written statement contending inter-alia that the rent of the shop was not Rs. 5,000/- per month plus taxes. The last rent of the shop was paid @Rs. 12,00/- per month plus taxes and due receipt of payment of rent was issued by the respondent. The applicant also denied that he had carried out material alteration which caused substantial damage to the shop. It was also averred that the applicant never approached the respondent on 29.5.2012 or any other date and offered rent of Rs. 5,000/-. The alleged receipt issued by the respondent is forged and fabricated. The applicant denied his signature and thumb impression on the receipts. The fact of compromise between the parties settling the rent at Rs. 5,000/- plus 31% taxes have been denied by the applicant. It was further averred that the rent of the shop was Rs. 105/- per month on 16.7.1983. Thereafter the rent was enhanced to Rs. 140/- on 1.4.1987. According to the defendant, periodical enhancement of the rent was done. The rent was enhanced to Rs. 1200/- per month plus taxes with effect from 01.04.2009 and Rs.1440 plus taxes from 01.04.2012.

7. Based on pleadings between the parties, the following five issues were framed by the Trial Court:-

"1. Whether the monthly rent for the shop in question was Rs. 5000/- and taxes?

2. Whether the defendant has committed any default in making payment of rent to the plaintiff since 01.01.2012.

3. Whether the notice sent by the plaintiff to the defendant for termination of tenancy is duly served on the defendant and the tenancy is terminated by the notice.

4. Whether this court has jurisdiction to hear this suit.

5. Whether the plaintiff is entitled to get any relief ."

8. The respondent in support of his case filed three original rent receipt dated

15.6.2012 (paper No. 21C/1), rent receipt dated 22.6.2012 (paper No. 21C/2) and rent receipt dated 23.10.2012 (paper No. 21C/3) which according to the respondent are original counterfoils of the receipts dated 15.6.2012, 22.6.2012, 23.10.2012(for convenience paper no.21C/1 to 21C/3 referred as 'rent receipts' as referred by the trial court), report of Rajkumar Shrotriya, handwriting expert and produced himself as PW1 and Handwriting expert Rajkumar Shrotriya. Besides above, several other documentary evidence has been filed by the respondent, reference of which is not relevant.

9. The applicant in support of his case filed various rent receipts in the original, report of handwriting expert Satish Chandra Varshney, produced himself as D.W. -1, Mukesh Kumar Khandewal D.W.-2 and expert Satish Chandra Varshney.

10. The trial court decided issue Nos. 1 and 4 jointly. The Trial Court considered the documentary and oral evidence of both the parties threadbare and held that the expert report of the applicant is not credible and the rent of the shop is Rs. 5,000/- per month, therefore, the U.P. Act No. 13 of 1972 does not apply to the shop.

11. The issue No. 2 was also decided in favour of the respondent as the Trial Court based on evidence and material on record found that the applicant is in arrears of rent since 1.1.2012, therefore, he has defaulted in payment of rent. The Trial Court found that the notice terminating the tenancy was duly served upon the applicant and the applicant did not abide by the notice. Consequently, it decided the issue No. 3 also in favour of the respondent. Accordingly, the Trial Court decided issue no.5 in favour of the respondent and decreed the suit.

12. Learned Senior Counsel for the applicant has assailed the finding on the issue No. 1.

13. Challenging the finding on the aforesaid issue, learned Senior Counsel contended that the rent of the shop was Rs. 1200/- plus taxes which was enhanced to Rs. 1440/- per month from 1.4.2012 is evident from the notice dated 29.5.2012 of the respondent. He further submits that the Trial Court has not given any reason for rejecting the expert report and testimony of the Expert Sri Satish Chandra Varshney produced by the applicant which proved the three rent receipts paper No. 21C/1 to paper No. 21C/3 are forged and fabricated.

14. His further submission is that the trial court has reiterated the expert report of the respondent which is evident from paragraph no. 28 of the judgement and has not given any independent reason to record the finding that the three rent receipts, paper No. 21C/1 to paper No. 21C/3 bear signature and thumb impression of the applicant. It is further contended that the respondent has filed original rent receipts paper No. 21C/1 to paper No. 21C/3 instead of receipt book containing the counterfoils of the alleged rent receipts, this act of the respondent shows that the aforesaid rent receipts are obviously forged, consequently, the trial court in the absence of receipt book should have drawn adverse inference under Section 114 of the Indian Evidence against the respondent. It is also urged that the alleged compromise between the parties have not been proved.

15. In the light of the above submission, Counsel for the applicant argues that the trial court erroneously relied upon the rent receipt paper No. 21C/1 to paper No. 21C/3 and expert report of Raj Kumar Shrotriya to hold the rent of the shop is Rs.5000/-per month plus taxes@31%. The counsel for the applicant has relied upon paragraph 86 to 89 of the judgment in the case of **Union of India and others Vs. Devendra Kumar Chaudhary 2018(9)ADJ 570** as to what is the evidentiary value of the expert opinion in a case.

16. It is lastly argued that since the trial court has committed patent illegality in decreeing the suit, therefore, the impugned order warrants interference by this court in exercise its revision power under Section 25 of The Provincial Small Cause Courts Act, 1887. In support of the aforesaid submission, he has placed reliance upon the following judgements:-

"(i) Ram Murti Devi Vs. Pushpa Devi & others, 2017 (15) S.C.C. 230

(ii) Rai Chand Jain Vs. Miss Chandrakanta Khosla, 1991 (1) S.C.C. 422.

(iii) Ram Das Vs. Ishwar Chand & others, 1988 (3) S.C.C. 131.

(iv) Vinod Kumar Arora Vs. Surjeet Kaur, 1987 (3) S.C.C. 711".

17. Refuting the aforesaid submission, learned counsel for the respondent submitted that The trial court while rejecting the expert report of the applicant has given elaborate reasons which are supported by the record. It thereafter proceeded to examine the genuineness of the signature and thumb impression of the applicant on paper No. 21C/1, paper No. 21C/2 and paper No. 21C/3 and recorded a finding that the same bears signature and thumb impression of the applicant. Thus, he submits that the finding of the Trial Court being the finding of fact does not call for interference by this Court in the exercise of its revision jurisdiction.

18. He further submits that the applicant cannot impel the respondent to file evidence. If the applicant wanted the receipt book containing counterfoils of rent receipt paper no.21C/1 to paper no. 21C/3to be placed on record, he should have filed an application before the Court below in this regard. If the Trial Court on submission of such an application was satisfied that the production of receipt book is necessary to do justice, it would have passed necessary orders directing the respondent to produce the relevant receipt book, and if the order of the court was not complied with by the respondent, then only the adverse inference could be drawn against the respondent. In support of his contention, he has placed reliance upon Apex Court's judgement in the case of **Union of India Vs. Ibrahim Uddin and another, 2012 (8) SCC 148**. He has also placed reliance upon the judgement of **Trilok Singh Chauhan Vs. Ram Lal (dead) through legal representatives and others, 2018 (2) SCC 566** on the point that if the finding is not perverse and based on the appreciation of evidence on record, the court should refrain from interfering with such findings in the exercise of its revision jurisdiction being the finding of fact.

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

20. It is not in dispute that the applicant is the tenant of the shop and

there is a relationship of landlord and tenant between the respondent and applicant. The respondent alleges that once he sent a notice dated 29.5.2012 terminating the tenancy on the ground of a material alteration in the shop, the applicant approached him with a request not to take any legal action and offered rent of the shop at Rs. 5,000/- per month plus 31% tax, i.e. Rs. 6550/- per month. The respondent produced three original rent receipt dated 15.6.2012 (paper No. 21C/1), rent receipt dated 22.6.2012 (paper No. 21C/2) and rent receipt dated 23.10.2012 (paper No. 21C/3) to prove the rent of the shop agreed between the parties, which, according to him, was duly acknowledged by the applicant by putting his signature and thumb impression on the said receipts.

21. The applicant had denied any compromise between him and the respondent in which rent of the shop was enhanced to Rs. 5,000/- plus 31% taxes per month. He also denied the signature and thumb impression on the said receipt. He alleges that three receipts i.e. three original rent receipt dated 15.6.2012 (paper No. 21C/1), rent receipt dated 22.6.2012 (paper No. 21C/2) and rent receipt dated 23.10.2012 (paper No. 21C/3) are forged and fabricated receipts.

22. The controversy in the present case centres around the aforesaid three receipts since if the signature and thumb impression on the aforesaid three receipts are proved to be of the applicant, it is proved that the respondent has agreed to pay rent of the shop @ Rs.5,000/- plus 31% tax. The respondent filed a report of the handwriting expert and produced Expert Rajkumar Shrotriya to prove that the receipts bear signature and thumb impression of the applicant. The applicant also filed a report of the handwriting expert and produced Expert Satish Chandra Varshney to prove that the signature and thumb impression on aforesaid three receipts are not of the applicant and are forged.

23. The Trial Court while adverting to the issue No. 1 has considered various rent receipts filed by the applicant which demonstrated that the rent of the shop was Rs. 1200/- plus taxes. The trial court found that the rent receipt produced on record establishes payment of rent of the shop till 31.3.2011 as no rent receipt for the period after 31.3.2011 showing payment of rent was filed by the applicant. Consequently, it held that the applicant has paid the rent till 31.3.201.

24. The Trial Court, thereafter, proceeded to consider the expert report submitted by the applicant and the respondent. On close appraisal of the expert report and the statement of the expert of the respondent, the trial Court found the report of the expert of the respondent is correct and the signature and thumb impression on the three rent receipts was of the applicant. The Trial Court thereupon considered the expert report of the applicant and found that according to the expert report paper No. 102Ga, Q-2 to Q-6 (Thumb impression of the applicant on Paper no.21C/1 to 21C/3) and T-1 (Standard Thumb impression of the applicant) have the same characteristic, even then he has stated in his report that there are dissimilarities in Q-2 to Q-6 and T-1.

25. At this point, it would be pertinent to reproduce that portion of the report of the

expert Satish Chandra Varshney where he has dealt with the thumb impression:

"*.....**As regards the Thumb-impressions:***

(a) Standard thumb-impressions mark T1 to T4 show on a preliminary examination that:

-In impression mark T1 only some of the ridges are visible in lower portion on the basis of these ridges the pattern of the impression may be judged that is of loop type. In this pattern the ridges are entering and flowing out after re-curving in the middle in the left side and makes the delta point on the right side. In impression mark T2 no one ridge or ridge characteristics is distinctly visible, so it is blurred and not comparable.

The impression mark T3-T4 are of Arch type. In this pattern the ridges are flowing from one side to other side without taking any turn in middle.

(b) Disputed thumb impression mark Q1 to Q6 in these impression:

-In impression mark Q1 no one ridge or ridge characteristics is distinctly visible, so it is blurred and not comparable.

-In impression mark Q2 to Q6 the flow of ridges is clear on the basis of these ridges the pattern of the impressions may be judged that is of loop type. In this pattern the ridges are entering and flowing out after re-curving in the middle in the left side and makes the delta point on the right side.

Further examination of these impressions Q2 to Q6 show that in Q3 the ridges are very much faint no one ridge characteristics is distinctly visible so it is not comparable.

(c) So I made a detailed analysis of ridge characteristics in disputed thumb-impressions Q2-Q4-Q5-Q6 and in standard impression T1 which is the main basis of comparison that shows basic dis-similarities in Q2-Q4-Q5-Q6 and in T1.....″

26. From the aforesaid underlined portion of paragraph 'a' and 'b' of the expert report extracted above, it is evident that the report of the Expert clearly suggest that Q2-Q4-Q5-Q6 and T1 have the same characteristic and yet in paragraph C in the conclusion part, the Expert records that there is dissimilarity in Q2-Q4-Q5-Q6 and T1. The aforesaid conclusion which on the face of record appears to be not correct led the Trial Court believe that the report of the Expert of the applicant is not credible.

27. The Trial Court thereafter proceeded under Section 73 of the Indian Evidence Act to verify the genuineness of signature and thumb impression on the receipts and other documents on record namely receipt No. 34C/29, 34C/31, 34C/32 submitted by the applicant, signature of the applicant on Vakalatnama paper No. 13-C and written statement. On examination of the admitted signature of the applicant, the Trial Court recorded a finding that the applicant is in the habit of making two kinds of signature **'in one kind** he draws only one headline on all the three words of his signature and **in other kind**, he makes three different headlines one on every word of signature'. By recording the aforesaid finding, the Trial Court was of the view that the expert report submitted by Expert Satish Chandra Varshney is not correct and is not worthy of reliance. The Trial Court also noticed the fact that the applicant has deposited rent @ Rs. 5,000/- per month and taxes in the court during the

pendency of the case which also amounts to an admission by the applicant with respect to the rate of rent.

28. This court in the case of **Union of India and others (supra)** has held that the expert report is only an opinion of an expert and such opinion cannot be treated to be a conclusive piece of evidence. It can also be inferred from the number of judgments of the apex court relied upon in the said judgment that an expert witness howsoever impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. At this point, it would also be pertinent to notice the judgment of the Apex court in the case of **Murari Lal 1980(1)SCC704** (referred in paragraph 88 of the judgment of *Union of India*) wherein it has been held that the courts are empowered under Section 73 of the Evidence Act to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. Paragraph 12 of the judgment of *Murari Lal* is reproduced hereunder:

"The argument that the Court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the Court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the Court. Where there is none, the Court will have to seek guidance from some authoritative textbook and the Courts own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that Shashi Kumar v. Subodh Kumar and Fakhruddin v. State of Madhya Pradesh were cases where the Court itself compared the writings."

29. Thus, from the judgment of the Apex Court in **Murari Lal (Supra)** it is crystal clear that the Court can in the interest of justice compare handwritings as it is empowered to do so under Section 73 of the Indian Evidence Act.

30. In the case in hand, the relevant extract of the report of expert Satish Chandra Varshney reproduced above was relied upon by the Trial Court to doubt the correctness of the expert report. Further, The trial court by invoking power under Section 73 of the Indian Evidence Act compared the signature of the applicant on the three rent receipts paper No. 21C/1, paper No. 21C/2, and paper No. 21C/3 with the signature of the applicant on receipt no. 34C/29, 34C/31, 34C/32, Vakalatnama and written statement of the applicant, and on verification, it found that the signature on three rent receipts matched with the signature of the applicant on the documents referred above filed by the applicant. Thus, it is evident that the trial court after evaluating the expert report and other evidence on record has given proper and

credible reason to conclude that the report of expert Satish Chandra Varshney is not credible. Thus, the submission of counsel for the applicant that no reason has been given by the Trial Court in disbelieving the report of expert Satish Chandra Varshney is misconceived and not supported by the record.

31. Now coming to the submission of counsel for the applicant that the receipt book containing counterfoils of receipt paper no. 21C/1 to 21C/3 was not filed nor the aforesaid receipts bear a serial number. Therefore, it is a case where adverse inference should be drawn against the respondent that these receipts are manipulated and forged as the respondent had failed to produce the receipt book.

32. The Apex Court in the case of **Union of India Vs. Ibrahim Uddin and another, 2012 (8) SCC 148** has held that merely withholding of documentary evidence by a party is not enough to draw an adverse inference against him. Paragraph Nos. 16, 17 and 24 of the judgment is extracted hereinbelow:-

"16. In Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr., AIR 1967 SC 256, this Court held that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be drawn:

"It is true that the defendant-respondent also did not call upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non-producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent case."

17. In Ramrati Kuer v. Dwarika Prasad Singh & Ors., AIR 1967 SC 1134, this Court held:

"It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts." (See also:Ravi Yashwant Bhoir v. District Collector, Raigad & Ors., AIR 2012 SC 1339).

24. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has

to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary."

33. Counsel for the applicant could not demonstrate from the record that the applicant had filed an application demanding production of the receipt book. The applicant needed to file an application praying for a direction to the respondent to produce receipt book asserting that the production of the receipt book was necessary for the proper adjudication of the dispute so that the court could have examined whether the production of receipt book was essential for right decision of the case and give the necessary direction for production of the receipt book. Therefore, it is not a case where the trial court could draw an adverse inference. Thus, the submission of counsel for the applicant that an adverse inference should have been drawn against the respondent for not producing the receipt book is devoid of substance.

34. Counsel for the applicant has lastly argued that it is astonishing that the original of the aforesaid three rent receipts i.e. paper no.21C/1 to 21C/3 had been produced by the respondent whereas the original of the three rent receipts could have been produced only by the applicant to whom the said receipts are alleged to have been issued. Accordingly, he submits that the aforesaid fact demonstrates that the aforesaid receipts are forged and fabricated.

35. To the said submission, learned counsel for the respondent submitted that as the aforesaid contention has been advanced for the first time before this Court, therefore, the respondent has explained in paragraph No. 14 of the counter affidavit as to how these receipts have been filed. Paragraph No. 14 of the counter affidavit is extracted herein below:-

"14. That the contents of para 14 of the 'said affidavit' as stated are wrong and denied. It is stated that the plaintiff/opposite party filed counter foils of rent receipts duly signed and thumb marked by the defendant/revisionist. The rate of rent beside tax payable in relation to the shop in question @ Rs. 5,000/- per month plus Rs. 1550/- per month will be apparent from the counter foils. The plaintiff/opposite party stated that torn out part of the rent receipt is placed below the counter foil of the rent receipt and by inserting carbon paper in between the requisite details about payment of rent is mentioned therein and after removal of carbon paper, parties appended their signatures on the receipts i.e. counter foils in original as well as rent receipts carbon copy signed by them. It is stated that tenants used to

pay the rent not only appended his signature but also his thumb impression on front and back side of the counter foils of the rent receipt. Thereafter carbon copy of rent receipt is handed over to the tenant concern. The counter foil remain with the plaintiff/opposite party, which were filed by him before the court below. From bare perusal of counter foils of rent receipts there is perforation on the right side of it which establishes that the same were counter foils of rent receipts retain by plaintiff/opposite party. In absence of cogent and valid reason to infer doubt about counter foils of those rent receipts remain in the custody of the plaintiff/landlord. Allegations to the contrary made in para under reply are without any basis. The plaintiff/opposite party has rightly filed those counter foils of the rent receipt which contain signatures and thumb impression of the defendant/revisionist. The defendant/revisionist with oblique motive and malafide reason has denied his liability to pay rent @ Rs. 5,000/- per month besides Rs. 1550/- P.M. towards taxes and his signatures and thumb impression on the counter foils of the rent receipts besides those counter foils are forged and fabricated. The facts contrary to this asserted by the defendant/revisionist in paragraph under reply are wrong and denied.

That the Rent Receipts filed by the Defendant/Revisionist in Lower Court are issued and acknowledge in same manner and style. The perforation are on left hand side by bare perusal, it can be confirmed."

36. Because of the reasons detailed in paragraph No. 14 of the counter affidavit, the court finds that the respondent has given a plausible explanation as to how the three rent receipts which are in fact counterfoils have been filed in original. Further, the record shows that the applicant has not raised aforesaid argument before the trial court and has raised it for the first time in revision, which cannot be permitted to be raised in the revision. Accordingly, this Court finds no substance in the argument of counsel for the applicant that the filing of the original receipt itself demonstrates that they are forged.

37. For the reasons given above, this Court finds that the finding recorded by the Trial Court is a finding of fact based upon proper appreciation of evidence and material on record and interference with the aforesaid finding is not warranted by this court in the exercise of power under Section 25 of the Provincial Small Causes Court Act in view of the judgment of the Apex Court in the case of **Trilok Singh Chauhan (supra).**

38. Since the judgment of the trial court is not perverse or based on a misreading of the evidence or against the record, therefore, the judgments of the Apex Court in cases, namely **Ram Murti Devi (Supra), Rai Chandra Jain (Supra), Ram Das (Supra)** and **Vinod Kumar Arora (Supra)** relied upon by the applicants on the point that the court can interfere with the judgment of the trial court on facts where judgment is based on a misreading of evidence are not applicable.

39. Consequently, the revision lacks merit and is accordingly, **dismissed**. Interim order stands vacated. There is no order as to the cost.

40. The office is directed to return the record of the court below forthwith without any delay.

(2020)06ILR A625
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2020

BEFORE

THE HON'BLE RAJAN ROY, J.

Application U/S 24/ Order 39 Rule 2-A CPC No. - 126 of 2018
&
Application U/S 24/ Order 39 Rule 2-A CPC No. - 127 of 2018

Smt. Durgawati Devi ...Applicant
Versus
Muktinath Tiwari ...Opposite Party

Counsel for the Applicant:
Vaibhav Srivastava

Counsel for the Opposite Party:

A. Civil Law - Code of Civil Procedure, 1908-Section 24 - Code of Criminal Procedure,1973-Sections 125,127- challenge to- maintainability of-Section 24 CPC or Section 407 Crpc-petition filed by wife for transfer of proceedings from the Family Court Faizabad to Family Court, Ambedkar Nagar-Family Court is deemed to be a Civil Court for the purposes of suits and proceedings governed by the CPC while Family Court exercises jurisdiction exercisable by the Magistrate of the First Class under CrPC, therefore Section 407

CrPC would clearly apply for transfer of proceedings u/s 125 and 127 CrPC as Sub-section 2 of Section 10 of the Act,1984 says that the provisions of the CrPC or the rules made thereunder, shall apply to the proceedings under Chapter IX CrPC before a Family Court-thus, application u/s 24 is not maintainable.(Para 2 to 14)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Vijay Kumar Prasad Vs St. of Bih. & ors. (2004) 5 SCC 196

2. Mohd.Nadeem Vs St. of U.P. Crl .Rev. No. 98 of 2015

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

1. These petitions have been filed by the wife for transfer of proceedings under Section 125 (3) Code of Criminal Procedure (hereinafter referred as Cr.P.C. 1973,) and Section 127 Cr.P.C bearing Case No. 119 of 2015, Smr. Durgawati Devi Vs. Muktinath Tiwari and Case No. 118 of 2015, Smt. Durgawati Devi Vs. Muktinath Tiwari respectively from the Principle Judge Family Court, Faizabad to the court of Principle Judge Family Court, Ambedkar Nagar.

2. During the Course of argument a question arose as to whether an application under Section 24 of the Code of Civil Procedure, 1908 (herein after referred as C.P.C.) would be maintainable for transfer of proceedings under Section 125 and 127 Cr.P.C. 1973, or not? This query had been put to the learned counsel for the applicant by the Court vide its order dated 07.02.2020.

3. When the matter was taken up for hearing, thereafter, learned counsel for the applicant relied upon a decision of the Supreme Court reported in (2004) 5 SCC 196; Vijay Kumar Prasad Vs. State of Bihar and others; wherein it had been held that proceedings under Section 125 Cr.P.C were of Civil nature. He contended that proceedings in question being of a civil nature, transfer

application under Section 24 CPC would be maintainable before this Court. He also relied upon decision of a Co-ordinate Bench of this Court in the case of Mohammad Nadeem Vs. State of U.P. and other in Criminal Revision No. 98 of 2015 and connected matters wherein it had been held that judgments and orders passed by the Family Court would be subject to the remedy provided under Section 19 of the Family Courts Act, 1984 and not the remedy available under the Criminal Procedure Code, 1973 or the Code of Civil Procedure, 1908 and it will be deemed to be a Civil Court for the purpose Section 19 of the Act, 1984. Based on it he submitted that there is no difficulty in maintaining an application under Section 24 CPC for transfer of the proceedings pending before the Family Court, under Section 125 and 127 Cr.P.C. 1973, as it is deemed to be a Civil Court. Relying upon the same decision he contended that against an order passed by the Family court, a petition under Section 482 Cr.P.C would not be maintainable, as the Family Court is deemed to be a Civil Court and not a Criminal Court subordinate to High Court within meaning of 482 Cr.P.C. 1973, Therefore, according to him, for this reason also an application under Section 24 C.P.C would be maintainable.

4. The Family Courts Act, 1984 (herein after referred as Act, 1984) was enacted by the Parliament to provide for the establishments of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. For the purposes of the issue involved in this application Section 7 and 10 of the Act, 1984 are relevant as they deal with jurisdiction and procedure generally, respectively. Section 7 dealing with jurisdiction reads as under:-

*" 7. **Jurisdiction.-- (1)** Subject to the other provisions of this Act, a Family Court shall--*

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any aw for the time being in force in respect of suits and proceedings of the nature referred to in the Explananation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court, as the case may be, such subordinate civil court for the area to which the jurisdictionof the Family Court extends.

Explanation.-- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit of proceeding for an order or injunction in circumstances arising out of a mutual relationship;

(e) a suit of proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit of proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise--

(a) the Jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

Section 10 dealing with procedure generally to be followed in the Family Courts reads as under:-

*" **10. Procedure generally.**-- (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such Court.*

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one Party and denied by the other."

5. On a bare perusal of Section 7(1) the Court finds that the Family Court, subject to other provisions of the said Act, has been vested with jurisdiction exercisable by any District Court or any Sub-ordinate Civil Court under any law for the time being in force in respect of **suits and proceedings** of the nature referred to in the ***explanation*** and for this purpose it is deemed to be a District Court or as the case may be such sub-ordinate Civil Court for the area to which the jurisdiction of the Family Court extends. Clause (a) to (g) mentions about the **suits and proceedings** referred in Section 7(1)(a). Clause (f) of the ***explanation*** to Section 7(1) refers to **suit or proceeding for maintenance.** The suit or proceeding for maintenance referred in Clause (f) however is distinct from the proceedings for maintenance under Section 125 and 127 of Chapter IX Cr.P.C. 1973, This is evident from the fact that the latter proceedings are separately dealt with and are separately mentioned in Sub-section 2 of Section 7. Therefore, reference to suit or proceedings for maintenance in Clause (f) of the explanation to Section 7 (1) appears to be a reference to such proceedings under the Hindu Adoption and Maintenance Act, 1956 or the Hindu Marriage Act, 1955. If the said provision included the proceedings for maintenance under Section 125 and 127 then the legislature would not have mentioned the latter proceedings separately under Sub-section 2 of Section 7.

6. Now as per Sub-section 2, a Family Court, subject to other provisions of the Act, shall have and exercise also as

jurisdiction exercisable by the Magistrate of first class under Chapter IX (relating to order for maintenance of wife children and parents of the Code of Criminal Procedure,1973) and such other jurisdiction as may be conferred on it by any other mention. The distinction between the two jurisdictions, one mentioned in Section 7(1) and the other in Sub-section 2 of Section 7, is thus clear from the scheme of the Act itself. Now the question is as to what is the procedure to be applied to these two jurisdiction and to the proceedings arising there from especially in the context of transfer of proceedings under Section 125 and 127 Cr.P.C. 1973 pending before the Family Court i.e. whether an application under Section 24 CPC will apply or an application under Section 407 Cr.P.C. will apply or for that matter any other remedy would be available in this regard. In this context when the Court peruses Section 10, which describes the procedure generally to be followed by the Family Court, it is revealed that Sub-section 1 thereof, which is subject to other provisions of the Act and the Rules, says that the provisions of the C.P.C. 1908 and of any other law for time being in force shall apply to the **suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973)**, before a Family Court, and for the purposes of application of the C.P.C., a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court. Now the said provision itself makes it very clear that the C.P.C. applies to suits and proceedings **other than the proceedings under Chapter IX of the Cr.P.C.** Thus Cr.P.C,1973 is excluded from application to suits and proceedings referred in Section 10(1) which is obviously a reference to the suits and proceedings mentioned in Section 7(1) read with clause (a) to (g) of the explanation to it.

7. Sub-section 2 of Section 10, which is again subject to the other provisions of the Act and the Rules, says that the provisions of the Cr.P.C. or the rules made thereunder, shall apply to the proceedings under Chapter IX Cr.P.C before a Family Court. Thus Cr.P.C applies to proceedings under Chapter IX. It being so, a logical corollary of it is that, for the transfer of any proceedings under Section 125 and 127 Cr.P.C. 1973, which fall under Chapter IX Cr.P.C. 1973,, the Cr.P.C, 1973 applies. Section 407 Cr.P.C. 1973, contains a provision which empowers the High Court to transfer any particular case from a Criminal Court subordinate to it its authority to any other criminal Court of equal or superior jurisdiction. The High Court may either act either on the report of the lower Court or on the application of the party interested or on its own initiative. In the instant case a transfer is being sought from the Family Court, Faizabad to the Court of Principle Judge Family Court, Ambedkar Nagar that is outside the sessions division have an application will lie before the High Court.

8. Now from the bare perusal of Section 10 (1), it is evident that the Family Court is deemed to be a Civil Court for the purposes of suits and proceedings governed by the C.P.C and not for the purposes of proceedings under Chapter IX of the Cr.P.C, as has already been discussed herein above. So far as proceedings under Chapter IX of the Cr.P.C. are concerned, the Family Court exercises jurisdiction exercisable by the Magistrate of the first class under the

Code of Criminal Procedure, therefore, this Court is of the view that Section 407 would clearly apply for transfer of proceedings under Section 125 and 127 Cr.P.C. 1973, as they are contained in Chapter IX, Cr.P.C. 1973.

9. The contention of the learned counsel for the petitioner that application under Section 24 C.P.C would be maintainable in the facts and circumstances of the case is thus unacceptable.

10. The fact that the proceedings under Section 125 Cr.P.C have been held by the Supreme Court to be essentially of a Civil nature does not make much of a difference so far as applicability of the provisions of CPC or Cr.P.C to such proceedings are concerned as this is an aspect which is governed by the provisions contained in the Act, 1984 itself as already discussed. As per Sub-section 2 of Section 10 in the Code of Criminal Procedure applies to proceedings under Section 125 and 127 Cr.P.C. The Counsel could not point out any other provisions in the Act or the Rules, in the Act, 1984 or the rules made thereunder if any, which could persuade the Court to take any other view of the matter.

11. Even as per the judgment in Mohammad Nadeem (Supra) provisions of CPC have not been made applicable to proceedings under Chapter IX and there is nothing therein which could persuade this Court to hold otherwise. The ratio of the said judgment on the issue as to whether an appeal would lie under Section 19 of the Act, 1984 or remedy under the provisions of any other law for the time being in force like Cr.P.C., CPC and Hindu Marriage Act is available, does not have any bearing so far as the question involved in this application is concerned. The question here is as to whether, for transfer of proceedings under Section 125 and 127, C.P.C will apply or Cr.P.C will apply. From a bare perusal of Sub-section 2 of Section 10, as already discussed, and for the reasons already given in the Cr.P.C. which applies and it contains a provision for transfer of such proceedings under Section 407 thereof.

12. In the aforesaid case of Nadeem as there was a specific remedy against the orders of the Family Court by way of an appeal under Section 19 (1) of the Act, 1984, therefore, the provisions of the CPC and the Cr.P.C were held to be inapplicable but the said reasoning does not apply in this case in view of the unambiguous provision of the Act, 1984 itself in this regard, as noted hereinabove, which permits the applicability of Cr.P.C. to proceedings under Chapter IX Cr.P.C. This is also the view taken by a co-ordinate Bench of this Court in the Case of Durga Prasad Vs. Family Judge, Bareilly, 98 (33) ALR 537.

13. In view of the aforesaid discussion, it is not necessary to go into the question as to whether remedy will lie under Article 227 of the Constitution of India as suggested by some of the learned Counsels, as this would be the case only if there was no remedy available in the Cr.P.C. 1973.

14. In view of the above these applications/petitions under Section 24 C.P.C are **not maintainable** and are accordingly **dismissed** but with liberty to seek other appropriate remedy available in law and without prejudice to the same.

(2020)06ILR A630
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.06.2020

BEFORE
THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE CHANDRA DHARI SINGH, J.

Special Appeal Defective No. 107 of 2019

State Bank of India, Bombay & Ors. ...Appellants
Versus
S.B. Singh ...Respondent

Counsel for the Appellants:
Sudeep Seth, Alok Saxena

Counsel for the Respondents:
Dharmendra Kumar Dixit

A. Service Law – Departmental proceedings – Criminal proceedings - Dismissal – Indian Penal Code, 1860: Sections 419, 420, 467, 468 - There is no violation of principle of natural justice in this case. A bank employee who had refused to avail of the opportunities provided to him in a disciplinary proceeding of defending himself against the charges of misconduct involving his integrity and dishonesty, cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself of the charges levelled against him and the disciplinary proceeding conducted against him had resulted in violation of principles of natural justice. (Para 22)

B. Words & Phrases – "honourable acquittal" - It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted. (Para 27)

C. Mere acquittal of an employee by a criminal court has no impact on the disciplinary proceedings initiated by the Department (Para 28, 40) - Acquittal in a criminal case by itself cannot be a ground for interfering with an order of punishment imposed by the disciplinary authority. Order of dismissal can be passed even if the delinquent officer had been acquitted of the criminal charge. (Para 30)

In the absence of any provision in the service rules for reinstatement, if an employee is not honourably acquitted by a criminal court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal Court and the enquiry conducted by way of disciplinary proceedings is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal Court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. (Para 4, 41)

Special Appeal allowed. (E-4)

Precedent followed:

1. St General Manager (Operations), S.B.I. Vs R. Periyasamy, (2015) 3 SCC 101 (Para 4)

2. Deputy Inspector General of Police Vs S. Samuthiram, (2013) 1 SCC 598 (Para 4)

3. Manager, R.B.I. Vs S. Mani, (2005) 5 SCC 100 (Para 4)

4. RBI Vs Bhopal Singh Panchal, (1994) 1 SCC 541 (Para 27)

5. R.P. Kapur Vs U.O.I., AIR 1964 SC 787 (Para 28)

6. State of Assam Vs Raghava Rajgopalachari, 1972 SLR 44 (SC) (Para 28)

7. Robert Stuart Wauchope Vs Emperor, ILR (1934) 61 Cal 168 (Para 28)

8. Southern Railway Officers Assn. Vs U.O.I., (2009) 9 SCC 24 (Para 30)

9. State Bank of Hyderabad Vs P. Kata Rao, (2008) 15 SCC 657 (Para 31)

10. Karnataka SRTC Vs M.G. Vittal Rao, (2012) 1 SCC 442 (Para 32)

11. B.C. Chaturvedi Vs U.O.I., (1995) 6 SCC 749 (Para 33)

12. Bank of India Vs Degala Suryanarayan, (1999) 5 SCC 762 (Para 34)

13. Union of India Vs Sardar Bahadur, (1972) 4 SCC 618 (Para 35)

14. Deport Manager, A.P. SRTC Vs Mohd. Yusuf Miya, (1997) 2 SCC 699 (Para 36)

15. Suresh Pathrella Vs Oriental Bank of Commerce, (2006) 10 SCC 572 (Para 37)

16. Samar Bahadur Singh Vs St. of U.P., (2011) 9 SCC 94 (Para 38)

17. SBI Vs Narendra Kumar Pandey, 2013 MPLJ Online (SC) 24; (2013) 2 SCC 740 (Para 39)

Appeal filed for rectification of order and judgment dated 06.12.2018, passed by Single Judge in Writ Petition No. 2844 (SS) of 2004

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The instant appeal has been filed for correctness of order judgment and order dated 06.12.2018 passed by learned Single Judge in Writ Petition No.2844 (SS) of 2004 (S.B. Singh vs. State Bank of India and Ors.).

2. Brief facts of the case are as follows:

(i) Show-cause notice dated 22.05.2001 was issued by the appellant/Bank to the respondent/writ petitioner seeking explanation of fraudulent withdrawal aggregated of Rs.54,100/- on various dates from the saving bank accounts of Shri V.K. Jaiswal and Shri Udham Singh during his posting as Passing Officer at Phulpur, Azamgarh Branch of the Bank from 22.08.1996 to 15.06.2000. The respondent/writ petitioner submitted his reply on 22.05.2001.

(ii) The Bank initiated departmental proceedings by issuing charge-sheet to the respondent/writ petitioner by charging him for making fraudulent withdrawal amounting to Rs.54,100/- from saving bank accounts of Shri V.K. Jaiswal and Shri Udham Singh thereby exposing the Bank to substantial loss. The respondent/writ petitioner did not submit any written statement in defence. Shri R.K. Srivastava was appointed as enquiry officer by the appointing authority to inquire the charges levelled against the respondent/writ petitioner. The Bank also lodged an FIR against the respondent/writ petitioner bearing Crime No.23 of 2002 for committing offence under Sections 419, 420, 467 & 468 IPC on 22.02.2002 at P.S. Phulpur, District Azamgarh.

(iii) On 23.04.2003 the enquiry officer submitted his report holding the allegation no.1 partly proved. However, Deputy General Manager (Disciplinary Authority) disagreed and tentatively found the charge to be fully proved. The disciplinary authority sought representation of the respondent/writ petitioner on findings of the enquiry officer. On 06.06.2003, the respondent/writ petitioner submitted a representation. The disciplinary authority imposed the punishment of dismissal from service on 17.11.2003. Against punishment order dated 17.11.2003, the respondent/writ petitioner submitted departmental appeal to the Chief General

Manager (Appellate Authority) on 06.01.2004. Vide order dated 05.04.2004, the appellate authority dismissed the departmental appeal and found the penalty commensurate with the lapses held proved against the respondent/writ petitioner. The respondent/writ petitioner preferred a petition bearing Writ Petition No.2844 (SS) of 2004, impugning the order of punishment dated 17.11.2003 and order of dismissal of departmental appeal dated 05.04.2004.

(iv) Vide order dated 07.06.2008, the Chief Judicial Magistrate, Azamgarh convicted the respondent/writ petitioner for offence punishable under Sections 419, 420, 467 & 468 IPC in Criminal Case No.3995 of 2006 (State of U.P. vs. S.B. Singh). Against the said order, the respondent/writ petitioner preferred a criminal appeal bearing No.27 of 2008 before Additional Sessions Judge, Azamgarh. The said criminal appeal was allowed by the appellate Court vide order dated 24.05.2010 and the respondent/writ petitioner was acquitted by granting benefit of doubt.

(v) After the order of the criminal appeal, the respondent/writ petitioner amended Writ Petition No.2844 (SS) of 2004 by bringing subsequent development on record. Vide impugned order dated 06.12.2018, learned Single Judge allowed the writ petition and quashed order of punishment dated 17.11.2003 and order of appellate authority dated 05.04.2004 with direction to the appellant/Bank to treat the respondent/writ petitioner in service w.e.f the date of dismissal order dated 17.11.2003 till the date of his superannuation i.e. 31.07.2016 and to provide him all consequential service benefits and the post retiral benefits.

3. The learned counsel appearing for the appellant has submitted that judgment and order dated 06.12.2018 (supra) passed by learned Single Judge is erroneous in law as well as on facts. The learned Single Judge erroneously presumed and proceeded in the entire judgment on the premise that the respondent/writ petitioner was "honourably' acquitted in the criminal proceedings, although he was acquitted on benefit of doubt.

4. The learned counsel has further submitted that it is settled law that the departmental enquiry is independent of criminal proceedings. So, acquittal in a criminal court is of no help and even if, a person stands acquitted by a criminal court, departmental enquiry can be held, since standard of proof required in a departmental enquiry and in a criminal case are different; In criminal case, standard of proof is required beyond reasonable doubt while in departmental enquiry, it is proof on preponderance of probabilities. Judgment of acquittal passed in favour of an employee by giving benefit of doubt per se would not be binding upon the employer. To support his contention learned counsel for the appellant has relied on **[General Manager (Operations), State Bank of India vs. R Periyasamy, reported in 2015 (3) SCC 101: Deputy Inspector General of Police Vs S.Samuthiram, reported in 2013 (1) SCC 598: Manager, Reserve Bank of India Vs S. Mani, reported in 2005 (5) SCC 100].**

5. It is further submitted that learned Single Judge has erroneously held that the respondent/writ petitioner had not been afforded ample opportunity of hearing in the departmental enquiry on the premise that the account holders Shri Udham Singh and Shri V.K. Jaiswal had not been produced as witnesses in the departmental enquiry. The learned Single Judge has

also failed to consider and appreciate that reasonable opportunity of defence was provided to the respondent/writ petitioner in the departmental enquiry but the respondent/writ petitioner neither filed reply to the charge-sheet nor adduced oral evidence by producing Shri Udham Singh and Shri V.K. Jaiswal (account holders) as defence witnesses and did not cross examine the management witnesses Shri Ram Aadhar Tiwari and Shri Shyam Murari Mishra and also not engaged any defence representative nor submitted defence brief to the enquiry Officer.

6. It is argued that the learned Single Judge has failed to consider and appreciate that sufficiency of evidence is not a ground for judicial review in departmental proceedings; only total absence of evidence and non-compliance of principles of natural justice causing some real prejudice to the delinquent officer are the grounds for judicial review.

7. It is also submitted that the learned Single Judge also failed to consider and appreciate that an employee of Bank is required to take all possible steps to protect interest of the Bank and discharge his duties with utmost integrity, honesty devotion and diligence and do nothing unbecoming of an officer of a Bank. The respondent/writ petitioner acted in breach of Bank's rules and had lost confidence with the Bank and it was a futile exercise of judicial review to embark upon the decision of disciplinary authority imposing punishment, preceded by an enquiry.

8. It is further submitted that the learned Single Judge had erroneously held that the appellate authority has rejected the appeal without considering factual legal matrix of the issue in question and the appellate order did not reflect application of mind. It is submitted that in view of the above, the impugned judgment of the learned Single Judge being erroneous in law as well as on facts and is liable to be set aside.

9. Per contra, learned counsel for the respondent/writ petitioner has vehemently opposed the submissions advanced by learned counsel for the appellant/respondent by submitting that there is no infirmity in the impugned order/judgment passed by learned Single Judge. He has submitted that with respect to alleged misconduct during the period from 04.01.1997 to 21.07.1997, charges were issued by the Deputy General Manager, State Bank of India, Zonal Office, Region - II, Gorakhpur i.e. Disciplinary Authority through charge-sheet dated 08.11.2001 after more than four years without explaining the delay in issuing the said charge-sheet. It is submitted that the enquiry officer conducted preliminary hearing on 25.01.2002 and regular hearing on 20.08.2002 meaning thereby only two days. On 20.08.2002, two management witnesses namely Shri Ram Adhar Tiwar and Shri Shyam Murari Misra deposed before the enquiry officer and gave statement contrary to Rule 24 of Master Circular (Saving Bank Account). The enquiry officer submitted an enquiry report dated 23.04.2003 vide which Charge No.1 was found partly proved. The disciplinary authority recorded disagreement note dated 20.05.2003

on the finding of the enquiry officer without disclosing any reasons.

10. The learned counsel has further submitted that the respondent/writ petitioner requested to reopen the enquiry for giving a proper opportunity to the respondent/writ petitioner but the same was not considered by the concerned authority. It is submitted that it is the appointing authority and not the disciplinary authority who gave note dated 20.05.2003 on the basis of which the respondent/writ petitioner was dismissed from service vide order dated 17.11.2003.

11. The learned counsel for the respondent/writ petitioner has submitted that bare perusal of enquiry report dated 23.04.2003, disciplinary note dated 20.05.2003 and dismissal order dated 17.11.2003 would reveal that the same suffer from improper appreciation of fact and non-application of mind to the facts and circumstances of the case as the materials on record do not establish/prove the allegations against the respondent/writ petitioner.

12. It is further submitted that the departmental appeal which was preferred by the respondent/writ petitioner was rejected by the appellate authority vide order dated 05.04.2004 without appreciation of facts and without applying mind to the issues and point raised by the respondent/writ petitioner, therefore, the said order passed in the departmental appeal is bad in law and liable to be set aside.

13. The learned counsel has submitted that in the statement made before the criminal Court during the criminal proceedings, Shri Udham Singh, account holder, accepted his signatures on withdrawal form and acknowledged the receipt of the payment. It is further submitted that Shri Udham Singh was produced as prosecution witness and he categorically stated that no fraud was made in his account and no amount was withdrawn by anyone. It is submitted that since criminal proceedings and departmental proceedings were on the same set of facts, therefore, when the respondent/writ petitioner has been acquitted in criminal proceedings "honourably', then he cannot be held guilty in the departmental enquiry.

14. The learned counsel vehemently argued that the judgment of the criminal Court acquitting the respondent/writ petitioner has to be construed as an "honourable' acquittal and that the respondent/writ petitioner cannot be proceeded with on the same set of facts on which he was acquitted by a criminal Court.

15. We have heard learned counsel for the parties and perused the record. We may first deal with the departmental proceedings initiated against the respondent/writ petitioner.

Departmental Proceedings:-

16. We may indicate that the following were the charges levelled against the respondent/writ petitioner in the departmental proceedings on the basis of which charge-sheet dated 08.11.2001 was served on the respondent/writ petitioner:

"1. You fraudulently obtained payments through withdrawal forms

Rs.49,000/- on various occasions from Savings Bank Account of Shri Vinod Kumar Jiswal (S.B. A/c No.15508) and Rs.5,100/- on two occasions from Savings Bank Account of Sri Udham Singh (S.B. A/c No.3135).

All the said withdrawals were posted and passed by you. The payment of withdrawals were received by you. The payment of withdrawals were received from the teller counter/paying cashier."

17. The disciplinary authority vide letter dated 08.11.2001 had required the respondent/writ petitioner to submit statement of defence in response to the charge-sheet, in terms of service rules, within 10 days of receipt of the said letter. Similarly, vide letter dated 11.10.2002, the disciplinary authority required the respondent/writ petitioner to submit defence brief by 27.10.2002 but the respondent/writ petitioner did not submit the same. The respondent/writ petitioner had also chosen not to cross-examine the witnesses in the departmental proceedings, inspite of being afforded the said opportunity. The respondent/writ petitioner himself expressed his desire to engage defence representative and sought permission to advise his name but he did not do so. The respondent/writ petitioner wrote a letter dated 28.11.2002 and sought permission for defence representative and also sought for reopening of the departmental enquiry. After giving ample opportunity to the respondent/writ petitioner, the disciplinary authority passed order dated 17.11.2003 by imposing penalty of dismissal from service.

18. As per the documentary evidence, the respondent/writ petitioner had withdrawn money from one Shri Udham Singh's Account. The account holder, Shri Udham Singh, wrote letter dated 20.08.1997 to the Bank authorities wherein he denied having withdrawn money from his account. He clearly stated in the said letter that neither does the withdrawal form bear his signatures nor was withdrawn money on the concerned dates. The charge relating to withdrawals of money by the respondent/writ petitioner from the account of Shri V.K. Jaiswal was also duly proved during the enquiry proceedings. The signatures borne on the withdrawal forms do not tally with the signature on the account opening form. Hence, it is evident that the said account holders did not withdraw money from their account.

19. It would be pertinent to sum up the reasons why the Presenting Officer (Shri V.K. Srivastava) in his brief concluded that the withdrawals by respondent/writ petitioner from accounts of the two account holders stood proved. The reasons are as follows:-

"i) Perusal of Cash Payment Register of relevant dates shows name of the respondent/writ petitioner as being the person who received payments from the said account holders;

ii) Deposition during the course of enquiry by the payment cashiers who worked at Cash Counter during the relevant time, namely Ram Adhar Tiwari and Shyam Murari Verma who examined themselves as PW1 and PW2 respectively.

iii) The fact that the respondent/writ petitioner did not cross examine the payment cashiers PW1 and PW 2.

iv) The account holders Shri Vinod Kumar Jaiswal vide letters dated 14.06.2000 and 24.11.2000 and Shri Udham Singh vide letter dated

26.08.2007, denied having received payments or withdrawn money form their accounts on the alleged dates.

v) Amount had been debited to the account stood confirmed from Relative Day Book, Day Book Summary and Saving Bank Account, General Ledger Head.

vi) Petitioner produced letter dated 03.06.2000 which has no relation with charge leveled against him.

20. On 23.04.2003, the enquiry officer submitted enquiry report partly proving the sole charge except the allegation that the respondent/writ petitioner has posted 14 withdrawals. Vide order dated 20.05.2003, Deputy General Manager (Disciplinary Authority) disagreed with the enquiry report dated 23.04.2003 and fully proved the sole charge. Deputy General Manager (Disciplinary Authority) sent a letter dated 20.05.2003 to the respondent/writ petitioner alongwith enquiry report dated 23.04.2003 and disagreement note dated 20.05.2003 for representation. The respondent/writ petitioner submitted reply dated 06.06.2003 and requested for reopening the enquiry as was earlier requested through letter dated 28.11.2002. Vide order dated 17.11.2003 passed by General Manager (Appointing Authority), the respondent/writ petitioner was dismissed from service as the charges levelled against the respondent/writ petitioner was duly proved.

21. A departmental appeal was filed against order dated 17.11.2003 passed by the appellate authority i.e. General Manager on 06.01.2004. The said appeal was also rejected by the appellate authority on 05.04.2004.

22. In view of the facts as discussed above, it is evident that the respondent/writ petitioner did not participate in the departmental enquiry and he also did not submit his reply/written submission to the enquiring officer. There is no violation of principle of natural justice in this case. The records of the disciplinary proceedings show that the respondent had avoided filing of the written explanation for the charges of misconduct levelled against him and also had for no valid reason refused to co-operate in the disciplinary proceedings. A bank employee who had refused to avail of the opportunities provided to him in a disciplinary proceeding of defending himself against the charges of misconduct involving his integrity and dishonesty, cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself of the charges levelled against him and the disciplinary proceeding conducted against him had resulted in violation of principles of natural justice.

Criminal Proceedings:-

23. We have indicated in the above-mentioned paragraphs that a criminal case was also registered against the respondent/writ petitioner being Crime No.23 of 2002, under Sections 419, 420, 467 & 468 IPC at Police Station Pulpur, District Azamgarh by one Shri Manoj Kumar Das, the then Manager, State Bank of India, Branch Pulpur, District Azamgarh against unknown persons with respect to same 14 withdrawal forms amounting to Rs.54,100/-.

24. After completion of investigation, the investigating agency filed a charge-sheet before the Court of Chief Judicial Magistrate, Azamgarh. After filing the charge-sheet the case was registered as Criminal Case No.3995 of 2006 (State of U.P. vs. S.B. Singh). The respondent/writ petitioner was convicted for offence punishable under Section 419, 420, 467 & 468 IPC vide order dated 07.06.2008 passed by Chief Judicial Magistrate, Azamgarh.

25. Against order dated 07.06.2008 (supra), the respondent/writ petitioner filed a criminal appeal bearing no.27 of 2008 before Additional Sessions Judge, Court No.1, Azamgarh. Vide order dated 24.05.2010, the Additional Sessions Judge, Court No.1, Azamgarh acquitted the respondent/writ petitioner from all the charges levelled against him on the ground that the prosecution has failed to prove his case beyond reasonable doubt. Benefit of doubt was given to the respondent/writ petitioner by the Additional Sessions Judge while acquitting him. Therefore, it is crystal clear that he was convicted by Chief Judicial Magistrate, Azamgarh vide order dated 07.06.2008 (supra), however, was acquitted subsequently by giving benefit of doubt vide order dated 24.05.2020 (supra). In such circumstances, acquittal of the respondent/writ petitioner cannot be said as "honourable acquittal'.

26. We may indicate that before order of acquittal dated 24.05.2010 (supra), the departmental enquiry was concluded and the respondent/writ petitioner was dismissed from service on 17.11.2003. Now the question is when the departmental enquiry has been concluded resulting in dismissal of the delinquent from service, whether the subsequent finding recorded by the criminal court acquitting the respondent/delinquent will have any effect on the departmental proceedings?

Honourably acquittal:-

27. The meaning of the expression "honourable acquittal" came up for consideration before the Hon'ble Supreme Court in RBI v. Bhopal Singh Panchal - (1994) 1 SCC 541. In that case, the Hon'ble Supreme Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, the Hon'ble Supreme Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

28. In R.P. Kapur v. Union of India -AIR 1964 SC 787, the Hon'ble Supreme Court has held that even in the case of acquittal, departmental proceedings may follow where the acquittal is other than honourable. In State of Assam v. Raghava Rajgopalachari -1972 SLR 44 (SC), the Hon'ble Supreme Court quoted with approval the views expressed by Lord

Williams, J. in Robert Stuart Wauchope v. Emperor [ILR (1934) 61 Cal 168] which is as follows: (Raghava case [1972 SLR 44 (SC)] , SLR p. 47, para 8)

"8. ... "The expression "honourably acquitted" is one which is unknown to courts of justice. Apparently it is a form of order used in courts martial and other extrajudicial tribunals. We said in our judgment that we accepted the explanation given by the appellant, believed it to be true and considered that it ought to have been accepted by the government authorities and by the Magistrate. Further, we decided that the appellant had not misappropriated the monies referred to in the charge. It is thus clear that the effect of our judgment was that the appellant was acquitted as fully and completely as it was possible for him to be acquitted. Presumably, this is equivalent to what government authorities term "honourably acquitted".'" (Robert Stuart case [ILR (1934) 61 Cal 168], ILR pp. 188-89)

Effect of judgment of acquittal:-

29. Contention of the respondent/writ petitioner is that since the criminal proceedings and departmental proceedings were on the same set of facts and when the respondent/writ petitioner was acquitted in criminal proceedings honourably, then he should be reinstated in service.

30. The Hon'ble Supreme Court in the case of Southern Railway Officers Assn. v. Union of India - (2009) 9 SCC 24 has held that acquittal in a criminal case by itself cannot be a ground for interfering with an order of punishment imposed by the disciplinary authority. The Court reiterated that the order of dismissal can be passed even if the delinquent officer had been acquitted of the criminal charge.

31. In State Bank of Hyderabad v. P. Kata Rao - (2008) 15 SCC 657, the Hon'ble Supreme Court has held that there cannot be any doubt whatsoever that the jurisdiction of the superior Courts in interfering with the finding of fact arrived at by the enquiring officer is limited and that the High Court would also ordinarily not interfere with the quantum of punishment and there cannot be any doubt or dispute that only because the delinquent employee who was also facing a criminal charge stands acquitted, the same, by itself, would not debar the disciplinary authority in initiating a fresh departmental proceeding and/or where the departmental proceedings had already been initiated, to continue therewith. The Hon'ble Supreme Court has further held as follows in Para - 20:

"20. The legal principle enunciated to the effect that on the same set of facts the delinquent shall not be proceeded in a departmental proceedings and in a criminal case simultaneously, has, however, been deviated from. The dicta of this Court in M. Paul Anthony v. Bharat Gold Mines Ltd. - (1999) 3 SCC 679 : 1999 SCC (L&S) 810 however, remains unshaken although the applicability thereof had been found to be dependent on the fact situation obtaining in each case."

32. In the case of Karnataka SRTC v. M.G. Vittal Rao - (2012) 1 SCC 442, the Hon'ble Supreme Court after a detailed survey of various judgments on the issue with regard to the effect of

criminal proceedings on the departmental enquiry, held that the disciplinary authority imposing the punishment of dismissal from service cannot be held to be disproportionate or non-commensurate to the delinquency.

33. The scope of departmental inquiry and criminal cases have been considered by the Hon'ble Supreme Court in number of cases. The said issue is no longer res integra. In B.C. Chaturvedi v. Union of India - (1995) 6 SCC 749, the Supreme Court has held as under:

"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no eviden criminal appeal ce. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

34. In Bank of India v. Degala Suryanarayan - (1999) 5 SCC 762, it is held by the Hon'ble Supreme Court as under:

"11. Strict rules of evidence are not applicable to departmental enquiry proceedings. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravamen of the charge against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental enquiry proceedings. The Court exercising the jurisdiction of judicial review would not interfere with the findings of fact arrived at in the departmental enquiry proceedings excepting in a case of mala fides or perversity i.e. where there is no evidence to support a finding or where a finding is such that no man acting reasonably and

with objectivity could have arrived at that finding. The Court cannot embark upon reappreciating the evidence or weighing the same like an appellate authority. So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained. In Union of India v. H.C. Goel, the Constitution Bench has held:

The High Court can and must enquire whether there is am evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true does the conclusion follow that the charge in question is proved asainst the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence legally the impugned conclusion follows or not."

35. In Union of India v. Sardar Bahadur - (1972) 4 SCC 618, the Supreme Court has held as under:

"15. A finding cannot be characterized as perverse or unsupported by any relevant materials if it is a reasonable inference from proved facts. Now what are the proved facts : Nand Kumar as representative of Ram Sarup Mam Chand and Mam Chand and Company of Calcutta filed five applications for licences to set-up steel re-rolling mills on 14th June, 1956. On 25th June, 1956, a cheque drawn in favour of P.S. Sundaram was given to the respondent by Nand Kumar for Rs 2500; the cheque was endorsed and the amount credited in the account of the respondent. When the respondent borrowed the amount in question from Nand Kumar, he was not working in the Industries Act section. Nand Kumar knew that the respondent was working in the Steel & Cement section of the Ministry and the applications for the grant of licences for setting up the steel plant re-rolling mills would go to that section. Even if the applications were to be dealt with at the initial stage by the Industries Act section the respondent at least was expected to know that in due course the section in which he was working had to deal with the same. This is borne out by the fact that in July, 1956 copies of the applications were actually sent to the Steel & Cement section where the respondent was working. If he, therefore, borrowed money from Nand Kumar a few days earlier it seems rather clear that he placed himself under pecuniary obligation to a person who was likely to have official dealings with him. The words likely to have official dealings take within their ambit the possibility of future dealings between the officer concerned and the person from whom he borrowed money. A disciplinary proceeding is not a criminal trial. The standard proof required is that of preponderance of probability and not proof beyond reasonable doubt. If the inference that Nand Kumar was a person likely to have official dealings with the respondent was one which a reasonable person would draw from the proved facts of the case, the High Court cannot sit as a Court of appeal over a decision based on it. Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials. If the enquiry has been properly held the question of adequacy or

reliability of the evidence cannot be canvaased before the High Court (See: State of Andhra Pradesh v. S. Sree Rama Rao, AIR 1963 SC 1723) No doubt there was no separate finding on the question whether Nand Kumar was a person likely to have official dealings with the respondent by the Inquiring Officer or the President. But we think that such a finding was implied when they said that Charge No. 3 has been proved. The only question was whether the proved facts of the case would warrant such an inference. Tested in the light of the standard of proof necessary to enter a finding of this nature, we are satisfied that on the material facts proved the inference and the implied finding that Nand Kumar was a person likely to have official dealings with the respondent were reasonable."

36. In Deport Manager, A.P. SRTC v. Mohd. Yousuf Miya - (1997) 2 SCC 699, the Hon'ble Supreme Court has expressed its view as under:

"8. We are in respectful agreement with the above view. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public (sic duty), as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Evidence Act. Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. The enquiry in the departmental proceedings relates to the conduct of the delinquent officer and proof in that behalf is not as high as in an offence in criminal charge. It is seen that invariably the departmental enquiry has to be conducted expeditiously so as to effectuate efficiency in public administration and the criminal trial will take its own course. The nature of evidence in criminal trial is entirely different from the departmental proceedings. In the former, prosecution is to prove its case beyond reasonable doubt on the touchstone of human conduct. The standard of proof in the departmental proceedings is not the same as of the

criminal trial. The evidence also is different from the standard point of the Evidence Act. The evidence required in the departmental enquiry is not regulated by the Evidence Act."

37. In the case of **Suresh Pathrella v. Oriental Bank of Commerce - (2006) 10 SCC 572**, the Hon'ble Supreme Court has held as under:

"11. In our view, the findings recorded by the learned Single Judge are fallacious. This Court has taken the view consistently that acquittal in a criminal case would be no bar for drawing up a disciplinary proceeding against the delinquent officer. It is well-settled principle of law that the yardstick and standard of proof in a criminal case is different from the disciplinary proceeding. While the standard of proof in a criminal case is a proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities."

38. In Samar Bahadur Singh v. State of U.P. - (2011) 9 SCC 94, the Hon'ble Supreme Court categorically held:

"7. Acquittal in the criminal case shall have no bearing or relevance to the facts of the departmental proceedings as the standard of proof in both the cases are totally different. In a criminal case, the prosecution has to prove the criminal case beyond all reasonable doubt whereas in a departmental proceedings, the department has to prove only preponderance of probabilities. In the present case, we find that the department has been able to prove the case on the standard of preponderance of probabilities. Therefore, the submissions of the counsel appearing for the appellant are found to be without any merit".

39. In **SBI v. Narendra Kumar Pandey - 2013 MPLJ Online (S.C.) 24 : (2013) 2 SCC 740**, the Hon'ble Supreme Court held as under:

"23. The inquiring authority has examined each and every charge levelled against the charged officer and the documents produced by the presenting officer and came to the conclusion that most of the charges were proved. In a departmental enquiry, the disciplinary authority is expected to prove the charges on preponderance of probability and not on proof beyond reasonable doubt. Reference may be made to the judgments of this Court in Union of India v. Sardar Bahadur and R.S. Saini v. State of Punjab. The documents produced by the Bank, which were not controverted by the charged officer, support all the allegations and charges levelled against the charged officer. In a case, where the charged officer had failed to inspect the documents in respect of the allegations raised by the Bank and not controverted, it is always open to the inquiring authority to accept the same".

40. We are of the view that the mere acquittal of an employee by a criminal Court has no impact on the disciplinary proceedings initiated by the Department. The respondent/writ petitioner, it may be noted, is an employee of a Bank and he was convicted by learned Chief Judicial Magistrate, Azamgarh in Criminal Case No.3995 of 2006 (supra). However, subsequently he was acquitted by the appellate Court by giving benefit of doubt. That being the factual situation, we are of the view that the respondent/writ

petitioner was not honourably acquitted by the criminal Court in the criminal appeal but only by giving benefit of doubt.

41. As we have already indicated, in the absence of any provision in the service rules for reinstatement, if an employee is not honourably acquitted by a criminal court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal Court and the enquiry conducted by way of disciplinary proceedings is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal Court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile, etc. In the case on hand, the prosecution did not take steps to examine many of the crucial witnesses. The Court, therefore, acquitted the accused giving the benefit of doubt. We are not prepared to say after considering the entirety of the matter and the facts involved in the instant case that the respondent/writ petitioner was honourably acquitted by the criminal Court in Criminal Appeal No.27 of 2008 (supra).

42. It is also noticed by this Court that the respondent/writ petitioner was convicted by the trial Court but acquitted by the appellate Court by giving benefit of doubt. Without taking into notice the fact that on the initial occasion in the trial, the respondent/writ petitioner was convicted, learned Single Judge reached at the conclusion that the respondent/writ petitioner was honourably acquitted.

43. A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. In the instant case, the charges against the respondent/writ petitioner are not casual in nature and are serious. These aspects do not appear to have been kept in view by the learned Single Judge.

44. For the afore-mentioned reasons, the impugned judgment dated 06.12.2018 passed by learned Single Judge in Writ Petition No.2844 (SS) of 2004 (S.B. Singh vs. State Bank of India) cannot be sustained and the same is hereby set aside.

Accordingly, the instant special appeal is allowed.

No order as to costs.

(2020)06ILR A644
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.05.2020

BEFORE
THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE SAURABH LAVANIA, J.

Special Appeal No. 140 of 2020

Anil Kumar Rana ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Raj Vikram Singh.

Counsel for the Respondents:
C.S.C.

A. Service Law – Departmental/disciplinary proceedings – Dismissal – U.P. Police Officers of Subordinate Rank (Punishment and Appeal), Rules, 1991 - After several rounds of litigation opposing the dismissal from service, appellant filed an application dated 13.06.2018 for de-novo enquiry and w.r.t that moved an application under Right to Information Act, 2005 and in absence of any reply to the same preferred a Claim Petition before the Tribunal seeking directions to official respondents to provide the status of de-novo enquiry and the copy of the enquiry report, which was dismissed vide order dated 24.01.2020. The writ petition against the said order was also dismissed by impugned order dated 27.02.2020. Court in appeal has held that considering the contents of uncontroverted personal affidavit filed by Superintendent of Police, District Hardoi and in absence of any order of the competent authority (i.e. Superintendent of Police, District Hardoi) for holding the de-novo enquiry in the matter of appellant, it cannot be held that the de-novo enquiry was initiated in the matter of appellant. (Para 32 to 35)

Principles of "Useless Formality" theory - *"no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."* **Every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void.** The validity of the order has to be decided on the touchstone of "prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing." (Para 40)

It was held that no fruitful purpose would be served in interfering in the judgment and order dated 27.02.2020 on the basis of arguments raised by the appellant broadly based on violation of principles of natural justice, as copy of the personal affidavit was not provided to the appellant and the Writ Court passed an ex-parte judgment without giving any opportunity to appellant for filing response. (Para 41)

Special Appeal dismissed. (E-4)

Precedent followed:

1. Aligarh Muslim University & ors. Vs Mansoor Ali Khan, (2000) 7 SCC 529 (Para 39)

2. M/s Dharampal Satyapal Ltd. Vs Deputy Commissioner of Central Excise, Gauhati & ors., (2015) 8 SCC 519 (Para 40)

Precedent cited:

1. Shamsher Bahadur Vs Board of Directors, Farrukhabad Gramin Bank, Writ-A No. 41169 of 2003, Judgment dated 14.09.2016 (Para 23)

Appeal assails the judgment and order dated 27.02.2020, passed by the learned Writ Court.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. When the matter was taken up through Video Conferencing Sri Raj Vikram Singh, learned counsel for the petitioner and Sri Manish Mathur, learned

counsel for the State-respondent appeared.

2. Under appeal is the judgment and order dated 27.02.2020 passed in Writ Petition No.2936 (S/S) of 2020 (Anil Kumar Rana v. State of U.P. & Ors.).

3. Brief facts of the case are to the effect that the petitioner/appellant filed the Writ Petition No.2936 (S/S) of 2020, for the following main reliefs:-

"(i) This Hon'ble Court may graciously be pleased to issue a writ of mandamus to direct the opposite parties to provide the enquiry report of the de-nova enquiry to the petitioner.

(ii) This Hon'ble Court may graciously be pleased to issue a writ of mandamus to direct the opposite parties to provide the status of the de-nova enquiry to the petitioner."

4. It is stated that the appellant was duly selected on 17.08.1997 on the post of constable in the police department of Uttar Pradesh under reserved category i.e. Schedule Tribes. After rendering 11 years regular service in the department, a preliminary enquiry was initiated against the petitioner in regard to the Caste Certificate No.9320, which was issued on 01.02.1994 by the Tehsildar Shahbad-District-Hardoi, and thereafter departmental/disciplinary proceedings were carried out against the appellant under the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991 (in short "Rules of 1991") and the appellant was dismissed from service vide order dated 26.06.2007.

5. Being aggrieved by the order of dismissal dated 26.06.2007, the appellant preferred the departmental appeal under the Rules of 1991, that too was dismissed by the Appellate Authority vide order dated 30.04.2008.

6. Challenging the order of dismissal dated 26.06.2007 as also the order of Appellate Authority dated 30.04.2008, the appellant preferred the Writ Petition No. 4262 (S/S) of 2008 (Anil Kumar Rana vs. State of U.P. & Ors.) and the same was decided on 28.07.2008 by this Court. Vide order dated 28.07.2008, the appellant was directed to approach the U.P. State Services Tribunal (in short "Tribunal"). Thereafter, the appellant approach the Tribunal by filing Claim Petition 2306 of 2010 (Anil Kumar Rana vs. State of U.P. & Ors.). The Claim Petition was filed against the order of dismissal dated 26.06.2007 and order of Appellate Authority dated 30.04.2008 and the same was dismissed vide judgment and order dated 24.08.2011 by the Tribunal. The Claim Petition was dismissed being highly time barred.

7. Thereafter, the petitioner approached this Court by means of Writ Petition No.1788 (S/B) of 2010 (Anil Kumar Rana vs. State of U.P. & Ors.) and the same was dismissed vide order dated 10.12.2015.

8. Needless to say that this Court also dismissed the Review Petition No.563 of 2015 filed by the appellant with regard to judgment and order dated 10.12.2015 passed in Writ Petition No.1788 (S/B) of 2011 vide order dated 19.05.2016.

9. Being aggrieved, the appellant approached the Hon'ble Apex Court by

preferring the Special Leave Petition, which was also dismissed.

10. It is also stated that after dismissal of Special Leave Petition, the appellant preferred an application dated 13.06.2018 for de-novo enquiry and on the said application, the de-novo/disciplinary enquiry was initiated by the opposite party no.2, in which the opposite party no.3, Inspector Police Station-Shahabad, District Hardoi, was appointed as enquiry officer. In the de-nono enquiry, the enquiry officer sent a letter dated 27.08.2018 to Tehsildar Shahabad, District-Hardoi for the purposes of verification of Caste Certificate No.9320 of the appellant. In response to the letter dated 27.08.2018, Tehsildar Shahabad, District-Hardoi vide his letter dated 31.10.2018 informed that the Caste Certificate No.9320 is not original but another Case Certificate No.7629 is the original and was issued by the Tehsildar-Shahabad, District-Hardoi.

11. It is further stated that with regard to the de-novo/disciplinary enquiry, the appellant moved an application under Right to Information Act, 2005 through an Advocate and in absence of any reply to the same, the appellant preferred the Claim Petition no.1819 of 2019 (Anil Kumar Rana vs. State of U.P. & Ors.) before the Tribunal seeking direction to official respondents to provide the status of de-novo enquiry and the copy of the enquiry report, as apppears from order of Tribunal dated 24.01.2020. The Tribunal dismissed the Claim Petition vide order dated 24.01.2020 being not maintainable.

12. In the aforesaid factual background the appellant approached this Court by means of Writ Petition No.2936 (S/S) of 2020 for the reliefs quoted above. The relevant paras of the Writ Petition are quoted below for ready reference:-

"25. That there after on 14.06.2018 the petitioner sent an application for de-novo enquiry in the light of the judgment of the Hon'ble Apex Court in "Union of India and others vs. P.Thayagarajan" dated 24, November 1998. This is pertinent to mention herein the said judgment of Hon'ble Apex Court reiterated that if any fact or legal point has been left then the de-novo enquiry may be initiated.

26. That on the application the opposite party no.2 initiated the de-novo enquiry and the opposite party no.3 was appointed the enquiry officer.

27. That after commencement of the enquiry the petitioner was called various times for the inquiry and the petitioner co-operated in the enquiry so that he always appeared before enquiry officer.

28. That the caste certificate which was disputed and in question was verified by the enquiry officer opposite party no.3 and reply thereof the opposite party no.4 written a letter to the opposite party no. whereby the opposite party no. (Tehsildar Shahabad Hardoi rectified and told the caste certificate no.6320 of the petitioner is fake.)".

29. That on the application the opposite party no.2 initiated the de-novo enquiry and the Inspector Police Station, Shahabad, District Hardoi was appointed the enquiry officer.

30. That on 27.08.2018 the enquiry officer sent a letter ot verify the caste certificate no.9320 of the petitioner from the Tehsildar Shahabad, Hardoi.

31. That the Tehsildar Shahabad, District Hardoi vide his letter No.595/Ra.

Li.-Jati Satyapan/18 dated 31.10.2018 informed to the enquiry officer that the caste certificate 9320 of the appellant is not original but his another caste certificate no.7629 is the original and issued by the Tehsil Shahabad. The true copy of the letter No.595/Ra. Li.-Jati Satyapan/18 dated 31.10.2018 of the Tehsildar Shahabad, District Hardoi, is being annexed here as Anneuxre No.2 to this Writ Petition.

32. That the petitioner was never sent any letter of enquiry nor he was provided the number of the letter of the opposite parties pertaining to the de-novo enquiry and he was not told the final decision taken by the opposite parties on the enquiry report of the enquiry officer."

13. The Writ Court on 14.02.2020, after taking into consideration the facts and the relevant documents available on record granted time to learned counsel for the appellant to bring on record any document to show that the de-novo enquiry was conducted against the appellant. The relevant observation made in the order dated 14.02.2020, on reproduction, reads as under:-

"From a perusal of the material on record, it appears that there is no document indicating initiation of any de novo inquiry after dismissal of special leave petition by Hon'ble the Supreme Court. In the aforesaid factors it does not appear that any de novo inquiry was conducted although learned counsel for petitioner has drawn attention to a letter dated 31st October, 2018, which however does not indicate the same.

Learned counsel for petitioner seeks some time in order to bring on record any document such as as a charge sheet indicating de novo disciplinary inquiry having been held."

14. The Writ Court after taking into consideration the arguments advanced by the learned counsel for the petitioner-appellant made following observations in the order dated 12.02.2020:-

"Today, learned counsel for the petitioner could not bring on record any documents indicating the fact as to whether the de novo inquiry has been initiated in the issue of the petitioner.

As per learned counsel for the petitioner, since no document any kind whatsoever including the charge-sheet have been served upon the petitioner after initiating the de novo proceedings, therefore, he is unable to bring on record such documents.

If the petitioner was unable to bring on record such documents in terms of order dated 04.02.2020, he could have pointed out the Court with the request that he could not bring on record those documents so that the precious time of the Court could be saved. Further, he has not filed any affidavit indicating therein that the documents, as per the order of this Court dated 04.02.2020, may not be brought on record as those documents are not available with him.

This Court is unable to comprehend as to why the de novo proceedings have been initiated in the issue of the petitioner when the issue has finally been decided upto the level of Hon'ble Supreme Court.

Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.2 to the writ petition, which is a letter dated 31.10.2018 preferred by the Tehsildar, Tehsil-Shahabad, District-Hardoi addressing to the Inspector Incharge, Kotwali-Shahabad referring the

letter dated 27.08.2018 of Inspector Incharge of Kotwali, Shahabad apprising him that the Caste Certificate of the petitioner was issued from his office.

The contention of learned counsel for the petitioner is that if this Court summons the letter dated 27.08.2018 of Inspector Incharge, Kotwali-Shahabad, the fact would be clarified that in the issue of the petitioner the de novo inquiry has been initiated and the Inspector Incharge, Kotwali-Shahabad was the Inquiry Officer.

As per learned counsel for the petitioner, the petitioner was serving on the post of Constable, whose Appointing Authority is Superintendent of Police, therefore, only the Superintendent of Police can initiate de novo proceedings, if any, and appoint any officer as Inquiry Officer.

In view of the aforesaid submissions, learned counsel for the petitioner has submitted that on perusal of the letter dated 27.08.2018 of Inspector Incharge, Kotwali-Shahabad would be clarifed that de novo proceedings in the issue of the petitioner has been initiated.

After considering the aforesaid submission of learned counsel for the petitioner, this Court has observed that all the aforesaid contentions do not satisfy the Court regarding query being made in the order dated 04.02.2020 and has cautioned the learned counsel for the petitioner that if after summoning the said letter it is not disclose that any de novo proceedings have been initiated in issue of the petitioner, the writ petition would be dismissed with heavy cost, even then, he has pressed his request for summoning the document."

15. On 19.02.2020, the learned Writ Court passed the following order:-

"Heard learned counsel for the petitioner and Dr. Udaiveer, learned Additional Chief Standing Counsel.

On the basis of instruction received from Superintendent of Police, Hardoi, learned Additional Chief Standing counsel submits that no de novo enquiry has been initiated against the petitioner.

Learned counsel for the petitioner refuted the said statement and submitted that if there is no de novo enquiry, then personal affidavit of Superintendent of Police, Hardoi should be filed. It is further submitted by learned counsel for the petitioner that letter dated 27.8.2018 issued by respondent no.3-Enquiry Officer/Inspector, Police Station Shahabad, District Hardoi, has not been placed before this Court.

Learned Additional Chief Standing counsel prays for and is granted a week's time to file personal affidavit of Superintendent of Police, District Hardoi stating all these things therein.

List this case again in the next cause list."

16. After the aforesaid, the personal affidavit was filed by Sri Amit Kumar, Superintendent of Police, District Hardoi. In the said affidavit it has been specifically stated that Superintendent of Police is the competent/appointing/disciplinary authority and by the authority concerned i.e. Superintendent of Police, District-Hardoi, no direction was ever given for holding the de-novo/disciplinary enuqiry against the appellant.

17. In regard to the application/representation dated 13.06.2018 moved by the appellant after dismissal of Special Leave Petition by the Apex Court, it is stated that in routine

manner the same was forwarded to S.H.O. Shahabad on 21.06.2018 and in turn the S.H.O., Hardoi forwarded the same to the Sub-Inspector Civil Police, P.S.-Shahabad and thereafter Sub-Inspector sent a letter to the Tehsildar-Shahabad and in response to the same, Tehsildar-Shahabad replied vide letter dated 31.10.2018 Shahabad affirming its earlier report sent in respect of Caste Certificate. The relevant paras of the personal affidavit of Superintendent of Police, District- Hardoi, Sri Amit Kumar reads as under:-

"13. That after the aforesaid legal recourse being exhausted by the petitioner (except the claim petition no. 1819 of 2019) he made a misconceived representation / application dated 13.06.2018 address to the Superintendent of Police, District Hardoi for de-nova enquiry and the marked to the Circle Officer same was (Police) Shahabad in routine manner and the Circle Officer, in turn, forwarded to the said application to S.H.O. Shahabad on 21.06.2018.

14.. That in very routine manner the Shahabad also deputed the application to the Sub Inspector, Civil Police, namely Sri Om Pal Singh working in P.S. Shahabad and the said Sub Inspector sent a letter to Tehsildar, Tehsil- Shahabad and the Tehsildar replied vide ts letter dated 31.10.2018 to S.H.O. Shahabad affirming its earlier report sent in respect of caste certificate. The copy of the letter dated 27.08.2018 issued to Tehsildar Shahabad, Hardoi by Sub-Inspector Om Pal Singh and reply thereof by Tehsildar dated 31.10.2018 annexed are herewith as Annexure No. P.A.-1 and P.A.-2.

15. That deponent reaffirms and states that no order direction was ever for initiating/ conducting the de-nova enquiry in the natter of the petitioner by the deponent or the then Superintendent of Police, District Hardoi in furtherance to application of petitioner dated 13.06.2018.

16. That there is no question to initiate or conduct any fresh enquiry in the matter particularity when the matter went to the level of the Hon'ble Apex Court. However, the application being received in routine manner in the office of deponent are forwarded to the concerned Circle Officer and in the present matter also the C.O. Shahabad Circle sent the application dated 13.06.2018 to S.H.O. Shahabad and the correspondence have been made in between the P.S. Shahabad Tehsil and Authorities.

17. That the deponent humbly submits that in the matter of petitioner the direction for de- nova enquiry was never given by the deponent or by the predecessor after receiving the application on 13.06.2018. None else except the Superintendent of Police can direct for enquiry or de-nova enquiry being the Appointing Authority and as such no direction at the level of appointing authority was ever given for de- nova enquiry. The correspondence between the P.S. Shahabad and Tehsildar has been made and the same cannot be said to be de-nova enquiry. However, it so happened in very routine manner and the petitioner cannot alleged the same to be de-nova enquiry nor can get any benefit."

18. Thereafter, the writ petition was fixed on 27.02.2020 and on that date when the case was called out, no one appeared for the appellant.

19. The learned Writ Court, after considering the previous orders as also

the personal affidavit of the Superintendent of Police, District-Hardoi-Sri Amit Kumar, dismissed the writ petition with costs of Rs.5,000/- vide judgment and order dated 27.02.2020.

20. Needless to say that in the order dated 12.02.2020, the learned Writ Court specifically observed as under:-

"After considering the aforesaid submission of learned counsel for the petitioner, this Court has observed that all the aforesaid contentions do not satisfy the Court regarding query being made in the order dated 04.02.2020 and has cautioned the learned counsel for the petitioner that if after summoning the said letter it is not disclose that any de novo proceedings have been initiated in issue of the petitioner, the writ petition would be dismissed with heavy cost, even then, he has pressed his request for summoning the document."

21. Further, in the judgment under appeal dated 27.02.2020, the learned Writ Court has specifically stated that "since the learned counsel for the appellant has not appeared in this case today nor any request for adjournment has been made, therefore, the matter is being decided finally on the basis of material available on record."

22. In the aforesaid factual background the present appeal has been filed assailing the judgment and order dated 27.02.2020.

23. Sri Raj Vikram Singh, learned counsel for the appellant while assailing the judgment and order dated 27.02.2020, under appeal, broadly argued that:-

(i) The observation of the learned Writ Court with regard to the issuance of fresh charge-sheet for the purposes of holding the de-novo enquiry is unsustainable in view of the judgment of this Court dated 14.09.2016 in Writ-A No.41169 of 2003 of (Shamsher Bahadur vs. Board of Directors, Farrukhabad Gramin Bank).

(ii) The copy of the supplementary affidavit was not provided to the appellant and even no opportunity of filing its response was given to the appellant. In absence of reply to the personal affidavit, the Writ Court considered the averments made therein and dismissed the writ petition.

(iii) The judgment, under appeal, dated 27.02.2020 is an ex-parte judgment as on the said date the learned counsel for the appellant could not appear before the learned Writ Court. The learned Writ Court failed to appreciate the pleadings and documents on record pertaining to initiation of de-novo enquiry.

24. Per contra, Sri Manish Mishra, learned Standing Counsel appearing for State, supporting the judgment, under appeal, dated 27.02.2020 submitted that pleading with regard to holding of de-novo enquiry against the appellant are not sufficient nor any document has been placed before the learned Writ Court by the appellant to prove the fact that the de-novo enquiry was ordered by the competent authority i.e. Superintendent of Police, District Hardoi.

25. Learned State Counsel further submitted that after taking into consideration the pleadings and documents on record, the Writ Court vide

order dated 04.02.2020 granted time to learned counsel for the appellant to bring on record any document by which it can be proved that de-novo enquiry was ordered against the appellant and thereafter this Court passed the order dated 12.02.2020 as also the 19.02.2020. In compliance of order passed by this Court dated 19.02.2020, the Superintendent of Police, Hardoi filed his personal affidavit, wherein it has been specifically stated that no order by the competent authority i.e. Superintendent of Police, Hardoi was ever passed for holding the de-novo enquiry against the appellant.

26. It is also stated that after dismissal of Special Leave Petition, the appellant moved an application dated 13.06.2018 for holding the de-novo enquiry and the same was proceeded in routine manner and in relation to the same, the Tehsildar vide his reply dated 21.06.2018 affirmed its earlier report sent in respect of Caste Certificate.

27. In response to the arguments advanced by the learned counsel for the appellant that the copy of the personal affidavit was not provided to the appellant nor any opportunity was given by the Writ Court to file its response as also the judgment under appeal, is an ex-parte judgment and in view of the same the judgment and order dated 27.02 2020 is liable to be set aside and the matter may be remanded back to the learned Writ Court for decision afresh, the learned counsel for the State, Sri Manish Mishra, submitted that the arguments advanced by the learned counsel for the appellant, are liable to be rejected keeping in view the principles of "Useless Formality" theory. Elaborating his arguments, he further submitted that before the Writ Court, the appellant failed to prove the fact related to holding of de-novo enquiry against him and even the appellant has not placed any document or affidavit before this Court to controvert the averments made in the personal affidavit sworn by Sri Amit Kumar, Superintendent of Police, District Hardoi and to prove that the de-novo enquiry was ordered or conducted in the matter of appellant and as such no fruitful purpose would be served in interfering in the judgment and order dated 27.02.2020 on the basis of the arguments raised by the learned counsel for the appellant broadly based on violation of principles of natural justice.

28. It is further submitted by Sri Manish Mishra, learned counsel for the State-respondent that the observations of the Writ Court in regard to issuance of charge sheet made in the judgment and order dated 27.02.2020 have only been made to ascertain the fact that whether in the matter of appellant the de-novo enquiry was ordered or conducted, which in fact was neither initiated nor conducted, and accordingly, on this aspect, the judgment, under appeal, is not liable to be interfered with.

29. In addition to above, it is submitted that the appeal is liable to be dismissed with heavy costs taking into consideration the entirety of the case as also the observation made by the Writ Court in the order dated 12.02.2020.

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

31. The following issues are required to be considered in the instant appeal.

(i) Weather in the instant case for holding the de-novo enquiry the competent authority i.e. Superintendent of Police, District Hardoi passed any order or not.

(ii) Whether the judgment, under appeal, is liable to be interfered with on the grounds related to principles of natural justice or not.

32. With regard to issue no.(i), we have considered the averments made in the memo of writ petition, quoted hereinbefore, as also documents annexed therewith and the contents of the uncontroverted personal affidavit filed by the Superintendent of Police District Hardoi.

33. In para 25 to 32 of the Writ Petition certain facts have been narrated with regard to initiation of holding of de-novo enquiry. In support of averments made in para 25 to 32, the petitioner-appellant has not placed on record the order of initiation of de-novo enquiry against him by the competent authority i.e. Superintendent of Police, District Hardoi. In absence of any order of the competent authority i.e. Superintendent of Police, District Hardoi for holding the de-novo enquiry in the matter of appellant, it can not be held that the de-novo enquiry was initiated in the matter of appellant. In this view, we are of the view that the averments made in para 25 to 32 of the writ petition, are misconceived.

34. The averments made in para 25 to 32 of the writ petition have been controverted by the Superintendent of Police, District Hardoi in his personal affidavit. In the personal affidavit filed by the Superintendent of Police, District Hardoi, it has been specifically stated that the application of the appellant dated 13.06.2018 was proceeded in routine manner and in relation to the same, Tehsildar-Shahabad, District Hardoi vide his letter dated 31.10.2018 affirmed its earlier report sent in respect of caste certificate and it has also been specifically stated therein that de-novo enquiry was never initiated either by the deponent or by the predecessor of the deponent after receiving the application of the appellant on 13.06.2018. It has also been stated that Superintendent of Police, District Hardoi is the competent authority and in the case of appellant no order was ever passed by the competent authority to hold the de-novo enquiry.

35. Even before this Court, in the appeal, no affidavit or document has been filed by the petitioner-appellant controverting the averments made in the personal affidavit of the Superintendent of Police, District Hardoi.

36. In view of the aforesaid, particularly in absence of any document or affidavit controverting the facts/averments made in the personal affidavit filed by the Superintendent of Police, District Hardoi, we are of the view that in the instant case, de-novo enquiry against the appellant was never ordered or initiated by the competent authority i.e. Superintendent of Police, District Hardoi.

37. Now coming to issue no.(ii). Issue no.(ii), which is to the effect that whether the judgment, under appeal, is liable to be interfered with on the ground of violation of principles of natural justice or not.

38. In the instant case, the violation of principles of natural justice has been

alleged by the learned counsel for the appellant on two aspects i.e. (i) the opportunity was not provided by the Writ Court to file the response to the personal affidavit filed by the Superintendent of Police, District Hardoi, which was relied upon by the Writ Court while passing the judgment dated 27.02.2020 and (ii) the judgment, is an ex-parte judgment as on the date of passing of judgment i.e. 27.02.2020, learned counsel for the appellant could not appear before the Writ Court.

39. At this juncture, we feel it appropriate to quote relevant paragraphs of the judgment of the Hon'ble Apex Court passed in the case of Aligarh Muslim University & Ors. vs. Mansoor Ali Khan reported in (2000) 7 SCC 529, which are as under:-

"21. As pointed recently in M.C. Mehta v. Union of India [(1999) 6 SCC 237] there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Gadde Venkateswara Rao v. Govt. of A.P. [AIR 1966 SC 828 : (1966) 2 SCR 172] it is not necessary to quash the order merely because of violation of principles of natural justice.

22. In M.C. Mehta [(1999) 6 SCC 237] it was pointed out that at one time, it was held in Ridge v. Baldwin [1964 AC 40 : (1963) 2 All ER 66 (HL)] that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] Chinnappa Reddy, J. followed Ridge v. Baldwin [1964 AC 40 : (1963) 2 All ER 66 (HL)] and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in S.L. Kapoor case [(1980) 4 SCC 379] laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi v. State Bank of India [(1984) 1 SCC 43 : 1984 SCC (L&S) 62] Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's

Administrative Law (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

"[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] . In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in Rajendra Singh v. State of M.P. [(1996) 5 SCC 460]

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta [(1999) 6 SCC 237] referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

26. It will be sufficient, for the purpose of the case of Mr Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] , namely, that on the admitted or indisputable facts, only one view is possible. In that event no prejudice can be said to have been caused to Mr Mansoor Ali Khan though notice has not been issued."

40. In the judgment passed in the case of **M/s Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati & ors, 2015 (8) SCC 519**, the Hon'ble Apex Court observed as under:-

"39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason--perhaps because the evidence against the

individual is thought to be utterly compelling--it is felt that a fair hearing "would make no difference"--meaning that a hearing would not change the ultimate conclusion reached by the decision-maker--then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn. [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , who said that: (WLR p. 1595 : All ER p. 1294)

"... A breach of procedure ... cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.J. opined in Cinnamond v. British Airports Authority [(1980) 1 WLR 582 : (1980) 2 All ER 368 (CA)] that: (WLR p. 593 : All ER p. 377)

"... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing."

41. Taking into consideration the facts and circumstances of the present case including the reasoning given by us on issue no.(i), as noted above, and the principles of "Useless Formality" theory as also the observations made by the Hon'ble Apex Court, quoted hereinabove, we decide the issue no.2 against the appellant and hold that the judgment and order dated 27.02.2020 is not liable to be interfered with on the ground of violation of principles of natural justice, as alleged by the learned counsel for the appellant.

42. In view of aforesaid, the Special Appeal is ***dismissed***. No order as to costs.

(2020)06ILR A655
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No. 190 of 2020 alongwith other connected cases

Ram Niwas Singh ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Shantanu Khare, Ashok Khare

Counsel for the Opposite Parties:
C.S.C. Avneesh Tripathi, Chandan Agarwal, Sri Vivek Verma

Service Law - Appointments - Fake B.Ed. degrees - State Universities Act, 1973 - U.P. Basic Educational Staff Rules, 1973 - The U.P. Government Servant (Discipline and Appeal) Rules, 1999 - The petitioners obtained government employment on the post of assistant teachers on the basis of their fake B.Ed. degrees. This is a fraudulent act. This is a settled law that fraud and justice never dwell together. The forgery is in the basic eligibility conditions for appointments on the post of assistant teachers inasmuch as B.Ed. Degree are fake. The process of appointments of the petitioners who obtained government employment on the basis of fake B.Ed. Degrees stand vitiated. The petitioners have become beneficiaries of illegal and fraudulent appointments. Such appointments are *void ab initio.* (Para 69(vii),(viii))

The Division Bench judgment in the case of Shri Puran Prasad Gupta Memorial College Vs. State of U.P. and ors. Was tht the University was to declare result of 85% students admitted in private unaided professional colleges and 50% students admitted by such colleges under Management quota. The SIT (Special Investigation Team) adjusted all the excess admitted students in these 25 private unaided professional colleges, i.e. upto 85% students by counselling and upto 50% students by management. Thus, the submission of the petitioner that the SIT has not considered the excess admitted students whose results were declared in terms of Shri Puran Prasad Gupta *(Supra)* is incorrect.(Para 69(i))

The petitioners who obtained appointments on the post of Assistant Teachers on the basis of fake B.Ed. Degrees and who fall under 2,823 fake students declared by the University, their orders of cancellation of appointments or dismissal from service on the ground of obtaining appointments on the basis of fake B.Ed. 2005 degree cannot be interfered with by invoking, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. The petitioners who have been declared fake students, their order of cancellation of appointments or dismissal from service passed by the concerned District Basic Education Officer are affirmed. (Para 69(vi))

The Court held that holding disciplinary proceedings against the petitioners envisages by Article 311 of the Constitution of India or under any disciplinary rules including Uttar Pradesh Basic Education Staff Rules, 1973 or the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 shall not rise. (Para 69(viii))

Writ Petition Disposed off. (E-10)

List of cases cited:-

1. Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. and ors. Civil Writ No. 399 (MB) of 2017

2. S.N. Mukherjee Vs. Union Of India (1990) 4 SCC 594

3. Roop Singh Negi Vs. Punjab Nation Bank 2009 (2) SCC 570 *(distinguished)*

4. Subodh Kumar Prasad Vs. State of Bihar and ors. 2001 (10) SCC 282 *(distinguished)*

5. Union of India Vs. Ashok Kumar Verma 2017 (9) ADJ 680*(distinguished)*

6. L.I.C. of India Vs. Ram Pal Singh Bisen 2010 (4) SCC 491 *(distinguished)*

7. Reena Devi Vs. State of U.P. and ors. Writ A No. 18163 of 2019

8. State of Bihar Vs. Kirti Narayan Prasad 2019 (1) ESC-3 (SC)

9. Punjab Urban Planng Authority Vs. Karamjeet Singh AIR 2019 SCC 1913

10. Union of India and ors Vs. Raghuwar Pal Singh 2018 (15) SCC 463

11. Nidhi Kayam And ors. Vs. State of M.P. and ors. 2017 (4) SCC 1

12. Bank of India and ors. Vs. Avish D. Mandi Vikar and ors. 2005 (7) SCC 690

13. R. Vishwanath Pillai Vs. State of Kerla 2004 (2) SCC 105

14. Rita Mishra Vs. Director of Primary Education, Bihar AIR 1998 (Patna) 26

15. Islamic Academy of Education Vs. State of Karnataka (2003) 6 SCC 697

16. TMA Pie Foundation Vs. State of Karnataka (2002) 8 SCC 481

17. P.A. Inamdar Vs. State of Maharashtra 2005 6 SCC 537

18. Sunil Kumar Vs. Dr. Bhimrao Ambedkar, University and anr. Writ C No. 2906 of 2013

19. Tilak Singh and 495 ors Vs. State of U.P. and 4 ors. Writ A No. 468 of 2020

20. Union of Inida & anr. Vs. Raghuwar Pal Singh (2018) 15 SCC 463

21. Nidhi Kaim & Anr. Vs. State of Madhya Pradesh & Ors. (2017) 4 SCC 1

22. Rita Mishra & ors. Vs. Director, Primary Education, Bihar & ors. AIR 1988 Patna 26

23. R. Vishwanatha Pillai Vs. State of Kerala & ors. (2004) 2 SCC 105

24. State of Bihar Vs. Kriti Narayan Prasad 2019 (1) ESC 3

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

1. Heard Sri Ashok Khare, Sri Shashinandan, Sri H.N. Singh, Sri R.K. Ojha, and Sri V.K. Singh, learned senior advocates along with their assisting counsels, Sri Prabhakar Awasthi, Sri Satyendra Chandra Tripathi, Sri Siddharth Khare, Sri Rohit Upadhyay, Sri Rakesh Kumar Singh, Sri Kailash Nath Singh, Sri Arvind Kumar Tiwari, Sri Vineet Kumar Singh, Sri K.M. Yadav, Sri Upendra Kumar, Sri Ajit Kumar, Sri Vinod Kumar Singh, Sri Man Bahadur Singh, Sri Rajeev Kumar and Sri Ram Jatan Yadav and other learned counsels for the petitioners, Sri Sanjay Kumar Singh, Sri Bhupendra Kumar Yadav, Sri Raghvendra Pratap Singh, Sri Sanjay Kumar Srivastava, Sri Vikram Bahadur Singh, Sri A.K. Yadav, Sri Yatindra, Sri Raghvendra Pratap Singh, Sri Shyam Krishna Gupta, Sri Pradeep Singh Sengar, Sri Pranesh Dutt Tripathi, Sri Suresh Kumar, Sri B.K. Yadav, Sri Sanjay Chaturvedi and Sri Shravan Kumar Pandey, learned counsels for the District Basic Education Officers and the U.P. Basic Education Board, Prayagraj, Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri J.N. Maurya, CSC I and Sri R.P. Dubey, learned Additional Chief Standing counsel for the State respondents, and, Sri Ashok Mehta, learned senior advocate assisted by Sri Gagan Mehta, Sri M.N. Singh and Sri Avanish Tripathi, learned counsels for the respondent Dr. Bhimrao Ambedkar, University, Agra. Sri Akhilesh Chandra Misra, Advocate whose name is appearing in several writ petitions as counsel for the respondent University has not appeared.

2. This batch of writ petitions were heard at length on several days. Learned counsels for the petitioners have argued the matter on 12.02.2020, 13.02.2020, 14.02.2020, 18.02.2020, 20.02.2020, 24.02.2020 and 03.03.2020. Arguments on behalf of respondent University were heard on 25.02.2020 and 26.02.2020. Learned Additional Advocate General on behalf of State has also argued on 03.03.2020. In rejoinder submissions were made by learned counsels for the

petitioners on 4.03.2020, 05.03.2020 and 06.03.2020. WRIT - A No. - 190 of 2020 and WRIT - A No. - 13785 of 2019 have been treated as leading writ petition in which the respondent University filed counter affidavits and supplementary counter affidavits but no rejoinder affidavits have been filed by the petitioners despite time granted on 10.02.2020 on request of Sri Ashok Khare, Sri H.N. Singh, Sri R.K. Ojha, learned senior advocates which fact is noted in the order dated 10.02.2020.

Facts

3. Petitioners in this batch of writ petition are Assistant Teachers. They obtained employment as Assistant Teachers on the basis of alleged B.Ed. Degree - 2005 shown to have been issued by Dr. Bhimrao Ambedkar University, Agra. Subsequently their degree/marksheets were found to be fake or tampered. Special Investigation Team (SIT) was constituted under the Orders of this Court in Writ Petition No. - 2906 of 2013 (PIL) (Sunil Kumar Vs.Dr. Bhimrao Ambedkar University And Another). The SIT submitted its report dated 14.08.2017 giving details of fake degrees/marksheets and tampered degrees/marksheet. Thereafter, the District Basic Education Officers issued notices to the petitioners requiring them to show cause as to why their appointments be not cancelled on the ground of their B.Ed. Degrees/marksheets to be fake or tampered. Thereafter the impugned orders cancelling the appointments of the petitioners were passed.

4. Subsequently, the respondent Dr. Bhimrao Ambedkar University, Agra. Also issued notices to all the students having fake B.Ed. Degrees/marksheets and those having tampered degrees/marksheets. These notices dated 28.12.2019 were published on official website of the University as well as in several largely circulated daily news papers, including "Amar Ujala" (Hindi) and "Times of India" (English) on 29.12.2019.

5. The decision of the Executive Council of the respondent - University dated 06.12.2019 for taking action with respect to the fake B.Ed. Degrees/Marksheet - 2005 and tampered B.Ed. Degrees and marksheets - 2005 and the aforesaid notices dated 28.12.2019 published in newspaper on 29.12.2019 and on the official website of the respondent - University, were challenged by 496 persons by filing Writ WRIT - A No. - 468 of 2020 (Tilak Singh And 495 Others Vs. State Of U P And 4 Others) which was dismissed by this Court by order dated 20.1.2020. Relevant portion of the aforesaid order dated 20.01.2020 in the case of Tilak Singh (supra) is reproduced below:-

"6. Upon investigation, the SIT team submitted report in August, 2017 which states that 3517 fake mark sheets and 1053 tampered mark sheets were distributed and these mark sheets have been adjusted in the tabulation chart. The SIT categorized the candidates in two list. One list of those candidates whose mark sheets are fake and the second list of those candidates whose marks sheet have been tampered. The Deputy Inspector General of Police, SIT by letter dated 11.07.2019 forwarded the aforesaid two list alongwith photo copy of tabulation chart to the University. He further requested the University by the said letter

to verify the list of candidates from its record, and after identifying the candidates possessing fake and tampered degrees, it should proceed to cancel all such degrees as per procedure provided in the U.P. State Universities Act,1973 (hereinafter referred as 'Act, 1973'). The aforesaid letter was followed by the letter of Additional Chief Secretary dated 25.11.2019 addressed to the Vice Chancellor of the University making similar request to him.

7. Thereafter, the Executive Council of the University held an emergent meeting on 06.12.2019 and after considering the letter of the State Government dated 25.11.2019 took a decision to verify the list of fake/tampered candidates received from the Special Investigation Team and to invite objection against the same. The relevant extract of decision of the Executive Council is extracted hereinbelow:-

"उक्त परीक्षा समिति दिनांक 06.08.2016 के निर्णय की संपुष्टि कार्य परिषद बैठक 28.08.2017 में हो चुकी है।

निर्णयः अपर मुख्य सचिव, राजस्व एवं बेसिक शिक्षा उ0 प्र0 शासन के पत्र संख्या– 583/ ALUBRLS dw /19 दिनांक 25.11.2019 को परिषद के समक्ष पढ़कर सुनाया गया I

आवंटित सीटों के सापेक्ष अधिक संख्या अर्थात 100 सीटोक पर जो 135 प्रवेश/परीक्षा करायी गयी है उस सम्बन्ध में एस0आई0टी0 की जांच आख्या बतायी जाये। कुल सचिव ने मा0 सदस्य को अवगत कराया कि जांच तत्कालीन अधिकारी श्री पुतान सिंह एवं वर्तमान में ए0एस0पी0 एस0आई0टी0 श्रीमती अमृता मिश्रा द्वारा बताया गया कि एस0आई0टी0 ने विश्वविद्यालय द्वारा 85 सीटें एवं महाविद्यालय द्वारा 50 सीटों को जोडते हुये कुल 135 समस्त छात्र/छात्राओं के अंकतालिका, उपाधि सम्बन्धी चार्ट की जांच की गयी है। इस प्रकार प्रबन्धकीय कोटे में प्रवेशित छात्रों को सम्मिलित किया गया। कुलसचिव द्वारा परिषद को बताया गया कि अग्रिम कार्यवाही एस0आई0टी0 मुख्यालय लखनईण्ण से जानकारी एवं मूल अभिलेख लेकर की जायेगी। चर्चा के दौरान मा0 सदस्य प्रो0 संजय चौधरी द्वारा धारा– 49 (ए) एवं 67 से तथा सम्बन्धित परिनियम की जानकारी चाही गयी। कुलसचिव ने परिषद को सम्बन्धित प्रावधानों से अवगत कराया गया किः–

परिनियम-13-03 "Before taking any action under Section 67 for the withdrawal of any degree, diploma or certificate conferred or granted by the University, the person concerned shall be given and opportunity to explain the charge against him. The charge framed against shall be communicated by the Registrar by registered post and the person concerned shall be required to submit his explanation within a period of not less than fifteen days of the receipt of the charges".

के अन्तर्गत डिग्री, डिप्लोमा वापिस लेने के पहले रजिस्टर्ड डाक द्वारा 15 दिन सूचना के साथ सम्बन्धित से स्पष्टीकरण मागा जायेगा। सभी सम्बन्धित छात्र/छात्राओं के पता .....तो विश्वविद्यालय और नव एस0आई0टी0 के पास उपलब्ध है इस समस्या के समाधान हेतु सदस्यगणों ने सुझाव दिया कि एस0आई0टी0 से प्राप्त डाटा को विश्वविद्यालय की बेबसाइड पर अपलोड कराया जाये। परिषद ने यह भी निर्णय लिया कि एस0आई0टी0 से सम्बन्धित सूचना पी0डी0एफ0 प्रारूप में प्राप्त की जाये। जिससे अग्रिम कार्यवाही सुचारू रूप से संचालित हो सके। इसके लिये एस0आई0टी0 से अविलम्ब अनुरोध किया जाये । तदोपरान्त दैनिक समाचार पत्रों मे इस आशय का समाचार भी प्रकाशित कराया जाये। इस प्रस्ताव पर सदस्यगणों ने थंम एवं ज्ंउचमतमक की सूची को सार्वजनिक किये जाने पर सहमति प्रदान की। इस प्रकार सम्बन्धित व्यक्ति से प्राप्त स्पष्टीकरण के आधार पर नियमानुसार विधिक कार्यवाही की जाये तथा समय्≤ पर परीक्षा समिति विश्वविद्यालय सभा तथा कार्य– परिषद को अवगत कराये जाने का निर्णय लिया गया। कृत कार्यवाही से सम्बन्धित विभाग एवं माननीय उच्च न्यायालय को आवश्यक रूप से सूचित किया जाये।

ब– कार्यपरिषद द्वारा विश्वविद्यालय अनुदान आयोग, विश्वविद्यालय और महाविद्यालयों में शिक्षकों और अन्य शैक्षिक कर्मचारियों की नियुक्ति हेतु न्यूनतम अर्हता तथा उच्चतर शिक्षा मे मानको के रख रखाव हेतु अन्य उपाय सम्बन्धी विनियम 2018 के सम्बन्ध मे उत्तर

प्रदेश शासन उच्च शिक्षा अनुभाग–1 के पत्र संख्या–890/सत्तर–1–2019–16 (114) /2010 दिनांक 16 अगस्त–2019 को कार्यपरिषद के अनुमोदन की प्रत्याशा में कुलपति आदेश दिनांक 21.11.2019 के अन्तर्गत डा0 भीम राव अम्बेडकर विश्वविद्यालय, आगरा की परिनियमावली की धारा– 21.14 पर प्रख्यापित किये जाने से अवगत कराना। निर्णय कार्य परिषद उक्त मद से अवगत हुई। परिषद ने कुलपति कृत कार्यवाही को अनुमोदन प्रदान किया।"

8. Pursuant to the decision of the Executive Council, the University proceeded to publish the notice in newspaper whereby all the candidates, who had passed the B.Ed. examination during the academic session 2004-05, have been intimated that three list namely list of fake candidates, list of tampered candidates and list of candidates appearing in the examination on the basis of roll number allotted to more than one candidate has been published on the official website of the University requiring such individual candidate to submit reply online as also offline by registered or speed post within a period of 15 days failing which exparte proceedings would be taken.

9. The Vice Chancellor on 28.12.2019 passed an order to upload the list of fake candidates, list of tampered candidates and list of candidates appearing in the examination on the basis of roll number allotted to more than one candidate for uploading on the official website of the University. Thereafter, a detailed public notice has been released on the official website of the University on 29.12.2019 and University proceeded to publish three separate list namely; list of fake candidates, list of tampered candidates and list of candidates as candidates from among more than one candidate, who have appeared in the examination with the same roll number alongwith said notice and questionnaire. The said notice alongwith questionnaire issued by the University is extracted hereinbelow:-

"एतद्द्वारा सर्व साधारण एवं सम्बन्धित को सूचित किया जाता है कि याचिका संख्या 2006/2013 सुनील कुमार बनाम डा0 भीमराव आंबेडकर विश्वविद्यालय आगरा में माननीय उच्च न्यायालय, इलाहाबाद द्वारा पारित आदेशों के अनुपालन में बी0 एड0 सत्र 2004–2005 के प्रकरणों में जांचोपरान्त एस0आई0टी0 मुख्यालय उत्तर प्रदेश लखनऊ में मु0अ0सं0 02/2015 धारा 409/420/467/468/471/204/201 सपठित 120 बी भा0द0वि0 व 13 (1) डी (2) (3) भ्र0नि0 अधिनियम बनाम हरीश कसाना आदि पंजीकृत किया गया है। उक्त मु0 अ0 सं0 मे प्रचलित विवेचना के क्रम मे एस0आई0टी0 द्वारा सम्बन्धित छात्रों की तीन सूचियॉ– फेंक, टेम्पर्ड व एक ही अनुक्रमांक पर परीक्षा देने वाले एक से अधिक छात्रों की सूची प्रेषित करते हुये विश्वविद्यालय से आवश्यक कार्यवाही करने की अपेक्षा की गई है।

इस विषय में विश्वविद्यालय की कार्य–परिषद की बैठक दिनांक 06.12.2019 में लिये गये निर्णय के अनुसार एस0आई0टी0 से प्राप्त तीनों श्रेणी के छात्रों मे से फेंक ;थंमद्ध व टेम्पर्ड शैक्षणिक प्रमाण पत्रों व एक ही अनुक्रमांक पर परीक्षा देने वाले एक से अधिक छात्रों का विवरण विश्वविद्यालय की अधिकृत वेबसाइड www./dbrau. Org.in पर प्रसारित है।

(अ) फेंक छात्रों की सूची।

(ब) टेम्पर्ड छात्रों की सूची।

(स) एक ही रोल नम्बर पर परीक्षा देने वाले एक से अधिक छात्रों की सूची।

फेंक ;थंमद्ध एवं टैम्पर्ड छात्रों एवं एक ही अनुक्रमांक पर परीक्षा देने वाले एक से अधिक छात्रों की सूची में नामित छात्रों को सूचित किया जाता है कि वे इस सूचना के प्रकाशन की तिथि से 15 दिवस के अन्दर कुलसचिव, डा0 भीमराव आंबेडकर विश्वविद्यालय, आगरा को ऑन लाईन एवं पंजीकृत/स्पीड पोस्ट द्वारा हार्ड कापी प्रेषित करते हुये अपना पक्ष एवं आपत्तियां प्रस्तुत करें जिससे उनके प्रकरणों में अग्रेतर विधि सम्मत कार्यवाही की जा सके। अन्यथा की स्थिति में उपरोक्त अंकित प्रकरणों में विश्वविद्यालय को एक पक्षीय कार्यवाही करने हेतु बाध्य होना पडेगा। टैम्पर्ड

उपाधिपत्रों/अंकपत्रों वाले छात्रों की सूची पर विधिक कार्यवाही पृथक से प्रचलित की जायेगी।

उक्त कार्यवाही माननीय उच्च न्यायालय, इलाहाबाद द्वारा याचिका संख्या 2906/2013 सुनील कुमार बनाम डा0 भीमराव आंबेडकर विश्वविद्यालय आगरा के निर्णयाधीन होगी।

डॉ0 भीमराव आंबेडकर विश्वविद्यालय, आगरा

(पूर्ववर्ती आगरा विश्वविद्यालय, आगरा)

बी. एड. वर्ष 2005 (एस0 आई0 टी0 जांच से सम्बंधित) प्रवेश/परीक्षा सम्बंधित विवरण

नोटः– एस0 आई0 टी0 जांच से सम्बंधित निम्न सूचनाये विश्वविद्यालय वेबसाइट ूण्कइतंनण्वतहण्पद पर अपलोड कर शीर्षक– बी0 एड0 मुख्य परीक्षा 2005 सम्बन्धी प्रत्यावेदन सील्ड लिफाफे में केवल पंजीकृत/स्पीड पोस्ट के कुलसचिव, डॉ. भीमराव आंबेडकर विश्वविद्यालय, आगरा को प्रेषित करे।

1	*छात्र/छात्रा का नाम*	
2	*छात्र/छात्रा का स्थाई/पत्रव्यवहार का पता, मो0 नम्बर एवं आधार कार्ड नम्बर।*	
3	*छात्र/ छात्रा के पिता का नाम।*	
4	*प्रवेश परीक्षा का अनुक्रमांक।*	
5	*जिस महाविद्यालय में प्रवेश लिया उसका नाम*	
6	*प्रवेश काउन्सिलिंग अथवा प्रबन्धकीय कोटे में हुआ (स्पष्ट उल्लेख करें)*	
7	*कांउन्सिलिंग संख्या/प्रबन्धकीय कोटे में प्रवेश सूची में स्थान (काउन्सिलिंग पत्र संलग्न करे।)*	
8	*महाविद्यालय में प्रवेश के समय प्रवेश शुल्क ड्राफ्ट/नकद जमा कराने का विवरण।*	*डाफ्ट/रसीद संख्या...../धनराशि..... दिनांक (प्रमाण सहित)*
9	*महाविद्यालय में स्कॉलरशिप प्राप्त की दशा में विवरण।*	*डाफ्ट/रसीद संख्या...../धनराशि..... दिनांक (प्रमाण सहित)*
10	*नमांकन संख्या (Enrollment No.)*	
11	*मुख्य परीक्षा बी0 एड0 05 का अनुक्रमांक*	
12	*बी0 एड0 वर्ष 2005 मुख्य परीक्षा के परीक्षा केन्द्र का नाम*	
13	*बी0 एड0 वर्ष 2005 परीक्षा में बैठने का प्रवेश पत्र की छाया प्रति।*	
14	*बी0 एड0 वर्ष 2005 की परीक्षा मे सम्मिलित होने के बाद अंकतालिका स्वयं प्रमाणित कर संलग्न करें।*	
15	*यदि अस्थाई प्रमाण पत्र विश्वविद्यालय द्वारा निर्गत किया गया हो तो प्रमाण पत्रों की संख्या–समस्त अस्थाई प्रमाण पत्रों की छाया प्रति संलग्न करें।*	
16	*मूल उपाधि का विवरण कमांक संख्या*	
17	*अन्य कोई विवरण/सूचना*	

नोट–उपरोक्त से सम्बन्धित सभी अभिलेखों की स्वप्रमाणित प्रतियॉ/प्रमाणक अनिवार्य रूप से संलग्न करे।

संलग्नों की संख्या अंको में .....(शब्दो में).....

सम्बन्धित महाविद्यालय के प्राचार्य द्वारा अग्रसारण– प्रमाणित किया जाता है कि श्री/श्रीमती/कुमारी .....पुत्र/पुत्री ..... .निवासी .....ने महाविद्यालय में वर्ष 2004–05 कांउसलिंग मेनजमेन्ट.....के अन्तर्गत विधि सम्मत प्रवेशित छात्र/छात्रा थे/थी। श्री ....को जो अंकतालिका विश्वविद्यालय द्वारा जारी की गयी थी उसके .....अंक प्राप्त हुये हो तथा सैद्धान्तिक में .....श्रेणी तथा प्रायोगिक में .....श्रेणी था।

छात्र/छात्रा के हस्ताक्षर..... प्राचार्य दिनांक ..... हस्ताक्षर एवं मुहर"

10. The hard copy of the questionnaire is to bear the signature of the candidate and also the seal and signature of the Principal of the College. The aforesaid public notice calling upon the petitioners to submit information as required in the questionnaire are impugned in the present petition.

11. Challenging the aforesaid notices, learned Senior Counsel has made following submissions;

(i) The decision of the Executive Counsel in its meeting dated 06.12.2019 to verify and identify the fake and tampered marks sheet of B.Ed. for the academic session 2004-05 is not an independent decision of the Executive Council rather the said exercise is being undertaken on the dictate of the letter of Additional Chief Secretary dated 25.11.2019 as well as letter of Deputy Inspector General of Police dated 11.07.2019

(ii) The investigation report of SIT has not yet been accepted either by this Court or by any other Court, and the said report cannot be treated to be a substantial and conclusive piece of evidence to arrive at a conclusion that marks sheet/degree obtained by the petitioners are fake or tampered. In support of his contentions, he has placed reliance upon the judgement of Apex Court in the case of M.C. Mehta (Taj Corridor Scam) Vs. Union of India and Others 2007(1) SCC 10 & judgement of Kerala High Court at Ernakulam in the case of Major Basil John Vs. State of Kerala and Others Crl. M.C. No.1877 of 2015 decided on 22.06.2017.

(iii) Controversy regarding the validity of marks sheet obtained by the petitioners is already concluded by the judgment of this Court in Writ Petition no.399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. and Others) as this Court has validated the admission of petitioners and directed for declaration of result. Hence, the aforesaid exercise undertaken by the University to verify the marks sheet in order to find out the fake and tampered marks sheet is nothing but an abuse of process of law.

(iv) As per Section 67 of the Act, 1973, the Court may by a two-third majority of the members present and voting withdraw from any person any degree, or certificate conferred or granted by the University. In the present case, the decision to cancel the degree has not been taken by the Court but by the Executive Council, who is not competent to initiate such process as the Court and Executive Council are two different authorities under the Act, 1973. Thus, the verification exercise undertaken by the Executive Council is without jurisdiction. He further submits that statute 13.03 of the First Statutes of the Agra University provides the procedure and the manner which is to be followed before taking

decision to cancel the degree, but the notices impugned are in complete violation of statute 13.03 inasmuch as the said notice does not communicate the charge against the petitioners so as to enable them to submit their explanation.

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

20. At this juncture, it would be relevant to refer the chain of events in which the present exercise to verify and cancel the fake, fabricated and tampered marks sheet and degrees have been undertaken. This Court while considering the Writ C No.2906 of 2013 (Sushil Kumar Vs. Dr. Bhimrao Ambedkar University and Another) found that the original cross list produced pertaining to B.Ed. examination 2005 does not bear signature of any of the authority concerned. The first order passed in the writ petition is extracted hereinbelow:-

"Vice-Chancellor of the University should file his personal affidavit after inspection of original records in respect of B.Ed. examination 2005, by the next date.

Original cross list has been produced today pertaining to B.Ed. Examination 2005 before this Court. It is surprising that none of the pages of the register bear any signature of any officer. Such register appears to be, prima facie, a manufactured document. It is stated that cross list are required to be signed by duly authorized persons and it is only then that the cross list can be accepted as genuine. It is also stated that all cross list of other examinations are duly signed by the officers of the University.

List on 12.03.2013.

The cross list produced today is returned to the counsel for the University."

21. In the said writ petition, the Vice Chancellor had filed an affidavit contending therein that though, the First Information Report has been lodged with the police with regard to fake mark-sheets issued to the students but no investigation had taken place. In the aforesaid backdrop, the Court directed the State to be impleaded as a party by order dated 05.08.2013. On the direction of this Court, a preliminary investigation was carried out. The preliminary investigation report revealed the shocking state of affairs in the University. Consequently, this Court on 14.03.2014 issued a direction to the Secretary, Home, U.P. Lucknow, to assign the investigation to a Special Investigation Agency of the State other than C.B, C.I.D. Pursuant to the direction of this Court, a special investigation team was constituted by the orders of Deputy Director General of Police dated 06.05.2014. Subsequently, this Court on 09.09.2015 after noticing the previous orders directed the Registrar General to place the said matter before Hon'ble The Chief Justice requesting him that the writ petition be treated and dealt with as a Public Interest Ligation by the appropriate Bench.

24. The first contention of Sri Khare that exercise undertaken by the Executive Council is not an independent exercise but has been done at the behest of the State Government is misconceived inasmuch as the University had full knowledge about the fact that the large scale fraud has been committed in issuing the fake and tampered marks sheet of B.Ed. Examination-2005, which fact is also fortified from the personal affidavit of the Vice Chancellor of the University filed before this Court wherein he has made a categorical averment that as many as 6 FIR had been lodged to

investigate the allegation of issuance of fake and tampered mark-sheets to the students in collusion with the University employee but no investigation was done by the Police and a request was made to the Court through the said affidavit to handover the investigation to any independent agency. In the aforesaid backdrop, this Court passed an order for constituting SIT to carryout the investigation.

25. The exercise of verification of fake as well as tampered degree should have been undertaken by the University voluntarily instead of waiting for any direction from the Court or authority more so when it was aware of the fact that the fake and tampered mark-sheets have been issued to the students in connivance with the employees of the University. Thus, to say that the verification exercise undertaken by the University is on the dictate of the State Government is not correct and misconceived. In this view of the fact, the first submission of the petitioner is not sustainable.

26. As far as the second contention of Sri Khare that report of SIT is not a conclusive piece of evidence and that cannot be considered and relied upon to hold that degree/marks sheet of the candidates mentioned in the list of candidates of fake marks sheet or tampered marks sheet also lacks substance for the reason that the respondents have not yet cancelled the marks sheet/degree of the candidates categorized in the three list; the list of candidates of fake mark-sheet, list of candidates of tampered mark-sheets and list of candidates appearing in the examination on the basis of roll number allotted to more than one candidate, rather the authority has issued a notice inviting details from each candidate in the form of questionnaire so as to verify the fact as to whether name of a candidate in the list of fake or tampered marks sheet has been correctly shown in the list submitted by the SIT. Had the authorities treated the report of SIT to be a conclusive piece of evidence, there was no occasion for the respondents to publish the notice impugned in the writ petition and asking the candidates to furnish information sought in the questionnaire. Further, the two letters dated 11.07.2019 & 25.11.2019 of the Deputy Inspector General of Police, SIT & Additional Chief Secretary also directs the University to follow the procedure as provided in the Act, 1973 for cancellation of a degree. Thus, this Court does not find any merit in the second submission of the counsel for the petitioner.

28. As regards the third submission of Sri Khare that the controversy as regards the validity of admission and issuance of the mark-sheets of the petitioners have already been concluded by this Court in Writ Petition no.399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. and Others) and other writ petitions, this Court without adverting upon the merits of the contention advanced by the learned Senior Counsel finds it appropriate that the petitioners may raise the said contention before the authority concerned as each individual candidate has to demonstrate that his case is covered by the said judgement and this Court has validated his admission.

30. Now, coming to the fourth contention of Sri Khare, it is relevant to mention that the Court is vested with the power under Section 67 of the Act, 1973 to cancel the degree/marks sheet. The

Court under Act, 1973 is to exercise such power only in cases where the University finds that the marks sheet or degree has been issued by the University though, it has been tampered. The procedure contemplated under the Act, 1973 cannot be said to be applicable to cancel those degrees which according to the University have not been issued by it and have been procured by the candidates from outside with which the University has no concern.

31. In the case in hand, the Executive Council has undertaken the exercise to verify and sort out list of candidates whose degree or marks sheet are fake and list of candidates whose marks sheet are tampered and list of candidates who have appeared with the roll number allotted to many other candidates. The Court as defined in the Act, 1973 is not empowered to carryout any such exercise, and it is only Executive Council who has power to undertake such exercise. Therefore, the last submission of Sri Khare is also devoid of merit.

32. It has also been urged by Sri Ashok Khare, learned Senior Counsel that questionnaire issued by the respondents requires certain information which may not be available with the petitioners and further the said questionnaire requires that it shall bear the seal and signature of principal of the College which is wholly impossible inasmuch as the principal of the concerned college has refused to sign the form and petitioners are helpless to supply information as sought through the questionnaire.

33. A perusal of the questionnaire reveals that it has not sought any information which cannot be said to be available with the petitioners. The information sought through the aforesaid questionnaire are essential to find out and segregate fake and tampered marks sheet/degree. Thus, in the opinion of the Court, the said contention also does not stand to its merit.

34. This Court while exercising power under Article 226 of Constitution of India cannot shut its eyes about the entire chain of events which had led to unearth scam of such a magnitude where fake marks sheet have been procured by the candidates with impunity and on the basis of such fake or tampered marks sheet, they have obtained employment as Assistant Teacher.

36. However, this Court cannot also loose sight of the fact that petitioners have obtained employment on the basis of marks sheet alleged to have been issued to them and have been working for more than a decade. Further, there may be cases where Principal of the concerned college may refuse to put signature on the questionnaire and the petitioners cannot force the Principal of the concerned college to put signature and seal on the questionnaire and petitioners may be rendered remedy less. Therefore, in the interest of justice and fairplay, this Court is of the opinion that University while carrying out the exercise to verify the mark-sheet/degree should follow the following observation of the Court:-

(i) The University while verifying the mark-sheet/degree of a candidate may not refuse to consider the questionnaire of a candidate if the same does not bear the signature & seal of the Principal of the college.

(ii) In case after verification, the University disowns the degree of a candidate being fake, the University is not required to follow the procedure contemplated under the Act, 1973 for cancellation of degree/marks sheet. However, it is desirable in the interest of

justice and fairplay that the University in such cases should pass reasoned and speaking order giving the basis on which it has formed opinion that degree is fake and has not been issued by the University.

(iii). In case University finds that the degree/marks sheet have been issued by it though tampered, in such an event, the University is expected to follow the procedure provided in the Act, 1973 and give a show cause notice to such candidate and thereafter, pass appropriate orders.

6. The respondent University took decision dated 07.02.2020 declaring 2,823 students to be fake students who managed to procure fake B.Ed. degrees. The matter of remaining 814 students are under consideration of the University who have submitted their representations either with complete or incomplete information. A copy of the order dated 07.02.2020 passed by the Dr. Bhimrao Ambedkar, University, Agra has been filed alongwith a supplementary counter affidavit dated 10.02.2020 in Writ A No.190 of 2020. No rejoinder affidavit to it has been filed. Aforesaid order of the University, despite being in the knowledge of the petitioners; has not been challenged by any of the petitioners either by filing a separate writ petition or by seeking amendment in this batch of writ petitions.

7. The list of 2823 students declared fake by the University by order dated 07.02.2020 has been made part of the order which is scanned and pasted as Appendix I to this judgement.

8. In this batch of writ petitions the petitioners have challenged the orders passed by District Basic Education Officers cancelling the appointments of the petitioners or holding the appointments to be void ab initio on the ground that these were obtained on the basis of fake B.Ed. Degrees or on the basis of tampered B.Ed. Marksheets. None of the petitioners have challenged the order dated 07.02.2020 passed by the respondent University declaring 2,823 persons to be fake students. None of the petitioners have filed any amendment application to amend the pleadings and / or to challenge the aforesaid order of the respondent - University dated 07.02.2020.

Submissions on behalf of the Petitioners

9. Sri H.N. Singh, learned counsel for the petitioner in Writ-A No.19981 of 2019 submitted that he is arguing for the petitioners whose B.Ed. Degrees/Marksheet-2005 are alleged to be tampered or has been declared fake. He submits as under:-

(i) Marks sheet issued to petitioners bears the note that the marks register shall be final in case there is discrepancy between the marks sheet issued and marks register of the University. Therefore, the marks register (tabulation chart) is final.

(ii) The University has proceeded merely on the basis of report of SIT and declared 2823 students as fake merely because these students could not submit reply. Therefore, the order of University dated 07.02.2020 to declare the petitioners as fake, is wholly unjustified.

(iii) No notice was issued by the University to students before declaring them as fake by order dated 07.02.2020.

(iv) University has merely presumed that since the name of the petitioners are not mentioned in the mark register and, therefore, such students are fake.

(v) Mark register or tabulation register is a final paper. Therefore, the

University should have first determined whether petitioners' name appears in the marks register and if it does not appear, only then matter can be further inquired, to find out whether there is any manipulation.

(vi) As per paragraph nos. 2 and 3 of the order of the University dated 07.02.2020 filed as Annexure-SA-I in Writ-A No. 190 of 2020, order is yet to be passed with respect to 814 students who are allegedly fake students and who submitted their reply. Therefore, it was not justified for the University to declare 2823 students as fake, who could not submit reply.

(vii) If affiliated colleges have admitted students and the University allowed them to appear in the examination, then such students are not fake.

(viii) Query by the Court

(a) At this point this Court specifically pointed to the learned counsel for the petitioner that the alleged B.Ed. Marksheet, 2005 filed as Annexure-1 to the writ petition does not bear even enrollment number. Neither copy of enrollment card nor any papers have been filed alongwith writ petition to show that the petitioner was enrolled as students of the respondent - University for B.Ed.,2005 Course.

On being pointed out, learned counsel for the petitioner clearly admitted that copies of papers which are available with the petitioner, have been filed with the writ petition.

(ix). In reply, learned counsel for the petitioner referred paragraph 4 of the writ petition in which it has clearly been stated that he appeared from B.S.A. College, Mathura, which is affiliated to Dr. Bhimrao Ambedkar University, Agra as regular student and in support thereof, merely mark sheet has been filed as Annexure-1 to this writ petition.

(x). University has not yet taken decision in respect of tampered mark sheets. Therefore, unless University declares the mark register and mark sheet as tampered, cancellation of appointment of petitioner as Assistant Teacher, is arbitrary and illegal.

10. Sri Ashok Khare, learned Senior Counsel has argued on behalf of the petitioners in Writ-A 13785 of 2019 as the leading writ petition. He has argued for the petitioners, who are allegedly fake students and also on behalf of other petitioners whose mark sheets have been found to be tampered. He submitted as under:-

(i) As per SIT report, 12,472 students are entered in the tabulation chart and result of 8,930 students were declared and thus merely on this basis, the SIT presumed in paragraph no. 6 of its report that the differences between two, on verification, is 3517 who are fake students, and they have not been students of any affiliated colleges. This finding in the SIT report is in the teeth of the Division Bench judgment dated 06.04.2007 in Writ Petition No. 399 (MB) of 2017 (Shri Puran Prasad Gupta Memorial Degree College Versus State of U.P. and others) and other connected writ petitions. In the said judgment, Division Bench directed for declaration of result of 85 students by the University 50 students admitted by colleges under management quota, which shall not be taken to be breach of condition of recognition of N.C.T.E. in view of peculiar facts and circumstances of the case.

(ii) The SIT report accepts the position that the name of all the students,

who are said to have tampered mark sheets, exists in the tabulation chart of the University which was produced before the High Court in PIL No. 2906 of 2013 (Sunil Kumar Vs. Dr. Bhimrao Ambedkar University, Agra and another) and copy thereof was given to Special Investigation Team (SIT). Therefore, name of the students appearing in the tabulation Chart/Marks register are genuine students and their mark sheets cannot be held to be tampered.

(iii) The university has declared 2823 students as fake and SIT has also held these students as fake merely on the ground that they were admitted beyond the strength sanctioned by the N.C.T.E. The basis so taken is in the teeth of the Division Bench judgment dated 06.04.2007 in the case of Pooran Prasad Gupta Memorial Degree College (Supra) in which Division Bench directed for declaration of result of 85 students admitted by counseling by the University and 50 students directly admitted by colleges.

(iv) The basis of holding fake or tampered by the SIT is mark foil of 8899 students recovered by it from the University Campus as mentioned in paragraph no.3 of SIT report. This cannot be made basis to hold the students fake or to hold mark sheets tampered.

(v) Since all the petitioners are regular and permanent teaching staff, therefore, without initiating regular disciplinary proceeding, they cannot be dismissed from the service.

(vi). By the impugned order dated 08.08.2019 the petitioners have been dismissed from service merely on the basis of report of the SIT and chart provided by it and without initiating disciplinary proceeding under U.P. Basic Educational Staff Rules,1973 and U.P. Government Servant (Discipline and Appeal) Rules, 1999.

(vii) Query by the Court

(a) Whether the petitioners have filed copies of B.Ed. admit cards, receipt of deposit of fee or certificate and other evidences as asked by the District Basic Educational Officer ?

(b) Whether the petitioners have filed copies of their admit card, copy of the enrollment card, copy of the receipt of deposit of fee etc. as proof of their being students of the University for B.Ed. Course, 2005 either before the District Basic Education Officer or alongwith this writ petition ?.

(c) Learned counsel for the petitioners could not submit any reply.

(viii). The University has not undertaken any exercise pursuant to the order of this Court in the case of Tilak Singh and 495 others Versus State of U.P. and others) in Writ-A No. 468 of 2020 decided on 21.01.2020 before passing the order dated 07.02.2020 which has been filed as Annexure SA-1 in Writ-A No. 190 of 2020. The order of the University dated 07.02.2020 declaring 2823 students as fake is merely based on the SIT report and the SIT report is based merely on presumption that students in excess of sanctioned strength admitted by the University and the colleges for B.Ed. Course, 2005 are fake, while the Division Bench in Civil Writ No. 399 (MB) of 2017 (Shri Puran Prasad Gupta Memorial Degree College Versus State of U.P. and others) decided on 04.07.2007 has directed to issue mark sheet to such students. Thus order of the University dated 07.02.2020 is not valid. The aforesaid Division Bench judgment has become final and yet it has not been noticed by the SIT.

(ix). The SIT report has no evidenciary value. It is merely an investigation report, which has not been approved by any Court. It continues to be an opinion of the SIT. It is not a substantive piece of evidence. Petitioners have not yet been communicated about fake degree. Name of the petitioners find mention in the tabulation chart of the University which has not been held to be fake or manipulated. Therefore, there is no basis to declare the B.Ed Degree 2005 as fake, even if, the petitioners/candidates have not submitted any reply before the University pursuant to the notice dated 28.12.2019.

(x). As per provision of Section 16 of the State Universities Act and Statute 13.03 of the First Statutes of the University, the matter could have been considered only by the Court or the University and not by Executing Council. Therefore, the order dated 07.02.2020 is not a valid order.

(xi). Present writ petition cannot be dismissed merely on the basis of the order dated 07.02.2020 passed by the respondents-University declaring 2823 students as fake. An opportunity should be provided to the petitioners to challenge it.

11. Sri Seemant Singh, learned counsel for the petitioner has argued in Writ -A No.12792 of 2019 making it as his leading writ petition. He submitted as under:-

(i) The argument of Sri Ashok Khare, learned Senior Counsel is adopted.

(ii) There was no tampering in the mark sheet.

(iii) The entire case has been set up on the basis of SIT report. The SIT has left the fact that marks of several candidates were lowered in the tabulation chart. University should abide by the tabulation chart and not by the counter foils which were recovered by the SIT from the University Campus.

(iv) So long as marks secured by the petitioners are mentioned in the tabulation register, there cannot be any allegation of tampering.

12. Sri Prabhakar Awasthi, learned counsel for the petitioners has argued in Civil Misc. Writ Petition No. 19903 of 2019 as his leading writ petition. He submitted as under:-

(i) Fake would be those students who have never appeared. The case of the University is that students were admitted beyond the sanctioned strength. Such excess students have been declared to be fake, which is not permissible.

(ii) Whether it is a case of fake students or tampered mark sheet, no action can be taken by the respondent-University, inasmuch as on the basis of their B.Ed, 2005 Degree, petitioners did Special B.T.C. Course after due verification of the degree.

(iii) Some students might have been fake but the order dated 07.02.2020 has been passed by the respondent-University in generality declaring 2823 students as fake, which is not permissible.

(iv) The SIT could not reach on any conclusion about tampered mark sheets. There was no tampering. The apprehension of SIT is baseless.

13. Sri Krishan Ji Khare, learned counsel has argued in Civil Misc.Writ Petition No. 15524 of 2018 treating it as leading writ petition. He states that he is arguing for petitioners whose appointments have been cancelled on the

ground of fake degree. He submitted as under:-

(i) The petitioner appeared for admission test for B.Ed. Course 2004-05 and after counseling, he went to take admission in Long Shri Devi Maha Vidyalaya, Nagla, District Hathras, but the said Degree College had not given admission and the University assured that their B.Ed examination shall be taken. For main examination of B.Ed, an admit card was issued by the University to the petitioner allotting Roll No.5148083 which was allotted to some other student also and therefore, the Centre In-charge of P.C. Bangla College, Hathras allotted roll number to the petitioner as 518083A but when the result of the petitioner was withheld, then he contacted the B.Ed Department of the University where an employee has issued him mark sheet and gave new Roll No.5148084. Thus the petitioner is a genuine student.

(ii) Query by the Court

(a) In the alleged attendance letter, the Centre is shown as Long Shri Devi Maha Vidyalaya, Nagla, District Hathras which does not bear even signature of Centre Superintendent and in which the roll number is shown as 5148083A while as per own case set up by the petitioner in his alleged reply dated 06.01.2020, his Centre as P.C. Bangla College, Hathras where the Centre Superintendent/Incharge has made his Roll No as 5148083A. Further as per own case of the petitioner, in his reply dated 06.01.2020 that he had not attended the classes in any college of the University and the mark sheet was issued by some employee of B.Ed Department allotting new roll number. How these facts may indicate that petitioner is not a fake student or his degree is not fake ?

(b). Learned counsel for the petitioner could not reply to this query.

14. Sri Yogendra Kumar Srivastava, learned counsel for the petitioner has argued in Civil Misc. Writ Petition No. 18614 of 2019 treating it as leading writ petition. He submitted as under:-

(i) He adopts argument of Sri Ashok Khare, learned Senior Counsel.

(ii) The name of the petitioner neither appeared in the list of fake students nor in the list of tampered mark sheet but the services of the petitioner has been terminated illegally merely on the basis of SIT report in which his roll number is 522108, College Code No. 148 Shanti Niketan Degree College Tehra, District Agra is shown as fake. He submitted that detail reply alongwith all relevant papers submitted by the petitioner were not at all considered by the District Basic Education Officer, Firozabad nor these papers were held to be fake or manipulated. Therefore, the impugned order cancelling appointment of the petitioner and declaring it to be null and void, is arbitrary and illegal.

15. Sri Syed Irfan Ali, learned counsel for the petitioner has argued in Writ Petition No. 14097 of 2019. He submitted as under:-

(i) Marks shown in the mark sheet of the petitioner is lower than the marks shown in the tabulation chart and therefore, his mark sheet cannot be said to be tampered. The report of SIT observing B.Ed. Mark Sheet, 2005 of the petitioner to be tampered, is baseless.

(ii). In the impugned order dated 13.08.2019 the District Basic Education Officer has not considered properly the explanation submitted by the petitioner.

16. Sri Naveen Kumar Sharma, learned counsel for the petitioner has argued in Writ Petition No. 62979 of

2017. He adopted the argument of Sri Ashok Khare, learned Senior Counsel.

17. Sri Vijay Tripathi, learned counsel for the petitioner has argued in Civil Misc. Writ Petition No. 2858 of 2018 and submitted that in the mark sheet of petitioner's B.Ed., 2005, the marks are lower than tabulation chart, hence it is not a case of tampering of marks sheet but the petitioner has been dismissed from service on the ground that his marks sheet is tampered, which is merely based on the report of the SIT.

18. Sri Dinesh Rai, learned counsel for the petitioner has argued in Writ Petition No. 60007 of 2017. He submitted that only flaw is that in the mark sheet, the name of father of petitioner is not mentioned which was a clerical error. The name of the petitioner is neither in the list of fake student nor in the list of tampered mark sheet. Therefore, the impugned order dismissing the petitioner from service is not sustainable.

19. Sri Satendra Chandra Tripathi, learned counsel for the petitioner has argued in Writ Petition No. 467 of 2020, Writ Petition No. 377 of 2020, Writ No. 367 of 2020 and Writ Petition No. 939 of 2020. He adopted the argument of Sri Ashok Khare, learned Senior Advocate. With respect of Writ Petition No. 939 of 2020 he submitted that the petitioner's B.Ed degree is of the year 2003-04 Batch and therefore, it could not be declared as fake on the basis of report of the SIT.

20. Smt. Mahima Maurya Kushwaha, learned counsel for the petitioner has argued in Writ Petition No. 320 of 2020. She submitted that the petitioner has never been student of Dr. Bheem Rao Ambedkar University, Agra. He has done B.A and B.Ed. from Calcutta University. She has further submitted that the petitioner has never submitted B.Ed Degree 2005 of Dr. Bheem Rao Ambedkar University, Agra to obtain employment as Assistant Teacher. She has submitted reply, but it was not considered by the District Basic Education Officer while passing the impugned order.

21. Sri Sandeep Kumar, learned counsel for the petitioner has argued in Writ Petition No. 1593 of 2020 and adopted the argument of Sri Ashok Khare, learned Senior Counsel.

22. Sri J.K. Srivastava, learned counsel for the petitioner has argued in Writ A No. 2706 of 2020 that by order dated 24.02.2020 he was required to submit his reply.

23. Sri Brijendra Deo Mishra, learned counsel has argued in Writ -A No. 2603 of 2020 and adopted arguments of Sri Ashok Khare, learned Senior Counsel.

24. Sri Shashi Nandan, learned Senior Counsel in Writ-A No. 15260 of 2019 has argued for the petitioners. He submitted as under:-

(i) The appointment of the petitioners have been cancelled on the ground that their B.Ed. Degree is fake, whereas mark sheet of the petitioners bears enrollment number and roll number. Thus once the University has allotted enrollment number to the petitioners, they cannot be said to be fake students. Burden is upon the University to show as to how the petitioners are fake students, which the University has failed to discharge.

(ii) Ratio of admission for B.Ed. Course, 2005 between the students to be admitted through University and management quota was 85:15. But the colleges admitted 50% students under Management quota which was approved by the Division Bench in Civil Writ No. 399 (MB) of 2017 (Shri Puran Prasad Gupta Memorial Degree College Versus State of U.P. and others) decided on 06.04.2007. This 85% students obtained admission through University and 50% students obtained admission under Management quota. Thus there were excess admission by 35%. These 35 students have been alleged to be fake who are not fake, as their admission is protected by Division Bench judgment in the case of Shri Puran Prasad Gupta Memorial Degree College (Supra).

(iii) The University instead of exercising its authority, pressurized the colleges to get these 35 % students admitted in their colleges. It made nodal centres in colleges and allowed the excess admitted students to appear in examination allegedly without permission of the N.C.T.E. Hence these students are neither fake students nor their mark sheet can be termed as fake. The observations made by the Division Bench in the aforesaid judgment with regard to the admission of these excess 35% students, have been conveniently ignored by the SIT in its report and held these 35% excess students to be fake, which is wholly illegal.

(iv) Copy of the order dated 07.02.2020 passed by the University has been filed along with Supplementary counter affidavit in Writ-A No. 190 of 2020. Even if, students have not responded, yet the University was bound to record reason for declaring them fake, but respondent-University has passed the order dated 07.02.2020, in breach of the principle of natural justice. Petitioners attempted to submit reply prior to the order dated 07.02.2020, but the University has refused it. Therefore, the order dated 07.02.2020 passed by the respondent-University is faulty order. Reliance is placed upon judgment of Hon'ble Supreme Court in S.N. Mukherjee Vs. Union of India (1990) 4 SCC 594 (Para 35, 36 and 40).

(v) Since no decision has been taken by the University regarding tampered mark sheet, therefore, no submission is required to be made at this stage as University is yet to take decision.

25. Sri Radha Kant Ojha, learned Senior Counsel argued in Writ-A No. 484 of 2020. He submitted as under:-

(i) Argument of Sri Ashok Khare, learned Senior Counsel and Sri Shashi Nandan, learned Senior Counsel are adopted.

(ii) The University has not declared its tabulation chart to be fake or manipulated. Therefore, the students whose names are appearing in the tabulation chart cannot be held to be fake.

(iii) As per note-I appended to the mark sheet, the marks entered by the University in the marks register (tabulation Chart) shall be final and in case of any discrepancy between these two entries, the entries of tabulation chart shall be final. Therefore, order dated 07.02.2020 passed by the University to declare 2823 students as fake is arbitrarily and illegal.

(iv) The report of the SIT is based on unauthentic paper i.e. Mark foils, which are said to have been found by the SIT in the Campus of the University.

(v) Tabulation chart is a public document. Therefore, if the University is placing reliance on it, it cannot be said

that it is incorrect unless the University holds it to be incorrect or manipulated in totality. Reference is made to paragraph nos. 2 and 3 of the SIT report filed in Civil Misc. Writ Petition No. 13785 of 2019.

(vi) For declaring the students as fake, the respondents-University should have first declared tabulation chart in totality to be incorrect or manipulated and only then respondent-University could declare the students as fake students. If the University declares its tabulation chart to be partly manipulated or incorrect, then it has to give specific reason, which has not been done.

(vii) No submissions are being made for tampered mark sheets inasmuch as the matter is pending before the University.

(viii) Tabulation chart is primary evidence and B.Ed. degree are secondary evidence. Once tabulation chart is correct, the degree cannot be said to be forged. University is treating students as fake or non existing, which is not correct. As per para 13.03 and 13.04 of the Statutes of the University and Section 67 of the State Universities Act, the University can withdraw degree on certain grounds, which are not existing in the present set of facts.

(ix) The show cause notice dated 28.12.2019 published by the University in the newspaper and also on the official website, does not contain any reason and does not cover the ground of Section 67 of the State University Act. No specific charge against the petitioners has been levelled.

26. In support of his submissions, Sri R.K. Ojha, learned Senior Counsel has relied upon judgment reported in Roop Singh Negi Vs. Punjab Nation Bank 2009 (2) SCC 570 (para 10, 11, 12 and 13) regarding recording of evidence collected by the Investigating Officer, Subodh Kumar Prasad Vs. State of Bihar and others 2001(10) SCC 282 (para 6 and 9) regarding fake appointment, Union of India Vs. Ashok Kumar Verma 2017 (9) ADJ 680 (para 10,11, 36 to 39) regarding employment obtained on the basis of fake experience certificate and L.I.C. Of India Vs. Ram Pal Singh Bisen 2010 (4) SCC 491 (para 26,27,31) on the principles that the admission of documents does not prove its contents, which has to be proved by the primary and secondary evidence.

Submission on behalf of the State-Respondents.

27. Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri J.N. Maurya, C.S.C.-I submitted as under:-

(i) SIT was constituted under the order of this Court in PIL.

(ii) Appointment of petitioners have been cancelled in accordance with law. They lacked basic educational qualification. Their B.Ed. Degrees have been found to be fake or tampered. Therefore, their appointments have been lawfully cancelled after affording opportunity of hearing. Disciplinary proceeding as per U.P. Basic Educational Staff Rules,1973 and U.P. Government Servant (Discipline and Appeal) Rules, 1999 is not required to be initiated.

(iii) Reliance is being placed on judgment dated 05.12.2019 of this Court in Writ-A No. 18163 of 2019 (Reena Devi Versus State of U.P. and others) and judgments of Hon'ble Supreme Court in State of Bihar Vs. Kirti Narayan Prasad 2019 (1) ESC-3 (SC), Punjab Urban Planning Authority Vs. Karamjeet Singh

AIR 2019 SCC 1913, Union of India and others Vs. Raghuwar Pal Singh 2018 (15) SCC 463, Nidhi Kayam and another Vs. State of M.P. and others, 2017 (4) SCC 1, Bank of India and others Versus Avish D. Mandi Vikar and others 2005 (7) SCC 690, R. Vishwanath Pillai Vs. State of Kerla 2004 (2) SCC 105 and judgment of Patna High Court in Rita Mishra Vs. Director of Primary Education, Bihar AIR 1998 (Patna) 26.

(iv) None of the petitioners have challenged either report of the SIT or decision of the University dated 07.02.2020 declaring the B.Ed. Degree, 2005 as fake. Under the circumstances, the arguments of the petitioners against the order dated 07.02.2020 or against the SIT report, cannot be even entertained.

Submission on behalf of respondent-Dr. Bhimrao Ambedkar University, Agra.

28. Sri Ashok Mehta, learned Senior Counsel, assisted by Sri Gagan Mehta has referred the orders dated 23.01.2014, 14.03.2014, 20.08.2014, 15.04.2014 and 09.09.2015 in Writ-C No.2906 of 2013 (subsequently converted in PIL by order dated 09.09.2015) as well as various paragraphs of the SIT report, Division Bench order dated 06.04.2007 in Writ No. 399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College) and various paragraph of the counter and supplementary counter affidavit filed in Writ-A No. 13785 of 2019 and Writ-A No. 190 of 2020 and submitted as under:-..

(i) There were 84 colleges affiliated with Dr. Bhimrao Ambedkar University, Agra. Two colleges namely Jai Murti College, Firozabad and Kehri Nal Gautam Smarak Mahavidalaya Nagla Saruwa, Agra were not permitted for B.Ed. Course by the N.C.T.E. and therefore, B.Ed Course was not conducted in these two colleges. Thus in total 82 Degree Colleges, B.Ed. Course was conducted in the academic Session 2004-05. However, mark sheets were also managed by 147 persons each in the name of the aforesaid two colleges for B.Ed. Course, 2005. Out of the aforesaid 84 colleges, 25 colleges were Private unaided colleges having permission for B.Ed. Course.

(ii) The admission through University and under Management quota was in the ratio of 85:15 but all the twenty five private un-aided professional institutes/colleges asserted to admit 50% students under management quota. Thus private un-aided professional institutes/colleges, the admission through University was 85% and the college admitted 50% under Management quota and thus total admission was 135 which was excess by the 35. After adjusting these 35 students, examination was conducted and result was declared by the University for 8930 students who appeared in the final examination for the B.Ed. Course, 2005. Subsequently, forgery was committed and additional pages were attached with the tabulation chart raising number of students to 12,472. These excess students adjusted in the tabulation chart by adding pages in the tabulation chart, were not the students of any Degree college for B.Ed, Course, 2005. They were fraudulently shown to have been awarded marks from 75% to 82%.

(iii) The Division Bench Judgment of Lucknow Bench in Shri Puran Prasad Gupta Memorial Degree College (Supra) is confined to private un-aided professional institutes/colleges, which were total 25 in number, in which upto

35% excess students for B.Ed Course, 2005 were allowed to appear in the examination. The SIT determined the number of fake students after adjusting these excess students, which fact is evident from the computation chart annexed with the SIT report. Thus the contention of the petitioners is that the aforesaid extra students have been declared as fake, is incorrect and baseless.

(iv) The SIT, during the investigation; recovered 8899 award foils (mark foils) as evident from para 3 and 7 of the SIT report. These award foils related to all 82 affiliated colleges. On verification of tabulation chart with mark foils, tampering was found with respect to 1053 students, whereby originally secured 2nd and 3rd Division marks were raised to 80% to 82% and thus by tampering 1st Division was shown. The University has initiated appropriate proceeding in matters of tampered marksheets, which are pending disposal.

(v) Thus fraud was played by interested persons including employees and the students and therefore, the petitioners are not entitled for any relief. Reliance is placed on judgment of Hon'ble Supreme Court reported in 2003 (8) SCC 311 (para nos. 13,14, 15), 2003 (8) SCC 319 (Para 15 to 29), 2004 (6) SCC 325 (12) and 2017 (8) SCC 670.

(vi) In the case of fraud, report of SIT can be relied particularly when none of the petitioners have either alleged the SIT report to be bad nor they challenge it. Petitioners' contention that the SIT has prepared the report without giving effect to the Division Bench Judgment of Lucknow Bench of this Court in Shri Puran Prasad Gupta Memorial Degree College (Supra), is wholly incorrect and baseless. The SIT has adjusted excess admitted students which fact is evident from the chart annexed with the SIT report, which is part of the SIT report.

(vii) None of the petitioners have challenged the order dated 07.02.2020 passed by the University. The University has declared the petitioners as fake students. The employment obtained by fake students on the basis of forged/fake B.Ed Degree, have been lawfully cancelled by the impugned orders placed by the respective District Basic Education Officer.

Submission on behalf of the counsel for the District Basic Education Officer and U.P. Basic Education Board.

29. None of the counsels for the District Basic Education Officers and U.P. Basic Education Board argued the case. They simply stated that they are supporting the impugned orders.

Discussion and Finding

30. I have carefully considered the submissions of learned counsel for the parties and perused the record of writ petitions.

Background And Effect of Judgment in Shri Puran Prasad Gupta Memorial Degree College Case - Confined to Private Unaided Colleges

31. There were 84 degree colleges affiliated with the respondent Dr. Bhimrao Ambedkar University, Agra, out of which two colleges were not granted permission for B.Ed. Course by the National Council for Teachers Education (for short "NCTE"). Thus, total 82 colleges were affiliated and were having permission from NCTE for different

number of seats for B.Ed. Course 2005. Out of these 82 colleges, 25 colleges were private unaided professional colleges.

32. As per Government order dated 09.09.2004 issued by the State Government, the admission through the University and the management quota was in the ratio of 85:15. However, these private unaided professional colleges were insisting for more admission under management quota. Therefore some Private unaided Professional Colleges challenged the aforesaid Government order dated 09.09.2004 in writ petition No.90 (MS) of 2005 and by order dated 25.09.2005, the writ petition was dismissed against which a Special Appeal No.220 of 2005 was filed in which an interim order was granted by the Division Bench providing for admission in the ratio of 50:50 in the light of the law laid down by Hon'ble Supreme Court in Islamic Academy of Education Vs. State of Karnataka (2003) 6 SCC 697.

33. In TMA Pie Foundation Vs. State of Karnataka (2002) 8 SCC 481 (paras 67 to 72) a constitution Bench of Hon'ble Supreme Court considered the right of Management to fill up seats for admission in private unaided professional institution and held that such institutions are entitled for autonomy in their administration while, at the same time, they can not forego or discard the principle of merit and therefore it would be permissible for the University or the Government at the time of granting recognition, to require a private unaided institution to provide for merit based selection while, at the same time, giving the management sufficient discretion in admitting students. The prescription of percentage for this purpose has to be done by the Government according to the Government needs and different percentages can be fixed for minority unaided and non - minority unaided professional colleges and the same principle may be applied to other non professional but unaided educational institution viz. Graduation and post graduation non professional colleges or institutions.

34. Thereafter, the constitution Bench of Hon'ble Supreme Court in the case of Islamic Academy of Education Vs. State of Karnataka (2003) 6 SCC 697 (paras 18 to 21) considered the aforesaid paragraph 68 of the judgment in the case of TMA Pie (Supra) with respect to unaided professional colleges and for admission for the year 2003-04 directed that the seats be filled up by the institution and the State Government in the ratio of 50:50.

35. The respondent Dr. Bhimrao Ambedkar, University, Agra, invited applications for admission in B.Ed. Session 2004-05. The last date for submission of application was 31.05.2004. Entrance examination was conducted on 04.07.2004. counseling for first phase, second phase and last phase was conducted between 25.11.2004 to 18.03.2005. The final examination for B.Ed. Session 2005 was held between 10.05.2006 to 24.05.2006. It appears that private unaided affiliated colleges were insisting for 50% admission through management quota. The Writ Petition No.399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College Versus State of U.P. and others) was heard and decided on 06.04.2007 alongwith Special Appeal No.220 of 2005 (Shri Puran Prasad Gupta Memorial Degree College

Versus State of U.P. and others). In the aforesaid judgment the Division Bench specifically noted that the colleges before it are private unaided colleges who have admitted upto 50% students under management quota and the examination has been conducted by the university after accepting their examination forms alongwith fee and had issued admit cards in the light of the constitution Bench judgment of Hon'ble Supreme Court as aforementioned including the judgment in the case of P.A. Inamdar Vs. State of Maharashtra 2005 6 SCC 537 (paras 130, 137 and 154). The Division Bench (in Shri Puran Prasad Gupta Memorial Degree College case) held that the ratio of seats between the State and the Management in the Colleges in question would be 50:50 and the University was not competent to send a list of students beyond the aforesaid prescription. However, to protect the excess upto 35% students sent by the University for admission, the Division Bench held that in the given circumstances there is no fault of students nor any motive can be attributed to the colleges who have admitted them in the College in accordance with merit and the University has declared result of 85 students though it was having authority to send students upto 50% in terms of the interim order and, therefore, the University shall declare the result of the students who have been admitted by the colleges in question and shall issue marksheets.

36. Thus, the crux of the Division Bench judgment in the case of Shri Puran Prasad Gupta Memorial Degree College (supra) was that the University was to declare result of 85% students admitted in private unaided professional colleges and 50% students admitted by such colleges under Management quota.

Undisputed facts and result of Investigation

37. There were only 25 private unaided professional colleges for B.Ed. Course affiliated to the respondent - University out of total 84 Colleges. Eventually a Writ C No.2906 of 2013 (Sunil Kumar Vs. Dr. Bhimrao Ambedkar, University and another) was filed before this Court in which it came to light by preliminary inquiry report that the state of affairs in the University are shocking. The Superintendent of Police CBCID in his report dated 03.06.2014 has recommended for investigation by Special Investigation Agency. Case Crime No.48 of 2014, registered under Sections 420/467/468/471 IPC read with Section 34, P.S. Hari Parvat Agra was brought to the notice of the Court. The report also mentioned that several employees of the University are involved in fabrication and manufacture of statement of marks and degrees of the University. The police has also recovered several computers, lap tops, printers and pen drives from the accused persons. In the aforesaid case of Sunil Kumar (supra) learned single Judge passed orders dated 23.01.2014, 14.03.2014, 05.05.2014, 02.07.2014, 20.08.2014, 15.09.2014 and lastly 09.09.2015. By order dated 09.09.2015 the writ petition was converted into Public Interest Litigation. Pursuant to the order of this court dated 14.03.2014, a Special Investigating Team was constituted by the State Government by order dated 29.04.2014 and consequential order dated 29.04.2014 was issued by the Director General of Police U.P. Lucknow. The Special Investigation Team (for short

SIT) carried out the investigation and submitted its report dated 14.08.2017 under the signature of the Additional Superintendent of Police SIT UP Lucknow. Perusal of the SIT report shows that several criminal cases have been registered in the matter of fake degrees and tampered marksheets etc. which also includes employees and Officers of the University. The SIT also recovered from the University Campus all the award foils (marks foils). Award foil is a document prepared and signed by the examiner containing details of marks awarded. On the basis of award foils marksheets are prepared. These foils of 82 Colleges were recovered by the SIT. Out of 84 colleges, two colleges, namely, Jay Murti College Firozabad and Kehrinal Gautam Smarak College, Aligarh were not granted permission/recognition by the NCTE and yet 147 marksheets each of these two colleges were managed and fraudulently procured by fake students.

38. The facts and figures based on records including the S.I.T. report relating to B.Ed. Course 2005, are summarized as under:-

SUMMARY (CHART) B.Ed. COURSE 2005

Sl No.	Particulars	57 Affiliated Aided Colleges for B.Ed. Course 2005	25 Private unaided colleges for B.Ed. Course 2005	2 Colleges not having permission for B.Ed. 2005	Total (84 Colleges)
1	Total seats for B.Ed. Course 2005 Allotted/ Sanctioned by N.C.T.E.	5,340	2,810	0	8,150
2	Admission by counselling	4,500 (About 85%)	1,404 (50%)	0	5,904
3	Admission by Management	718 (About 14%)	1,404 (50%)	0	2,122
4	Total students admitted (2+3)	5,218	2,808	0	8,026
5	Total students participated in B.Ed. Examination				8,899
6	Excess students participated in Examination (About 31%) due to allotment of seats by				873

	counselling up to 85% and by management up to 50% in 25 Private Unaided Colleges (5-4)				
7	Result prepared by the Authorised Agency of the University and declared by the University				8,930
8	Result prepared by the Authorised Agency of the University in excess of students who participated in B.Ed. Examination 2005(7-5)				31
9	Total students shown in the Tabulation Chart by adjustment by adding additional pages				12,472
10	Fake students adjusted in the Tabulation Chart as shown in the S.I.T. report dated 14.08.2017 (9-5)				3,573
11	Total fake students finally found and notices dated 18.12.2019				3,637

	issued to them by the University as per list with the University and also uploaded on its official website as mentioned in the order of the University dated 07.02.2020				
12	Persons who fraudulently shown B.Ed. Degrees bearing roll numbers allotted to other students (Notices dated 28.12.2019 issued.				45
	List uploaded on the official website of the University)				
13	Total Tampered Marksheets found by the University and notices issued to concerned students				1,084
14	Total of Fake Students + Duplicate Roll Numbers + Tampered Marksheets (11+12+13)				4,766

Note: There are some minor totaling/ calculation error in the chart annexed to the S.I.T. Report relating to students admitted and fake students. Correct figures have been mentioned above.

39. The figures and facts as summarized in the chart above, have neither been disputed nor denied by the petitioners nor any error of facts have been shown or pointed out by the petitioners in the list/ number of fake students and tampered mark-sheets mentioned in the SIT report and the list annexed nor the SIT reports have been shown to me to have been challenged before any court.

40. Alongwith the aforesaid SIT report, College wise list of B.Ed. 2005 have been annexed by the SIT which is part of the report, which contains college wise details of total seats sanctioned by the NCTE, admission by counseling, admission by management quota, total students (counseling + management), total students shown in the tabulation chart, number of students as per award foil, total fake students and total tampered marksheets in tabulation chart etc. Perusal of the aforesaid summary shows that the private unaided colleges admitted upto 50% students. The SIT adjusted all the excess admitted students in these 25 private unaided professional colleges. Thus, the submissions of learned counsels for the petitioners that the SIT has not considered the excess admitted students whose results were declared in terms of the Division Bench judgment in the case of Shri Puran Prasad Gupta Memorial Degree College (supra); is incorrect, vague and baseless.

41. Without disputing the correctness of the facts relating to B.Ed. Course 2005 as briefly summarized in the chart in para 38 above, learned counsels for the petitioners mainly contended that the excess students who were admitted and who participated in B.Ed. 2005 examination in terms of orders passed by the Division Bench in Shri Puran Prasad Gupta Memorial Degree College (supra) have been declared fake. The stand so taken by the petitioners falling under the category of fake students, is factually incorrect and totally baseless. Learned counsels for the petitioners have also not disputed clear instances of frauds mentioned in the S.I.T. report dated 14.08.2017 and various F.I.Rs. lodged with the concerned Police Stations.

42. Perusal of facts and figures based on records as briefly summarised in para 38 above reveals that there were total 8150 sanctioned seats for B.Ed. Course 2005 out of which 5340 seats were in 57 Affiliated Aided Colleges. Remaining 2810 seats were in 25 private unaided colleges to which benefit of Division Bench orders in Shri Puran Prasad Gupta Memorial Degree College case (supra) was extended. Perusal of item Nos.2, 3, 4, 5, 6 and 7 of the chart in para-38 above leaves no doubt that the ratio of admission by counselling and management was maintained. Total 8899 students including 873 excess students who participated in the B.Ed. 2005 examination, their results were also declared. These 8,899 genuine students and 3637 + 45 fake students have been segregated. Notices dated 28.12.2019 have been issued by the University to the aforesaid fake students.

Observations/ findings in orders passed in Writ-C No.2906 of 2013 and the final order dated 20.01.2020 in Writ-A No.468 of 2020 (Tilak Singh and 495 others vs. State of U.P. and 4 others):-

43. I have already reproduced in paragraph-5 above the relevant

paragraphs of the judgment and order dated 20.01.2020 passed by this court in the case of Tilak Singh and 495 others (supra), which refers important facts and also the orders passed in Writ-C No.2906 of 2013. From the order dated 12.03.2013 passed in Writ-C No.2906 of 2013 as reproduced in the aforequoted order in the case of Tilak Singh and 495 others (supra), it is evident that cross list pertaining to B.Ed. Examination 2005 was produced by the University before the Court and it was noticed by the court that none of its pages bear signature of any officer, which prima facie, appeared to be a manufactured document. It was stated that all cross lists of other examinations are duly signed by the officers of the University. In the aforequoted order in the case of Tilak Singh and 495 others (supra), this court rejected contentions of the learned counsels for the petitioners that exercise undertaken by the Executive Council is not an independent exercise but has been done at the behest of the State Government. This court observed that the University had full knowledge about the fact that large scale fraud has been committed in issuing the fake and tampered marks sheet of B.Ed. Examination-2005. This court further observed that the procedure contemplated under the State Universities Act, 1973, cannot be said to be applicable to cancel those degrees which according to the University have not been issued by it and have been procured by the candidates from outside with which the University has no concern. The court further observed that in the case in hand, the Executive Council has undertaken the exercise to verify and sort out list of candidates whose degree or marks sheet are fake and list of candidates whose marks sheet are tampered and list of candidates who have appeared with the roll number allotted to many other candidates. This court further observed that a perusal of the questionnaire reveals that it has not sought any information which cannot be said to be available with the petitioners. The information sought through the aforesaid questionnaire are essential to find out and segregate fake and tampered marks sheet/degree. This Court while exercising power under Article 226 of Constitution of India cannot shut its eyes about the entire chain of events which had led to unearth scam of such a magnitude where fake marks sheet have been procured by the candidates with impunity and on the basis of such fake or tampered marks sheet, they have obtained employment as Assistant Teacher.

44. The findings recorded by this court as briefly mentioned in the preceding paragraph, have not been disputed by learned counsels for the petitioners during the course of their arguments. Learned counsels for the petitioners have neither stated nor shown that the judgment and order dated 20.01.2020 in the case of Tilak Singh and 495 others (supra), has been challenged by any of the petitioners or any other person before any court or the said order has been interfered with.

Exercise undertaken by the University

45. The respondent University under took the exercise to deal with fake students and matters of tampered marksheets/degrees. The executive council in its meeting dated 06.12.2019 considered all the issues relating to the

fake students and tampered marksheets etc. and resolved to make public the list of fake students and tampered marksheets and to issue notices to them. Pursuant to the decision of the executive council dated 06.12.2019, the list of 3637 fake students, 1084 students having tampered marksheets and 45 persons having fake duplicate roll numbers were uploaded on the official website of the University on 28.12.2019. Notices were also issued and uploaded on the official website. Notices were also published in largely circulated daily news papers requiring all the three categories of persons to submit information on the points mentioned in the questionnaire within 15 days, online and by registered/speed post.

46. By the aforesaid notices the University required the fake students to submit 17 informations, namely, name of students, permanent/correspondence address, mobile number and Adhar Card number, father's name, roll number of entrance examination, name of college where admission taken through counselling or under Management quota, counseling number/place in management quota list and to annex copy of counseling letter, particulars of fees deposited at the time of admission in degree college, particulars of scholarship, enrollment number, roll number in final B.Ed. Examination 2005, name of examination center in final B.Ed. Examination 2005, photo copy of admit card of B.Ed. Examination 2005, self attested mark-sheet of B.Ed. 2005, Provisional certificate, if any, issued by the University, particulars of original degree, and any other particulars/information.

47. Vide Para-33 of the judgment in Tilak Singh and 495 others (supra), this court held that perusal of the aforesaid questionnaire reveals that it has not sought any information which can be said to be not available with the petitioners and these informations are essential to find out and segregate fake and tampered marks sheet/ degree. Despite this, out of 3637 fake students, 2823 have neither responded nor submitted any information. Response from only 814 persons of fake students list were received by the University. Out of these 814 students, 796 students have not submitted any information/papers. Only 18 students have submitted informations/papers. Matters of these 814 students are pending decision before the University. In para 13 of the supplementary counter affidavit the University has stated that decision shall be taken within 21 days in respect of these 814 persons.

48. The aforesaid notice was challenged by large number of persons in WRIT - A No. - 468 of 2020 (Tilak Singh And 495 Others Vs. State Of U P And 4 Others) which was dismissed by this Court by order dated 20.01.2020, with the following observations/directions :-

(i) The University while verifying the mark-sheet/degree of a candidate may not refuse to consider the questionnaire of a candidate if the same does not bear the signature & seal of the Principal of the college.

(ii) In case after verification, the University disowns the degree of a candidate being fake, the University is not required to follow the procedure contemplated under the Act, 1973 for cancellation of degree/marks sheet. However, it is desirable in the interest of justice and fairplay that the University in such cases should pass reasoned and

speaking order giving the basis on which it has formed opinion that degree is fake and has not been issued by the University.

(iii). In case University finds that the degree/marks sheet have been issued by it though tampered, in such an event, the University is expected to follow the procedure provided in the Act, 1973 and give a show cause notice to such candidate and thereafter, pass appropriate orders.

49. It would be relevant to mention that most of the submissions of the petitioners as made in this batch of writ petitions were also made by the petitioners in Tilak Singh And 495 Others (supra) and the same were rejected by the aforesaid order dated 20.01.2020, relevant portion of which has been reproduced in para 5 above. None of the learned counsels for the petitioners have pointed out or stated before me that any of the petitioners or any other person have challenged the aforesaid order of this court dated 20.01.2020 in the case of Tilak Singh And 495 Others (supra).

50. A supplementary counter affidavit of Dr. Rajiv Kumar Registrar/Controller of Examinations of Dr. Bhimrao Ambedkar, University, Agra, was filed on behalf of respondent - University in the leading Writ A No.190 of 2020, annexing therewith a copy of the order dated 07.02.2020, passed by the Vice-Chancellor declaring 2823 persons as fake students.

51. Learned counsel for the University has provided complete copies of the aforesaid supplementary Counter Affidavit to the learned Senior Advocates appearing in this batch of writ petitions.

52. A list of 2,823 fake students alongwith other particulars is annexed as part of the order dated 07.02.2020 passed by the respondent-University. Perusal of this order shows that out of 3,637 fake students, 2,823 have not submitted any information/reply or objection before the University. The online applications and by registered/speed posts were received by the University only from 814 students, out of which 796 have not submitted information as required in the questionnaire. Only 18 students have submitted all the required information. The petitioners who have been declared fake students by the University by order dated 07.02.2020 have not challenged the said order either separately or by filing amendment applications. Thus, the petitioners who obtained appointments on the post of Assistant Teachers on the basis of fake B.Ed. Degrees and who fall under 2,823 fake students declared by the University, their orders of cancellation of appointments or dismissal from service on the ground of obtaining appointments on the basis of fake B.Ed. 2005 degree can not be interfered with by invoking, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. The concerned District Basic Education Officers shall find out petitioners within four weeks from today from Appendix I to this Judgement. Those petitioners who have been declared fake students as per Appendix I, their order of cancellation of appointments or dismissal from service passed by the concerned District Basic Education Officer are affirmed. The concerned District Basic Education Officers or other authorities shall be free to take further action in accordance with law against such petitioners including recovery of

benefits obtained by the petitioners under the interim orders of this Court.

Whether regular disciplinary proceedings are required to be initiated in matters of petitioners who obtained employment on the basis of fake B.Ed. Degrees:-

53. Undisputedly, the petitioners who fall under the list of fake students, have obtained appointments on the post of Assistant Teacher on the basis of their fake B.Ed. Degrees. Regular disciplinary proceedings under the U.P. Basic Educational Staff Rules, 1973 (hereinafter referred to as "the Rules of 1973") and the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "the Rules of 1999"), have not been initiated by the respective District Basic Education Officers before passing the impugned orders for cancellation their appointments or dismissal from service. The arguments of the learned counsels for the petitioners that the petitioners could not be dismissed from service or their appointments could not be cancelled without initiating proceedings under the Rules of 1973 and the Rules of 1999, have no substance under the facts and circumstances of the case.

54. Undisptuedly, B.Ed. was the essential qualification for appointment of the petitioners on the post of assistant teachers. The petitioners falling under the list of fake students, have obtained government employment on the post of assistant teachers, on the basis of fake B.Ed. Degrees. This was a fraudulent act. It is settled law that fraud and justice never dwell together. The forgery is in the basic eligibility conditions for appointments on the post of assistant teachers inasmuch as B.Ed. Degrees are fake. Consequently, these appointments are NULL and VOID. Therefore, the process of appointments of the petitioners who obtained government employment on the basis of fake B.Ed. Degrees, stand vitiated.

55. Hon'ble Supreme Court in Union of India & Anr. v. Raghuwar Pal Singh, (2018) 15 SCC 463 had examined a case, where the appointment letter was issued without approval of the competent authority. The question arose whether such appointment letter would be a case of nullity or a mere irregularity? In case of nullity, affording opportunity to the incumbent would be a mere formality and non-grant of opportunity may not vitiate the final decision of termination of his services. Hon'ble Supreme Court held that in absence of prior approval of the competent authority, the Director Incharge could not have hastened issuance of the appointment letter. The act of commission and omission of the Director Incharge would, therefore, suffer from the vice of lack of authority and nullity in law.

56. In Nidhi Kaim & Anr. v. State of Madhya Pradesh & Ors., (2017) 4 SCC 1, a three Judge Bench dealt with admission of students to MBBS Course on the basis of illegal and unfair admission process and held as under:

"92. ...Having given our thoughtful consideration to the above submission, we are of the considered view that conferring rights or benefits on the appellants, who had consciously participated in a well thought out, and meticulously orchestrated plan, to circumvent well laid down norms, for

gaining admission to the MBBS course, would amount to espousing the cause of "the unfair". It would seem like allowing a thief to retain the stolen property. It would seem as if the Court was not supportive of the cause of those who had adopted and followed rightful means. Such a course would cause people to question the credibility of the justice-delivery system itself. The exercise of jurisdiction in the manner suggested on behalf of the appellants would surely depict the Court's support in favour of the sacrilegious. It would also compromise the integrity of the academic community. We are of the view that in the name of doing complete justice it is not possible for this Court to support the vitiated actions of the appellants through which they gained admission to the MBBS course.

xx xx xx

94. ...Even in situations where a juvenile indulges in crime, he has to face trial, and is subjected to the postulated statutory consequences. Law, has consequences. And the consequences of law brook no exception. The appellants in this case, irrespective of their age, were conscious of the regular process of admission. They breached the same by devious means. They must therefore, suffer the consequences of their actions. It is not the first time that admissions obtained by deceitful means would be cancelled. This Court has consistently annulled academic gains arising out of wrongful admissions. Acceptance of the prayer made by the appellants on the parameter suggested by them would result in overlooking the large number of judgments on the point. Adoption of a different course, for the appellants, would trivialise the declared legal position. Reference in this behalf may be made to the judgments relied upon by the learned counsel representing Vyapam.

xx xx xx xx xx

108. ...In the facts and circumstances of the case in hand, it would not be proper to legitimise the admission of the appellants to the MBBS course in exercise of the jurisdiction vested in this Court under Article 142 of the Constitution. We, therefore, hereby decline the above prayer made on behalf of the appellants."

43) In another three Judge Bench judgment in Chairman and Managing Director, Food Corporation of India & Ors. v. Jagdish Balaram Bahira & Ors.(2017) 8 SCC 670, the Court was examining the consequences of false caste certificate produced to seek appointment. The Court held as under:

"69. For these reasons, we hold and declare that:

xx xx xx

69.3. The decisions of this Court in R.Vishwanatha Pillai v. State of Kerala, (2004) 2 SCC 105 : 2004 SCC (L&S) 350] and in Union of India v. Dattatray, (2008) 4 SCC 612 :(2008) 2 SCC (L&S) 6, which were rendered by Benches of three Judges laid down the principle of law that where a benefit is secured by an individual-such as an appointment to a post or admission to an educational institution--on the basis that the candidate belongs to a reserved category for which the benefit is reserved, the invalidation of the caste or tribe claim upon verification would result in the appointment or, as the case may be, the admission being rendered void or non est.

xx xx xx

69.7. Withdrawal of benefits secured on the basis of a caste claim which has been found to be false and is invalidated is a necessary consequence which flows

from the invalidation of the caste claim and no issue of retrospectivity would arise;"

(Emphasis supplied by me)

57. A Full Bench of the Hon'ble Patna High Court in the case of Rita Mishra & Ors. v. Director, Primary Education, Bihar & Ors. AIR 1988 Patna 26 has dealt with appointment in the education department claiming salary although the letter of appointment was forged, fraudulent and illegal. The Full Bench declined to grant such claim and held that "the right to salary stricto sensu springs from a legal right to validly hold the post for which salary is claimed. It is a right consequential to a valid appointment to such post. Therefore, where the very root is non-existent, there cannot subsist a branch thereof in the shape of a claim to salary. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise."

58. The aforesaid judgment of Full Bench of Patna High Court in the case of Rita Mishra (supra) was approved by a three Judges Bench of Hon'ble Supreme Court in R. Vishwanatha Pillai Vs. State of Kerala & Ors. (2004) 2 SCC 105.

59. A three Judges Bench of Hon'ble Supreme Court in the case of State Of Bihar Vs. Kirti Narayan Prasad, decided on 30th November 2018 {reported in 2019 (1) ESC 3} has considered the matter of appointments made on the basis of forged appointment letter and held as under:

"17. In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish the genuineness of their appointment and to show cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio.We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise. Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged byArticle 311of the Constitution or under any other disciplinary rules shall not arise."

60. Thus, those petitioners who have secured appointments on the basis of forged B.Ed. Degrees or marksheets and on that basis they have been inducted in Government service then they became beneficiary of illegal and fraudulent appointments. Such appointments are void ab initio. Therefore, holding disciplinary proceedings against them as envisaged by Article 311 of the Constitution of India or under any disciplinary rules including the Uttar Pradesh Basic Education Staff Rules, 1973 or the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999, shall not arise.

Petitioners falling under the list of fake students whose matters are pending decision before the University:-

61. Pursuant to the notices dated 28.12.2019, total 814 persons falling under the list of fake students, have submitted online applications, out of which, 796 persons have not submitted the required information/papers. Only 18 persons have submitted the required information/papers. However, matters of all the 814 persons falling under the list of fake students/ fake B.Ed. Degrees, are pending decision before the University. In paragraph-13 of the supplementary counter affidavit dated 10.02.2020 filed in leading Writ-A No.190 of 2020, the respondent-University has stated that decision with regard to 814 persons will be taken within 21 days. However, it has not been brought on record whether the decision has been taken by the University or not with respect to 814 persons.

62. Therefore, the respondent-University is directed to take appropriate decision, in the matter of the aforesaid 814 persons falling in the list of fake students within three months from today, if decision has not been taken by the University as yet. In the event, the University is not able to take decision within the aforesaid period of three months due to some sound reason then before expiry of the period, it may apply before this court for extension of time narrating the reasons and annexing therewith copies of relevant papers in support of reasons. The respondent-University shall communicate the decision so taken to the Secretary, U.P. Basic Education Board, Prayagraj and the concerned alleged students within next three days of the decision and shall also upload it on its official website. The Secretary, U.P. Basic Education Board shall communicate the aforesaid decision of the University to the concerned District Basic Education Officers within next one week. Those petitioners who fall under the list of the aforesaid 814 fake students, their impugned orders of cancellation of appointments or dismissal from service shall abide by the decision of the University as aforesaid. Those petitioners whose B.Ed. Degree are declared fake by the University, their orders of cancellation of appointment/ dismissal from service shall sand affirmed. Those petitioners whose B.Ed. Degrees are found genuine by the respondent - University, their order of cancellation of appointments/ dismissal from service shall be immediately recalled by the concerned District Basic Education Officer. For a period of four months from today or till the decision of the University as aforesaid, whichever is earlier, no coercive action shall be taken against the petitioners falling under the aforesaid list of 814 fake students. However, payment of salary shall be made only to those petitioners whose

B.Ed. Degrees are found by the University to be genuine. It is further directed that if the respondent - University does not take decision within the stipulated period or within the extended period, if any, in respect of the aforesaid 814 persons, then an amount equivalent to 10% of the total salary of the petitioners falling under the list of the aforesaid 814 persons whose B.Ed. Degrees are found to be fake, shall be recovered by the State Government from the personal salary/assets of the Vice Chancellor, the Registrar and other responsible officers and employees of the University, who may be found by the State Government to be guilty to delay the decision. The recovery shall be made from them in such ratio as may be determined by the State Government. The period of three months to take decision, if not taken so far; has been granted to the University keeping in mind the period of lock-down and other hardships due to Pandemic COVID-19.

Tampered Marksheets

63. The respondent University has not yet taken decision in matters of petitioners who have allegedly obtained employment on the basis of tampered marksheet. The decision is to be taken by the respondent University in such matters in the light of the observations made by this Court dated 20.01.2020 in WRIT - A No. - 468 of 2020. These matters are still pending decision before the University. Therefore, to meet the ends of justice the respondent University is directed to conclude entire proceedings in accordance with law in matters of tampered mark-sheet, within six months from today and pass reasoned order/ orders and upload it on its official website. The respondent University within a week thereafter shall send a copy of the decision to the Secretary U.P. Basic Education Board, the concerned petitioners and the concerned District Basic Education Officers. For a period of six months or till orders as aforesaid are passed, whichever is earlier, no coercive action shall be taken against the petitioners falling under the list of tampered mark sheets, but payment of salary to them shall be made after their mark sheets/degrees are found genuine. Those petitioners whose B.Ed. Marksheets/degrees are held by the respondent - University to be tampered, their impugned orders of cancellation of appointments/dismissal from service passed by the concerned District Basic Education Officers, shall stand affirmed and the State-respondents shall be free to take further action in accordance with law, if any, including recovery of benefits obtained by such petitioners under the interim orders of this Court. Those petitioners whose marksheets/degrees are found genuine by the respondent University, their order of cancellation of appointment/dismissal from service shall be recalled by the concerned District Basic Education Officers within one week from the date of receipt of decision of the respondent University. The period of six months as aforesaid has been granted to the University keeping in mind the lock-down period and other hardships due to Pandemic COVID-19. However, liberty is granted to the University to apply for extension of time for strong and cogent reasons.

Analysis of other submissions of the petitioners:-

64. Learned counsel for the petitioners in Writ-A No.12792 of 2019, Writ-A No.14097 of 2019 and Writ-A No.2858 of 2018, has submitted that

mark-sheets of the petitioners have been alleged to be tampered whereas no such allegation can be made in view of the fact that the marks mentioned in their marksheets are lower-than the marks mentioned in the tabulation chart. If it is so, then these petitioners allegedly of tampered marksheet category, may appear before the respondent-University in response to the notices issued by the University and may raise all their objections before the University.

65. Sri Dinesh Rai, learned counsel for the petitioner in Writ-A No.60007 of 2017 has submitted that the name of the petitioner is neither in the list of fake students nor in the list of tampered marksheet. Therefore, the impugned order of dismissal of the petitioner from service is not sustainable. This writ petition has been filed praying to quash the show cause notice dated 18.11.2017 issued by the District Basic Education Officer, Kasganj. Proper course for the petitioner is to submit reply before the authority concerned. Therefore, this writ petition is disposed of directing the petitioner to submit reply before the authority concerned within six weeks from today, if not submitted so far and the authority concerned shall take an appropriate decision in accordance with law within next six weeks.

66. Sri Satyendra Chandra Tripathi while arguing in Writ-A No.467 of 2020, Writ-A No.377 of 2020, Writ-A No.367 of 2020 and Writ-A No.939 of 2020, has submitted that the B.Ed. Degrees of the petitioners are of the batch 2003-04 while report of the SIT is with respect to the B.Ed. Batch 2004-05 and, therefore, the petitioners could not have been declared as fake students. Perusal of the impugned order dated 04.01.2020 in Writ-A No.939 of 2020 shows that the appointment of the petitioner has been cancelled on the ground of tampered marksheets. Perusal of paragraphs-8 and 9 of the writ petition prima facie shows that the petitioner completed his B.Ed. in the year 2004. However, there is no consideration of this fact by the District Basic Education Officer, Etawah. Therefore, the order dated 04.01.2020 impugned in Writ-A No.939 of 2020, is quashed. Liberty is granted to the respondent District Basic Education Officer, Etawah to pass an order afresh in accordance with law, after affording opportunity of hearing to the petitioner. So far as the Writ-A Nos.367, 377 and 467, all of 2020 are concerned, I find that the alleged marks-sheets of the petitioners are of B.Ed. Examination 2005 which do not even bear enrollment number. Thus, facts of these writ petitions are different from Writ-A No.939 of 2020. The petitioners of these Writ-A Nos.367, 377 and 467, all of 2020 may participate in the proceeding before the University, if they fall under the category of Tampered Mark-sheets. If they fall under the category of fake students and have been/ are declared fake students by the University, then impugned order of cancellation of appointment or dismissal from service shall stand affirmed.

67. Learned counsel for the petitioner in Writ-A No.320 of 2020 has submitted that the petitioner's appointment has been cancelled by the impugned order dated 11.12.2019 on the ground that he is fake student and obtained employment on the basis of B.Ed. Degree of the Academic Session 2004-05 of Dr. B.R. Ambedkar University, Agra, bearing Roll No.5129087. In paragraph-5 of the writ

petition, the petitioner has mentioned that he has passed B.Ed. in the year 2002 from University of Calcutta. He has filed copy of B.Ed. Marksheet of University of Calcutta of B.Ed. Examination 2002 as Annexure-1 to the writ petition. He has also filed photostat copy of a self attested marksheet of B.Ed. 2005 of Dr. B.R. Ambedkar University, Agra as Annexure-16 to the writ petition and has alleged in paragraph-18 of the writ petition that the District Basic Education Officer has provided copy of the aforesaid B.Ed. 2005 mark-sheet. In paragraph-17, the petitioner has alleged to have submitted a reply dated 28.11.2019 before the respondent No.4 in response to the notice dated 18.11.2019 in which he mentioned about his B.Ed. Degree, 2002 from University of Calcutta. He has stated that he has neither applied for B.Ed. Course 2005 from Dr. B.R. Ambedkar University, Agra nor has obtained employment on the basis of B.Ed. Degree of Dr. B.R. Ambedkar University. This aspect of the matter has not been considered in the impugned order dated 11.12.2019. Therefore, the impugned order dated 11.12.2019 is quashed. The respondent No.4 is directed to pass a reasoned order afresh in accordance with law within six weeks. While passing the order, the respondent No.4 shall also examine records relating to the petitioner for obtaining employment as Assistant Teacher and other relevant material before him, without being influenced by any of the observations made in this paragraph. The writ petition is disposed of with these observations.

Judgments relied by petitioners:

68. Sri R.K. Ojha has relied upon certain judgments mentioned in Para-26 above, which are distinguishable on facts of the present case. In Roop Singh Negi's case (supra) relied by him, the facts were that Roop Singh was a peon in the bank and disciplinary proceeding was initiated against him after five years of the incidence of issuance of some bank drafts which were alleged to have been issued from a book, which was allegedly taken away by the aforesaid peon. It was found that the draft book remained in custody of the branch manager. No witness was examined to prove relied upon documents. The only basic evidence relied by the Inquiry Officer was the purported confession of Roop Singh before the police, for which the Roop Singh stated that he was forced to sign on the said confession as he was tortured in the police station. On these facts, Hon'ble Supreme Court held that departmental proceeding is a quasi judicial proceeding and inquiry report was found to be not based on any evidence. The facts of the present cases are entirely different, which have been discussed in detail in preceding paragraphs. Therefore, this judgment is of no help to the petitioner. In the case of Subodh Kumar Prasad (supra), the facts were that services of the appellant in that case who was compounder, were terminated on the basis of receipt of a letter from the Civil Surgeon that no appointment letter was issued. On peculiar facts of that case, Hon'ble Supreme Court distinguished its judgment in the case of Ashwini Kumar and set aside the order passed by the disciplinary authority. The principles of law regarding cancellation of appointment or dismissal from service in matters where the basic eligibility certificate is forged or fake, has been settled in various judgments and some of the judgments have been discussed and followed by me as

mentioned in preceding paragraph Nos.52 to 58 of this judgment. The judgment in the case of Union of India vs. Ashok Kumar (supra), is also distinguishable on facts of the present cases. In the relied upon paragraph-37 of the said judgment, this court held that the allegation of fraud, i.e. the charge levelled could not be proved by adducing any cogent and credible evidence before the Inquiry Officer and the entire attempt of the petitioners (Union of India) was that ex parte inquiry conducted by vigilance authorities and conclusion drawn by them shall be taken as a conclusive evidence to uphold the punishment. In the present cases, the facts are entirely different. The respondent - University has declared certain persons to be fake students after affording reasonable opportunity of hearing. These petitioners have even failed to supply the essential informations and documents relating to their alleged B.Ed. Degrees. With respect to remaining fake students and tampered marksheets, matters are still pending before the University. Thus, the judgment relied is distinguishable on the facts of the present cases. The judgment in the case of LIC of India and others (supra), is on entirely different set of facts and principles. The judgment in the case of S.N. Mukherjee vs. Union of India, (1990) 4 SCC 594 relied by Sri Shashi Nandan, learned senior advocate, is with respect to the necessity of recording of reasons by an authority while exercising quasi judicial function. In the present set of facts, notices were issued and all the persons who were classified as fake students, were required to submit certain informations and copies of certain essential papers relating to their alleged B.Ed. degrees, which were not submitted by them. With respect to remaining persons who submitted reply, matters are pending decision before the respondent-University. The judgment of Kerla High Court dated 22.06.2017 in Criminal Misc. Case No.1877 of 2015 relied by Sri Ashok Khare, relates to a criminal case.

CONCLUSION:-

69. In view of the above discussion and findings, my conclusions are briefly as under:-

(i) Crux of the Division Bench judgment in the case of Shri Puran Prasad Gupta Memorial Degree College (supra) was that the University was to declare result of 85% students admitted in private unaided professional colleges and 50% students admitted by such colleges under Management quota.

(ii) The SIT adjusted all the excess admitted students in these 25 private unaided professional colleges, i.e. upto 85% students by counselling and upto 50% students by management as evident from the facts and figures mentioned in item Nos.1 to 7 of Para-38 above. Thus, the submissions of learned counsels for the petitioners that the SIT has not considered the excess admitted students whose results were declared in terms of the Division Bench judgment in the case of Shri Puran Prasad Gupta Memorial Degree College (supra); is incorrect, vague and baseless.

(iii) Perusal of facts and figures based on records as briefly summarised in para 38 above reveals that there were total 8150 sanctioned seats for B.Ed. Course 2005 out of which 5340 seats were in 57 Affiliated Aided Colleges. Remaining 2810 seats were in 25 private unaided colleges to which benefit of Division Bench orders in Shri Puran Prasad Gupta

Memorial Degree College case (supra) was extended. Perusal of item Nos.2, 3, 4, 5, 6 and 7 of the chart in para-38 above leaves no doubt that the ratio of admission by counselling and management was maintained. Total 8899 students including 873 excess students who participated in the B.Ed. 2005 examination, their results were also declared. These 8,899 genuine students and 3637 + 45 fake students have been segregated. Notices dated 28.12.2019 have been issued by the University to the aforesaid fake students.

(iv) Pursuant to the decision of the Executive Council dated 06.12.2019, the list of 3637 fake students, 1084 students having tampered marksheets and 45 persons having fake duplicate roll numbers were uploaded on the official website of the University on 28.12.2019. Notices were also issued and uploaded on the official website. Notices were also published in largely circulated daily news papers requiring all the three categories of persons to submit information on the points mentioned in the questionnaire within 15 days, online and by registered/speed post.

(v) Vide Para-33 of the judgment in Tilak Singh and 495 others (supra), this court held that perusal of the aforesaid questionnaire reveals that it has not sought any information which can be said to be not available with the petitioners and these informations are essential to find out and segregate fake and tampered marks sheet/ degree. Despite this, out of 3637 fake students, 2823 have neither responded nor submitted any information. Response from only 814 students of fake students list were received by the University. Out of these 814 students, 796 students have not submitted any information/papers. Only 18 students have submitted informations/papers. Matters of these 814 students are pending decision before the University. In para 13 of the supplementary counter affidavit the University has stated that decision shall be taken within 21 days in respect of these 814 persons.

(vi) The petitioners who obtained appointments on the post of Assistant Teachers on the basis of fake B.Ed. Degrees and who fall under 2,823 fake students declared by the University, their orders of cancellation of appointments or dismissal from service on the ground of obtaining appointments on the basis of fake B.Ed. 2005 degree can not be interfered with by invoking, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. The concerned District Basic Education Officers shall find out petitioners within four weeks from today from Appendix I to this Judgement. Those petitioners who have been declared fake students as per Appendix I, their order of cancellation of appointments or dismissal from service passed by the concerned District Basic Education Officer are affirmed. The concerned District Basic Education Officers or other authorities shall be free to take further action in accordance with law against such petitioners including recovery of benefits obtained by the petitioners under the interim orders of this Court.

(vii) Undisptuedly, B.Ed. was the essential qualification for appointment of the petitioners on the post of assistant teachers. The petitioners falling under the list of fake students, have obtained government employment on the post of assistant teachers, on the basis of fake B.Ed. Degrees. This was a fraudulent act. It is settled law that fraud and justice never dwell together. The forgery is in the

basic eligibility conditions for appointments on the post of assistant teachers inasmuch as B.Ed. Degree are fake. Therefore, the process of appointments of the petitioners who obtained government employment on the basis of fake B.Ed. Degrees, stands vitiated.

(viii) Thus, those petitioners who have secured appointments on the basis of forged B.Ed. Degrees or marksheets and on that basis they have been inducted in Government service then they became beneficiary of illegal and fraudulent appointments. Such appointments are void ab initio. Therefore, holding disciplinary proceedings against them as envisaged by Article 311 of the Constitution of India or under any disciplinary rules including the Uttar Pradesh Basic Education Staff Rules, 1973 or the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999, shall not arise.

(ix) The respondent-University is directed to take appropriate decision, in the matter of the aforesaid 814 persons falling in the list of fake students within three months from today, if decision has not been taken by the University as yet. In the event, the University is not able to take decision within the aforesaid period of three months due to some sound reason then before expiry of the period, it may apply before this court for extension of time narrating the reasons and annexing therewith copies of relevant papers in support of reasons. The respondent-University shall communicate the decision so taken to the Secretary, U.P. Basic Education Board, Prayagraj and the concerned alleged students within next three days of the decision and shall also upload it on its official website. The Secretary, U.P. Basic Education Board shall communicate the aforesaid decision of the University to the concerned District Basic Education Officers within next one week. Those petitioners who fall under the list of the aforesaid 814 fake students, their impugned orders of cancellation of appointments or dismissal from service shall abide by the decision of the University as aforesaid. Those petitioners whose B.Ed. Degree are declared fake by the University, their orders of cancellation of appointment/ dismissal from service shall sand affirmed. Those petitioners whose B.Ed. Degrees are found genuine by the respondent - University, their order of cancellation of appointments/ dismissal from service shall be immediately recalled by the concerned District Basic Education Officer. For a period of four months from today or till the decision of the University as aforesaid, whichever is earlier, no coercive action shall be taken against the petitioners falling under the aforesaid list of 814 fake students. However, payment of salary shall be made only to those petitioners whose B.Ed. Degrees are found by the University to be genuine. It is further directed that if the respondent - University does not take decision within the stipulated period or within the extended period, if any, in respect of the aforesaid 814 persons, then an amount equivalent to 10% of the total salary of the petitioners falling under the list of the aforesaid 814 persons whose B.Ed. Degrees are found to be fake, shall be recovered by the State Government from the personal salary/assets of the Vice Chancellor, the Registrar and other responsible officers and employees of the University, who may be found by the State Government to be guilty to delay the decision. The recovery shall be made from them in such ratio as may be

determined by the State Government. The period of three months to take decision, if not taken so far; has been granted to the University keeping in mind the period of lock-down and other hardships due to Pandemic COVID-19.

(x) to meet the ends of justice the respondent University is directed to conclude entire proceedings in accordance with law in matters of tampered mark-sheet, within six months from today and pass reasoned order/ orders and upload it on its official website. The respondent University within a week thereafter shall send a copy of the decision to the Secretary U.P. Basic Education Board, the concerned petitioners and the concerned District Basic Education Officers. For a period of six months or till orders as aforesaid are passed, whichever is earlier, no coercive action shall be taken against the petitioners falling under the list of tampered mark sheets, but payment of salary to them shall be made after their mark sheets/degrees are found genuine. Those petitioners whose B.Ed. Marksheets/degrees are held by the respondent - University to be tampered, their impugned orders of cancellation of appointments/dismissal from service passed by the concerned District Basic Education Officers, shall stand affirmed and the State-respondents shall be free to take further action in accordance with law, if any, including recovery of benefits obtained by such petitioners under the interim orders of this Court. Those petitioners whose marksheets/degrees are found genuine by the respondent University, their order of cancellation of appointment/dismissal from service shall be recalled by the concerned District Basic Education Officers within one week from the date of receipt of decision of the respondent University. The period of six months as aforesaid has been granted to the University keeping in mind the lock-down period and other hardships due to Pandemic COVID-19. However, liberty is granted to the University to apply for extension of time for strong and cogent reasons.

(xi) Writ-A No.60007 of 2017 has been filed praying to quash the show cause notice dated 18.11.2017 issued by the District Basic Education Officer, Kasganj. Proper course for the petitioner is to submit reply before the authority concerned, who shall take decision in accordance with law as per direction in Para-65 above.

(xii) Perusal of the impugned order dated 04.01.2020 in Writ-A No.939 of 2020 shows that the appointment of the petitioner has been cancelled on the ground of tampered marksheet. Perusal of paragraphs-8 and 9 of the writ petition prima facie shows that the petitioner completed his B.Ed. in the year 2004. However, there is no consideration of this fact by the District Basic Education Officer, Etawah. Therefore, the impugned order dated 04.01.2020 is quashed. Liberty is granted to the respondent District Basic Education Officer, Etawah to pass an order afresh in accordance with law, after affording opportunity of hearing to the petitioner.

(xiii) In paragraph-5 of Writ-A No.320 of 2020, the petitioner has mentioned that he has passed B.Ed. in the year 2002 from University Calcutta. He has filed copy of B.Ed. Marksheet of University of Calcutta of B.Ed. Examination 2002 as Annexure-1 to the writ petition. The petitioner has alleged to have submitted a reply dated 28.11.2019 before the respondent No.4 in response to the notice dated 18.11.2019 in which he mentioned

about B.Ed. Degree, 2002 from University of Calcutta. He has stated that he has neither applied for B.Ed. Course 2005 from Dr. B.R. Ambedkar University, Agra nor has obtained employment on the basis of B.Ed. Degree of Dr. B.R. Ambedkar University. This aspect of the matter has not been considered in the impugned order dated 11.12.2019. Therefore, the impugned order dated 11.12.2019 is quashed. The respondent No.4 is directed to pass a reasoned order afresh in accordance with law within six weeks. While passing the order, the respondent No.4 shall also examine records relating to the petitioner for obtaining employment as Assistant Teacher and other relevant material before him, without being influenced by any of the observations made in Para-67 above.

70. With the aforesaid detail observations/ directions all the writ petitions are disposed off.

(2020)06ILR A696
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER , J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 253 of 2020

State of U.P. & Ors. ...Appellants
Versus
Dr. Raj Kamal Singh ...Respondent

Counsel for the Appellants:
Sri Manish Goyal (A.A.G.), Sri Ashok Kumar Goyal (Addl. C.S.C.)

Counsel for the Respondents:
Sri H.P. Shahi, Sri Virendra Singh, Sri A.B. Maurya.

A. Civil Law - UP State Medical Colleges Teachers Services Rules, 1999 – Rule 5 – Benefit of Pay Protection – Admittedly the writ petitioner/respondent was appointed pursuant to an appointment Order issued subsequent to the Government Order dated 24.09.2015 and 08.07.2016 – Writ petitioner would be governed in terms of the policy guidelines under the said government orders – His claim for entitlement for pay protection would be as per the terms thereof – He would not be entitled to pay protection as per terms of the policy of the State Government under the G.O. dated 24.09.2015 – Held the impugned judgment has proceeded on a wrong factual premise. (Para 17, 18 and 20)
Special Appeal allowed; Writ Petition dismissed (E-1)

Cases relied on :-

1. Jagdish Parwani Vs U.O.I. & ors. (2018) 15 SCC 591

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

1. The present intra court appeal seeks to challenge the judgment and order dated 18.07.2019 passed by a learned Single Judge in Writ-A No. 10674 of 2019 (Dr. Raj Kamal Singh Vs. State of U.P. and 2 others), whereby the writ petition has been allowed and the order dated 05.04.2019 passed by the State Government which was impugned therein has been quashed.

2. The authorities of the State Government who were the respondents in the writ petition are the appellants before us.

3. Learned Additional Advocate General appearing for the appellants has submitted that the learned Single Judge

has erroneously proceeded on a presumption that the writ petitioner had been appointed by the State Government on 26.08.2015 i.e. prior to 24.09.2015 when the relevant government order was issued clarifying that the benefit of an earlier government order dated 12.06.1998 with regard to pay protection would not be available to a government servant appointed by open recruitment.

4. It is submitted that the writ petitioner in fact submitted his joining pursuant to a subsequent appointment order dated 20.09.2016, which is after issuance of the government order dated 24.09.2015, and in view thereof the judgment of the learned Single Judge having been rendered on an incorrect factual premise, cannot be legally sustained.

5. Learned counsel appearing for the respondent-writ petitioner has tried to support the judgment of the learned Single Judge by submitting that though the petitioner had joined the post of Lecturer at the State Medical College, Jhansi, pursuant to the appointment order dated 20.09.2016, he had initially been granted appointment in terms of an appointment order dated 26.08.2015 which was prior in time to the issuance of the government order dated 24.09.2015 and as such the benefit of pay protection could not have been denied to him.

6. In order to appreciate the rival contentions, the relevant facts, as are reflected from the records before us, are required to be noticed.

7. The subject matter of the controversy pertains to appointment against a post of Lecturer in a State Medical College in Uttar Pradesh, which is governed by the Uttar Pradesh State Medical Colleges Teachers Services Rules, 19991, as amended from time to time. Under the aforesaid Rules, the appointing authority is the Governor of the State.

8. As per Rule 5 of the aforesaid Service Rules, the posts of Lecturers in State Medical Colleges are to be filled up by direct recruitment on the recommendation of the Uttar Pradesh Public Service Commission2. The vacancies existing in the teaching cadre in the State Medical Colleges were notified to the Commission and the same were advertised in terms of an advertisement dated 24.08.2013 inviting online applications for filling up the vacancies by direct recruitment. Pursuant to the said advertisement, the respondent-petitioner submitted his application and was selected by the Commission on the basis of an interview. Consequent thereto, the State Government issued an appointment order dated 26.08.2015 whereunder the petitioner was granted appointment and posting against the post of Lecturer (Tuberculosis and Respiratory Medicine/Pulmonary Medicine) at the Medical College, Azamgarh. The appointment order provided for a specific condition whereunder the petitioner was required to join the post within a period of one month, failing which the appointment order was to be cancelled and his candidature would cease. It transpires that the petitioner did not join within the stipulated time period, and another appointment order dated 20.09.2016 was issued whereunder he was appointed/posted at the Medical College, Jhansi, on the same terms and conditions as under the earlier order dated

26.08.2015. Accepting the subsequent appointment order dated 20.09.2016, the petitioner joined the post of Lecturer at the Medical College, Jhansi on 07.10.2016, and raised a claim for pay protection which came to be turned down by the State Government by means of an order dated 05.04.2019 by assigning the reason that since the petitioner had been appointed after 24.09.2015, his case would not be covered as per terms of Government Orders dated 24.09.2015, 08.07.2016 and 12.06.1998, and accordingly he would not be entitled for the benefit of pay protection. Challenging the aforesaid order dated 05.04.2019, the writ petition was filed which has been allowed in terms of the judgment under appeal.

9. The policy of the State Government with regard to grant of pay protection to persons working in Public Sector Undertakings/Corporations, Universities prior to their appointment in services under the government was governed in terms of a government order dated 12.06.1998 which provided that the candidates working in Public Sector Undertakings/Corporations and Universities, who were appointed upon selection made by the Public Service Commission or a duly constituted selection committee, would be granted the benefit of pay protection. Subsequently, a government order dated 24.09.2015 was issued clarifying that the benefit of the earlier government order dated 12.06.1998 would not be available to a government servant who had been appointed consequent to his selection in a recruitment based on open competition. The government order dated 24.09.2015 was further amended with the issuance of another government order dated 08.07.2016 containing a stipulation that the claims made with regard to pay protection in cases where appointments had been made subsequent to 24.09.2015 would be governed as per the provisions under the government order dated 24.09.2015. For ease of reference the two government orders dated 24.09.2015 and 08.07.2016 are being extracted herein below :-

''संख्या–4/2015/जी–2–25/दस–2015–301/98 टी0सी0–1

प्रेषक,
अजय अग्रवाल,
सचिव,
उ0 प्र0 शासन।

सेवा में,

समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,
उत्तर प्रदेश।

वित्त (सामान्य) अनुभाग–2 लखनऊः दिनांक 24 सितम्बर, 2015

विषयः सार्वजनिक उपक्रम/निगम, विश्वविद्यालय में कार्यरत् सेवकों की राजकीय सेवा में नियुक्ति पर वेतन संरक्षण/निर्धारण की सुविधा प्रदान किया जाना।

महोदय,

उपर्युक्त विषयक वित्त विभाग के शासनादेश संख्या जी–2–359/दस–1998, दिनांक 12 जून, 1998 शासनादेश संख्या जी–2–1252/दस–2000–301–98, दिनांक 21 नवम्बर, 2000 एवं शासनादेश संख्या जी–2–929/दस–2004–301/98, दिनांक 19 मई, 2004 द्वारा राज्य सरकार के अपने सार्वजनिक उपक्रम/निगम, विश्वविद्यालय में कार्यरत् कर्मियों तथा भारत सरकार के सार्वजनिक उपक्रम/निगम में कार्यरत् कर्मियों को लोक सेवा आयोग/सक्षम स्तर के चयन समिति द्वारा चयनोपरान्त राज्य सरकार की सेवा में नियुक्ति पर वेतन संरक्षण की व्यवस्था की गयी है जो भारत सरकार द्वारा समान विषय पर की गयी व्यवस्था पर आधारित है।

2–उल्लेखनीय है कि भारत सरकार द्वारा उपर्युक्त व्यवस्था के संदर्भ में निर्गत अपने मूल

शासनादेश के संबंध में अपने कार्यालय ज्ञापन संख्या – 12/1/96/– म्जजण;च्ंल.1द्ध दिनांक 10–07–98 द्वारा यह स्पष्टीकरण भी निर्गत किया गया है कि सार्वजनिक उपक्रमों निगम विश्वविद्यालय में कार्यरत कर्मियों को खुली प्रतियोगिता के आधार पर भारत सरकार की सेवा में नियुक्त होने पर वेतन संरक्षण का लाभ देय नहीं है। राज्य सरकार द्वारा भी अपने शासनादेश दिनांक 12 जून, 1998 में यह स्पष्ट प्राविधान किया गया है कि राजकीय सेवा में नियुक्ति पर सार्वजनिक उपक्रम आदि में प्राप्त वेतन संरक्षण की सुविधा इसलिये प्राविधानित की जा रही है ताकि उनमें कार्यरत बुद्धिजीवी सेवकों को राजकीय सेवा में आकर्षित किया जा सके। खुली प्रतियोगिता से उक्त उद्देश्य की पूर्ति किसी भी स्थिति में नहीं होती है, अपितु लोक सेवा आयोग अथवा सक्षम स्तर के चयन में विशिष्ट योग्यता धारको का चयन किये जाने पर ही ऐसी स्थिति बनती है। अतएव सम्यक विचारोपरान्त भारत सरकार की व्यवस्था एवं राज्य सरकार के शासनादेश के सदंर्भ में सार्वजनिक उपक्रम/निगम, विश्वविद्यालय में कार्यरत् कर्मियों की लोक सेवा आयोग/सक्षम स्तर के चयन समिति द्वारा चयनोपरान्त राज्य सरकार की सेवा में नियुक्ति पर प्रदान किए गए वेतन संरक्षण के संदर्भ में पूर्व में जारी शासनादेशों के क्रम में यह स्पष्ट किया जाता है कि शासनादेश दिनांक 12–06–1998 द्वारा प्रदत्त वेतन संरक्षण की सुविधा का लाभ ऐसी स्थिति में देय नहीं है जबकि संबंधित सरकारी सेवक का चयन खुली प्रतियोगिता के आधार पर हुआ हो। बल्कि उक्त सुविधा का लाभ शासन द्वारा तभी अनुमन्य कराया जाना है, जब सार्वजनिक उपक्रमों/निगमों, विश्वविद्यालय में कार्यरत कर्मियों की विशेषज्ञता का लाभ लेने के लिये किसी विशिष्ट पद पर उनका चयन लोक सेवा आयोग द्वारा साक्षात्कार के माध्यम से किया जाये एवं लोक सेवा आयोग द्वारा शासन को प्रेषित अपने संस्तुति पत्र में यह स्पष्ट रूप से इंगित किया गया हो कि संबंधित कर्मी का वेतन उपरोक्त शासनादेश दिनांक 12–06–1998 के अन्तर्गत संरक्षित किया जाना है। इसके अतिरिक्त इस प्रकार नियुक्त सरकारी सेवकों को वेतन संरक्षण का लाभ तभी देय है जब वे अपने पूर्व पद पर स्थायी हों। इस प्रकार के प्रकरणों में वेतन संरक्षण के आदेश प्र0वि0 द्वारा वित्त विभाग की सहमति से जारी किए जायेंगे। जिन प्रकरणों में वेतन संरक्षण का लाभ वित्त विभाग की सहमति से पूर्व में अनुमन्य कराया जा चुका है, उन्हें पुनः नहीं खोला जायेगा।

भवदीय

अजय अग्रवाल

सचिव

संख्या–4/2015/जी–2–25

(1)/दस–2015–301/98 टी0सी0–1,तद्दिनांक

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित :–

1– महालेखाकार, लेखा प्रथम एवं द्वितीय, उत्तर प्रदेश, इलाहाबाद।

2– प्रमुख सचिव, विधान सभा/विधान परिषद, उत्तर प्रदेश, लखनऊ।

3– सविचालय के समस्त अनुभाग।

4– निदेशक वित्त एवं लेखा प्रशिक्षण संस्थान, 22/3, इन्दिरा नगर, लखनऊ।

आज्ञा से

बी0के0 सिंह

विशेष सचिव

संख्या–3/2016/जी–2–119/दस–2016–30 1/98टी0सी–1

प्रेषक,

अजय अग्रवाल,

सचिव,

उ0प्र0 शासन।

सेवा में,

समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,

उत्तर प्रदेश।

वित्त सामान्य अनुभाग–2 लखनऊ : दिनांक : 08 जुलाई, 2016

विषयः सार्वजनिक उपक्रम/निगम, विश्वविद्यालय में कार्यरत सेवकों की राजकीय सेवा में नियुक्ति पर वेतन संरक्षण की सुविधा प्रदान किए जाने विषयक शासनादेश दिनांक 24 सितम्बर, 2015 में संशोधन।

महोदय,

उपर्युक्त विषय की ओर आपका ध्यान आकृष्ट करते हुए मुझे यह करने का निदेश हुआ है कि श्री राज्यपाल महोदय, सार्वजनिक उपक्रम/निगम, विश्वविद्यालय में कार्यरत सेवकों की राजकीय सेवा में नियुक्ति पर वेतन संरक्षण/निर्धारण की सुविधा प्रदान किए जाने विषयक शासनादेश संख्या–4/2015/जी–2–25/दस–2015–301/98

टी0सी0–1, दिनांक 24 सितम्बर, 2015 के प्रस्तर–2 की अन्तिम पंक्ति में यह प्रावधान कि ''जिन प्रकरणों में वेतन संरक्षण का लाभ वित्त विभाग की सहमति से पूर्व में अनुमन्य कराया जा चुका है उन्हें पुनः नहीं खोला जायेगा'' को विलुप्त कर उसके स्थान पर निम्नलिखित प्रावधान किए जाने की सहर्ष स्वीकृति प्रदान करते हैं :–

''दिनांक 24 सितम्बर, 2015 से पूर्व की नियुक्ति के मामलों का निस्तारण वित्त विभाग के शासनादेश संख्या–जी–2–359/दस–1998, दिनांक 12 जून, 1998 की व्यवस्थानुसार किया जायेगा तथा दिनांक 24 सितम्बर, 2015 एवं उसके पश्चात हुई नियुक्तियों के मामलों का निस्तारण शासनादेश दिनांक 24 सितम्बर, 2015 के प्रावधानों के अनुसार किया जायेगा।''

2–कृपया तद्नुसार आवश्यक कार्यवाही करने का कष्ट करें।

भवदीय,
अजय अग्रवाल
सचिव''

10. In the facts of the case, it is not disputed that the petitioner did not join pursuant to the initial appointment order dated 26.8.2015 and it was only pursuant to a subsequent appointment order dated 20.09.2016 issued by the State Government that the petitioner joined the post of Lecturer at the State Medical College, Jhansi.

11. The writ petitioner, having admittedly joined the post of Lecturer (T.B./Chest) at the Medical College, Jhansi, on 07.10.2016 pursuant to the appointment order dated 20.09.2016, therefore cannot claim the benefit of pay protection on the basis of the previous appointment order dated 26.08.2015 offering appointment to the writ petitioner at Azamgarh.

12. The claim sought to be raised by the respondent-petitioner based on the earlier appointment order dated 26.08.2015 cannot be accepted for the simple reason that the offer of appointment in terms of the said appointment order was never acted upon. Subsequently, another order of appointment dated 20.09.2016 was issued and it was pursuant to the same that the petitioner joined the post of Lecturer at the State Medical College, Jhansi on 07.10.2016. The appointment of the petitioner thus cannot be treated as being prior to 24.09.2015.

13. The appointment of the petitioner against the post of Lecturer at the State Medical College, Jhansi, which has been ultimately accepted by him is therefore pursuant to the appointment order dated 20.09.2016 issued by the State Government which is clearly subsequent to the issuance of the Government Order dated 24.09.2015 clarifying the policy of the State Government with regard to pay protection.

14. The grant of pay protection, in a particular case, would depend on the prevalent policy, which may be based upon consideration of a variety of factors as also the recommendations made by expert bodies with little scope of interference in exercise of powers of judicial review. The entitlement to pay protection, if any, would thus flow strictly from the prevalent policy directives and any claim made in regard to the same would have to be tested on the basis of the said policy guidelines.

15. To support the aforesaid proposition, reference may be had to the decision in Jagdish Parwani Vs. Union of India and others3, in which a claim for pay protection sought on the basis of a notification issued by the Department of Personnel and Training, Government of

India, on 28.02.1992, granting pay protection to employees selected by direct recruitment on or after 01.02.1992, was turned down and the appellant was held not entitled to benefit of pay protection since he had been appointed to the post prior to 01.02.1992. The relevant observations made in the judgment are as follows :-

"15. A bare perusal of the memorandum would make it crystal clear that the employees of the State Government undertakings selected for posts in the Central Government on direct recruitment basis on and after 1-2-1992 were also extended the benefit of pay protection, as was provided in the case of the employees of the Central Government public undertakings as per Notification dated 7-8-1989.

16. In the aforesaid notification, it was clearly stipulated that the said benefit of pay protection is effective only from the first of the month in which the OM is issued i.e. from 1-2-1992, which means that the said OM was given prospective effect only. Therefore, the said OM could even be said to be a clarification on the issue which is sought to be raised in the present case. It was clearly pointed out in the said notification that employees like the appellant would be entitled to get such pay protection, as employees of the State Government undertakings on their appointment in the Central Government service only from the effective date of 1-2-1992.

17. If the appellant would have been appointed for a post in the Central Government on direct recruitment basis after 1-2-1992 such benefit of pay protection could have been made available to him. But since the appellant was selected and appointed to a post in the Central Government on 23-2-1990 after working as an employee of the State Government undertaking viz. UPSEB, the Notification dated 7-8-1989 was not applicable to him and, therefore, he could not have legally claimed for any pay protection.

x x x x x

19. The position with regard to the entitlement or otherwise of the appellant for getting pay protection was made clear by issuing the Notification dated 28-2-1992 clearly stipulating therein that an employee of the State Government undertaking selected for post in the Central Government on direct recruitment basis would be entitled to pay protection upon appointment in the Central Government only effective from 1-2-1992. The appellant having joined the MES, Ministry of Defence prior to the aforesaid date was not entitled to the benefit of the aforesaid notification which was issued much after his joining date and, therefore, the benefit of the aforesaid notification is not available to the appellant."

16. On the question of entitlement to pay protection, the decision rendered in the aforementioned judgment of Jagdish Parwani, has held that the issue with regard to pay protection arises after an employee joins his new post, where he gets his new pay scale, and his entitlement to pay protection would be on the basis of applicable rules regarding pay protection at that stage. It was stated thus :-

"21. ...So far as getting pay protection is concerned, the said issue arises as soon as an employee joins his new post, where he gets his new pay scale and if he is entitled to any pay protection

that is the stage and date when it is granted by whatever notifications, memorandums which are available and applicable at that stage laying down such rules regarding pay protection..."

17. In the instant case also, the writ petitioner, having accepted the appointment pursuant to an appointment order dated 20.09.2016, issued subsequent to the government orders dated 24.09.2015 and 08.07.2016, would be governed in terms of the policy guidelines under the said government orders and his claim for entitlement for pay protection would be as per the terms thereof.

18. The appointment of the petitioner having been made pursuant to selection based on direct recruitment in an open competition on the recommendation made by the Commission consequent to an advertisement, he would not be entitled to pay protection as per terms of the policy of the State Government under the government order dated 24.09.2015. The aforesaid position stands further clarified in terms of the subsequent government order dated 08.07.2016 whereunder it is provided that the matters relating to pay protection in respect of appointments made after 24.09.2015 would be governed as per the terms of the Government Order of the said date.

19. Counsel appearing for the respondent has not been able to dispute the aforesaid factual position with regard to the writ petitioner having not accepted the earlier appointment order dated 26.08.2015 in terms of which he had been appointed as Lecturer at the Medical College, Azamgarh, and that it was only pursuant to the subsequent appointment order dated 20.09.2016 that the petitioner accepted the offer of appointment and joined the post of Lecturer at the Medical College, Jhansi, on 07.10.2016.

20. The above being the undisputed factual position, we have no hesitation in coming to the conclusion that the judgment dated 18.07.2019 passed by the learned Single Judge has proceeded on a wrong factual premise, and, therefore, cannot be sustained, and accordingly the same is set aside.

21. The Special Appeal is, therefore, allowed.

22. The writ petition stands dismissed.

(2020)06ILR A702
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 1439 of 2020
Connected with
Writ A No. 1115 of 2020

Ramesh Chandra Verma ...Petitioner
Versus
Director of Education (Secondary) U.P. Prayagraj & Ors. ...Respondents

Counsel for the Petitioner:
Sri Adarsh Singh, Sri Indra Raj Singh.

Counsel for the Respondents:
C.S.C., Sri Vivek Yadav

A. Intermediate College – Government Residential Quarter – Illegal Encroachment – Policy for occupation – Directions issued – All the concerned officers of the State

Government shall ensure strict compliance of the aforequoted Government Order dated 25.2.2020 – No officer or employee shall be allowed to overstay in a Government accommodation after his retirement / transfer / dismissal from service / resignation etc., beyond the period prescribed in the aforequoted Government Order dated 25.2.2020. (Para 6)

Writ Petition disposed off (E-1)

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

1. Heard Sri Indraraj Singh, learned counsel for the petitioners and Sri Shailendra Singh, learned standing counsel for the State respondents.

2. The petitioners are teachers in Government Inter College, Prayagraj. They have been allotted residential quarters in the campus of Government Inter College, Prayagraj meant for residences of teachers, but the quarters were illegally occupied by the private respondents. Despite representations made by the petitioners, the aforesaid residential quarters were not vacated. Therefore, the petitioners have filed the present two writ petitions. In the leading Writ-A No. 1439 of 2020, this Court passed the following order on 31.1.2020:-

"Heard Sri Adarsh Singh, learned counsel for the petitioner, Sri Shailendra Singh, learned standing counsel for the respondent nos. 1 to 5 and Sri Vivek Yadav, learned counsel for the respondent no. 6.

Briefly stated facts of the present case are that the petitioner is an Assistant Teacher in Government Inter College, Prayagraj. By order dated 16.5.2017, the government residential quarter for teacher being Quarter No. C-1 was allotted to him by competent Authority i.e. the respondent no. 4. The aforesaid quarter has been illegally occupied by the respondent no. 6 who was working as Sahitiyak Sahayak Madhyamik Shiksha Parishad, Prayagraj. Since, the respondent no. 6 was not vacating the aforesaid illegally occupied government residential quarter, therefore, the petitioner moved a representation dated 3.6.2017 before the Secretary (Secondary) Education, Government of U.P. who issued a direction dated 3.7.2017 to the respondent no. 1 directing that the possession of the allotted government residential quarter be given to the petitioner within one month and report be submitted within a week. Thereafter, Additional Director of Education (Madhyamik), Allahabad sent a letter dated 25.8.2017 to the District Magistrate, Allahabad and Nagar Ayukta, Nagar Nigam, Allahabad requesting for removal of encroachments from the government land by certain unsocial elements who have constructed shops in the campus of Government Inter College, Prayagraj and also requested to remove illegal occupants from government residential quarter Nos. C-1 and C-6. Similar request was made by the Director of Education (Madhyamik), U.P., Allahabad to the District Magistrate, Allahabad vide letter dated 25.10.2017.

It appears that somehow the respondent no. 6 obtained some favourable letter from the Joint Director of Education, Prayagraj Region, Prayagraj, but it was also cancelled by the said Joint Director of Education vide his letter No. 3854-55 / 2019-20 dated 17.8.2019. It further appears that the respondent no. 6 has also removed some old trees from government residential quarter no. C-1, and therefore, the

Principal of the Government Inter College, Prayagraj wrote a letter No. 803-05 dated 20.8.2019 to the respondent no. 6 to deposit the value of the trees and also vacate the government residential quarter.

The Additional Director of Education (Madhyamik), U.P., Prayagraj has also apprised the Joint Director of Education, Prayagraj and the District Magistrate, Prayagraj vide letter No. 391-97 dated 22.8.2019 about an order of this Court and to get vacate the government residential quarter, illegally occupied by the respondent no. 6. The Director of Education (Madhyamik), U.P., Prayagraj also wrote a letter no. 509 dated 6.9.2019 to the Secretary Madhyamik Shiksha Parishad for stopping the salary of the respondent no. 6 and to initiate disciplinary proceedings against her for illegal occupation of the government residential quarter and for disobedience of the Government Orders.

It appears that in the meantime, the respondent no. 6 filed a Writ-A No. 14176 of 2019 which was disposed of by order dated 24.9.2019 directing the Director of Education (Secondary) to pass an appropriate order in accordance with law within 15 days. It appears that pursuant to the aforesaid order of this Court, the Director of Education (Secondary) passed an order dated 12.12.2019 holding that the respondent no. 6 is in illegal occupation of the government residential quarter in the campus of Government Inter College, Prayagraj which is meant for teachers. Therefore, the Principal of the Government Inter College, Prayagraj again wrote a letter no. 1592-99 dated 17.12.2019 to the respondent no. 6 followed by letter dated 7.1.2020 directing the respondent no. 6 to vacate the government residential quarter in question and to hand over its vacant possession, but the respondent no. 6 did not obey it. The petitioner has also made representation before the District Magistrate, Prayagraj (respondent no. 5) and the Principal of the Government Inter College, Prayagraj, but nothing has been done and the respondent no. 6 is continuing in illegal occupation of the government residential quarter.

In Writ-A No. 18253 of 2019 (Rakesh Kumar Vs. Principal, Government Inter College, Prayagraj & 4 others), this Court considered similar controversy with respect to a residential quarter situate in the same Government Inter College, Prayagraj and following the law laid down by Hon'ble Supreme Court in several judgments, issued the following directions:-

"14. In the present case, since the accommodation has now been got vacated from the respondent No.5 and the allottee has been given possession of the allotted Government Accommodation, therefore, this writ petition is disposed of and the following directions are issued which shall be strictly complied with by the State Government:-

(i) The State Government shall ensure compliance of the directions of Hon'ble Supreme Court in the case of S.D. Bandi (supra) and take immediate action against all such employees/ officers who are unauthorisedly over staying in a Government Accommodation after their retirement or transfer.

(ii) Necessary action shall be taken by competent authorities in the State of Uttar Pradesh against such Employees/Officers who are unauthorisidely over staying in Government allotted accommodation after their retirement or transfer (as suggested by Hon'ble Supreme Court in

the case of S.D. Bandi's case and directed to be implemented in Vimal Bhai case).

(iii) The State Government shall frame and adopt a uniform policy within two months from today, if not framed so far, for granting extension to retain the Government accommodation beyond prescribed limit and shall strictly adhere to it.

(iv) The State Government shall call for information from all the District Authorities in the State of Uttar Pradesh within two months from today about the Officers and Employees who are unauthorisedly over staying or retaining the Government accommodation beyond prescribed limit, after their retirement or transfer. Within next one month, the State Government shall ensure that all such Government accommodation being illegally or unauthorisedly occupied by retired/transferred Employees and Officers are vacated immediately. In the event, any inaction is shown by any authority, the State Government shall ensure that necessary action is also taken against such authorities.

15. With the aforesaid directions this writ petition is disposed of.

16. Let a copy of this judgment be sent by the Registrar General of this Court to the Chief Secretary, Government of Uttar Pradesh for necessary action and compliance."

It appears that neither the District Magistrate, Allahabad, nor the departmental officers of U.P. Secondary Education Department, nor the Chief Secretary of the State of U.P. have made any effort to obey and implement the statutory provisions, the judgment of Hon'ble Supreme Court and a clear direction given by this Court by order dated 28.11.2019 in the case of Rakesh Kumar (supra). The matter is serious and requires action to be taken against the State Authorities who prima-facie failed to discharge their duties.

Let a report be submitted by the Chief Secretary of State of U.P. before the next date fixed with respect to the compliance of the directions of this Court in the case of Rakesh Kumar (supra). The District Magistrate, Prayagraj and the Director of Education (Secondary), Prayagraj shall show cause for non compliance of the order of this Court in the case of Rakesh Kumar (supra).

Put up in the additional cause list on 5.2.2020.

If before the next date fixed, the residential quarter in question is not got vacated and steps for removal of encroachments in the campus of Government Inter College, Prayagraj are not taken by all the Authorities concerned, then the respondent nos. 1, 3 & 5 shall remain personally present before this Court.

This order shall be communicated by the learned Chief Standing Counsel to the respondent nos. 1, 3 & 5 within 24 hours."

3. This Court also took note of the order passed in Writ-A No. 18253 of 2019 (Rakesh Kumar Vs. Principal Government Inter College, Prayagraj & 4 others) in which directions were issued to the State Government to frame a policy for occupation of government residential quarters.

4. Today, an affidavit of Sri Rajendra Rajendra Kumar Tiwari, Chief Secretary, State of Uttar Pradesh dated 26.2.2020 has been filed. In paragraph 5 of the affidavit, the Chief Secretary has stated as under:-

"5. That since matter is relates to the policy decision and many Departments of the State Government are involved, a meeting was convened on 20.2.2020 under the Chairmanship of the Chief Secretary along with all Additional Chief Secretaries / Principal Secretaries / Secretaries and thereafter following decision has been taken:-

I. That through a letter No. 232/15.2.2020 dated 20.2.2020 issued by Secondary Education Department (Section-2) information from all Additional Chief Secretaries / Principal Secretaries / Secretaries and District Magistrates of the Districts have been called for regarding illegal occupation of government residential accommodations with the direction to provide a list of the aforesaid unauthorised occupants and also action taken by the authorities against the employees who had not vacated the government residential accommodations and in pursuance thereof information has been furnished by different Departments under a prescribed proforma. A copy of letter No. 232/15.2.2020 dated 20.2.2020 issued by Secondary Education Section-2 and copy of the information as submitted by different departments regarding unauthorised occupants on government residential accommodations are being annexed herewith and marked as Annexure Nos. 2 & 3 respectively to this compliance affidavit.

II. That in pursuance of the aforesaid letter dated 20.2.2020 which has been issued by the Department of Secondary Education Section-2, a direction was issued to the Principal Secretary of Public Works Department, State of U.P. Lucknow to prepare and implement a general allotment policy of government residential accommodation to the Government servant and employees of the State of U.P. And the said policy will be applicable to all the administrative departments of Government within State of U.P. The residential allotment policy has been issued vide G.O. dated 25.2.2020 with the Public Works Department of the Government of U.P. For residential buildings / accommodations of Estate Department. Policy is being annexed here with and marked as Annexure No. 4 of this compliance affidavit.

III. That as regards unauthorised occupants within the premises of Government Inter College, Prayagraj, it is submitted that in pursuance of the order passed by this Hon'ble Court on 5.2.2020 in the present writ petition, all unauthorised possession which were occupied by the different persons have got been vacated and immediate action for eviction of all unauthorised occupations of government residential accommodations in other Districts of the State of U.P., legal action is under way. A copy of eviction of unauthorised occupants in the premises of Government Inter College, Prayagraj is being annexed herewith and marked as Annexure No. 5 to this compliance affidavit.

IV. That since the order of this Hon'ble Court could not be complied with by the authorities within time, explanation of the responsible officer namely Sri Vinay Kumar Pandey, Director of Secondary Education and Sri Divya Kant Shukla, Joint Director of Education, Prayagraj Division, Prayagraj has been called for. Letters have been issued on 22.2.2020 to both the aforesaid officers namely Sri Vinay Kumar Pandey, Director of Secondary Education and Sri Divya Kant Shukla, Joint Director of Education, Prayagraj Division,

Prayagraj are being annexed herewith and marked as Annexure Nos. 6 & 7 respectively to this compliance affidavit."

5. The policy decision being Government Order No. 13/2020/299/23–5–20–6 (सा0)/2020 has been filed which is reproduced below:-

''संख्याः– 13/2020/299/23–5–20–6 (सा0)/2020

प्रेषक,

नितिन रमेश गोकर्ण,

प्रमुख सचिव,

उत्तर प्रदेश शासन।

सेवा में,

1– समस्त अपर मुख्य सचिव / प्रमुख सचिव/ सचिव

उत्तर प्रदेश शासन।

2– समस्त मण्डलायुक्त/ जिलाधिकारी,

उत्तर प्रदेश।

3– समस्त विभागाध्यक्ष/ कार्यालयाध्यक्ष,

उत्तर प्रदेश।

लोक निर्माण अनुभाग–5 लखनऊः दिनांक : 25 फरवरी 2020

विषयः मा0 उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका सं0– 18253/2019, राकेश कुमार बनाम प्रधानाचार्य, राजकीय इण्टर कालेज, प्रयागराज व अन्य में पारित निर्णय दिनांक 28.11.2019 के अनुपालन मे सरकारी आवासों मे अध्यासन की अवधि के निर्धारण के सम्बन्ध में।

महोदय,

उपर्युक्त विषय के सम्बन्ध में मा0 उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका सं0–18253/2019, राकेश कुमार बनाम प्रधानाचार्य, राजकीय इण्टर कालेज, प्रयागराज व अन्य में पारित निर्णय दिनांक 28.11.2019 के क्रियात्मक अंश निम्नवत हैः–

14. In the present case, since the accommodation has now been got vacated from the respondent No.5 and the allottee has been given possession of the allotted Government Accommodation, therefore, this writ petition is disposed of and the following directions are issued which shall be strictly complied with by the State Government:-

(i) The State Government shall ensure compliance of the directions of Hon'ble Supreme Court in the case of S.D. Bandi (supra) and take immediate action against all such employees/ officers who are unauthorisedly over staying in a Government Accommodation after their retirement or transfer.

(ii) Necessary action shall be taken by competent authorities in the State of Uttar Pradesh against such Employees/Officers who are unauthorisidely over staying in Government allotted accommodation after their retirement or transfer (as suggested by Hon'ble Supreme Court in the case of S.D. Bandi's case and directed to be implemented in Vimal Bhai case).

(iii) The State Government shall frame and adopt a uniform policy within two months from today, if not framed so far, for granting extension to retain the Government accommodation beyond prescribed limit and shall strictly adhere to it.

(iv) The State Government shall call for information from all the District Authorities in the State of Uttar Pradesh within two months from today about the Officers and Employees who are unauthorisedly over staying or retaining the Government accommodation beyond prescribed limit, after their retirement or transfer. Within next one month, the State Government shall ensure that all such Government accommodation being illegally or unauthorisedly occupied by retired/transferred Employees and Officers are vacated immediately. In the event, any inaction is shown by any authority, the State Government shall ensure that necessary action is also taken against such authorities.

1– मा0 न्यायालय के उक्त निर्णय दिनांक 28.11.2019 द्वारा राज्य सरकार को सरकारी आवासो में अध्यासन बनाये रखने की अवधि निर्धारण के सम्बन्ध में एक समरूप निति का निर्धारण किये जाने के आदेश दिये गये है।

2– इस सम्बन्ध मे उल्लेखनीय है कि राज्य सम्पत्ति अनुभाग–2, उ0प्र0 शासन की अधिसूचना दिनांक 02.01.2017 द्वारा राज्य सम्पत्ति विभाग के नियंत्रणाधीन भवनों का आवंटन नियमावली–2016 प्रख्यापित की गयी है। उक्त नियमावली के नियम–8 में राज्य सरकार के अधिकारियों/ कर्मचारियों हेतु सरकारी आवासों में अध्यासन की अवधि के निर्धारण की व्यवस्था दी गयी है। अतः मा0 उच्च नयायालय के आदेश दिनांक 28.11.2019 के अनुपालन में शासन द्वारा सम्यक विचारोपरान्त राज्य सरकार के अधिकारियों/ कर्मचारियों हेतु सरकारी आवासो में अध्यासन की अवधि की उपर्युक्त व्यवस्था को राज्य सरकार के समस्त शासकीय विभागों पर समान रूप से निम्नानुसार लागू किये जाने का निर्णय लिया गया है:–

(1) राज्य सरकार के अधीन कार्यरत अखिल भारतीय सेवा के अधिकारियो, न्यायिक सेवा के अधिकारियो तथा राज्य सरकार के अधिकारियों / कर्मचारियों और पत्रकारों/ वरिष्ठ पत्रकारों को भवनो का आवंटन उनके मुख्यालय में तैनात रहने की अवधि तक के लिये किया जायेगा। आवंटितियो के स्थानान्तरण/ सेवानिवृत्ति की दशा में आवंटितियों को उनके द्वारा अध्यासित आवास को उनके स्थानान्तरण / सेवानिवृत्ति के दिनांक से 30 दिनांक के भीतर रिक्त करना होगा।

(2) कोई आवंटन उस दिनांक से जिस दिनांक को आवंटिती द्वारा भवन का कब्जा प्राप्त किया गया हो, से प्रभावी होगा।

(3) किसी कर्मचारी / अधिकारी को आवंटित कोई भवन, नीचे सारणी के स्तम्भ–2 में उल्लिखित कोई घटना होने पर उसके स्तम्भ–3/4 में तत्स्थानी प्रविष्टियों में विनिर्दिष्ट अवधि तक बनाये रखा जा सकता है परन्तु यह कि भवन की आवश्यकता अधिकारी, कर्मचारी, पत्रकार, वरिष्ठ पत्रकार या उसके परिवार के सदस्यो के वास्तविक उपयोग के लिये हो।

		स्करकारी आवासो मे अध्यासन की अवधि–	
क्र0 सं0	*घटना*	*सामान्यतया*	*विशेष अनुज्ञा से अतिरिक्त अवधि*
1	त्यागपत्र पदच्युति, सेवा से हटाया जाना या सेवा समाप्ति	30 दिन	..
2	सेवा निवृत्ति या सेवान्त अवकाश (टर्मिनल लीव)	30 दिन	30 दिन
3	आवंटिती की मृत्यु	90 दिन	90 दिन
4	मुख्यालय से बाहर स्थानान्तरण	30 दिन	30 दिन
5	राज्य सरकार से इतर स्थानान्तरण	30 दिन	30 दिन
6	अस्थायी स्थानान्तरण	120 दिन	..
7	भारत में विदेश सेवा में जाने पर	30 दिन	30 दिन
8	सेवानिवृत्ति अवकाश या फण्डामेण्टल रूल 86 के अधीन स्वीकार की गयी अस्वीकृत अवकाश	(सेवानितृत्त प्रभावी होने के दिनांक से 30 दिन के भीतर)।	..
9	अवकाश (सेवानिवृत्ति अवकाश, अस्वीकृत अवकाश, सेवारत अवकाश,	अवकाश अवधि के लिये किन्तु 04 माह से अधिक नहीं।	..

	चिकित्सा अवकाश या अध्ययन अवकाश से भिन्न)		
10	भारत के बाहर अध्ययन अवकाश या प्रतिनियुक्ति	अवकाश अवधि के लिये किन्तु 06 माह से अधिक नहीं।	
11	भारत में अध्ययन अवकाश	अवकाश अवधि के लिये किन्तु 06 माह से अधिक नही।	
12	चिकित्सा आधार पर अवकाश	अवकाश की सम्पूर्ण अवधि के लिये।	
13	प्रशिक्षण पर जाने पर	प्रशिक्षण की सम्पूर्ण अवधि के लिये।	
14	प्रसूति/ बाल्य देखभाल अवकाश	प्रसूति / बाल्य देखभाल अवकाश और अधिकतम 180 दिन की अवधि के अध्यधीन निरन्तरता में स्वीकृत अवकाश अवधि के लिये।	

स्पष्टीकरण– मद (चार) (पॉच) व (सात) के सापेक्ष उल्लिखित स्थानान्तरण पर अनुज्ञेय अवधि की गणना प्रभार छोड़ने और नये पद का कार्यभार ग्रहण करने के पूर्व अधिकारी को स्वीकृत और उसके द्वारा उपभोग किये गये अवकाश, यदि कोई हो, की अवधि के दिनांक से की जायेगी।

(4) जहॉ कोई भवन उपरोक्त प्रस्तर–2(3) के अधीन बनाये रखा जाय वहां आवंटन अनुमन्य अनुग्रह अवधि की समाप्ति पर रद्द हुआ समझा जायेगा जब तक कि उसकी समाप्ति के पश्चात के दिनांक को या उसके पूर्व उक्त अधिकारी मुख्यालय मे राज्य सरकार के अधीन किसी पद का कार्यभार ग्रहण न कर ले।

(5) प्रस्तर–2 (2)(3)(4) मे दी गयी किसी बात के होते हुए भी जब कोई अधिकारी सेवा से पदच्युत कर दिया जाय या हटा दिया जाय या जब उसकी सेवायें समाप्त कर दी गयी हो और उस कार्यालय को जिसमे ऐसा अधिकारी इस प्रकार पदच्युत किये जाने, हटाये जाने या सेवा समाप्त किये जाने के ठीक पूर्व नियोजित था, विभागाध्यक्ष का लिखित रूप मे कारण अभिलिखित करने के पश्चात यह समाधन हो जाय कि लोक हित में ऐसा करना आवश्यक है या समीचीन है तब ऐसे अधिकारी को किये गये भवन के आवंटन को या तो तुरन्त या प्रस्तर–(3) की सारणी के स्तम्भ–3 में उल्लिखित एक माह की अवधि की समाप्ति के पूर्व ऐसे दिनांक को जिसे विनिर्दिष्ट किया जाय, रद्द करने की अपेक्षा की जा सकती है।

(6) कोई आवंटिती जो सकारी सेवा से त्ययाग पत्र दे दिया हो, सरकारी आवास को बनाये रखने और प्रतिपाल्य/ पति–पन्नी के नाम से ऐसे भवन को विनियमित किये जाने के लिये पात्र नहीं होगा।

(7) सेवा से गायब अधिकारियो/ कर्मचारियो को आवंटित भवनों का विनियमितिकरण के सम्बन्ध मे–

यदि किसी अधिकारी/ कर्मचारी के गायब होने की प्रथम सूचना रिपोर्ट उसके परिवार द्वारा दर्ज करायी गयी है और पुलिस द्वारा उसे खोजे न जा सकने की रिपोर्ट दी गयी है, तो ऐसे मामलो में आवंटित भवनो के विनियिमितीकरण हेतु निम्न प्रक्रिया का पालन किया जायेगा–

अधिकारी कर्मचारी के गायब होने के सम्बन्ध में पुलिस से इस आशय की सूचना प्राप्त होने के उपरान्त कि सम्बन्धित कर्मी अब भी गायब है, से एक वर्ष की अनुमन्य अनुग्रह अवधि समाप्त होने के उपरान्त आवंटन निरस्त कर दिया जायेगा, परन्तु सामान्य किराये पर अग्रिम एक वर्ष की और अवधि तक के लिये आवंटन बनाये रखने की इस शर्त के साथ अनुमति दी जा सकती है कि गायब अधिकारी/ कर्मचारी के किसी पारिवारिक सदस्य के नाम मुख्यालय में कोई भवन नहीं है।

3– अतः इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि सरकारी आवासों में अध्यासन की अवधि

के सम्बन्ध में उपर्युक्त प्राविधानों को राज्य सरकार के समस्त विभागो में तत्काल प्रभाव से लागू किये जाने की एतद्द्वारा श्री राज्यपाल महोदय सहर्ष स्वीकृति प्रदान करते हैं।

4— मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 28.11.2019 के अनुपालन में यह भी निर्देश दिये जाते है कि उपर्युक्तानुसार निर्धारित अवधि के उपरान्त सरकारी आवासो में रहने वाले अनधिकृत/ अवैध अध्यासियों से आवास रिक्त कराने के सम्बन्ध में नियमानुसार आवश्यक कार्यवाही भी सुनिश्चित की जाय।

भवदीय

ह0 अपठनीय

25.2.2020

(नितिन रमेश गोकर्ण)

प्रमुख सचिव।''

6. Since illegal occupation of residential quarters and other illegal encroachment in the premises of Government Inter College, Prayagraj are stated to have been removed by the State respondents, therefore, I do not find any good reason to proceed further in this writ petition. Therefore, this writ petition is disposed off with the following directions:-

(i) All the concerned officers of the State Government shall ensure strict compliance of the aforequoted Government Order dated 25.2.2020.

(ii) In terms of the aforequoted Government Order, no officer or employee shall be allowed to overstay in a Government accommodation after his retirement / transfer / dismissal from service / resignation etc., beyond the period prescribed in the aforequoted Government Order dated 25.2.2020.

(iii) The State Government shall call for information from all the District level Authorities of all departments in the State of Uttar Pradesh within two months from today about the Officers and Employees who are unauthorisedly over staying or illegally occupying or retaining Government accommodation. Within next one month, the State Government shall ensure that all such Government accommodation being illegally or unauthorisedly occupied, are vacated. In the event, any inaction is shown by any officer or employee, the State Government shall ensure that necessary action is also taken against such officer or employee.

(iv) The respondent no. 3 shall take all steps to provide good educational atmosphere and quality education in the Government Inter College, Prayagraj to restore the old glory of the said College.

7. Let a copy of this order be sent by the Registrar General of this Court to the Chief Secretary, Government of Uttar Pradesh, Lucknow and to the Additional Chief Secretary / Principal Secretary, Secondary Education, Government of Uttar Pradesh, Lucknow, for necessary action.

(2020)06ILR A710

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.05.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

THE HON'BLE ANJANI KUMAR MISHRA, J.

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Civil Misc. Writ Petition No. 2071 of 2017
Connected with
Writ A Nos. 2073 of 2017, 2074 of 2017, 2075 of 2017, 5634 of 2011, Special Appeal No. 22 of 2019 and Special Appeal No. 23 of 2019

Manish Kumar Mishra, Constable No. 041742918 ...Petitioner

Versus

The Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam, Sri Amrish Chaterji, Sri Vinod Kumar Mishra, Sri D.K. Mishra, Ms. Atipriya Gautam

Counsel for the Respondents:
A.S.G.I., Sri A.K. Mehrotra, U.O.I., Sri Manoj Kumar Singh, Sri Nand Lal, Sri Raghuraj Kishore Mishra, Sri Purnendu Kumar Singh, Sri Satish Kumar Rai.

A. Constitution of India – Article 226 – Writ – Cause of Action – Meaning – 'Cause of action' implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitutes the cause of action – It has been interpreted to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court – Each and every fact pleaded in the writ petition cannot by itself constitute a cause of action – Facts which have no bearing on the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned – Integral facts pleaded must have nexus or relevance with the lis so as to constitute a cause of action. (Para 12 and 20)

B. Constitution of India – Article 226(2) – Writ – Territorial Jurisdiction – Seat of Government or Authority – In view of the expression used in clause (2) of Article 226, even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter – To establish that the cause of action wholly or in part has arisen within the territorial jurisdiction of any High Court, the petitioner has to show that a legal right claimed by him has been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof – If the cause of action wholly or in part had arisen within the territory in relation to which it exercises jurisdiction, it can entertain the writ petition to pass orders or directions notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within its territories. (Para 12, 18 and 19)

C. Practice and Procedure – Determination of Ratio Decidendi – Doctrine of Precedent – The enunciation of the reason or principle upon which a question before a Court has been decided is alone a precedent – The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision – The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made and a minor premise consisting of the material facts of the case under immediate consideration. (Para 30)

D. Allahabad High Court Rules, 1952 – Chapter V, Rule 6 – Practice and Procedure – Reference to Larger Bench – Reference to a Larger Bench can only be made when there are conflicting views of the Coordinate Bench or the Larger Bench facing his Lordship on a subject/controversy before him making it difficult for him to take one or other view – Reference cannot be made merely to create a precedent or to get an authoritative pronouncement by the Larger Bench on any assumed conflict – Held – Reference itself is not merited as there is no conflict of opinion in the decisions referred by the learned Single Judge. (Para 15 and 31)

Reference stands answered (E-1)

Cases relied on :-

1. Rajendra Kumar Mishra Vs U.O.I. reported in (2005) 1 UPLBEC 108

2. Special Appeal No. 342 of 2010 D.G. CRPF, New Delhi Vs Constable Lalji Pandey

3. Nawal Kishore Sharma Vs U.O.I. & ors. reported in (2014) 9 SCC 329

4. Special Appeal Defective No. 785 of 2014; Bibhuti Narain Singh F.C.I. & ors.

5. Special Appeal No 158 of 2016 Har Govind Singh Vs U.O.I. & ors.

6. Saroj Mahanta (Mrs.), LT. Colonel Vs U.O.I. (2003) 3 ESC 1419

7. Special Appeal No. 997 of 1995; Kailash Nath Tiwari Vs U.O.I.

8. Dinesh Chandra Gahtori Vs C.O.A.S. (2001) 2 UPLBEC 12

9. St.of Raj. & ors. Vs M/s Swaika Properties & anr. (1985) 3 SCC 217

10. O.N.G.C. Vs Utpal Kumar Basu & ors. (1994) 4 SCC 711

11. Kusum Ingots & Alloys Ltd. Vs U.I.O. & anr. (2004) 6 SCC 254

12. U.O.I. & ors. Vs Adani Exports Ltd. & ors. (2002) 1 SCC 567

13. Om Prakash Srivastava Vs U.I.O. & anr. (2006) 6 SCC 207

14. Rajendran Chingaravelu Vs R.K. Mishra, Addl. Comm. Income Tax & ors. 14 (2010) 1 SCC 457

15. Writ-C No. 53941 of 2015; Suresh Jaiswal Vs St. of U.P. . & anr.

16. Chabi Nath Rai Vs U.O.I. & ors. (1997) 1 UPLBEC 236

17. Daya Shankar Bharadwaj Vs Chief of Air Staff, New Delhi & ors. AIR (1988) Allahabad 36

18. Collector of Customs, Calcutta Vs East India Commercial Company Calcutta & ors. AIR (1963) SC 1124

19. Special Appeal (Defective) No. 622 of 2008; Ex-Naik Ram Sharan Vs U.O.I. & ors.

20. Vishnu Kumar Bhargawa & ors. Vs Metropolitan Magistrate, Bombay & ors. 1986 ALJ 1093

21. Krishna Kumar Vs U.O.I. AIR (1990) SC 1782

(Delivered by Hon'ble Mrs. Sunita Agarwal, J., Hon'ble Anjani Kumar Mishra, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Vijay Gautam learned Senior Advocate assisted by Sri Amrish Chaterjee, Sri D.K. Mishra and Ms. Atipriya Gautam, learned advocates for the petitioners and Sri Satish Kumar Rai, Sri Manoj Kumar Singh, Sri Nand Lal, Sri Raghuraj Kishore Mishra and Sri Purnendu Kumar Singh, learned advocates appearing on behalf of the respondents.

2. This Larger Bench has been constituted under the orders of Hon'ble the Chief Justice on a reference made by the learned Single Judge vide judgment and order dated 25th January, 2017. In the writ petitions challenging the dismissal order and the order passed by the appellate and the revisional authority under the provisions of 11(1) of CRPF Act, 1949 readwith Rule 27 of Central Reserve Police Force Rules, 1955, a preliminary objection was raised with regard to the territorial jurisdiction of this Court. It was argued that no cause of action or part of cause of action has accrued to the petitioners within the State of U.P. and merely because the appellate and the revisional order had been communicated to them at their respective home districts in the State of Uttar Pradesh, same would not confer jurisdiction upon this Court to entertain the writ petitions.

3. The submission was that since the dismissal order has been passed by the

Commandant, 129th Battalion, CRPF at Bhotgaon, Kokarajhar, Assam and was communicated to the petitioners there itself and further that the departmental appeal and revision have been rejected by the competent authorities at Bhopal, the remedy before the petitioners is to either approach the Gauhati High Court or Jabalpur High Court, whichever they choose. The writ petitions challenging the dismissal, appellate and revisional orders cannot be maintained in this Court.

4. The learned Single Judge in the referral order noted the arguments of Advocates for both sides in the following words:-

"In support of their contention the respondents have relied upon a Full Bench decision of this Court in the case of Rajendra Kumar Mishra Vs. Union of India reported in 2005 (1) UPLBEC 108 as well as a Division Bench judgement of this Court passed in Special Appeal No. 342 of 2010 The Director General CRPF, New Delhi Vs. Constable Lalji Pandey. The Division Bench in Lalji Pandey (supra) has relied upon the Full Bench decision of this Court in the case of Rajendra Kumar Mishra (supra) and held that mere communication of the order of dismissal, appellate and revisional orders at the residential address of the respondents (therein) at district Bhadohi would not confer territorial jurisdiction on this Court.

Shri Vijay Gautam, learned counsel for the petitioners, on the other hand, has placed reliance upon a judgment of the Supreme Court in the case of Nawal Kishore Sharma Vs. Union of India and others reported in (2014) 9 SCC 329. Paragraph 20 of the said judgment reads as under:

"17. We have perused the facts pleaded in the writ petition and the documents relied upon by the appellant. Indisputably, the appellant reported sickness on account of various ailments including difficulty in breathing. He was referred to hospital. Consequently, he was signed off for further medical treatment. Finally, the respondent permanently declared the appellant unfit for sea service due to dilated cardiomyopathy (heart muscles disease). As a result, the Shipping Department of the Government of India issued an order on 12.4.2011 cancelling the registration of the appellant as a seaman. A copy of the letter was sent to the appellant at his native place in Bihar where he was staying after he was found medically unfit. It further appears that the appellant sent a representation from his home in the State of Bihar to the respondent claiming disability compensation. The said representation was replied by the respondent, which was addressed to him on his home address in Gaya, Bihar rejecting his claim for disability compensation. It is further evident that when the appellant was signed off and declared medically unfit, he returned back to his home in the District of Gaya, Bihar and, thereafter, he made all claims an filed representation from his home address at Gaya and those letters and representations were entertained by the respondents and replied and a decision on those representations were communicated to him on his home address in Bihar. Admittedly, appellant was suffering from serious heart muscles disease (Dilated Cardiomyopathy) and breathing problem which forced him to stay in native place, wherefrom he had been making all correspondence with regard to his disability compensation.

Prima facie, therefore, considering all the facts together, a part or fraction of cause of action arose within the jurisdiction of the Patna High Court where he received a letter of refusal disentitling him from disability compensation."

Shri Vijay Gautam has further placed reliance upon two Division Bench judgments of this Court passed in Special Appeal Defective No. 785 of 2014 Bibhuti Narain Singh Vs. Food Corporation of India and others and Special Appeal No 158 of 2016 Har Govind Singh Vs. Union of India and others. In both the judgments, the two Division Benches have relied upon the judgment of the Supreme Court in the case of Nawal Kishore Sharma (supra). In the case of Bibhuti Narain Singh (supra) the Court has held that in view of the judgment of Nawal Kishore Sharma (supra), the communication of the penalty order to the appellants at Faizabad would confer jurisdiction on this Court (Lucknow Bench) to maintain the special appeal. In the case of Har Govind Singh, the Division Bench has considered the judgment of Nawal Kishore Sharma (supra) and Full Bench judgment in the case of Rajendra Kumar Mishra (supra) as well as the judgment of the Constitution Bench in AIR 1961 SC 532, Lieutenant Col. Khajoor Singh Vs. Union of India and others and thereafter referring to the judgment of Nawal Kishore Sharma (supra) with approval, has entertained the special appeal and directed the Union of India to file its response.

Learned counsel for the respondents on the other hand submitted that paragraph 17 of Nawal Kishore Sharma (supra) cannot be read in isolation but must be read alongwith the observations made by the Supreme Court in paragraphs 18 and 19 of the said judgment. It is submitted by them that the plea of jurisdiction was never taken before the High Court (therein). The High Court had issued notice in response to which parties appeared and participated in the proceedings before the High Court. The High Court had also passed an interim order directing the Shipping Corporation of India to pay a sum of Rs.2.75 lacs to the petitioner. However, when the writ petition was taken up for hearing the High Court took a view that no cause of action, not even a fraction of cause of action had arisen within its territorial jurisdiction. The submission is that it is in this context that the Supreme Court in paragraph 19 of the Nawal Kishore Sharma (supra) held that the petition ought not to have been dismissed for want of territorial jurisdiction.

The submission further is that in Bibhuti Narain Singh (supra), the Division Bench of the High Court has noticed that the appellant (employee therein) was posted at Faizabad where the penalty order of stoppage of annual increments was served upon him. It is, therefore, contended that this fact of the appellants posting at Faizabad, U.P., in any case would confer jurisdiction on the Lucknow Bench of the High Court even without the aid of Naval Kishore Sharma (supra) and therefore, the order/judgment in Bibhuti Narain Singh has no application to the facts of the present case. "

The conflict noticed by the learned Single Judge for reference to the Larger Bench is in the following words:-

"Having considered the judgments and orders referred to above, I am of the view that there is a conflict of opinion

between the Full Bench judgment of this Court in the case of Rajendra Kumar Mishra (supra) and Constable Lalji Pandey (supra) on one hand and the orders passed by the two Division Benches of this Court in the case of Bibhuti Narain Singh (supra) and Har Govind Singh (supra) in the light of the judgment of the Supreme Court in the case of Nawal Kishore Sharma (supra) and this dispute, therefore, needs to be resolved by a larger Bench on the question with regard as to whether the observations of the Supreme Court in the case of Nawal Kishore Sharma (supra) in paragraph 17 can be said to be a binding precedent on this Court to entertain the above writ petitions or whether the observations of paragraph 17 were in the peculiar facts and circumstances of the case of Nawal Kishore Sharma (supra) in view of paragraphs 18 and 19 of the said judgment.

OR

In the alternative whether the judgment of the Full Bench in Rajendra Kumar Mishra (supra) and Constable Lalji Pandey (supra) can be said to still lay down the correct law in view of the judgment of the Supreme Court in Nawal Kishore Sharma (supra).

Therefore, in my opinion this controversy needs to be resolved by a larger Bench of this Court. Let the records of these cases be placed before the Hon'ble Chief Justice for constitution of a larger Bench to resolve the above conflict in the several decisions of this Court. "

5. Firstly we think it proper to re-formulate the questions referred for convenience:-

(i) Whether the judgments of the Full Bench in ***Rajendra Kumar Mishra Vs. Union of India1*** *and the Division Bench in* ***The Director General CRPF, New Delhi Vs. Constable Lalji Pandey****2 are still good law in view of the decision of the Supreme Court in Nawal Kishore Sharma Vs. Union of India and others3?*

(ii) Whether the decisions of the Division Bench ***in Bibhuti Narain Singh Vs. Food Corporation of India and others****4 and* ***Har Govind Singh Vs. Union of India and others****5 are good law on the subject in the light of judgment of the Supreme Court in the case of Nawal Kishore Sharma3?*

(iii) Whether there is any conflict of opinion in the decisions of the Full Bench in ***Rajendra Kumar Mishra1 and Division Bench in Constable Lalji Pandey****2 on one hand and in Bibhuti Narain Singh4 and Har Govind Singh5 on the other in the matter of exercise of territorial jurisdiction by the High Court in view of clause (2) of Article 226 of the Constitution of India and the issue needs to be resolved by the authoritative decision of the Larger Bench?*

6. To answer the above questions, firstly we would be required to go through the above decisions of this Court referred for our consideration one by one.

(a) The Full Bench in **Rajendra Kumar Mishra** was constituted on a reference made by a learned Single Judge, wherein he had referred two contradictory Division Bench judgments of this Court in **Saroj Mahanta (Mrs.), LT. Colonel v. Union of India6 and in Kailash Nath Tiwari v. Union of India**, decided on 9.1.2002. The short question before the Full Bench was whether this Court had jurisdiction to decide the writ petition challenging the Court martial proceedings

and the sentence awarded to the petitioner who was serving in Indian Army.

Learned Counsel for the petitioner therein had urged that in view of the decision of the Apex Court in **Dinesh Chandra Gahtori v. Chief of Army Staff**, a writ petition challenging the impugned sentence can be filed in any High Court in India as the Chief of Army Staff has been made respondent in that case. It was further urged that since the petitioner (therein) was resident of District Ballia within the State of Uttar Pradesh, the writ petition can be filed in the High Court at Allahabad.

Considering the law propounded by the Apex Court, referring to the various decisions, it was held by the Full Bench in paragraphs '39', '40' '41' and '42' as under:-

"39. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.

40. For the reasons given above we arc of the opinion that the Chief of Army Staff can only be sued either at Delhi where he is located or at a place where the cause of action, wholly or in part, arises.

41. We may mention that a "cause of action" is the bundle of facts which, taken with the law applicable., gives the plaintiff a right to relief against the defendant. However, it must include some act done by the defendant, since in the .absence of an act, ho cause of action can possibly occur. [Vide Radhakrishnamurithy v. Chandrasekhara Rao, AIR 1966 A.P. 334; Ram Awalamb v. Jata Shankar, AIR 1969 All. 526 (FB), and Salik Ram Adya Prasad v. Ram hakhem and others, AIR 1973 All. 1071.

42. In the present case no part of the cause of action has arisen in U.P. Hence in our opinion the writ petition is not maintainable in this Court. It is accordingly dismissed. The decision of the Division Bench in Kailash Nath Tiwari v. Union of India (supra) in our opinion does not lay down the correct law and is overruled."

It can, thus, be seen that the question whether the writ petition challenging the Court martial proceedings and the order of the Chief of Army Staff was maintainable in this Court, was decided in the facts of that case, it was held that since no part of cause of action had arisen in the State of U.P., hence the writ petition was not maintainable in this Court.

We may record that after referring decisions of the Apex Court, the Full Bench has held that the Chief of Army Staff can only be sued either at Delhi or at a place where the cause of action, wholly or in part, arises.

Limited issue as to whether the writ petition challenging the order of the Chief of Army Staff can be maintained in this Court was answered by the Full Bench repelling the plea of the petitioner that in view of decision of the Apex Court in Dinesh Chandra Gahtori8, the Chief of Army Staff may be sued anywhere in the Country. It was held that the said observation cannot be construed to mean that the Supreme Court had laid down any

absolute proposition that it is open to the petitioner to file a writ petition in any High Court in India. It was held that the said observation is only a laconic observation and cannot override the Larger Bench decisions of the Supreme Court, wherein it had laid down the principle that the place where whole or part of cause of action has arisen gives jurisdiction to the Court within whose territory such place is situate. Whether the cause of action has arisen within the territory of the particular Court will have to be determined in each case on its own facts in the context of the subject matter of the litigation, and relief claimed.

The Full Bench in Rajendra Kumar Mishra1, in principle has approved the decision of the Division Bench of this Court in Saroj Mahanta (Mrs.), LT. Colonel6, wherein it was stated that in order to determine as to whether the Court has a jurisdiction to entertain a petition, the pleadings in the petition have to be examined to form an opinion as to whether a cause of action partly or fully has arisen within the territorial jurisdiction of the Court. The Division Benches in Saroj Mahanta (Mrs.), LT. Colonel6, in the facts situation of that cases had concluded that this Court did not have territorial jurisdiction.

(b) In Constable Lalji Pandey2, the challenge before the Division Bench was to the punishment order dated 17.3.1994 of dismissal from service on the charge of unauthorized absence from duty. The writ petition was filed by the delinquent after exhausting departmental remedy of appeal as well as revision before the competent authorities which were also rejected. On a preliminary objection raised by the respondent with regard to the maintainability of the writ petition, the Division Bench has relied upon the view taken by the Full Bench in the case of Rajendra Kumar Mishra1 to hold that mere communication of dismissal, appellate and revisional orders at the residential address of the delinquent employee at District Bhadohi would not confer territorial jurisdiction to this Court. Mere residence of the petitioner within the territory of this Court would not confer jurisdiction to entertain the writ petition.

We may note here again that the Division Bench in Constable Lalji Pandey2 had decided the question of jurisdiction in the facts and circumstances of that case. It was noted that the delinquent employee who was a member of Central Reserve Police Force (C.R.P.F.) deliberately absented himself from duty for considerable long period without permission and due intimation to the department and without sending any medical certificate and proper application within time. He had not admitted himself in any of the C.R.P.F. Hospital and, therefore, his plea that he had fallen ill and could not join his duty, raised doubts about his conduct. The departmental authorities having considered various pleas raised by the petitioner in appeal and revision affirmed the punishment order. It can, thus, be clearly seen that the Division Bench had refused to entertain the writ petition rejecting on the plea that service of the dismissal, appellate and revisional orders upon the employee at his place of residence at Bhadohi would give rise to cause of action within the State of U.P. It was concluded that mere communication of the decisions at the residential address of a member of a disciplined force would not confer jurisdiction on this Court as the same cannot be said to be an integral fact to the bundle of facts which constitute cause of action in that case.

(c) Har Govind Singh5 is the decision where the Division Bench has

relied upon the decision of the Apex Court in Nawal Kishore Sharma3 to set aside the order of the learned Single Judge in dismissing the writ petition. The matter was remitted to the writ Court to decide afresh keeping in view of the observation of the Apex Court in Nawal Kishore Sharma3.

With due respect to their lordships, in the order dated 26.11.2019 of the Division Bench, we do not find any reasoning given by it to reach at the conclusion as to how the order of learned Single Judge was wrong and why in their opinion, the issue required reconsideration by the Single Bench.

We, however, may note that the same issue in **Har Govind Singh** had been remitted twice. In an earlier decision dated 27.4.2016, it was observed by the earlier Division Bench that the writ petition filed in the year 2004 had wrongly been dismissed after 12 years of its institution on the ground of want of territorial jurisdiction.

Be that as it may, in our considered opinion, the conclusion drawn by the Division Bench in Har Govind Singh5 is not the law laid down as a binding precedent which merited this reference. The reference to the decision of the Division Bench in Har Govind Singh5 in the referral order is, thus, wholly irrelevant.

(d) In Bibhuti Narain Singh4, the Division Bench of this Court placing reliance on the judgment of the Apex Court in Nawal Kishore Sharma3 has held that the part of cause of action had arisen within the jurisdiction of this Court, inasmuch as, the petitioner (therein) was posted in Faizabad, a District in the State of U.P. when the order of penalty of stoppage of annual increment was served upon him. It was held that though whole departmental proceedings concluded at the place beyond the territorial jurisdiction of the Court but since the order of punishment was served at the place of posting of the petitioner, within the State of U.P., part of cause of action would lie within the territorial jurisdiction of this Court.

We may note here that the issue as to whether the whole or part of cause of action would lie within the jurisdiction of a Court or not is a question to be decided in each case on its own facts in the context of the subject matter of litigation and relief claimed as the expression "cause of action" constitutes bundle of facts which the petitioner must prove, if traversed, to entitle to him to a judgment in his favour by the Court. In determining the objection of lack of territorial jurisdiction, the court must take into consideration the facts pleaded in support of cause of action albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. Thus, the question of territorial jurisdiction must be decided on the facts pleaded in the petition and, thus, would depend on the facts of the case.

(e) In Nawal Kishore Sharma3, the issue before the Supreme Court was regarding validity of the order passed by the Patna High Court dismissing the appellant's writ petition for want of territorial jurisdiction. The Supreme Court has discussed the law on exercise of jurisdiction (territorial) by the writ Court prior to and subsequent to the Constitution (42nd) Amendment Act, 1976, whereby clause (2) was inserted in

Article 226 of the Constitution of India which reads as under:-

Clause (2):- The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. (3) xxxxx (4) xxxxx"

While tracing the law holding the field, the judgment of the Apex Court in State of Rajasthan and Others vs. M/s Swaika Properties and Another9, was noted, wherein the expression "cause of action" was considered to hold as under:-

"8. The expression "cause of action" is tersely defined in Mulla's Code of Civil Procedure:

"The "cause of action' means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court."

In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. The mere service of notice under Section 52(2) of the Act on the respondents at their registered office at 18-B, Brabourne Road, Calcutta i.e. within the territorial limits of the State of West Bengal, could not give rise to a cause of action within that territory unless the service of such notice was an integral part of the cause of action. The entire cause of action culminating in the acquisition of the land under Section 52(1) of the Act arose within the State of Rajasthan i.e. within the territorial jurisdiction of the Rajasthan High Court at the Jaipur Bench. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action. .....xxxxxxxxxxx"

The expression "cause of action" considered in the case of Oil and Natural Gas Commission vs. Utpal Kumar Basu and others10, was noted :-

"6. Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition."

It was considered that in *Kusum Ingots & Alloys Ltd. vs. Union of India and Another*11, the Apex Court elaborately discussed Clause (2) of Article 226 of the Constitution, particularly the meaning of the word 'cause of action' with reference to Section 20(c) and Section 141 of the Code of Civil Procedure to hold that the entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the

petitioner can obtain a decree is the material facts. The expression material facts is also known as integral facts.

It was further observed that :-

"10. Keeping in view the expressions used in clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter."

It was noted that in Union of India and others vs. Adani Exports Ltd. and another12, the Apex Court has held that in order to confer jurisdiction on a High Court to entertain a writ petition, it must disclose that the integral facts pleaded in support of the cause of action do constitute a cause so as to empower the court to decide the dispute and the entire or a part of it arose within its jurisdiction. Each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts are such which have a nexus or relevance with the lis i.e. the dispute involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned.

In Om Prakash Srivastava vs. Union of India and another13, it was observed that writ petitioners have to establish that a legal right claimed by them has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.

In Rajendran Chingaravelu vs. R.K. Mishra, Additional Commissioner of Income Tax and Others14, the Apex Court while considering the scope of Article 226 of the Constitution, particularly the cause of action in maintaining a writ petition, held that clause (2) of Article 226 makes it clear that the High Court exercising jurisdiction in relation to the territories within which the cause of action arises wholly or in part, will have jurisdiction. This would mean that even if a small fraction of the cause of action (that bundle of facts which gives a petitioner, a right to sue) accrued within the territory of a State, the High Court of that State will have jurisdiction. .

Having considered the above decisions of the Apex Court, it was concluded in paragraph '16' in Nawal Kishore Sharma3 as under:-

"16. .....there cannot be any doubt that the question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limit of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, the petitioner has to establish that a legal right claimed by him has been infringed by the respondents within the territorial limit of the Court's jurisdiction."

7. It was thus held that in order to maintain the writ petition, the petitioner has to establish that a legal right claimed by him has been infringed by the

respondents within the territorial limit of the Court's jurisdiction.

8. Considering the above legal position, in the facts of that case in Nawal Kishore Sharma3, it was held by the Apex Court that the writ petition ought not to have been dismissed for want of territorial jurisdiction. The facts of the case noticed by the Apex Court were that the appellant while on duty reported sickness including difficulty in breathing and was referred to the hospital. Later, he was signed off for further medical treatment. Finally, the respondent permanently declared the appellant unfit for Sea services due to dilated Cardiomyopathy (heart muscles disease). As a result, the Shipping Department of the Government of India issued an order cancelling the registration of the appellant as a Seaman. A copy of the letter was sent to the appellant at his native place in Bihar, where he was staying after he was found medically unfit. Faced with this, the appellant sent a representation from his home in the State of Bihar to the respondent claiming disability compensation. The said representation was replied by the respondent, which was addressed to him at his home address in Gaya, Bihar, rejecting his claim for disability compensation.

9. Noticing the above facts, it was observed therein that admittedly, the appellant was suffering from serious heart muscles disease (Dilated Cardiomyopathy) and breathing problem which forced him to stay in his native place, wherefrom he had been making all correspondence with regard to his disability compensation. It was considered that all claims and representations filed by the appellant (therein) were entertained by the respondent and replied and decision on those representations were communicated to him at his home address in Bihar. Considering these facts together, it was held in Nawal Kishore Sharma3 that prima facie a part or a fraction of cause of action arose within the jurisdiction of the Patna High Court where he received the letter of refusal disentitling him from disability compensation. It was clearly observed by the Apex Court that the order of dismissal of writ petition on the ground of lack of jurisdiction cannot be sustained in the peculiar facts and circumstances of the case.

10. From an exhaustive reading of the decision in Nawal Kishore Sharma3, it is evident that the question of maintainability of the writ petition in Patna High Court was decided in the peculiar facts and circumstances of the case considering the nature and character of the proceedings under Article 226 of the Constitution. It was found that legal right claimed by the appellant (therein) to disability compensation had been infringed by the respondent with rejection of his representations communication from the home address of the employee and orders were communicated to him at the same address. On account of suffering from disease, the appellant having been permanently declared unfit was forced to stay in his native place.

11. From the above, it is evident that there can never be an encyclopedic exposition as to what would constitute cause of action in a case. The decisions of the Full Bench and the Division Benches of this Court and the Apex Court should not be read to exhaustively enunciate as to when and how the Court should

determine in a case that the cause of action, wholly or in part, has arisen within its territorial limits. Peculiar facts in the context of the subject matter of the litigation, and relief claimed are the only guiding factors for the learned Judge(s) to decide. It is to be entirely left at the discretion of the Judge(s) considering the petition to ascertain whether the cause of action did exist entitling the petitioner to approach the High Court concerned.

12. Each and every fact pleaded in the writ petition cannot by itself constitute a cause of action. Facts which have no bearing on the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned. In view of the expression used in clause (2) of Article 226 of the Constitution, even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter. Integral facts pleaded must have nexus or relevance with the lis so as to constitute a cause of action.

13. We find that law on the subject is fairly well settled with the decision of Larger Benches of this Court and the Supreme Court. The judgments of Division Benches and Larger Bench placed by the counsels for both sides before the learned Single Judge do not show any conflicting view in the matter and need no further explanation or elaboration.

14. The learned Single Judge, with due respect, totally misdirected himself in not considering the ratio of the decisions placed before him and referring the matter to the Larger Bench when no conflicting view on the matter was facing him. In our considered opinion, the learned Single Judge ought to have applied the law laid down by the Apex Court and the Larger Bench to appreciate the facts of the case to form its opinion as to whether the instant writ petitions were maintainable before this Court i.e. to decide whether the facts pleaded in the writ petitions constitute cause of action, wholly or in part to confer territorial jurisdiction on this Court.

15. We may note that reference to a Larger Bench under Chapter V Rule 6 of the Allahabad High Court Rules' 1952 can only be made when there are conflicting views of the Coordinate Bench or the Larger Bench facing his Lordship on a subject/controversy before him making it difficult for him to take one or other view. Reference cannot be made merely to create a precedent or to get an authoritative pronouncement by the Larger Bench on any assumed conflict. Whenever a matter is placed before the Court (whether single or division bench) for adjudication, if a question of law of whatever importance arises before that bench, ordinarily the Court should decide it itself by applying the legal principles and judicial pronouncements on the subject. Only if the learned judge reaches at a conclusion that there is conflict of precedent, i.e. conflicting views of the Coordinate Bench or the Larger Bench on the subject making it impossible for the Court to decide this way or the other, reference could have been made.

16. A Full Bench of this Court in Suresh Jaiswal vs. State of U.P. and another15 considering the scope of

Chapter V Rule 6 of the Allahabad High Court Rules' 1952 has held that:-

"53. Thus, from the above discussion, it is found that when it appears to a Single Bench or a Division Bench that there are conflicting decisions of the Co-ordinate strength of the same Court or that a question of law of importance having conflicting views arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with the request to form the Special or Full Bench to hear and decide the case on the questions raised in the case.

54. Normally, the judge concerned should make a reference briefly indicating reasons for his views which necessitated to refer the matter to a Larger Bench but the same is not indispensable.

55. At the same time, we may clarify that if reasons are not stated in respect of the order of reference, the Full Bench cannot decline to answer the questions referred to it. The brief reasons for making a reference, however, has to be indicated so as to enable the Larger Bench to know the minds of Hon'ble Judge(s) making the reference.

56. In the instant matter, as expressed above, we could not find any conflict between two decisions which warranted a reference before the Larger Bench.

57. The questions, in the reference order, framed by the Division Bench, assuming conflict of opinion in the election matters, with due respect, are sweeping. On a plain reading of the order of reference, it appears that their Lordships have referred the questions to the Larger Bench with a view to create a precedent assuming that those questions of law of importance may arise in election matters and an authoritative pronouncement of a Larger Bench is needed on the subject.

58. The pronouncement by a Full Bench, with due regards to the learned Judges referring the matter, on hypothetical conflict, would not be a proper judicial exercise.

60. In our considered view, an issue being of importance by itself, cannot be a ground for referring the matter to the Larger Bench."

17. Having said that, to restate the law, we may revisit the issue to clarify the legal position as we deem it apposite to express our view in order to lend a quietus to the doubts which appear to exist.

18. As noted above in detail, it is reiterated at the cost of repetition that the Supreme Court in Nawal Kishore Sharma3 having traced the legal position pre and post insertion of clause (2) in Article 226 of the Constitution had come to the conclusion that the question of jurisdiction (territorial) must be decided in the facts of the case having due regard to the pleading in the writ petition. Appreciating a long line of decisions ranging from the year 1985 till the year 2000 and the scope of Article 226 (2) of the Constitution, particularly the cause of action in maintaining a writ petition, it has been concluded in paragraph '16' of the report that to establish that the cause of action wholly or in part has arisen within the territorial jurisdiction of any High Court, the petitioner has to show that a legal right claimed by him has been infringed or is threatened to be infringed by the respondent within the territorial

limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.

19. What would constitute a cause of action obviously would depend upon the nature and character of the proceedings under Article 226 of the Constitution. Under Article 226 of the Constitution, the High Court can exercise powers to issue direction, order or writs for enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose. If the cause of action wholly or in part had arisen within the territory in relation to which it exercises jurisdiction, it can entertain the writ petition to pass orders or directions notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within its territories.

20. 'Cause of action' implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitutes the cause of action. It has been interpreted to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. The question as to whether the Court has territorial jurisdiction to entertain a writ petition, has to be decided on the basis of averments in the petition, truth or otherwise thereof, however, would be immaterial.

21. As cause of action is the bundle of facts to examine the issue of jurisdiction it is necessary that one of the interlinked fact must have occurred in a place where the case has been instituted. All necessary facts must form an integral part of the cause of action. The fact must have direct relevance in the lis involved. It is not that every fact pleaded can give rise to a cause of action so as to confer jurisdiction on the Court in whose territorial jurisdiction it has occurred.

22. Mere service of notice would not give rise to a cause of action unless service of notice is an integral part of the cause of action. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226 (2) of the Constitution must depend upon the nature of the impugned order giving rise to the cause of action. In order to confer jurisdiction on a High Court to entertain a writ petition, it must be disclosed that the integral fact pleaded in support of the cause of action do constitute a cause so as to empower the Court to decide the matter and the entire or a part of it arose within its jurisdiction. The facts pleaded in the writ petition must have the nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court.

23. In Ex. No. 1387-5234-M Sepoy/D.B./M.T., Chabi Nath Rai vs. Union of India & others16, a Division Bench of this Court, while considering the question whether the cause of action had arisen at Allahabad on communication of the decision on the representation of the appellant therein, had observed that the 'right to action' and 'cause of action' are two different things. This distinction was earlier considered by a Division Bench of this Court in Daya Shankar Bharadwaj v. Chief of Air Staff,

New Delhi and others17, wherein it was observed:-

"A right of action arises as soon as there is an invasion of right. But 'cause of action' and 'right of action'..... are not synonymous or interchangeable. A right of action is the right to enforce a cause of action (Americal Jurispurdence 2nd Edition Vol.1.) A person residing any where in the country being aggrieved by an order of Government Central or State or authority or person may have a right to action at law but it can be forced or the jurisdiction under Article 226 can be invoked of that High Court only within whose territorial limits the cause of action wholly or in part arises. The cause of action arises by action of the Government or authority and not by residence of the person aggrieved."

24. It was further discussed in Chabi Nath Rai16 that an order imposing penalty does not take effect unless it is communicated and the cause of action may arise at a place where it is communicated but if an order is passed in appeal or on a representation filed by delinquent and the order is confirmed, it does not give rise to any fresh cause of action at a place where the order of appellate authority is communicated. It is only an intimation to an order passed on the appeal or the representation made by the delinquent at a place where he is residing or where he indicates his address for communication of the order which may be passed on appeal by the authority concerned. Every order which is communicated to a person at a particular place does not give rise to the cause of action to institute an action where it is communicated.

To support its view, the Division Bench in Chabi Nath Rai16 (supra) had taken aid from the decision of the Apex Court in State of Rajasthan and Others vs. M/s Swaika Properties9 wherein though the notification issued by the authority under Section 52(2) of Rajasthan Urban Improvement Act was served at Calcutta on the petitioner but it was held that since the proceedings for acquisition had taken place at Jaipur and were complete, mere service of notice under Section 52 of the Act would not give rise to the cause of action at Calcutta.

It was concluded in Chabi Nath Rai16 that since the confirmation of the order of sentence was made at Jammu by the confirming authority, the mere fact that the appellant sent representation from Allahabad and the decision on his representation was communicated at Allahabad did not give rise to any cause of action at Allahabad.

On the plea that the doctrine of merger is applicable in the case when an order is passed in appeal and the place where appellate order is communicated should be treated as a place where cause of action arises, it was held in Chabi Nath Rai16 that even if the doctrine of merger is applied in relation to the statutory appeal, it is only the place where the appeal is decided, the Court will have jurisdiction to entertain the petition of the appellant. The decision of the Apex Court in Collector of Customs, Calcutta vs. East India Commercial Company Calcutta and others18, was considered, wherein it was held that once an order of original authority is taken in appeal to the appellate authority, it is the High Court within whose jurisdiction the appellate order has been passed, will only have jurisdiction to entertain the writ petition under Article 226 of the Constitution of India.

25. The view taken by the Division Bench in Chabi Nath Rai16 has been cited with approval by another Division Bench in Ex-Naik Ram Sharan vs. Union of India and others19 to hold that mere communication of the appellate order at the place where the petitioner resides itself does not give any cause of action.

26. In Vishnu Kumar Bhargawa and others vs. Metropolitan Magistrate, Bombay and others20, it was considered that the service of notice of the case filed in the Court of Metropolitan Magistrate, Bombay was not an integral part of cause of action, inasmuch as, for succeeding in the case, service of notice at Allahabad was not material and would not confer jurisdiction on the High Court at Allahabad to entertain the writ petition.

27. We subscribe to the view taken by the above noted Division Benches to hold that mere communication of the appellate or revisional order at the place of residence of the petitioner itself does not give rise to a cause of action within the territorial jurisdiction of the High Court within limit of which jurisdiction he resides as the communication of such a decision would confer only the "right to action". The confirmation of order of dismissal with the rejection of appeal and representation does not give rise to any fresh cause of action at a place where the order of appellate authority is communicated.

28. Further, we may note that doctrine "forum conveniens" has a limited application and the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. [Reference Kusum Ingots & Alloys Ltd.11]

29. Coming back to the reference, with greatest respect, we may note that the learned Single Judge ought to have considered the decisions of the Supreme Court and the Larger Benches of this Court to decide whether this Court has jurisdiction to entertain the writ petitions instead of referring the matter to Hon'ble The Chief Justice for constituting a Larger Bench. The judgments of Division Benches considered by the learned Single Judge were decided in the facts and circumstances of the particular case. What was binding on the learned Single Judge is the ratio decidendi of the judgment.

30. We are not called upon to determine as to how can the ratio decidendi be ascertained from a decision. We may, however, note that the doctrine of precedent i.e. being bound by previous decision is limited to the decision itself and as to what is necessarily involved in it. The enunciation of the reason or principle upon which a question before a Court has been decided is alone a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made and a minor premise consisting of the material facts of the case under immediate consideration. It is not the duty of the Court to spell it out with

difficulty in order to be bound by it. [See Krishna Kumar Vs. Union of India21].

31. In light of the aforesaid, we conclude that the reference itself is not merited as there is no conflict of opinion in the decisions referred by the learned Single Judge. We, however, clarified the law (with the help of the long line of decisions of the Supreme Court) in order to lend a quietus to the doubts which appear to exist so that to avoid any further delay in the proceedings.

32. Reformulated question no. (iii) of the Reference is, thus, answered in negative.

33. Reference stands answered, accordingly. The individual writ petitions and Special Appeals may now be placed before the appropriate Bench for disposal in light of the above.

(2020)06ILR A727
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.06.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Service Single No. 7517 of 2020

Anil Kumar Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Hari Om Singh.

Counsel for the Respondents:
C.S.C.

A. Service Law – Termination – Violation of principles of natural justice – The question as to what extent, principles of natural justice are required to be complied with would depend upon the fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. (Para 11)

The impugned order dated 15.02.2020 does not in substance amount to any fresh order of termination, it is merely an order passed as a consequence of the dismissal of the writ petition preferred by the petitioner against the order dated 20.10.1989 terminating the service of the petitioner. Moreover, the reasons indicated in the impugned order have not been disputed and rather stand admitted in the present writ petition. Hence the question of providing opportunity of hearing does not arise before passing the order dated 15.02.2020. It is in fact an order of discontinuance of service which was continuing on the basis of interim order of a dismissed writ petition. (Para 5, 6)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Dharmarathmakara R.A. Ramaswamy Mudaliar Ed. Institution Vs The Educational Appellate Tribunal & Anr., AIR 1999 SC 3219 (Para 9)

2. Ashok Kumar Vs U.O.I. . & ors. (Para 10)

3. Karnataka State Road Transport Corporation & anr. Vs S.G. Kotturappa and Another, (2005) 3 SCC 409) (Para 11)

4. Punjab National Bank and Others Vs Manjeet Singh & anr. , (2006) 8 SCC 647 (Para 12)

Petition challenges order dated 15.02.2020, passed by Settlement Officer Consolidation, Sitapur, U.P.

(Delivered by Hon'ble Manish Kumar, J.)

1. The present writ petition has been filed by the petitioner challenging the order dated 15.02.2020 passed by Opposite Party No.3 i.e. Settlement

Officer Consolidation, Sitapur, by which the services of the petitioner has been terminated.

2. The impugned order dated 15.02.2020 states that by order dated 20.10.1989 passed by the Commissioner Consolidation, Lucknow, U.P., the services of the petitioner was terminated. Against the order dated 20.10.1989, the petitioner preferred a Writ Petition No.9578 of 1989. In the said writ petition an interim order had been granted by this Court. In pursuance of interim order the petitioner was continuing in service, the writ petition however was dismissed on 12.04.2010. But the petitioner has not informed the authorities. Two applications were also dismissed on 26.04.2019. Hence the continuance of petitioner in service was due to the fact that the authorities has no knowledge hence the continuance was not legal. In the said circumstances there was no justification for his continuance in service hence his services is terminated with immediate effect.

3. Heard the learned counsels for the parties. Learned counsel for the petitioner heard on telephone as he expressed his inability to connect on video conferencing. He mainly submitted that prior to the passing of the order dated 15.02.2020 neither any show cause notice has been issued nor any opportunity was provided to the petitioner. The order dated 15.02.2020 has been passed in complete violation of the principles of natural justice.

4. On the other hand, Shri Rahul Shukla, learned Additional Chief Standing Counsel through video conferencing has pointed out that the C.M. Application Nos.30478/2019 and 30479/2019 has also been rejected by this Court vide its order dated 26.04.2019 even that has not been informed by the petitioner. The petitioner was continuing in the service only due to the interim order dated 07.11.1989. The opportunity of hearing is not required in the present case. It has further been submitted by the learned Additional Chief Standing Counsel that the petitioner has neither informed the dismissal of the writ petition in the year 2010 nor the dismissal of the applications moved in the year 2019.

5. After hearing the counsels for both the parties the position which emerges is that the petitioner was continuing in the service in the garb of the interim order dated 07.11.1989. The Writ Petition No.16815(W)/9578/1989 was dismissed in default on 12.04.2010. The restoration application was filed in the year 2019 has also been dismissed on 26.04.2019 and none of the reasons indicated in the order dated 15.02.2020 has been disputed by the petitioner, rather stand admitted in the writ petition particularly in Para 24 where it is also stated that a restoration application is pending but without disclosing the dates of applications it however, establishes the fact that his writ petition had been dismissed on default. The date of dismissal of writ petition on 12.04.2010 as disclosed in the impugned order has not been disputed nor the date of dismissal of two miscellaneous applications, which obviously might have been moved earlier for restoration.

6. The order impugned in the present writ petition i.e. order dated 15.02.2020 does not in substance amount to any fresh order of termination, it is

merely an order passed as a consequence of the dismissal of the Writ Petition No.16815(W)/9578/1989 preferred by the petitioner against the order dated 20.10.1989 terminating the service of the petitioner. Hence the question of providing opportunity of hearing does not arise before passing the order dated 15.02.2020. It is in fact an order of discontinuance of service which were continuing on the basis of interim order of a dismissed writ petition.

7. The fact of order terminating the services of the petitioner vide order dated 20.10.1989 and the fact that a writ petition was preferred and further writ petition was dismissed about ten years ago having been controverted in the writ petition.

8. In consequence of that order irrespective of language used in the order but in substance, as mentioned in the order itself. It is a consequence of dismissal of writ petition.

9. As far as the argument of learned counsel of the petitioner regarding non-compliance of principle of audi alteram partem. The Apex Court in the case of **Dharmarathmakara R.A. Ramaswamy Mudaliar Ed. Institution Vs. The Educational Appellate Tribunal & Anr.** has held that in a case where allegation and charges are admitted and no possible defence is placed before the authority concerned. What enquiry is to be made when one admits violations? In the present case, the facts are almost admitted. The case reveals itself and is apparent on the face of the record and in spite of opportunity no worthwhile explanation is forthcoming and it is not a fit case to interfere with the order impugned in the writ petition.

10. The Apex Court in the case of **Ashok Kumar Vs. Union of India & Others** has held as follows.:-

"This bring us to the question as to whether the principles of natural justice were required to be complied with. There cannot be any doubt whatsoever that the audi alteram partem is one of the basic pillar of natural justice which means no one should be condemned unheard. However, whenever possible the principle of natural justice should be followed. Ordinarily in a case of this nature the same should be complied with. Visitor may in a given situation issue notice to the employee who would be effected by the ultimate order that may be passed. He may not be given an oral hearing, but may be allowed to make a representation in writing.

It is also, however, well-settled that it cannot be put any straight jacket formula. It may not be in a given case applied unless a prejudice is shown. It is not necessary where it would be a futile exercise.

A court of law does not insist on compliance of useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences."

11. In the case of **Karnataka State Road Transport Corporation and Another v. S.G. Kotturappa and Another reported at [(2005) 3SCC 409)]** the Apex Court has held as under:-

"The question as to what extent, principles of natural justice are required to be complied with would depend upon the fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. They cannot be put in any straitjacket formula. The principles

of natural justice are furthermore not required to be complied with when it will lead to an empty formality. What is needed for the employer in a case of this nature is to apply the objective criteria for arriving at the subjective satisfaction. If the criteria required for arriving at an objective satisfaction stands fulfilled, the principles of natural justice may not have to be complied with, in view of the fact that the same stood complied with before imposing punishments upon the respondents on each occasion and, thus, the respondents, therefore, could not have improved their stand even if a further opportunity was given."

12. In the case **of Punjab National Bank and Others v. Manjeet Singh and Another** reported at [(2006) 8 SCC 647)], this Court has held as under:-

"The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The court will not insist on compliance with the principles of natural justice in view of the binding nature of the award. Their application would be limited to a situation where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principle of natural justice."

13. Hence, under the undisputed facts of the present case in any manner render the impugned order invalid on account of providing any opportunity prior to passing of impugned order. In these circumstances providing of an opportunity of hearing would merely be an empty formality and would be of no avail and a futile exercise.

14. Under these circumstances and reasons and law discussed hereinabove, I do not find any illegality or irregularity in the impugned order dated 15.02.2020 passed by Opposite Party No.3 there is no merit in the case and hence, the writ petition is **dismissed.**

(2020)06ILR A730
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.01.2020

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 12780 of 2018

Sinchai Mazdoor Sangh Uttar Pradesh, Lucknow & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Mishra.

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 14 – Equal right of pensionary benefit – Protection against arbitrariness – Held – Once the services of the petitioners have been acknowledged, then there is hardly any scope to deprive them the pensionary benefits, as are available to other public servants – Equal protection of laws must mean the protection of equal laws for all persons similarly – Article 14 strikes at arbitrariness because an arbitrary provision involves negation equality. The law is never been stagnated – An artificial classification has to be made by the respondent authorities while passing the order impugned amongst the Government servants, who are eligible for pension. The distinction

has been tried to be carved out is unsustainable in law. (Para 19 and 22)

Writ Petition allowed (E-1)

Cases relied on :-

1. Writ A no. 61107 of 2013; Gorakh Nath Pandey & ors. Vs St. of U.P. & ors. decided on 12.04.2016

2. Suresh Chandra Vs St. of U.P. & ors. (2014) 7 ADJ 721

3. St. of U.P. Vs Gorakh Nath Pandey 2018 (1) UPLBEC 362

4. Civil Appeal no. 6798/2019; Prem Singh Vs St. of U.P. & ors. decided on 02.09.2019

5. Secretary, St. of Karnataka & ors. Vs Uma Devi (2006) 4 SCC 1

6. Kesar Chand Vs the St. of Punjab AIR (1988) Punjab & Haryana 265

7. Punjab State Electricity Board Vs Natara Singh (2010) 4 SCC 317

8. Civil Appeal No.10806 of 2017; Habib Khan Vs the St. of Uttarakhand

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Sanjay Kumar Mishra, learned counsel for the petitioners and Shri Apurva Hajela, learned Standing Counsel for the State respondents.

2. The present writ petition is being filed under Article 226 of Constitution of India by Sinchai Mazdoor Sangh Uttar Pradesh through its General Secretary and 16 other employees working and retired employees of Workshop of Irrigation Department assailing the validity of order dated 07/17.03.2018 passed by Deputy Secretary (Yantrik), State of U.P., Civil Secretariat, Lucknow and further commanding the respondents to sanction the regular pension of the petitioner nos.2 to 171 at par with the Government Employees from the date of their respective retirement.

3. The description of petitioners are as follows:-

Sl No.	Name of Employee	Last post hold by the employee	Department	Date of appointment	Date of retirement (if attained the age of supernuation)
1.	Satveer Singh s/o Late Diwan Singh (Petitioner no.2)	Senior Fitter	Okhla Irrigation Workshop	01.05.1981	31.12.2012
2.	Isham Singh s/o Late Kullu Ram (Petitioner no.3)	Senior Fitter	Erection Workshop, Meerut	12.10.1973	31.01.2014
3.	Kamal Singh s/o Late Shiv Giri (Petitioner no.4)	Master Fitter	Irrigation Workshop, Mawana Road, Meerut	01.12.1972	31.07.2012
4.	Ram Pal	Senior Mould	Irrigation	11.11.19	30.11.2008

	s/o Late Fakeera (Petitioner no.5)	er	Workshop, Mawana Road, Meerut	67	
5.	Sarjeet Singh s/o Late Mangat Ram (Petitioner no.6)	Master Turner	Irrigation Workshop, Mawana Road, Meerut	02.11.1972	30.09.2011
6.	Indra Pal singh s/o Late Beerbal Singh (Petitioner no.7)	Master Turner	Irrigation Workshop, Mawana Road, Meerut	09.08.1972	31.12.2012
7.	Samar Pal Singh s/o Late Virendra Singh (Petitioner no.8)	Turner	Okhla Irrigation Workshop	30.01.1982	31.01.2014
8.	Jagpal Singh s/o Late Khairati Lal Singh	Moulder	Irrigation Workshop, Mawana Road, Meerut	23.11.1967	21.11.2009
	(Petitioner no.9)				
9.	Babu Ram s/o Late Sonar Singh(Petitioner no.10)	Welder	Okhla Irrigation Workshop	11.03.1981	14.09.2009
10.	Suleman Ansari s/o Late Akbar Ansari (Petitioner no.11)	Helper	Irrigation Workshop, Mawana Road, Meerut	03.09.1980	31.05.2013
11.	Gordhan Singh s/o Late Ghanshyam (Petitioner no.12)	Hammerman	Irrigation Workshop, Mawana Road, Meerut	05.09.1980	31.03.2013
12.	Laxmi Chand s/o Late Phool Singh (Petitioner no.13)	Welder	Irrigation Workshop, Mawana Road, Meerut	24.04.1971	30.04.2013

13.	Sardar Mohd. Khan s/o Late Khijar Mohd. Khan (Petitioner no.14)	Machinist	Okhla Irrigation Workshop	04.04.1981	28.02.2014
14.	Man Singh s/o Late Govind Singh (Petitioner no.15)	Moulder	Irrigation Workshop, Mawana Road, Meerut	20.10.1972	31.12.2013
15.	Har Gulal Singh s/o Late Ram Phal Singh (Petitioner no.16)	Senior Electrician	Irrigation Workshop, Mawana Road, Meerut	13.03.1978	31.09.2012
16.	Raj Kumar Sharma s/o Late Asha Ram Sharma (Petitioner no.17)	Turner	Irrigation Workshop, Mawana Road, Meerut	10.06.1980	31.07.2017

4. The terms and conditions of services of petitioners are governed under the Sinchai Karyashala Circle Service Rules, 19842. Admittedly, the petitioners are receiving the admissible salary and other allowances at par with the Government employees as has been paid to the regular employees of the Irrigation Department. Vide Government Orders dated 13.11.2007 and 27.02.2009, the employees working in the Irrigation Department under Industrial Establishment have been treated as Government Servants (Annexure no.2 and 3 to the writ petition). Accordingly, contribution towards provident fund had been deducted from the salary of the petitioners and other similarly situated employees and as such, it is alleged that since the very beginning they were in bona-fide belief/impression that they are receiving the regular salary and other allowances at par with the Government Employees, whereas, the same has not been ensured in favour of the petitioners. It has also been alleged that the Department had also discriminated some other employees, whose details are mentioned in paragraphs 26 and 27 of the writ petition, and they are getting pension like Government employees. Once this discrimination has been surfaced, the petitioners have agitated their claim and accordingly, wrote letters dated 04.03.2013 and 08.11.2013 to the second respondent for grant of pension to the employees who are working in Industrial Establishment of Irrigation Department3. Similarly, the Chief Engineer (Mechanical), Irrigation Department U.P. Lucknow, on his turn, has also recommended regarding payment of

pension to employees working in the Industrial Establishment vide letter dated 30.05.2013 addressed to the respondent no.2 as the issues have already been clarified in Government Order dated 13.11.2007, whereby, the employees of the Irrigation Department, who are working in Irrigation Workshop Divisions under Industrial Establishment, have been treated as Government Servants and accordingly, they are also entitled for pension and family pension at par with the Government Employees. Meanwhile, some inability had been shown regarding difficulty in payment of pension to petitioners and similarly situated employees through letter dated 25.06.2013 sent by Up-Sachiv, Government of U.P. to the Chief Engineer (Mechanical), Irrigation Department U.P. at Lucknow but subsequently through letter dated 03.07.2013, the Superintending Engineer, Irrigation Department Lucknow again reiterated and requested for ensuring the pension and another benefits as admissible to the Government Employees working in the Department.

5. Once the required benefits have not been ensured, the petitioners have preferred Civil Misc. Writ Petition no.668(S/S) of 2014. The same was disposed of according leave to the petitioners to move fresh representation before the Deputy Secretary (Yantrik), State of U.P., Civil Secretariat, Lucknow and the Authorities were also directed to decide the same within three months period. In response thereof, the petitioners have moved representation dated 22.12.2017, which was decided by the order impugned, whereby, the claim of the petitioners for pensionary benefits has been negated by treating them employees of Industrial Establishment as their services are governed under the provisions of Industrial Employment (Standing Orders) Act 1946 and Model Standing Orders, 1992 as well as other Labour Laws like Payment of Wages Act 1936 and Industrial Disputes Act 19474.

6. Learned counsel for the petitioners has drawn the attention of the Court to the fact that earlier the State Government has discriminated the petitioners while fixing a date of retirement as 58 years, whereas, the superannuation of State employees are 60 years. The same was assailed before this Court by preferring Writ Petition no.7641(S/S) of 2003 (Beni Madhav Pandey and another vs. State of U.P. and others). Vide order dated 11.10.2011, the said writ petition was allowed. For ready reference, the order dated 11.10.2011 is extracted as under:-

"Heard learned counsel for the petitioner. Learned Standing Counsel appears for the respondents.

According to the petitioners' counsel, the petitioners have attained the age of superannuation while working in the workshop of Irrigation Department. According to him, all those persons working in the Irrigation Department are entitled to continue up to the age of 60 years but a notice was served on the petitioners with regard to superannuation at the age of 58 years. The submission is that merely because the petitioners have been discharging duty in the workshop does not mean that they shall not be entitled for service benefits at par with other employees. In spite of categorical pleading on record, nothing has been brought on record to rebut the argument advanced by the petitioners' counsel that

the employees working in the workshop are part and partial of the irrigation department; rather in paragraph 5 of the counter affidavit, it has been stated that the petitioners belong to irrigation department. Once the petitioners are the employees of the State Government and also they have been admitted as employees of the Irrigation Department, only because they are discharging duty in the workshop shall not disentitle them to avail the service benefit at par with other employees of the irrigation department. Attention of this Court has not been invited to any rules, regulations or statutory provisions to make out a case that the service condition of the workshop employees are governed by different set of rules or regulations. In view of above, there appears to be no justification on the part of the respondents to treat the petitioners differently than other employees of the irrigation department. The impugned notice suffers from vice of arbitrariness and is discriminatory in nature.

Accordingly, the writ petition is allowed. A writ of certiorari is issued quashing the impugned notice dated 1.11.2003(Annexure-1) with consequential benefits."

7. In this backdrop, learned counsel for the petitioners submits that petitioners have also been discharging duties in the workshop but the same does not mean that they shall not be entitled to the service benefits at par with other employees of Irrigation Department, who have been accorded pension. The aforesaid order dated 11.10.2011 has been passed after exchange of affidavits. While passing the said order, the Court has specifically held that nothing has been brought on record to rebut the argument of petitioners that employees working in the workshop are not the part and partial of the Irrigation Department; rather in paragraph 5 of the counter affidavit, it has been stated that the petitioners belong to Irrigation Department. Once the petitioners are employees of the State Government and the same had also been admitted by the respondents while filing counter in the said case, then there shall not be any dis-entitlement of petitioners to avail the service benefits at par with the other employees of the Department. He informed to the Court that in the light of the observations made by this Court, the benefits have been extended to the petitioners in the said writ petition and age of their superannuation has been re-fixed to 60 years, as such, at this stage, the discrimination is being carved out in the case of petitioners and the same is in violation of Articles 14 and 16 of the Constitution of India.

8. Learned counsel for the petitioners has placed reliance on Section 2(d)(ii) of the Industrial Employment (Standing Orders) Act 1946, wherein, the employer has been defined as "in any Industrial Establishment under the Control of any department of any Government in India, the authority appointed by such Government in this behalf, or where no authority is so appointed, the head of the department." Thus, it is apparent that a Government may own industrial undertaking and in that circumstance, an employee working in such an industrial undertaking has to be held in service of Government and if the appointment is substantive and his service is to be paid by the Government, in such a situation, the employees would come under the purview of Regulation 361 of the Civil Services Regulation and

accordingly, the petitioners are entitled for pension. The same view has been laid down in Gorakh Nath Pandey and others vs. State of U.P. and others5, wherein, the plight of the incumbents those were working in the U.P. Government Cement Factory Churk, Mirzapur and they had been devoid the pension and other retiral benefits has been considered and accorded relief in the light of observations made in Suresh Chandra vs. State of U.P. and others6. Relevant extract of the said judgement is reproduced as under:-

"12. The Court has perused the order dated 12.3.2013 passed in Writ Petition No.47974 of 2008 wherein this Court had quashed the order passed by the General Manager, District Industries Centre, Sonebhadra and the direction was issued for according fresh consideration to the representation of the petitioner in the light of the order dated 2.8.2005 as indicated above. A perusal of the order dated 2.8.2005 issued by the Commissioner and Director of Industries, U.P. shows that the aforesaid order takes into account the fact that the employees appointed in U.P. Cement Factory at the time when it was run and managed by the Industries Department, were government employees. It further takes into consideration that from 1.4.1972 till 31.3.1981, such government servants were treated to be on deputation with U.P. State Cement Corporation and stood absorbed w.e.f. 1.4.1981 to the service of the U.P. State Cement Corporation Ltd. The order further indicates that the services rendered by such employees prior to 1.4.1981 were the services rendered as government servants.

13. This much is also reflected that the office order referred to the Government order dated 1.7.1981, by which retiral benefits have also been sanctioned to the temporary employees, and as such, the order dated 2.8.2005 had fastened the liability upon the General Manager, District Industries Centre to scrutinize the relevant pension papers and to forward the same to the State Government and the office of Accountant General so that the relevant papers for pension could be processed. Surprisingly, in derogation to the office order dated 2.8.2005 the present impugned order has been passed by the General Manager, District Industries Centre, Sonebhadra.

14. It is not disputed by the respondents while responding to the present writ petition regarding their absorption prior to 1.4.1981 and as such, all the petitioners fulfilled the stipulation contained in the Government order dated 1.7.1989 and the office order dated 2.8.2005 and consequently they are entitled for the pension. It is relevant to indicate that by the Government order dated 1.7.1989 the State Government had proceeded to issue an order providing pension to temporary Government servants, who have completed minimum 10 years of regular service. Admittedly, services rendered by the petitioners since 1.4.1971 till 31.3.1981 were treated as on deputation with U.P. State Cement Corporation and their services stood absorbed w.e.f. 1.4.1981 to the services of U.P. State Cement Corporation Limited and finally they have attained the age of superannuation between the years 1994 to 2004. Even otherwise as per the Government order dated 1.7.1989, admittedly the petitioners have completed 10 years' of regular service and as such, they are entitled for the pensionary benefits.

15. The Court has perused the order impugned and find that the respondents

had taken objection precisely on the ground that the case of petitioners is unsustainable in the light of provisions contained under Article 361 of Civil Services Regulation. The same cannot be sustained and is accordingly rejected. Once the respondent authorities had accorded certain benefits to the similarly situated employees, then the same cannot be denied to the petitioners.

The Court has also perused the Government order dated 1.7.1989 and the judgement of this Court in Suresh Chandra's case (supra) and find that the same is not applicable in the present facts and circumstances of the case.

16. In view of above, the impugned order cannot be sustained and is set aside.

17. The writ petition is allowed and the respondents are directed to calculate and pay the entire retiral dues of the petitioners within three months from the date of production of certified copy of this order."

9. Suffice to indicate that the said judgement has been approved/affirmed by the Division Bench of this Court in State of U.P. vs. Gorakh Nath Pandey7 reported in. Relevant paragraphs of the said judgement is quoted as under:-

"State of U.P. not being satisfied with the judgment and order of the learned Single Judge has filed this intra-court appeal.

Learned Advocate General of the State of Uttar Pradesh, Sri Raghvendra Singh challenges the correctness of the conclusions so drawn by the learned Single Judge. He would contend that the principle issue which requires consideration is as to whether the employees/workmen appointed in government cement factory, whose service conditions are governed by the Standing Orders certified under the Act, 1946 would be entitled to the benefits of pension under Civil Service Regulations or not.

He would submit that in terms of the Rule 7-B of the U.P. Fundamental Rules, the term Government Servant has been defined as a person appointed to a civil post or a civil service under the State Government, and serving in connection with affairs of Uttar Pradesh whose conditions of service have been or may be prescribed by the Governor under Section 241 (2) (b) of the Act.

Under Section 241 (2) (b) of the Government of India Act, 1935, the conditions of service of persons serving in a civil capacity in India could be prescribed, in the case of persons service in connection with the affairs of the Province, by rules made by the Governor or by a person authorized by the Governor to make rules for the purpose.

The Civil Service Regulations (Relating to Pension), in terms of Regulation 1 (a), are intended to define the conditions under which pension is earned by service in a Civil Department.

Therefore, the provisions of the U.P. Fundamental Rules as also the Civil Service Regulations would be applicable only to persons appointed to a civil post or a civil service under the State Government and serving in connection with the affairs of the State Government, or in other words to a Government Servant only.

In the facts of the present case the petitioners were industrial workmen with the meaning to be assigned as per the Standing Orders certified under the Act of 1946. Their conditions of service were governed by the Certified Standing

Orders. The petitioners were thereof clearly not civil servant or holders of civil post under the definition of the term Government Servant contemplates the U.P. Fundamental Rules. They were not appointed to a civil post or to a civil service under the State Government so as to entitle them for pension which is earned by service in a Civil Department as required under the Civil Service Regulations.

Crux of the submission of the learned Advocate General therefore, is what once the petitioners are found to answer the description of workmen/industrial employees within the meaning of to be assigned under the Standing Orders Act, they stand excluded from the definition of a person appointed to a civil post or in civil service within the meaning of U.P. Fundamental Rules/Civil Service Regulations and therefore they are not entitled to pension.

We specifically inquired from the learned Advocate General as to under which provision of the U.P. Fundamental Rules/Civil Service Regulations/Standing Orders Act, any such exclusion in respect of the persons who are workmen are not being a person appointed to a civil post. No response could be given. It is more or less an admitted position that there is no specific provision for excluding the workmen/industrial employees in the matter of payment of pension/retiral dues, who otherwise satisfy all the conditions as contemplates by Regulation 361 of the Civil Service Regulations.

The Standing Orders Act has been enforced with an object to law down the condition of service like disciplinary action, leave, allowances etc. so as to minimize the fraction between the workmen and employer in Industrial Undertaking. Such Industrial Undertaking can be private undertaking or Government Undertaking or Public Private Undertaking. It is useful to refer to the definition of employer contained in Section 2 (d) (ii) of the Act, 1946, which reads as follows: "2. Interpretation.

(d) "employer".....

(ii) in any industrial establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf, or where no authority is so appointed, the head of the department;"

Thus, it will be seen that a Government may own industrial undertaking and in that circumstance, a employee working in such an industrial undertaking has to be held to be in service of Government and if the appointment is substantive and his service is to be paid by the Government, he stands covered by the provisions of Regulation 361 of the Civil Service Regulations, which entitles him to pension.

For ready reference, Regulation 361 of the Civil Service Regulations reads as under:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:---

First-The service must be under Government.

Second-The employment must be substantive and permanent.

Third-The service must be paid by Government."

We may explain that use of the word "civil service" under Civil Service Regulations has to be read to include all nature of employment in the Government, except those which are in relation to defence service or service connected with defence.

Civil Service as defined in The New Dictionary of Cultural Literacy, Third Edition by Houghton Mifflin Company reads as under:

"The nonmilitary personnel who work for a government, applying its laws and regulations."

In our opinion the service conditions laid down as per the Certified Standing Orders, the Act, 1946 do not in any way impinge upon the right of a employee working in a Government Industrial Undertaking to be entitled to pension and other retiral dues under Regulation 361 of Civil Service Regulations. Provisions of Regulation 361 of the Civil Service Regulations are a beneficial piece of legislation and we do not find any reason for the persons who are covered by the Certified Standing Orders to be excluded from the benefits of Regulation 361 of the Civil Service Regulations, if they satisfy the other requirements of Regulation 361 of the Civil Service Regulations.

In our opinion even a workman/industrial employee of Government Industrial Undertaking has to be held to be a civil servant/holder of a civil post under the Government so as to be covered within the meaning of Regulation 361 of the Civil Service Regulations.

There is no issue with regard to other employees appointed in Factory at Churk and subsequently absorbed in the Corporation being paid pension in terms of the Government Order dated 2nd August, 2005.

We for the reasons recorded above see no reason as to why the workmen/industrial employees similarly appointed and absorbed be denied the same benefit. It is held that petitioners who answer the description of industrial employees/workmen shall also be covered by the Government Order dated 2nd August, 2005 and would be entitled to all benefits following therefrom.

In the totality of the circumstances on record we do not find any substance in the contentions raised by the learned Advocate General for the State to interfere with the judgment and order of the learned Single Judge dated 12th April, 2016.

All these appeals lack merit and are accordingly dismissed."

10. Learned counsel for the petitioners further submits that the petitioners had worked against substantive post since very beginning and their appointment is not at all from backdoor and time to time salary and other allowances, which were admissible to them, had been ensured in their favour and at this stage, they cannot be discriminated only on the ground that their services are governed with the Industrial Employment (Standing Orders) Act 1946 and Model Standing Orders, 1992 as well as other Labour Laws. In support of his submission, he has also relied upon the recent judgement passed by Hon'ble the Apex Court in the case of Prem Singh vs. State of U.P. and others8. The relevant extract of the said judgement is quoted as under:-

"29. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a

particular project which is the basic concept of the work charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No._____2019 @ SLP (C) No.5775 of 2018) the appellants were allowed to cross efficiency bar, after ''8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak w.e.f 15.9.1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-

320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

30. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.

31. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

32. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider

contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

35. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court in Secretary, State of Karnataka & Ors. v. Uma Devi 2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

36. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged

establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed.

37. All pending interlocutory applications and miscellaneous applications, if any, are disposed of."

11. In this backdrop, he submits that the case of the petitioners are on better footing in comparison to the work charged employee and as such, the benefit of pension is liable to be extended to the petitioners, as such, the order impugned is unsustainable being in violation of Article 14 and 16 of the Constitution of India and thus, this Court should come to the rescue and reprieve of the petitioners.

12. Per contra, Shri Apurva Hajela, learned Standing Counsel has vehemently opposed the writ petition. On the basis of averment mentioned in the Counter Affidavit, he submits that the provisions and service conditions of employees of industrial workshop is different than the service conditions of regular establishment and the same is governed by the Industrial Employment (Standing Orders) Act 1946 and Model Standing Orders, 1992 issued by the Government. For the employees of Industrial Establishment under the provisions of Employees Pension Scheme 1995, the pension is payable by the Employee Provident Fund office, whereas, for getting the said benefit, the petitioners have not submitted the prescribed documents with signatures to the workshop officer instead they are claiming the pension as is admissible to the regular establishment employees, which is not admissible in law as the same would create a separate and distinct class and as such, this Court should not interfere in the matter.

13. Heard rival submission and perused the record.

14. In order to appreciate the controversy in hand, it would be relevant to have a glance of provisions contained in Uttar Pradesh Retirement Benefits Rules 19619 Rule 3(8) of the Rules 1961 which contains the provisions in respect of qualifying service is extracted hereunder:-

"Rule 3. In these rules, unless is anything repugnant in the subject or context-

(1) .....

(2) .....

(8) "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulations.

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment.

(ii) periods of service in a work-charged establishment and

(iii) periods of service in a post paid from contingencies shall also count as qualifying service.

Note:- If service rendered in a non-pensionable establishment work-charged establishment or in a post paid from

contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service." (emphasis supplied)"

15. Regulations 361, 368 and 370 of Uttar Pradesh Civil Services Regulations are also relevant. They are extracted hereunder:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions: - First - The service must be under Government.

Second - The employment must be substantive and permanent.

Third--The service must be paid by Government.

These three conditions are fully explained in the following Section.

368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post shall qualify, except -

(i) periods of temporary or officiating service in non- pensionable establishment;

(ii) periods of service in work charged establishment; and

(iii) periods of service in a post paid from contingencies."

16. The qualifying service is the one which is in accordance with the provisions of Regulation 368 i.e. holding a substantive post on a permanent establishment. The proviso to Rule 3(8) clarify that continuous, temporary or officiating service followed without interruption by confirmation in the same or any other post is also included in the qualifying service except in the case of periods of temporary and officiating service in a non-pensionable establishment.

17. The provisions contained in Regulation 370 of the Civil Services Regulations excludes service in a non-pensionable establishment, work-charged establishment and in a post paid from contingencies from the purview of qualifying service. Under Regulation 361 of the Civil Services Regulations, the services must be under the Government and the employment must be substantive and permanent basis.

18. In the present case, nothing has been brought on record to indicate or suggest that the posts on which the petitioners were working are not substantive and permanent in nature. Contrarily, the petitioners have been given regular pay scale and other admissible allowances from time to time. Even it has not been shown to this Court that there was any break in service of the petitioners. More-so the order dated 13.01.2007 and 27.02.2009 passed by the Secretary of the Department concerned, clearly indicate that the employees of the Irrigation Department, who are working under the Industrial Establishment of the Department, have been treated as "Government Servants".

19. Once the services of the petitioners have been acknowledged, then there is hardly any scope to deprive them the pensionary benefits, as are available to other public servants. The equal protection of laws must mean the

protection of equal laws for all persons similarly situated. Article 14 strikes at arbitrariness because an arbitrary provision involves negation equality. The law is never been stagnated. Now even a work charged employee, once his services is being regularized, he becomes a public servant and the said period is liable to be counted as qualifying service. [Ref: Prem Singh (supra)].

20. Once the temporary or officiating service under the State Government has to be recounted for determining the qualifying service, in such a situation, it cannot be accepted that the period spent by the petitioners in the Department is to be taken as workman in the Industrial Establishment and they can be accorded the parity with the regular employees.

21. In the Counter Affidavit at no point of time any objection has been raised that petitioners are not discharging duty commensurate to their post or to the similarly situated employees working in the regular establishment. Every plea raised in a petition has to be specifically denied and in the absence of a specific denial, the assertions made in the petitioner will normally be deemed to have been admitted or at least the court can proceed on the basis of that it is an un-controverted fact.

22. An artificial classification has to be made by the respondent authorities while passing the order impugned amongst the Government servants, who are eligible for pension. The distinction has been tried to be carved out is unsustainable in law and more-so once it has been acknowledged that the petitioners are Government Servants like other employees, then to deprive them for pension is not only unjust and inequitable but hit by principle of arbitrariness and the order impugned is liable to be struck down being in violation of Article 14 of the Constitution of India.

23. The Hon'ble Apex Court in Prem Singh (supra), while considering the plight of the work charged employee has directed that their engagement under the work-charged establishment shall be counted as qualifying service for the purpose of pension as they had retired from the regular establishment keeping in mind the provisions contained in Rule 3(8) of the Rules 1961 as well as the instructions contained in Para 669 of the Financial Handbook. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions. While passing the said order, the Court has also considered the decision in the case of Secretary, State of Karnataka & Ors. v. Uma Devi10, wherein, it has been laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees, as such, the Court has held that those employees who have worked for ten years or more should have been regularized. It would not be proper to regulate them for consideration of regularisation as others have been regularised and direction has been issued to treat their services as a regular one.

24. In Kesar Chand v. the State of Punjab11, has been rendered by Full Bench of Punjab and Haryana High Court. The Rule 3.17 (ii) of the Punjab

Rules came up for consideration before the Full Bench which reads as under:

Rule 3.17. "if an employee was holding substantively a permanent post on the date of his retirement, his temporary or officiating service under the State Government, followed without interruption by confirmation in the same or another post, shall count in Full as qualifying service except in respect of -

(i) periods of temporary or officiating service in non-pensionable establishment;

(ii) periods of service in work-charged establishment; and

(iii) ....."

25. A Full Bench of the High Court in Kesar Chand (supra) has discussed the matter thus:

"19. In the light of the above, let us examine the validity of rule 3.17(ii) of the Punjab Civil Services Rules, Vol. II. This rule says that the period of service in a work-charged establishment shall not be taken into account in calculating the qualifying service. After the services of a work-charged employee have been regularised he becomes a public servant. The service is under the Government and is paid by it. This is what was precisely stated in the Industrial Award dated June 1, 1972, between the workmen and the Chief Engineer, P.W.D. (B. & R), Establishment Branch, Punjab, Patiala, which was published in the Government Gazette dated July 14, 1972. Even otherwise. the matter was settled by the Punjab Government Memo No.14095-BRI (3)-72/5383 dated 6th February 1973(Annexure P7) where it was stated that all those work charged employees who had put in ten years of service or more as on 15th August 1972, their services would be deemed to have been regularised. Once the services of a work-charged employee have been regularised, there appears to be hardly any logic to deprive him of the pensionary benefits as are available to other public servants under Rule 3.17 of the Rules. Equal protection of laws must mean the protection of equal laws for all persons similarly situated. Article 14 strikes at arbitrariness because an arbitrary provision involves negation equality. Even the temporary or officiating service under the State Government has to be reckoned for determining the qualifying service. It looks to be illogical that the period of service spent by an employee in a work-charged establishment before his regularisation has not been taken into consideration for determining his qualifying service. The classification which is sought to be made among Government servants who are eligible for pension and those who started as work-charged employees and their services regularised subsequently, and the others are based on any intelligible criteria and, therefore, is not sustainable at law. After the services of a work-charged employee have been regularised, he is a public servant like other servant. To deprive him of the pension is not only unjust and inequitable but is hit by the vice of arbitrariness, and for these reasons, the provisions of sub-rule (ii) of Rule 3.17 of the Rules have to be struck down being violative of Article 14 of the Constitution."

26. The Hon'ble Apex Court in Punjab State Electricity Board vs. Natara Singh12 has once again considered the question of determination of qualifying service for grant of pensionary benefits,

in particular, the benefit of previous service in work-charged capacity with the State Government and whether it can be included as pensionable service. The relevant extract of the said judgement is as follows:-

""25. In Kesar Chand v. State of Punjab 1988 (5) SLR 27 (P&H) the Full Bench held that Rule 3.17(ii) of the Punjab Civil Ser- vices Rules was violative of Article 14 of the Constitution of In- dia. The Full Bench decision was challenged before this Court by filing a special leave petition which was dismissed. Thus, the ratio laid down by the Full Bench judgment that any rule which excludes the counting of work-charged service of an employee whose services have been regularised subsequently, must be held to be bad in law was not disturbed by this Court. The distinction made between an employee who was in temporary or officiating service and who was in work-charged service as mentioned in Rule 3.17(ii) of the Punjab Civil Services Rules disappeared when the said Rule was struck down by the Full Bench. The effect was that an employee holding substantively a permanent post on the date of his retirement was entitled to count in full as qualifying service the periods of service in work-charged estab- lishments.

26. In view of this settled position, there is no manner of doubt that the work-charged service rendered by Respondent 1 under the Government of Punjab was qualified for grant of pension un- der the rules of the Government of Punjab and therefore, the Board was not correct in rejecting the claim of the respondent for inclusion of period of work-charged service rendered by him with the State Government for grant of pension, on the ground that service rendered by him in the work-charged capacity out- side PSEB and in the Departments of the State Government was a non-pensionable service.

27. The apprehension that acceptance of the case of Respondent 1 would result into conferring a status on them as that of em- ployees of the State of Punjab has no factual basis. It is true that the State Government has power to frame rules governing ser- vices of its employees under Article 309 of the Constitution whereas the Board has power to prescribe conditions of service by framing regulations under Section 79(c) of the Electricity (Supply) Act, 1948. However, governance of a particular institu- tion and issuance of instructions to fill up the gap in the fields where statutory provisions do not operate, is recognised as a val- id mode of administration in modern times.

40. So far as this argument is concerned, it is true that the Divi- sion Bench of the High Court has expressed the above opinion in the impugned judgment. However, the reference to Rule 3.17(ii) of the Punjab Civil Services Rules as well as the Full Bench de- cision of the Punjab and Haryana High Court in Kesar Chand v. State of Punjab (supra) and the speaking order dated 16-11-2005 passed by the Board rejecting the claim of Respondent 1 makes it abundantly clear that the High Court has directed the appel- lants to count the period of service rendered by Respondent 1 in work-charged capacity with the State Government for determin- ing qualifying service for the purpose of pension. Further, Re- spondent 1 has been directed to deposit the amount of Employ- ee's Contributory Fund which he had received

from the appel- lants along with interest as per the directions of the Board before the pension is released to him." (emphasis supplied)"

27. In **Habib Khan v. the State of Uttarakhand**, State Public Services Tribunal directed the counting of the service rendered by a work-charged employee as "qualifying service' for the pension. Writ Petition No.24 of 2007 was filed by the State of Uttarakhand against the said order. The same was dismissed by the Uttarakhand High Court. Against the said order Special Leave to Appeal was filed by the State which was also dismissed. Later on, the Full Bench of the Uttarakhand High Court took the view that the period of work-charged service cannot be counted for computation of the period of "qualifying service'. Based on Full Bench decision, review of the order dismissing Writ Petition No.24 of 2007 was sought which was allowed by order dated 27th July 2012 the same was questioned before the Hon'ble Apex Court, then the SLP was dismissed as withdrawn. Based on review petition, the matter was re-heard and the High Court vide order dated 26th May 2015 has held that the work-charged service cannot be counted for reckoning of the period of "qualifying service'. The decision of the Full Bench of the Uttarakhand High Court passed after the grant of review petition came up for consideration before the Hon'ble Apex Court and after placing reliance on the judgement passed in Kesar Chand (supra) and Natara Singh (supra), the Apex Court has held that the service rendered by the apellant as work-charged employee should be computed as qualifying service for grant of pension. The relevant extract of the said judgement dated 23.08.2017 reads as follows:-

"6. The pari materia provision contained in Rule 3.17(ii) of the Punjab Civil Services Rules had been struck down by a Full Bench decision of the Punjab and Haryana High Court in Kesar Chand vs. State of Punjab and ors. (supra). The challenge by the State against the aforesaid decision of the Full Bench of the Punjab and Haryana High Court was negatived by this Court.

The matter came up for consideration before this Court, once again, in the case of Punjab State Electricity Board and anr. Vs. Narata Singh and anr. (2010) 4 SCC 317. While dealing with the said question this Court in paragraph 25 of the report held that the Full Bench decision of the Punjab and Haryana High Court was perfectly justified in striking down Rule 3.17(ii) of the Punjab Civil Services Rules resulting in obliteration of the distinction made in the said Rules between 'temporary and officiating service' and 'work-charged service'. On the said basis, this Court took the view that the period of work-charged service should be reckoned for purposes of computation of "qualifying service' for grant of pension.

7. As already observed, the provisions of Rule 370 of the Civil Service Regulations applicable to the State of Uttarakhand are pari materia with the provisions of Rule 3.17(ii) of the Punjab Civil Services Rules, discussed above. If that is so, 'we do not see as to why the period of service rendered on work-charged ba- sis by the appellants should not be counted for purposes of com-putation of 'qualifying service' for grant of pension. The pari ma- teria provisions of Rule 3.17 (ii) of the Punjab Civil Services Rules having been interpreted and understood in the above man- ner by this Court in Narata Singh (supra) we do

not find any room for taking any other view except to hold that the appellants are entitled to reckon the period of work-charged service for purposes of computation of "qualifying service' for grant of pen- sion. We order accordingly; allow these appeals and set aside the impugned orders passed by the High Court.

8. All necessary and consequential benefit in terms of the present order will be paid and granted by the State to the appellants forthwith and without any delay."

28. In the present matter, this Court is of the considered opinion that the case of petitioner is on much better footing than the petitioners (work-charged employees) of Prem Singh (supra) and their services are liable to be considered for computation of length of services for extending the pensionary benefits as in the present matter, the petitioners have been appointed on substantive post in regular capacity and they had rendered their continuous service and the State Government had also accorded regular pay scale and other allowances admissible to the similarly situated other Government employees, in such a situation, after the retirement, it cannot be accepted that the services of petitioners would come under the Labour Laws, hence they are not entitled for pensionary benefit at par with Government employees.

29. The order impugned is unsustainable and the same is set aside.

30. Consequently, the Writ Petition is allowed. It is held that the petitioners are entitled for pension and other benefits as is admissible to the similarly situated employees of the State Government from the date of their superannuation. Let the admissible benefits be ensured in favour of petitioners in the light of above observations within the period of three months from the date of production of certified copy of this order.

(2020)06ILR A748
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.06.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Service Single No. 20476 of 2019
Connected with
Service Single No. 19881 of 2019

Rohit Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Girish Chandra Verma

Counsel for the Opposite Parties:
C.S.C., Anuj Kudesia, Ashwani Kumar Agnihotri, Gaurav Mehrotra, Utsav Mishra, Vinod Kumar Singh

A. Education/Service Law – Recruitment/Selection - U.P. Higher Education Services Commission (Procedure for Selection of Teachers) Regulation, 2014: Regulation 2(m), 6(2); U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994: Sections 3(1), 3(6); Notification No. 47 dated 24.06.2019 issued by U.P. Higher Education Services Commission, Allahabad; Government Orders dated 25.03.1994 and 30.01.2015 – The selection has two stages, viz the written examination and thereafter interview. According to Regulation 6(2), candidates have been called for interview in the ratio of 1:5 by determining the cut of marks category wise

i.e. General, OBC and SC/ ST. The petitioners of both the writ petitions, though have scored higher marks than the last candidate in general category, were not called for interview in any of the categories for the reason that they have not fallen within the cut off marks fixed for the OBC category candidates.

B. U.P. Higher Education Services Commission (Procedure for Selection of Teachers) Regulation, 2014: Regulation 6(2) - Regulation 6(2) says that "as for as possible", meaning thereby, the ratio could be more than five times if the situation may so demand. Regulation 6(2) is flexible and procedural in nature, which cannot impinge upon substantial rights provided statutorily i.e. U.P. Act No. 4 of 1994 and constitutionally. (Para 36, 37, 42)

C. A relaxation or concession given at the preliminary stage, cannot have any relevance in determining the merit of the candidate - The vacancies under the unreserved category are not reserved for anyone. A candidate belonging to the reserved category who has scored higher marks than the last in the merit list of general category, would be adjusted against the unreserved vacancy and not against the reserved vacancy, against which he has applied. (Para 13, 34, 42)

D. Even if there is no rule providing for short- listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. (Para 24, 42)

E. Regulation 2(m); Press Release dated 17.07.2019 and Office memorandum dated 09.12.2019 issued by U.P. Public Service Commission - Harmonious Construction has to be made reading the provisions of Regulations, 2014, Section 3(6) of U.P. Act No. 4 of 1994 and Articles 14 and 16 of the Constitution of India – By eliminating the reserved category candidate with higher marks at the intermediate stage itself namely, prior to interview amounts to final rejection of the candidature before completion of process of selection. A reserved category candidate shall not be debarred from further selection if the candidate has scored higher marks than cut off marks fixed for the candidates belonging to unreserved category called for the interview. (Para 20, 22, 23, 35, 42)

The memorandum and press release were held it to be contrary to statutory provisions U/S. 3(6) of 1994 Act and as was issued after first part of selection had already taken place, cannot have any retrospective effect. (Para 22, 38)

Writ Petitions allowed. (E-4)

Precedent followed:

1. U.P. Power Corporation Ltd. & anr. Vs Nitin Kumar & 9 ors., 2015 (5) ADJ 417; 2015 (5) ALJ 162 (Para 10, 11, 25, 40, 41)

2. Lalit Kumar Vs St. of U.P. & anr., Writ-A No. 68706 of 2015 (Para 10, 11, 41)

3. Jitendra Kumar Singh & anr. Vs St. of U.P. & ors., (2010) 3 SCC, 119 (Para 13, 29, 33)

4. Ajith Kumar . & ors. Vs Renu Kr. & anr., (2015) 16 SCC, 778 (Para 14)

5. Vikas Sankhala Vs Vikas Kumar Agarwal . & ors., (2017) 1 SCC 350 (Para 15)

6. Neeravkumar Dilipbhai Makwana Vs Gujrat Public Service Commission and Others, (2019) 7 SCC 383; AIR 2019 SC 3149 (Para 16).

7. Sanjeev Kumar Singh Vs State of U.P. . & ors., 2007 (2) ADJ 150 (Para 23)

8. The Secretary, U.P. Public Service Commission Vs Dr. Shiv Vinayak Tripathi & anr., Civil Appeal Nos. 4895-4904/2019, Judgment dated 04.12.2019 (Para 28, 38)

9. B. Ramakichenin Vs U.O.I., (2008) 1 SCC, 362 (Para 24)

10. Sachhida Nand Mishra Vs St. of U.P. . & ors., Writ Petition No. 6083 (S/S) of 2016,

Judgment and order dated 10-11-2016 (Para 43)

Precedent distinguished:

1. Deepa EV Vs U.O.I. . & ors., (2017) 12 SCC 680 (Para 28, 39)

2. Government of Andhra Pradesh Vs P. Dilip Kumar & anr., (1993) 2 SCC 310 (Para 26)

(Delivered by Hon'ble Manish Kumar, J.)

1. The controversy involved in both the aforesaid writ petitions is similar in nature, therefore, the same is decided by a common judgment.

2. Under challenge in the writ petitions i.e. Writ Petition No. 20476 (S/S) of 2019, Rohit Verma Versus State of U.P. and Others and Writ Petition No. 19881 (S/S) of 2019, Ayush Ranjan Chaudhary and Another Versus State of U.P. and Others, is the notification no. 47 dated 24-06-2019 issued by the U.P. Higher Education Services Commission, Allahabad (hereinafter referred as 'Commission' in short). By the said notification the Commission has called the candidates for interview in the ratio of 1:5 under three categories i.e. General, OBC and SC/ST as per the cut off marks determined categorywise as obtained in the written examination.

3. The petitioners belong to Other Backward Class category i.e. OBC and cut off marks determined for the OBC category candidates called for interview is 130.34 whereas for the general category candidates, the cut off marks is 103.37.

4. The petitioner in Writ Petition No. 20476(S/S) of 2019, has secured 125.84 marks whereas the petitioners in Writ Petition No. 19881(S/S) of 2019 have secured 125.44 and 116.48 marks respectively in the written examination.

5. The brief facts of the case are that notification no. 47 was issued by the Commission inviting applications for selection on the post of Assistant Professor in 33 subjects including 273 posts in Sociology bifurcating in three categories i.e. 167 posts for unreserved category, 63 posts for OBC category and 43 posts for SC & ST category, which is the subject matter of the present writ petitions.

6. Against 167 vacancies of unreserved category, 838 candidates were called for interview and the last candidate called has scored 103.33 marks in the written examination. Against 63 vacancies for OBC Category, 385 candidates were called and the last candidate has scored 133.34 marks. Under the SC/ST category, 217 candidates were called for interview against 43 vacancies and the last candidate has scored 112.36 marks. The candidates were called in ratio of 1 :5 in each category.

7. The selection has two stages, viz the written examination and thereafter interview. According to Regulation 6(2) of the U.P. Higher Education Services Commission(Procedure for Selection of Teachers) Regulations, 2014(In short referred as 'Regulations, 2014'), candidates have been called for interview in the ratio of 1:5 by determining the cut of marks categorywise i.e. General, OBC and SC/ST. The petitioners of both the writ petitions were not called for interview in any of the categories for the reason that they have not fallen within the

cut off marks fixed for the OBC category candidates.

8. The grievance of the petitioners is that the last candidate belonging to general category, who has obtained 103.37 marks has been called for interview, who is lower in merit.

9. Sri G.C.Verma and Sri Karunakar Srivastava, learned counsel for the petitioners have submitted that by not calling the petitioners for the interview, though, they have scored higher marks than the general category candidates, the Commission acted in contravention of Section 3(6) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred as the U.P. Act No. 4 of Act of 1994). Sections 3(1) and 3(6) of the said Act provide as under :-

"Section 3 (1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentages of vacancies to which recruitment are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens.-

(a) in the case of Scheduled Castes twenty one percent :

(b) in the case of Scheduled Tribes two percent :

(c) in the case of Other Backward Classes of citizens twenty seven per cent :

Provided that the reservation under clause (c) shall not apply to the category of other backward classes of citizens specified in Scheduled II."

"3 (6) If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub- Section (1)."

10. In support of abovementioned contention, learned counsel for the petitioners have relied upon the Division Bench Judgment of this court dated 19-05-2015 passed in Special Appeal No. 310 of 2015(U.P. Power Corporation Ltd. And Another Versus Nitin Kumar and 9 Others), which has been followed in Writ A No. 68706 of 2015 (Lalit Kumar Versus State of U.P. and Another).

11. Submission of learned counsels for the petitioners is that case of the present petitioners is squarely covered by the Judgment of this court in the case of Lalit Kumar (Supra) and U.P. Power Corporation Ltd.(Supra).

12. Learned counsels have further submitted that the State Government has issued a Government Order dated 25-03-1994. Para 4 of the said Government Order provides that if any candidate belonging to reserved category is selected with the general category candidates in an open selection, then he/she shall not be adjusted against the vacancies reserved for reserved category candidates, meaning thereby, such reserved category candidate shall be treated to be migrated against the unreserved vacancy though the reserved category candidates appeared in the selection after taking benefit of relaxation admissible to the candidates belonging to reserved category. Para 4 of the Government Order dated 25-03-1994 reads as follows :-

"(4) यदि आरक्षित श्रेणी से सम्बन्धित कोई व्यक्ति योग्यता के आधार पर खुली प्रतियोगिता में

सामान्य अभ्यर्थियों के साथ चयनित होता है तो उसे आरक्षित रिक्तियों के प्रति समायोजित नहीं किया जायेगा अर्थात् उसे अनारक्षित रिक्तियों के प्रति समायोजित माना जायेगा, भले ही उसने आरक्षित वर्ग के अभ्यर्थियों को अनुमन्य किसी सुविधा या छूट (यथा आयु सीमा में छूट आदि) का उपभोग किया हो।"

13. Learned counsel for the petitioners have further contended that on 30-01-2015, another order has been issued by the state government for strict compliance of provisions of Section 3(6) of U.P. Act No. 4 of 1994. In support of their submissions, they have also placed reliance on the Judgment of the Apex Court in the case of Jitendra Kumar Singh and Another Versus State of U.P. and Others, reported in 2010(3) SCC,119. In this case, the issue before the Apex Court were with regard to filling up of the general category posts by the candidates belonging to reserved category on their obtaining more marks than the last candidate in the general category. The Apex Court held that the submission of learned counsels for the petitioners/appellants is not accepted that the reserved category candidate having availed relaxation of age are disqualified for open category seat.

14. Another Judgment of the Apex Court, which has been relied upon by learned counsels for the petitioners is Ajith Kumar & Others Vs Renu Kr. and Others, reported in 2015 (16) SCC,778. In this case, the Apex Court held that once a candidate appears in the examination pursuant to a concession granted by the Service Commission, cannot be treated as less meritorious candidate who are entitled to be appointed to open category post even though having obtained higher marks. The Apex Court held that a relaxation or concession given at the preliminary stage, cannot have any relevance in determining the merit of the candidate.

15. The other Judgment of the Apex court, on which the learned counsels for the petitioners have placed reliance is Vikas Sankhala Versus Vikas Kumar Agarwal and Others, reported in (2017)1 SCC 350. In this case also, relaxation of 5% marks was made in favour of the reserved category candidates for passing TET test by the NCTE. The same issue had again cropped up that once concession has been taken, that candidate shall not be at par with the general category candidates. The Court framed three issues, which are quoted below :-

i. Whether the policy of the State as reflected in its letter dated March 23, 2011 deciding to give relaxation ranging from 10% to 20% in TET marks to different reserved categories as mentioned therein is valid in law?

ii. Whether NCTE notification dated July 29, 2011, which amends paragraph 3 of its earlier guidelines/notification dated February 11,2011, provides 5% relaxation to the reserved category to passing TET?

If so, whether it would be applicable to the reserved categories in the State of Rajasthan as well?

iii. Whether reserved category candidates, who secured better than general category candidates in recruitment examination, can be denied migration to general seats on the basis that they had availed relaxation in TET?

Learned counsels for the petitioners have relied upon the answer to Issue No. 3 which has been dealt with in Para 63(B) of the Judgment, which is quoted hereinbelow :-

63(b) Migration from reserved category to general category shall be admissible to those reserved category candidates who secured more marks obtained by the last unreserved category candidates who are selected, subject to the condition that such reserved category candidates did not avail any other special concession. It is clarified that concession of passing marks in TET would not be treated as concession falling in the aforesaid category.

16. Similar issue has been dealt with by the Apex Court by its Judgment dated 04-07-2019 passed in Civil Appeal No. 5185 of 2019(Arising out of S.L.P.(Civil) No. 3938 of 2018, Neeravkumar Dilipbhai Makwana Vs. Gujrat Public Service Commission and Others, whether a reserved category candidate, who has availed of age relaxation can thereafter seek to be accommodated in or migrated to the general category seat, the Apex Court replied in affirmative in favour of reserved category candidate.

17. Sri Vivek Shukla, learned counsel for the opposite parties no. 2 & 3 i.e. Uttar Pradesh Higher Education Service Commission, on the other hand, has vehemently opposed the submissions made on behalf of the petitioners. He has submitted that Section 3(6) of U.P. Act No. 4 of 1994 provides for "get selected on the basis of merit in an open competition". In the present case, the selection has yet not been completed. The selection would be completed only after the interview and hence, any migration from the reserved seat to unreserved seat is permissible only after completion of the selection but in the intermediate stage, migration is not permitted.

18. Learned counsel for the opposite parties no. 2 & 3 has further relied upon Regulation 6(2) of the Regulations 2014, which is quoted as under :-

"6. The commission shall scrutinize the applications and conduct the written examination and interview of eligible for the post of lecturer and principal.

i. Written examination for the post of lecturer shall consist one objective type question papers (General Knowledge and related optional subjects of fix marks-2000 (60+140) and for interview 30 marks. Final merit list shall be prepare on the basis of marks obtained on both) (200+30).

ii. Selection for the post of Principal based on a written examination. Academic Performance Indicator (API) marks and interview. Written examination consist one objective question paper comprising General Knowledge and administrative aptitude test of fix marks (30+70) 100 marks. For API 50 marks which shall be allotted by the Commission's guideline based on U.G.C. norms. For Interview fixed 20 marks.

(2) The number of candidates to be called for interview as for as possible, be between three to five, the vacancies advertise as the Commission may consider proper. All within cut off marks shall be called for interview."

19. According to the learned counsel for the respondents, the candidates have been called for interview as per the statutory provisions in the ratio of 1:5 by determining cut off marks categorywise i.e. General, OBC and SC/ST.

20. Learned counsel for the opposite parties no. 2 & 3 has further relied upon

the definition of selection as provided in Regulation 2(m) which is quoted below :-

2(m) "Selection" means selection of candidate finally after written examinations and interview, in pursuance of Advertisement already made." He has also placed reliance on Regulation 6 of the Regulations,2014, where it has been provided that "Final result declared to the marks of written examination and interview."

21. Learned counsel for the respondents has drawn attention of this court to the Press Release made by the Commission on 17-07-2019, which is quoted below :-

"यह भी स्पष्ट करना है कि लिखित परीक्षा सम्पूर्ण चयन प्रक्रिया की एक बीच की कड़ी है जिसमें अभ्यर्थियों को मात्र साक्षात्कार हेतु आमंत्रित किया गया है। ध्यातव्य है कि लिखित परीक्षा का परिणाम चयन नहीं होता है, आयोग द्वारा लिखित परीक्षा में प्राप्त अंकों के आधार पर विनियमावली–2014 के बिन्दु–6(2) साक्षात्कार के पश्चात् सफल अभ्यर्थियों के (लिखित परीक्षा + साक्षात्कार) प्राप्त अंकों की समेकित मेरिट सूची के आधार पर उत्तर प्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिए आरक्षण) अधिनियम–1994 के बिन्दु–3(6) के तहत अन्य पिछड़ा वर्ग, अनुसूचित जाति एवं अनुसूचित जनजाति के अभ्यर्थी अनारक्षित ;न्दतमेमतअमकद्ध सामान्य श्रेणी में चयनित किये जा सकेंगे।"

22. The learned counsel has further relied upon an office memorandum which has been issued by the U.P. Public Service Commission on 09-12-2019,wherein it has not been provided that if any candidate has taken benefit of any qualified standard, then that candidate is entitled for migration/adjustment in the open category at the stage of final selection. Copy of the said Office Memorandum has been enclosed with the written submissions filed on behalf of the opposite parties no. 2 & 3.

23. The learned counsel for the respondents has placed reliance on para 52 of the Judgment in the case of Sanjeev Kumar Singh Versus State of U.P. and Others, reported in 2007(2) ADJ 150, wherein it has been held that ex-facie and undoubtedly, at the time of final select list, Section 3(6) of Act of 1994 would be applicable and if a reserve category candidate has secured marks more than a last general category candidate, he is entitled to be selected against unresreved seat without being adjusted against a reserved seat. Even, the said judgment is not of any help to the opposite parties no. 2 & 3, the reason being that in the same paragraph, it has been provided that all the candidates securing 50% marks and more in the preliminary qualifying written test participated in the physical test irrespective of the number of candidates qualifying against individual category. The standard of selection is common to all, whereas in the present writ petitions, the petitioners have been debarred from interview despite the fact that they have secured more marks in the written test than the candidates who were called for the interview belonging to unreserved category.

24. Learned counsel has further submitted that the method of shortlisting can validly be adopted by the selection body even in the absence of any rule or regulation and in support of his contention, he has also relied upon the Judgment of the Apex Court in the case of B.Ramakichenin Vs Union of India, reported in 2008(1)SCC,362. For convenience, para nos. 15,16 & 17 of the said Judgment are quoted below:-

"15. It is well settled that the method of short- listing can be validly adopted by the Selection Body vide Madhya Pradesh

Public Service Commission vs. Navnit Kumar Potdar and another 1994 (6) SCC 293 (vide paras 6, 8, 9 and 13), Government of Andhra Pradesh vs. Dilip Kumar and another 1993 (2) SCC 30, etc.

16. Even if there is no rule providing for short- listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. for example, if for one or two posts there are more than 1000 applications received from eligible candidates, it may not be possible to interview all of them. In this situation, the procedure of short-listing can be resorted to by the Selection Body, even though there is no mention of short-listing in the rules or in the advertisement.

17. However, for valid short-listing there have to be two requirements

(i) It has to be on some rational and objective basis. For instance, if selection has to be done on some post for which the minimum essential requirement is a B.Sc. degree, and if there are a large number of eligible applicants, the Selection Body can resort to short-listing by prescribing certain minimum marks in B.Sc. and only those who have got such marks may be called for the interview. this can be done even if the rule or advertisement doe not mention only those who have the aforementioned minimum marks, will be considered or appointed on the post. Thus the procedure of short-listing is only a practical via- media which has been followed by the courts in various decisions since otherwise there may be great difficulties for the selecting and appointing as they may not be able to interview hundreds and thousands of eligible candidates;

(ii) If a prescribed method of short-listing has been mentioned in the rule or advertisement then that method alone has to be followed."

25. Learned counsel for the respondents has submitted that the selection is as per Regulations, 2014. The petitioners have neither challenged the relevant provisions of Regulations,2014 nor the Office Memorandum issued by the Commission. He has further contended that the the Judgments relied upon by the learned counsel for the petitioners are not applicable in the present case for the reason that the Judgment in the case of U.P. Power Corporation Ltd.(Supra), there was no Regulation, whereas in the present case, the Regulations are in existence providing the procedure and defining the selection.

26. As far as the other Judgment in the case of **Government of Andhra Pradesh Versus P.Dilip Kumar and Another,** reported in **1993(2)SCC310,** is also not applicable,since the provisions are different.

27. On the other hand, learned counsel namely Sri Anuj Kudesia, Sri Gaurav Mehrotra and Sri Satendra Tripathi, who have moved impleadment applications on behalf of the unreserved category candidates, their impleadment applications have already been allowed by this court by its order dated 02-06-2020 have submitted that the petitioners have not approached this court with clean hands by making concealment in not disclosing that they have appeared in the

examination by taking relaxation of 5% marks in post graduation as admissible to OBC category candidates. Sri Anuj Kudesia, Advocate, with the affidavit has also enclosed the copy of the form of Sri Rohit Verma, showing that he has scored 50% marks in Post Graduate and by taking advantage of relaxation of 5% marks, he became eligible to participate in the selection, since eligibility is 55% marks in the post graduation. It has further been contended that the petitioners have participated in the selection as an OBC Category candidates by taking relaxation and hence, cannot be treated at par with the candidates belonging to unreserved category.

28. Sri Anuj Kudesia, learned counsel has relied upon the Judgment of the Apex Court in the case of **Deepa EV Versus Union of India & Ors**, reported in **[2017(12)SCC,680** and the Judgment dated 04-12-2019 passed by the Apex Court in the case of The Secretary, U.P. Public Service Commission Versus Dr. Shiv Vinayak Tripathi and Another.

29. Learned counsel after arguing at some length, have failed to dispute the law laid down in the case of **Jitendra Kumar Singh (Supra**) and very fairly accepted that in the present case, Judgment in the case of Jitendra Kumar Singh(Supra) is applicable.

30. Sri Anuj Kudesia, learned counsel has further contended that the petitioners on the basis of assumption disclosed their marks in the writ petitions and there is no official declaration of the result of the written examination by the Selection Service Commission but it is found that the marks said to be obtained by the petitioner were not disputed in the Counter Affidavit filed on behalf of opposite parties no. 2 & 3.

31. Sri Karunakar Srivastava, learned counsel for the petitioners in Writ Petition No. 19881 (S/S) of 2019, has filed a Supplementary Affidavit disclosing therein that the petitioners in his writ petition have scored more than 55% marks in post graduation and in support of his contentions, he has enclosed copy of the form. On being asked learned counsel representing the opposite parties no. 2 & 3 (U.P. Higher Education Service Commission), as to whether they want to file any objection/reply, the learned counsel representing the Commission has stated that no reply is required and the documents are on record.

32. After hearing learned counsels for the parties, it is found that it is not disputed that if a candidate belonging to reserved category scores higher marks than a candidate belonging to unreserved category, then the reserved category candidate would be migrated against the seats/posts of unreserved category irrespective of having taken any concession, as laid down in various Judgments of this court as well as of the Apex Court. To adjudicate the controversy in the present writ petition, the following questions crop up for consideration :-

(I) In a case, where the benefit of reservation is provided to certain categories, will it be permissible to shortlist the candidates categorywise and prepare a separate lists of each category of candidates, namely General, OBC and SC/ST.

(II) Can a candidate in the reserved category be migrated to the list of

candidates of unreserved category on the basis of his merit ?

(III) At what stage of the process of recruitment, list of candidates on merits, so as to be called for interview is to be prepared particularly in reference to the provisions contained in Regulations,2014 ?.

33. It has been held by the Apex Court in the case of **Jitendra Kumar (Supra)** that the competition would start only at a stage when all the persons who fulfill all the requisite eligibility qualification,age etc. are shortlisted. Relevant extract of the said Judgment is quoted below:-

"17. .....However, after the promulgation of the 1994 Act and issuance of the Instructions dated 25th of March, 1994, the State Government has not treated relaxation in age and fee as relaxation in the standard of selection. Therefore, even if a candidate has availed concession in fee and or age limit, it cannot be treated to be relaxation in standard of selection. Therefore, it would not deny a reserved category candidate selection in Open Competition with General Category candidates. Such concessions can be granted by the State under Section (8)1 of the Act. The Division Bench has also held that a relaxation in age and concession in fee are provisions pertaining to eligibility of a candidate to find out as to whether he can appear in a competitive test or not and by itself do not provide any indicia of open competition. The competition would start only at a stage when all the persons who fulfill all the requisite eligibility qualification, age etc. are short listed. The candidates in the zone of consideration entering the list on the basis of aforesaid qualifications would thereafter participate in competition and open competition would commence therefrom. Therefore, concession granted under Section 8 would not disentitle a reserved category candidate of the benefit under Section 3 sub-Section (6)."

"49. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgment as noticed above. In these matters, we are concerned with the interpretation f the 1994 Act, the instructions dated 25.03.1994 and the GO dated 26.02.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved category candidate, thus, becoming eligible to be considered against a reserved vacancy, can also be considered against an unreserved vacancy if he/she secures more marks than the last candidate in the general category."

34. It is also clear that under the law a reserved category candidate has right to be considered against both the vacancies i.e. vacancies available for general category candidates depending upon his merit and the reserved category candidates. The vacancies under the unreserved category are not reserved for anyone. A candidate belonging to the reserved category who has scored higher marks than the last in the merit list of general category, would be adjusted against the unreserved vacancy and not against the reserved vacancy, against which he has applied.

35. If the submissions made on behalf of the opposite parties no. 2 & 3 are accepted then at the intermediate stage, the reserved candidate though

having scored higher marks in the written examination cannot be migrated to the unreserved category candidates, who have scored lesser marks, it would then lead to illegality and discrimination for the reasons that firstly; the merit will be compromised whereas it is the very basis of selection, secondly;, by eliminating the reserved category candidate with higher marks at the intermediate stage itself namely, prior to interview amounts to final rejection of the candidature before completion of process of selection, thirdly; if the migration from reserved to unreserved category is not permitted at the intermediate stage i.e at the interview stage, then how the categorization has been made at the intermediate stage fourthly; if contention of learned counsel representing the opposite parties no. 2 & 3 is accepted, then very purpose of the legislation of Act No. 4 of 1994 particularly, Section 3(6) would be frustrated and would become redundant.

36. The contention made on behalf of opposite parties no. 2 & 3 is that the selection is proceeded as per Regulation 6(2), which provides that number of candidates to be called for interview would be 3 to 5 times of the vacancies advertised, as stated in the Counter Affidavit, is also not acceptable for the reason that Regulation 6(2) says that "as for as possible", meaning thereby, the ratio could be more than five times if the situation may so demand.

37. Regulation 6(2) is flexible and procedural in nature, which cannot impinge upon substantial rights provided statutorily i.e. U.P. Act No. 4 of 1994 and constitutionally. Again Regulation 6(2) does not put any limitation as stated in the Counter Affidavit as a reason not extending the zone of consideration and try to justify their arguments.

38. Contention of learned counsel for the opposite parties no. 2 & 3 is that for limitation of extending the zone of consideration by increasing the ratio is also against the law laid down by the Apex court. In support of their contention for shortlisting, relied upon a decision which rather held otherwise in the case of Dr. Shiv Vinayak Tripathi (Supra). The facts of the case were that in order to shortlist the candidates, the screening test was conducted by the appellants in terms of the resolution and the ratio of 1:3 was applied, for the next stage of selection process which was in intermediate stage. The Selection Service Commission had increased the ratio from 1: 3 to 1: 12 as for as the OBC candidates are concerned for calling the OBC category candidates obtaining the equal marks belonging to general category candidates. The said action was challenged and controversy had reached upto the Apex Court. The Apex Court held that there is no illegality or invalidity in such exercise of power by the Commission for the reason that as per the well settled law that a person belonging to reserved category, entitled to be considered against the unreserved post, such person has to be firstly absorbed against the post of unreserved category.

The reliance placed upon press release dated 09/02/2019 has no value, whatsoever, so as to deserve consideration. On the face of it, it is contrary to statutory provisions under section 3(6) of 1994 Act. Again it has been issued after first part of selection has already been taken place. It cannot have any retrospective effect after the selection has started and completed in parts. This

press release does not help the respondents.

39. Judgment in the case of Deepa EV(Supra) relied upon by learned counsel, Sri Anuj Kudesia and Sri Gaurav Mehrotra is not applicable in the present case though the issue is same as mentioned in para 4 of the said Judgment, which reads as follows :-

"4. The appellant, who has applied under OBC category by availing age relaxation and also attending the interview under the "OBC category" cannot claim right to be appointed under the General category."

The Apex Court in para 8 of the said Judgment held as under :-

"8. The learned counsel for the appellant mainly relied upon the judgment of this Court in Jitendra Kumar Singh v. State of U.P., which deals with the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Government Order dated 25.03.1994. On a perusal of the above judgment, we find that there is no express bar in the said U.P. Act for the candidates of SC/ST/OBC being considered for the posts under general category. in such facts and circumstances of the said case, this Court has taken the view that the relaxation granted to the reserved category candidates will operate a level playing field. In the light of the express bar provided under the proceedings dated 01.07.1998 the principle laid down in Jitendra Kumar Singh cannot be applied to the case in hand."

In these circumstances, the Judgment in the case of Deepa EV(Supra) does not support the contention of learned counsels rather it cuts against their own argument.

40. Contention of learned counsel representing the opposite parties no. 2 & 3 that the Judgment in the case of **U.P. Power Corporation Ltd. (Supra)**, is not applicable for the reason that the U.P. Power Corporation Ltd. has no Regulations like Regulations, 2014. The said contention is not acceptable, since it is wholly immaterial whether such Regulation exits or does not exist particularly in view of provisions u/s 3(6) of 1994 Act and the principle of equality in the matter of selection on merit.

41. Judgment of Division Bench of this court in the case of **U.P. Power Corporation Ltd. (Supra)**has been followed by this court in the case of Lalit Kumar (Supra).

42. In view of the discussions held above, the questions as framed are replied accordingly as follows :-

(1) Shortlisting of the candidates categorywise is permissible with or without any such provision.

(2) Yes, the candidates after short listing, participated in the open selection alongwith the candidates belonging to unreserved category if scored higher marks then they shall be migrated to the unreserved category vacancies according to the merit and if necessary the ratio of candidates can be increased against the number of vacancies more particularly in view of flexibility provided in Regulation 6(2) of Regulation 2014 or even otherwise.

(3) By eliminating the reserved category candidate with higher marks at the intermediate stage itself namely, prior

to interview amounts to final rejection of the candidature before completion of process of selection. Regulations 2014 cannot be read in contravention of provision of an Act and the Constitution. A harmonious construction has to be made reading the provisions of Regulations,2014, Section 3(6)of U.P. Act No. 4 of 1994 and Articles 14 and 16 of the Constitution of India. The position that emerges out is that a reserved category candidate shall not be debarred from further selection if the candidate has scored higher marks than cut off marks fixed for the candidates belonging to unreserved category called for the interview.

43. At later stage, learned counsels representing the private respondents have relied upon the Judgment and order dated 10-11-2016 passed by this court in Writ Petition No. 6083 (S/S) of 2016, Sachhida Nand Mishra Versus State of U.P. and Others, to say that in such a circumstances whole selection need not be quashed and relief may be confined to the petitioners of this case who have approached this court. As a mater of fact no such plea has been raised to quash the whole selection in the present proceedings. The petitioners in the two writ petitions in question can well be granted relief confined to them without disturbing the whole process of selection which question was not raised by any party nor any such relief is sought.

44. It has also been informed by learned counsel representing all the parties that in all other 32 subjects, the selection has been made by following the same procedure and appointment orders have also been issued in favour of the successful candidates except for the Sociology Subject.

45. Since, the petitioners can be granted relief without quashing the selection process held so far, it is hereby directed that the petitioners having higher marks than the last candidate of unreserved category called for the interview, the petitioners, since have approached the court, shall be allowed in the further process of selection, against the unreserved seats, namely in the interview. To avoid any further delay, a direction is also issued to opposite parties no. 2 & 3 to complete the process as early as possible say within a period of six weeks from the date a certified copy of this order is served.

46. With the directions made hereinabove , both the writ petitions are hereby allowed.

47. No order as to costs.

48. Let a copy of this order be placed on the record of Writ Petition 19881 (S/S) of 2019.

(2020)06ILR A760
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.03.2017

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Rent Control No. 4819 of 2017

Haribansh Singh ...Appellant
Versus
Addl. Dist. Judge/F.T.C. No. 3, Raebareli & Ors. ...Respondents

Counsel for the Appellant:
Ajay Sharma

Counsel for the Respondent:

Civil Law - valid and invalid deposit of rent - The U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 20(2) and 30(1) - Provincial Small Causes Courts Act, 1887: Section 25

It is settled that in order to avail the benefits under rent control legislations the tenants are obliged to strictly comply with the provisions of the rent statutes. (Para 16)

The landlord had sent a notice dated 28.02.2007 terminating the tenancy of the petitioner (tenant) and demanding arrears of rent. Both the courts below have concurrently held that the said notice is deemed to have been served upon the petitioner. On 03.04.2007, the landlord filed the suit for arrears of rent and ejectment against the petitioner. It was only thereafter that the petitioner, on 20.04.2007, moved an application under Section 30 of the Act before the Court. The petitioner was defaulter at the time when the suit of Section 30 of the Act was filed. In view of the settled legal position the amount alleged to have been deposited by the petitioner under Section 30(1) of the Act, after the notice of demand was served upon him, is not a valid deposit and as such the petitioner does not derive any benefit out of said deposit. In case, the amount alleged to have been deposited by the petitioner under Section 30 of the Act is excluded, the petitioner on his own showing is not entitled to the benefit of section 20(4) of the Act. (Para 21)

Writ Petition Rejected. (E-10)

List of cases cited:-

1. Harcharan Singh vs Shivrani (1981) 2 SCC 535

2. Mundri Lal vs Sushila Rani (2007) 8 SCC 609

3. Smt. Mridula Dayal vs VIth Addl. District Judge, Allahabad & Ors. 1986 (2) ARC 132 *(followed)*

4. E. Palanisamy vs. Palanisamy (D) & ors. (2003) 1 SCC 123

5. Gokaran Singh vs 1st Additional District and Session Judge, Hardoi and others, 2000 (1) ARC 653 *(followed)*

6. Madhu Mittal (Smt.) vs Additional District Judge, Ghaziabad and ors 2004 (2) ARC 326 *(followed)*

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. On 03.04.2007, the plaintiff-respondent no. 3 instituted a Small Causes Case No. 7 of 2007 before the Court of Civil Judge, Senior Division, Court No. 14, Raebareli against the defendant-petitioner, for recovery of arrears of rent and ejectment. In her plaint, the plaintiff alleged that she was the landlady of a shop situated in House No. 101, Ward No. 3, situated at Mohalla Nai Bazaar, Lalganj, District Raibareli of which the defendant was a tenant on a monthly rent of Rs. 600 per month, plus taxes and that he had not paid rent for the period extending from November, 2005 to February, 2007 in spite of notice of demand dated 28.02.2007.

2. On 30.05.2008, the petitioner filed his written statement controverting the material averments made in the plaint. The petitioner inter alia pleaded that rent of the shop was Rs. 600 per month including taxes; that the alleged notice dated 28.02.2007 was never served upon the petitioner; that rent upto December, 2006 was paid; that the landlady refused to accept the rent for the month of January, 2007 and as such the same was sent to her by money order, which she

refused to accept. It was vaguely alleged that appropriate proceedings had been initiated for depositing the rent but no orders had been passed in the said proceeding. Alongwith his written statement, the petitioner also moved an application under section 151 CPC for depositing Rs. 9400/- (Rs. 8400 towards rent for the period extending from January, 2007 to February, 2008 and Rs. 1000/- towards Court fee and other expenses).

3. Based upon the pleadings of the parties, the trial Court framed 5 issues. The trial Court, after taking into account the oral and documentary evidence on record, decreed the suit of the respondent no.3 by judgment dated 27.03.2015. The trial Court inter alia held that the notice of demand had been duly served; that there was a relationship of landlord and tenant between the respondent no.3 and the petitioner; that the petitioner was found to be a defaulter under Section 20(2) of the Act. On these findings the suit was decreed. The aforesaid judgment of the trial Court has been upheld in Revision No. 36 of 2015 by the Additional District Judge, Court No. 3, Raebareli by the judgment dated 27.10.2016. These two judgments are under challenge in this petition.

4. Shri Ajay Sharma, learned counsel for the petitioner has made two submissions. Firstly, that the notice of demand was not served upon the petitioner and secondly, that the "first date of hearing' is the date on which the court applies its mind and not the date of filing of written statement as has been held by the courts below. The counsel submits that the petitioner had deposited the entire arrears of rent after excluding the amount deposited by him under section 30(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction Act, 1972 (for short "the Act') by the "first date of hearing' and as such the petitioner was entitled to the benefit of sub-section (4) of section 20 of the Act.

5. In so far as the first submission of the learned counsel for the petitioner is concerned, both the Courts below, on the basis of the evidence on record, have returned a concurrent finding of fact that the notice of demand dated 28.02.2007, which was sent by the respondent no. 3 by registered post, was tendered to the petitioner but was refused by him as was clear from the endorsement made by the postal authorities and consequently the notice would be deemed to have been sufficiently served upon the petitioner. In Harcharan Singh v. Shivrani, (1981) 2 SCC 535 the Apex Court has held that where a notice was sent by registered post and came back with the endorsement 'refused' made by the postal authorities, it would be sufficient in the eye of law to justify the presumption of service of the notice on the addressee. In this view of the matter there seems to be no error in the finding recorded by the Courts below that the notice of demand dated 28.02.2007 was duly served upon the petitioner. Furthermore, the Revisional Court also cannot be questioned for not interfering with the findings of fact recorded by the trial Court.

6. Section 25 of the Provincial Small Causes Courts Act, 1887 (for short "1887 Act') under which the Revisional Court has exercised its jurisdiction reads as under:

"25. Revision of decrees and orders of Courts of Small Causes.--The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

7. In Mundri Lal v. Sushila Rani, (2007) 8 SCC 609, the Apex Court reiterated that under Section 25 of the Act pure finding of fact based on appreciation of evidence may not be interfered with. It was held that findings of fact can be interfered with only when the findings were perverse or were based on no material or the findings had been arrived at upon taking into consideration the inadmissible evidence or the findings had been arrived at without consideration of relevant evidence.

8. In the absence of any patent perversity, in the light of the above precedent of the Apex Court, no valid ground for interference with the finding of fact recorded by the trial Court with regard to service of notice, and its affirmation by the Revisional Court is made out by the petitioner.

9. In so far as the second submission of the learned counsel for the petitioner is concerned, in the facts and circumstances of the case, it would not be necessary for this Court to delve deep into the issue regarding the "first date of hearing' as the outcome of this case hinges upon the question as to whether or not the petitioner had otherwise made compliance of sub-section (4) of Section 20 of the Act.

10. To determine this controversy reference may be made to some of the provisions of the Act. Sub-section (2) of Section 20 of the Act deals with the grounds upon the proof of which a tenant can be evicted from the leased premises. Sub-section (4) of Section 20 provides that if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in Court the amount mentioned therein, the Court may relieve the tenant from the liability of eviction. Relevant portions of Section 20(1), 20(2)(a) and Section 20(4) provide:

"20. Bar of suit for eviction of tenant except on specified grounds.- (1) Save as provided in Sub-section (2), no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner."

proviso (omitted as unnecessary)

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand:

proviso (omitted as unnecessary)

(b) to (g) (omitted as unnecessary)

(3) (omitted as unnecessary)

(4) In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in Court the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine percent per annum and the landlord's costs of the suit

in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-section (1) of Section 30, the Court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground: proviso (omitted as unnecessary) (5) and (6) (omitted as unnecessary)"

11. Section 30 of the Act provides for deposit of rent in Court in certain circumstances. Section 30(1) provide:

"30. Deposit of rent in Court in certain circumstances:-(1) If any person claiming to be a tenant of a building tenders any amount as rent in respect of the building to its alleged landlord and the alleged landlord refuses to accept the same then the former may deposit such amount in the prescribed manner and continue to deposit any rent which he alleges to be due for any subsequent period in respect of such building until the landlord in the meantime signifies by notice in writing to the tenant his willingness to accept it.

(2) & (6) (omitted as unnecessary)."

12. On a conjoint reading of Sections 20 and 30 of the Act, it is apparent that under Section 20(2) of the Act, the landlord gets a cause of action for evicting the tenant when the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. If, however, the tenant pays the entire arrears of rent due on or before the first date of hearing of the suit, the court may relieve the tenant against eviction even though he had not complied with Section 20(2). The tenant can take advantage of the benefit conferred by Section 20(4) only when he pays the entire amount of rent due, as required under Section 20(4), after deducting any amount already deposited by the tenant under Section 30(1) of the Act.

13. According to the petitioner he had deposited the entire arrears of rent on the first date of hearing after deducting the amount deposited by him under Section 30(1) of the Act.

14. A perusal of sub-section (1) of Section 30 of the Act shows that the tender of rent in respect of the building by the person claiming to be a tenant of the building to the alleged landlord of the building, and the landlord's refusal to accept the rent so tendered by the alleged landlord of the building are pre-requisites for making any deposits under sub-section (1) of Section 30 of the Act. In case, the pre-requisites are not fulfilled, the person claiming to be tenant of the building is not entitled to make deposits under sub-section (1) of Section 30 of the Act. Even if any deposits are made under Section 30(1) of the Act without fulfilling the said pre-requisites, such deposits will be invalid, and the person claiming to be tenant of the building will not be entitled to get any benefit of such deposits.

15. In Smt. Mridula Dayal v. VIth Addl. District Judge, Allahabad & Ors. 1986 (2) ARC 132 a Division Bench of this Court explained the difference between a valid deposit and an invalid deposit and held that the tenant cannot derive any benefit out of an invalid deposit by observing as under:

"If the deposit has been made in circumstances covered by subsection (1)

of Section 30 and in the prescribed manner, it would be a valid deposit made under that provision, and it obviously would enure towards claiming of benefit of subsection (4) of Section 20. If, on the other hand, the deposit has either not been made in the circumstances contemplated by sub-section (1) of Section 30 or not in the prescribed manner, it is not a deposit under sub-section (1) of Section 30 at all and no question of taking such deposits into consideration while considering the question whether or not the person claiming to be a tenant is entitled to be relieved of his liability as laid down in Section 20(4) of the Act, would arise."

(emphasis supplied)

16. By a catena of decisions of the Apex Court and also of this Court, it is now settled that in order to avail the benefits under rent control legislations the tenants are obliged to strictly comply with the provisions of these rent statutes.

17. In E. Palanisamy v. Palanisamy (D) & Ors., (2003) 1 SCC 123, the Apex Court held as follows:

"5. The rent legislation is normally intended for the benefit of the tenants. At the same time, it is well-settled that the benefits conferred on the tenants through the relevant statues can be enjoyed only on the basis of strict compliance of the statutory provisions. Equitable consideration have no place in such matters. The statute contains express provisions. It prescribes various steps which a tenant is required to take. In Section 8 of the Act, the procedure to be followed by the tenant is given step by step. An earlier step is a precondition for the next step. The tenant has to observe the procedure as prescribed in the statute. A strict compliance with the procedure is necessary. The tenant cannot straight away jump to the last step i.e. to deposit rent in court. The last step can come only after the earlier steps have been taken by the tenant.

(emphasis supplied)

18. Whether the said pre-requisites regarding tender of rent to the alleged landlord of the building and the refusal thereof by the alleged landlord of the building, are fulfilled in a case, is to be established by the person claiming to be the tenant of the building.

19. A Full Bench of this Court in Gokaran Singh v. Ist Additional District and Sessions Judge, Hardoi and others, 2000 (1) ARC 653 considered the scope of Section 30 and has held as under;

"32. In Indrasani's case (supra) it has been held that if the amount of rent at the correct rate is tendered by the tenant and the same is refused by the landlord, which covers to a particular period, tenant can not be held to be defaulter in respect thereof. After refusal of the rent by the landlord, tenant is legally entitled to deposit the same in the court under Section 30, but if thereafter, landlord serves notice of demand again at a higher rate, tenant need not tender the amount, which has been deposited under Section 30 again but he will be under obligation to tender the amount of rent due at the correct or admitted rate of rent. Without tendering the said amount, the tenant will have no right to deposit the same under Section 30 of the Act."

(emphasis supplied)

20. In Madhu Mittal (Smt.) v. Additional District Judge, Ghaziabad and

others, 2004 (2) ARC 326 a Division Bench of this Court following the dictum of the Full Bench in the case of Gokaran Singh (supra) held as under:

"4. The tenant started depositing rent under Section 30 of U.P. Act No. 13 of 1972 with effect from 01.07.1993 and continued to deposit the rent under Section 30 till 30.06.1995. Defendant admitted that meanwhile he received two registered notices from the landlord dated 27/30 January 1994 demanding the rent. In spite of the said notices, defendant continued to deposit the rent under Section 30 of the Act. The defendant did not deposit any rent in the suit. The suit was ultimately decreed on 30.01.1996 by J.S.C.C. Tenant-respondent no. 2 filed a revision against the judgment and decree passed by the trial court under Section 25 P.S.C.C. Act being S.C.C. Revision No. 60 of 1996. Vth Addl. District Judge, Ghaziabad through judgment and decree dated 19.03.1997, allowed the revision, set aside the judgment and decree passed by the trial court and dismissed the suit. The Revisional Court placing reliance upon, 1986 All. C.J. 782 (Gyanendra Lal and another Vs. Vishnu Narain Mishra) held that even after filing of the suit for ejectment tenant had two options, one deposit of rent under Section 30 of the Act and second; deposit of rent in court where suit for ejectment was filed. The writ petition is directed against the aforesaid judgment and order of revisional court.

5. It has been held in Full Bench Authority of this Court reported in 2000 (1) ARC 653, that deposit of rent under Section 30 of Act, after receiving notice of demand, is not permissible and any such deposit, if made, will not be of any benefit of the tenant. The tenant will have to be treated defaulter in payment of rent for the period subsequent to the receipt of notice given by landlord intimating his intention to receive the rent directly.

6. Accordingly, I hold deposit of rent made by the tenant after receipt of notice dated 27/30 January 1994 was not permissible and the said deposit cannot be said to be payment to the landlord. The tenant was defaulter when the suit was filed and the trial court rightly decreed the suit. In view of the above, I hold that the judgment passed by the revisional court is patently erroneous in law."

(emphasis supplied)

21. In the case at hand, the respondent no. 3 had sent a notice dated 28.02.2007 terminating the tenancy of the petitioner and demanding arrears of rent. Both the Courts below have concurrently held that the said notice is deemed to have been served upon the petitioner. The said finding has been upheld by this Court. On 03.04.2007, the petitioner filed the suit for arrears of rent and ejectment against the petitioner. It was only thereafter that the petitioner, on 20.04.2007, moved an application (registered as Misc. Case No. 21 of 2007) under section 30 of the Act before the Court of Civil Judge (Junior Division), Court No. 18, Dalmau, Raebareli. In view of the settled legal position the amount alleged to have been deposited by the petitioner under section 30(1) of the Act, after the notice of demand was served upon him, is not a valid deposit and as such the petitioner does not derive any benefit out of the said deposit. In case, the amount alleged to have been deposited by the petitioner under section 30 of the Act is excluded, the petitioner on his own showing is not entitled to the benefit of section 20(4) of the Act. The petitioner was, thus, a

defaulter at the time the suit was filed. The trial Court has rightly decreed the suit and the Revisional Court has rightly upheld the decree.

22. In view of the discussion made above there is no infirmity or illegality in the orders passed by the Courts below.

23. The petition is devoid of merit and is accordingly dismissed.

(2020)06ILR A767
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 75 of 2020

U.P.State Electricity Board, Lucknow & Ors. ...Appellants

Versus

Raghuraj Singh ...Respondent

Counsel for the Appellants:
Sri Amit Saxena, Sri Abhishek Srivastava

Counsel for the Respondent:
Sri Ajit Kumar, Sri Punit Khare, Sri Satish Tandon

A. Civil Law -U.P. State Electricity Board (Employees' Retirement) Regulations, 1975 – Regulation 2(c) – Compulsory Retirement – Opportunity to show cause – Principle of Natural Justice – An order of compulsory retirement involves no civil consequences and that the government servant does not lose any of the rights acquired by him before retirement – The appropriate authority has an absolute right to retire a government servant if it is of the opinion that it is in the public interest to do so – Accordingly if the authority bona fide forms that opinion, the correctness of the same cannot be challenged. (Para 13)

B. Compulsory Retirement – Purpose – While passing of an order of compulsory retirement, public interest, is the primary consideration, the purpose being to retain only efficient persons in service and to dispense with the services of the 'dead wood'**.** (Para 14)

C. Compulsory Retirement – Scope of Interference – In a matter of compulsory retirement, the subjective satisfaction of the reviewing authority was not open to court's interference in absence of mala fides, perversity, arbitrariness or unreasonableness – The object being public interest the formation of bona fide opinion by the appropriate authority in this regard could be challenged only on the grounds of being based on no evidence or being based on collateral grounds or being arbitrary but could not be challenged on merits. (Para 17 and 18)

Special Appeal allowed; Writ Petition dismissed (E-1)

Cases relied on :-

1. U.O.I. Vs Col. J.N. Sinha & ors. (1970) 2 SCC 458

2. St. of Guj. & anr. Vs Suryakant Chunilal Shah (1999) 1 SCC 529

3. U.O.I. Vs M.E. Reddy & anr. (1980) 2 SCC 15

4. Baikuntha Nath Das & anr. Vs Chief Dist. Medical Officer, Baripada & anr. (1992) 2 SCC 299

5. Posts and Telegraphs Board & ors. Vs C.S.N. Murthy (1992) 2 SCC 317

6. K. Kandaswamy Vs U.O.I. & anr. (1995) 6 SCC 162

7. Pyare Mohan Lal Vs St.of Jhar. & ors. (2010) 10 SCC 693

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

1. The present special appeal seeks to challenge the judgment and order dated 17.04.2019 passed in Writ-A No. 17360 of 1995 (Raghuraj Singh Vs. U.P.S.E.B. Lucknow and others) whereby the writ petition, which was directed against an order of compulsory retirement dated 23.12.1994 passed in exercise of powers under Regulation 2 (c) of the U.P. State Electricity Board (Employees' Retirement) Regulations, 19751 against the respondent-writ petitioner, has been allowed and the order of compulsory retirement has been set aside.

2. The Uttar Pradesh State Electricity Board, Lucknow2 and its authorities, who were respondents in the writ petition, are the appellants before us.

3. It is sought to be contended on behalf of the appellants that the learned Single Judge has proceeded to allow the writ petition principally on the basis of a finding that there existed no material on record which could support the opinion that the continuance of the petitioner in service was not in public interest and nothing to this effect had been detailed in the counter affidavit.

4. Learned Senior Counsel appearing for the appellants submits that the aforementioned finding recorded by the learned Single Judge is contrary to the facts on record, inasmuch as the order of compulsory retirement dated 23.12.1994 was in terms of the Board's order dated 22.2.1991 and as per the recommendation made by the Screening Committee on 07.10.1994, and on the basis of adverse reports, gross negligence in performance of duties and indiscipline on the part of the respondent-petitioner. It has been pointed out that the aforementioned fact was brought on record by a counter affidavit filed on behalf of the appellants/respondents, and the learned Single Judge having proceeded to allow the writ petition without taking into consideration the facts on record, the judgment cannot be legally sustained.

5. Learned counsel appearing for the respondent-petitioner, on the other hand, has supported the judgment of the writ court by submitting that there was no material whatsoever which could have justified passing of the order of compulsory retirement which was founded on no material and was a result of non-application of mind and has rightly been set aside by the learned Single Judge.

6. Rival contentions now fall for consideration.

7. The order of compulsory retirement dated 23.12.1994, in the present case, has been passed in exercise of powers under Regulation 2 (b) of the Regulations 1975, as amended in terms of the UPSEB (Employees' Retirement) (Second Amendment) Regulations, 1993. For ease of reference, Regulation 2 (b) and Regulation 2 (c) are being extracted below :-

"2. (a) x x x x x

Board's employee (whether permanent or temporary), without assigning any reason, require him to retire, in public interest, provided that such employee has completed 20 years of qualifying service and has attained the age of 50 years. Any employee of the Board, also, may, by giving three months' notice to the appointing authority, seek

voluntary retirement at any time, after attaining the age of 45 years, provided that he has completed minimum qualifying service of 20 years.

(c) The period of such notice shall be three months :

Provided that--

(i) any such Board's employee may, by order of the appointing authority or any authority to which the appointing authority is subordinate, without such notice or by a shorter notice be retired forthwith and on such retirement the Board's employee shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or, as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before his retirement.

(ii) It shall be open to the appointing authority or any authority to which the appointing authority is subordinate to allow a Board's employee to retire without any notice or by a shorter notice without requiring the Board's employee to pay any penalty in lieu of notice :

Provided further that such notice given by the Board's employee against whom disciplinary proceedings are pending or contemplated, shall be effective only if it is accepted by the appointing authority or any authority to which the appointing authority is subordinate, provided that in the case of contemplated disciplinary proceedings the Board's employee shall be informed before the expiry of his notice that it has not been accepted :

Provided also that the notice once given by a Board's employee under clause (b) seeks voluntary retirement shall not be withdrawn by him except with the permission of the appointing authority or any authority to which the appointing authority is subordinate;"

8. The provisions with regard to compulsory retirement under the aforementioned Regulations 1975 are somewhat similar in terms to the Fundamental Rule 56 (j) of the Fundamental Rules and also Fundamental Rule 56 (c) of the U.P. Fundamental Rules.

9. The principal ground canvassed by the petitioner to assail the order of compulsory retirement before the writ court was by submitting that there was no material whatsoever to justify that the petitioner had become a "dead wood", and that the order was founded on no material and was a result of non-application of mind. This was controverted by the appellants/respondent by filing a counter affidavit wherein it was specifically averred that the order of compulsory retirement dated 23.12.1994 was passed in terms of Board Order dated 22.02.1991 and as per the Screening Committee recommendation dated 7.10.1994 on the basis of adverse reports, gross negligence of duties and indiscipline on part of the respondent-petitioner. It was stated in paragraph 20 of the counter affidavit as follows:-

"20. That the contents of paragraph No.23 of the affidavit is not admitted and it is submitted that petitioner was retired vide Order No. 1729-E-8, dated 23.12.1994 in terms of B.O.No.100-Kavini-RVP/29/12-Kavini, dated 22.2.1991- as per screening committees

recommendations O.M.No.2891-E-V/V-Karya Chamta, dated 07.10.1994 only on the basis of adverse reports, gross negligence of duties and sufficient indiscipline on the part of the petitioner."

10. Attention of this Court has also been drawn to the proceedings of the Screening Committee and its recommendations dated 07.10.1994, which are on record as part of an affidavit filed on behalf of the appellants in the instant appeal, wherein the service records of the respondent-petitioner have been referred to.

11. The recommendation made by the screening committee which forms the basis of the order of compulsory retirement clearly shows that the petitioner was given adverse entries in his character roll for the period 03.12.1993 to 31.03.1984 and thereafter for the period 01.04.1985 to 31.03.1986 again he was given adverse entry in his character roll and his integrity was also withheld. Subsequently, for the period 5/1982 to 01.12.1983, on the basis of a departmental inquiry, an order of punishment of reduction of his pay scale by two stages was given and also a censure entry was awarded. The Screening Committee also has taken notice of the fact that a domestic enquiry was pending against the petitioner for the reason that the petitioner had not complied with an order of transfer dated 19.07.1988 and had not joined the place of his transfer within the stipulated time period.

12. In order to appreciate the rival contentions, the principles, evolved in terms of judicial precedents, governing compulsory retirement, may be adverted to.

13. The question as to whether before passing of an order of compulsory retirement there is any requirement of providing opportunity to show cause and whether application of rules of natural justice are necessary were considered in the decision in **Union of India Vs. Col. J.N. Sinha and others3**, and it was held that an order of compulsory retirement involves no civil consequences and that the government servant does not lose any of the rights acquired by him before retirement. Referring to Fundamental Rule 56 (j), it was held that the appropriate authority has an absolute right to retire a government servant if it is of the opinion that it is in the public interest to do so. The power could be exercised subject to the conditions mentioned in the rule, one of which was that the concerned authority must be of the opinion that it is in public interest to do so, and accordingly if the authority bona fide forms that opinion, the correctness of the same cannot be challenged. The observations made in the judgment, in this regard, are as follows :-

"9. Now coming to the express words of Fundamental Rule 56(j) it says that the appropriate authority has the absolute right to retire a Government servant if it is of the opinion that it is in the public interest to do so. The right conferred on the appropriate authority is an absolute one. That power can be exercised subject to the conditions mentioned in the rule, one of which is that the concerned authority must be of the

opinion that it is in public interest to do so. If that authority bona fide forms that opinion, the correctness of that opinion cannot be challenged before courts. It is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision.

The 1st respondent challenged the opinion formed by the Government on the ground of mala fide. But that ground has failed. The High Court did not accept that plea. The same was not pressed before us. The impugned order was not attacked on the ground that the required opinion was not formed or that the opinion formed was an arbitrary one. One of the conditions of the 1st respondent's service is that the Government can choose to retire him any time after he completes fifty years if it thinks that it is in public interest to do so. Because of his compulsory retirement he does not lose any of the rights acquired by him before retirement. Compulsory retirement involves no civil consequences. The aforementioned Rule 56(j) is not intended for taking any penal action against the Government servants. That rule merely embodies one of the facets of the pleasure doctrine embodied in Article 310 of the Constitution. Various considerations may weigh with the appropriate authority while exercising the power conferred under the rule. In some cases, the Government may feel that a particular post may be more usefully held in public interest by an officer more competent than the one who is holding. It may be that the officer who is holding the post is not inefficient but the appropriate authority may prefer to have a more efficient officer. It may further be that in certain key posts public interest may require that a person of undoubted ability and integrity should be there. There is no denying the fact that in all organizations and more so in Government organizations, there is good deal of dead wood, it is in public interest to chop off the same. Fundamental Rule 56(j) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest.

x x x

11. In our opinion the High Court erred in thinking that the compulsory retirement involves civil consequences. Such a retirement does not take away any of the rights that have accrued to the Government servant because of his past service. It cannot be said that if the retiring age of all or a section of the government servants is fixed at 50 years, the same would involve civil consequences. Under the existing system there is no uniform retirement age for all Government servants. The retirement age is fixed not merely on the basis of the interest of the Government servant but also depending on the requirements of the society. "

14. In **The State of Gujarat and another Vs. Suryakant Chunilal Shah4**, it was held that while passing of an order of compulsory retirement, public interest, is the primary consideration, the purpose being to retain only efficient persons in service and to dispense with the services of the "dead wood". The assessment of

efficiency is required to be made on the basis of material on record, of which confidential reports are an important input and an employee with doubtful integrity could not be considered to be efficient. It was stated thus :-

"23. In order, therefore, to find out whether any government servant has outlived his utility and is to be compulsorily retired in public interest for maintaining an efficient administration, an objective view of overall performance of that government servant has to be taken before deciding, after he has attained the age of 50 years, either to retain him further in service or to dispense with his services in public interest, by giving him three months' notice or pay in lieu thereof.

24. The performance of a government servant is reflected in the annual character roll entries and, therefore, one of the methods of discerning the efficiency, honesty or integrity of a government servant is to look at his character roll entries for the whole tenure from the inception to the date on which decision for his compulsory retirement is taken. It is obvious that if the character roll is studded with adverse entries or the overall categorisation of the employee is poor and there is material also to cast doubts upon his integrity, such a government servant cannot be said to be efficient. Efficiency is a bundle of sticks of personal assets, thickest of which is the stick of "integrity". If this is missing, the whole bundle would disperse. A government servant has, therefore, to keep his belt tight.

25. Purpose of adverse entries is primarily to forewarn the government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance."

15. Taking a similar view in **Union of India Vs. M.E. Reddy and another5,** it was reiterated that the object of compulsory retirement is to weed out the "dead wood" in order to maintain a high standard of efficiency and initiative in service. The object being public interest, the order of compulsory retirement can neither be held to be punitive nor stigmatory and hence the principles of natural justice are not attracted. The observations made in the judgment are as follows :-

"8. An analysis of this rule clearly shows that the following essential ingredients of the rule must be satisfied before an order compulsorily retiring a government servant is passed:

(1) That the member of the Service must have completed 30 years of qualifying service or the age of 50 years (as modified by notification dated July 16, 1969);

(2) That the government has an absolute right to retire the government servant concerned because the word "require" clearly confers an unqualified right on the Central Government;

(3) That the order must be passed in public interest;

(4) That three months' previous notice in writing shall be given to the government servant concerned before the order is passed.

It may be noted here that the provision gives an absolute right to the government and not merely a discretion, and, therefore, impliedly it excludes the rules of natural justice. It is also not disputed in the present case that all the conditions mentioned in rule referred to above have been complied with. It is a different matter that the argument of Reddy is based on the ground that the order is arbitrary and mala fide with which we shall deal later.

9. On a perusal of the impugned order passed by the Government of India it would appear that the order fully conforms to all the conditions mentioned in Rule 16(3). It is now well-settled by a long catena of authorities of this Court that compulsory retirement after the employee has put in a sufficient number of years of service having qualified for full pension is neither a punishment nor a stigma so as to attract the provisions of Article 311(2) of the Constitution. In fact, after an employee has served for 25 to 30 years and is retired on full pensionary benefits, it cannot be said that he suffers any real prejudice. The object of the rule is to weed out the dead wood in order to maintain a high standard of efficiency and initiative in the State Services. It is not necessary that a good officer may continue to be efficient for all times to come. It may be that there may be some officers who may possess a better initiative and higher standard of efficiency and if given chance the work of the government might show marked improvement. In such a case compulsory retirement of an officer who fulfills the conditions of Rule 16(3) is undoubtedly in public interest and is not passed by way of punishment. Similarly, there may be cases of officers who are corrupt or of doubtful integrity and who may be considered fit for being compulsorily retired in public interest, since they have almost reached the fag end of their career and their retirement would not cast any aspersion nor does it entail any civil consequences. Of course, it may be said that if such officers were allowed to continue they would have drawn their salary until the usual date of retirement. But this is not an absolute right which can be claimed by an officer who has put in 30 years of service or has attained the age of 50 years. Thus, the general impression which is carried by most of the employees that compulsory retirement under the conditions involves some sort of stigma must be completely removed because Rule 16(3) does nothing of the sort.

10. Apart from the aforesaid considerations we would like to illustrate the jurisprudential philosophy of Rule 16(3) and other similarly worded provisions like Rule 56(j) and other rules relating to the government servants. It cannot be doubted that Rule 16(3) as it stands is but one of the facets of the doctrine of pleasure incorporated in Article 310 of the Constitution and is controlled only by those contingencies which are expressly mentioned in Article 311. If the order of retirement under Rule 16(3) does not attract Article 311(2) it is manifest that no stigma or punishment is involved. The order is passed by the highest authority, namely, the Central Government in the name of the President and expressly excludes the application of rules of natural justice as indicated above.

The safety valve of public interest is the most powerful and the strongest safeguard against any abuse or colourable exercise of power under this rule. Moreover, when the Court is satisfied that the exercise of power under the rule amounts to a colourable exercise of jurisdiction or is arbitrary or mala fide it can always be struck down. While examining this aspect of the matter the Court would have to act only on the affidavits, documents, annexures, notifications and other papers produced before it by the parties. It cannot delve deep into the confidential or secret records of the government to fish out materials to prove that the order is arbitrary or mala fide. The Court has, however, the undoubted power subject to any privilege or claim that may be made by the State, to send for the relevant confidential personal file of the government servant and peruse it for its own satisfaction without using it as evidence.

11. It seems to us that the main object of this rule is to instil a spirit of dedication and dynamism in the working of the State Services so as to ensure purity and cleanliness in the administration which is the paramount need of the hour as the Services are one of the pillars of our great democracy. Any element or constituent of the Service which is found to be lax or corrupt, inefficient or not up to the mark or has outlived his utility has to be weeded out. Rule 16(3) provides the methodology for achieving this object. We must, however, hasten to add that before the Central Government invokes the power under Rule 16(3), it must take particular care that the rule is not used as a ruse for victimisation by getting rid of honest and unobliging officers in order to make way for incompetent favourites of the government which is bound to lead to serious demoralisation in the service and defeat the laudable object which the rule seeks to subserve. If any such case comes to the notice of the government the officer responsible for advising the government must be strictly dealt with. Compulsory retirement contemplated by the aforesaid rule is designed to infuse the administration with initiative and activism so that it is made poignant and piquant, specious and subtle so as to meet the expanding needs of the nation which require exploration of "fields and pastures new". Such a retirement involves no stain or stigma nor does it entail any penalty or civil consequences. In fact, the rule merely seeks to strike a just balance between the termination of the completed career of a tired employee and maintenance of top efficiency in the diverse activities of the administration.

12. An order of compulsory retirement on one hand causes no prejudice to the government servant who is made to lead a restful life enjoying full pensionary and other benefits and on the other gives a new animation and equanimity to the Services. The employees should try to understand the true spirit behind the rule which is not to penalise them but amounts just to a fruitful incident of the Service made in the larger interest of the country. Even if the employee feels that he has suffered, he should derive sufficient solace and consolation from the fact that this is his small contribution to his country, for every good cause claims its martyr."

16. The scope of judicial review in a matter relating to compulsory retirement came to be considered in **Baikuntha**

Nath Das and another Vs. Chief District Medical Officer, Baripada and another6, and it was held that opinion of the authority regarding compulsory retirement is his subjective satisfaction which is to be formed on the basis of entire record of service and since the order of compulsory retirement does not amount to punishment hence principles of natural justice are not required to be observed in passing of such an order. The principles, in this regard, were laid down as follows :-

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary -- in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter -- of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above.

35. Before parting with the case, we must refer to an argument urged by Sri R.K. Garg. He stressed what is called, the new concept of Article 14 as adumbrated in Maneka Gandhi vs. Union of India, (1978) 1 SCC 248 and submitted on that basis that any and every arbitrary action is open to judicial scrutiny. The general principle evolved in the said decision is not in issue here. We are concerned mainly with the question whether a facet of principle of natural justice -- audi alteram partem -- is attracted in the case of compulsory retirement. In other words, the question is whether acting upon undisclosed material is a ground for quashing the order of compulsory retirement. Since we have held that the nature of the function is not quasi-judicial

in nature and because the action has to be taken on the subjective satisfaction of the government, there is no room for importing the said facet of natural justice in such a case, more particularly when an order of compulsory retirement is not a punishment nor does it involve any stigma."

17. The aforementioned view was reiterated in **Posts and Telegraphs Board and others Vs. C.S.N. Murthy7**, and it was held that in a matter of compulsory retirement, the subjective satisfaction of the reviewing authority was not open to court's interference in absence of mala fides, perversity, arbitrariness or unreasonableness. It was stated as follows:-

"5. ...F.R. 56(j) authorises the Government to review the working of its employees at the end of their period of service referred to therein and to require the servant to retire from service if, in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of the delinquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The courts will not interfere with the exercise of this power, if arrived at bona fide and on the basis of material available on the record. No mala fides have been urged in the present case. The only suggestion of the High Court is that the record discloses no material which would justify the action taken against the respondent. We are unable to agree. In our opinion, there was material which showed that the efficiency of the petitioner was slackening in the last two years of the period under review and it is, therefore, not possible for us to fault the conclusion of the department as being mala fide, perverse, arbitrary or unreasonable. The Division Bench seems to have thought that, since the adverse remarks mentioned in the earlier letter of April 29, 1971 were not repeated in the subsequent letter, it should be taken that they had been given up subsequently or that the respondent had improved in the subsequent year. We do not think that this is a legitimate inference, for the report for 1971-72 only shows that the respondents' propensity to delay matters persisted despite the warning of the previous year. But, even if one assumes that the High Court was correct on this, the adverse remarks made against the respondent in relation to the period 1971-72, standing by themselves, can constitute sufficient material for the department to come to a conclusion in the matter. It is true that the earlier record of the respondent was good but if the record showed that the standard of work of the respondent had declined and was not satisfactory, that was certainly material enabling the department to come to a conclusion under F.R. 56(j). We are of opinion that the High Court erred in setting aside the order of compulsory retirement on the basis that there was no material at all on record justifying the action against the respondent."

18. Considering the nature of compulsory retirement, it was held in the case of **K. Kandaswamy Vs. Union of India and another8,** that an order of compulsory retirement does not amount to punishment nor does it entail loss of retiral benefits nor is it stigmatic. On the scope of judicial review it was held that

the object being public interest the formation of bona fide opinion by the appropriate authority in this regard could be challenged only on the grounds of being based on no evidence or being based on collateral grounds or being arbitrary but could not be challenged on merits. The observations made in the judgment in this regard are being extracted below :-

"8. As seen in the light of documents and in the light of the specific permission sought by the appellant himself on the basis of the special report submitted by the State Government, the Government of India through its appropriate committee reached the conclusion that in view of the doubtful integrity it would not be desirable in the public interest to retain the appellant in service. Accordingly, they have compulsorily retired the appellant from service. Compulsory retirement does not amount to dismissal or removal from service within the meaning of Article 311 of the Constitution. It is neither punishment nor visits with loss of retiral benefits; nor does it cast stigma. The officer would be entitled to the pension that he has actually earned and there is no diminution of the accrued benefits. The object of compulsory retirement of the government employee is public interest. If the appropriate authority bona fide forms that opinion, the correctness thereof on merits cannot be challenged before courts, though it may be open to the aggrieved employee to impugn it. But the same may be challenged on the ground that requisite opinion is based on no evidence or has not been formed or the decision is based for collateral grounds or that it is an arbitrary decision.

9. While exercising the power under Rule 56(j) of the Fundamental Rules, the appropriate authority has to weigh several circumstances in arriving at the conclusion that the employee requires to be compulsorily retired in public interest. The Government is given power to energise its machinery by weeding out dead wood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. When the appropriate authority forms bona fide opinion that compulsory retirement of the government employee is in the public interest, court would not interfere with the order."

19. The scope of judicial review in a matter relating to compulsory retirement again came up for consideration in **Pyare Mohan Lal Vs. State of Jharkhand and others9,** and reiterating the very limited scope of judicial review in case of compulsory retirement which is permissible only on grounds of non-application of mind, mala fides or want of material particulars, it was held that power to retire compulsorily a government servant in terms of service rules is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest. Referring to the earlier precedents on the point, the law was summarized as follows :-

"18. Thus, the law on the point can be summarised to the effect that an order of compulsory retirement is not a punishment and it does not imply stigma unless such order is passed to impose a punishment for a proved misconduct, as prescribed in the statutory rules (See Surender Kumar v. Union of India (2010) 1 SCC 158). The Authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some

cases that in spite of satisfactory performance, the authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said Authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the court to interfere in the exercise of its limited power of judicial review."

20. The provisions contained under Regulation 2 (b) and Regulation 2 (c) of the Regulations 1975 being in similar terms as Fundamental Rule 56 (j) of the Fundamental Rules as also the Fundamental Rule 56 (c) of the U.P. Fundamental Rules, the legal principles, which have evolved in terms of judicial precedents on the point of compulsory retirement under the Fundamental Rules, would squarely apply.

21. In the facts of the present case, the records of the case clearly reflect that the order of compulsory retirement has been passed as per the provisions contained under the Regulations, 1975, in terms of the Board Order dated 22.02.1991 and as per the Screening Committee recommendation dated 07.10.1994 on the basis of adverse reports in the character rolls, gross negligence of duties and indiscipline. The subjective satisfaction, having thus been recorded by the appropriate authority under the statutory regulations, the order cannot be said to be without basis or having been passed on extraneous reasons or without there being any material to support the same so as to render it arbitrary.

22. The judgment of the learned Single Judge whereunder the order of compulsory retirement has been set aside by stating the reason that the same has been passed without any material to support it and nothing in that regard had been referred to in the counter affidavit, thus cannot be supported from the facts which are evident from the records.

23. The judgment of the learned Single Judge is thus legally unsustainable and is therefore set aside.

24. The Special Appeal is accordingly allowed.

25. The writ petition stands dismissed.

(2020)06ILR A778
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal Defective No. 179 of 2020

Cane Commissioner, U.P. & Ors. ...Appellants
Versus
Adalat Singh ...Respondent

Counsel for the Appellants:
Sri Ravindra Singh

Counsel for the Respondent:
Sri Hari Nath Tripathi

A. Constitution of India – Article 226 – Writ – Delay – Jurisdiction of Court – Inordinate delay in approaching the writ Court for reasons of want of *bona fides* or inaction or negligence would deprive a party from his rights of invoking the extraordinary discretionary jurisdiction of the Court – The exercise of jurisdiction under Article 226 is essentially discretionary in nature and in a case of negligence or deliberate gross inaction or lack of *bona fides* on part of the party

approaching the Court, it may not be appropriate to exercise such discretionary jurisdiction – An explanation which is *ex facie* concocted and based on fanciful grounds, would be liable to be rejected. (Para 17 and 18)

Special Appeal allowed; Writ Petition dismissed (E-1)

Cases relied on :-

1. Esha Bhattacharjee Vs Raghunathpur Nafar Academy & ors. (2013) 12 SCC 649

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

1. This Special Appeal arises in respect of a judgment and order dated 29th May, 2019, passed by a learned Single Judge in Writ-A No.29775 of 2000 (Adalat Singh Vs. Cane Commissioner and others).

2. By the impugned judgment and order, the learned Single Judge was pleased to allow the writ petition by setting aside the impugned order dated 22nd February, 1990 with the observations that the writ petitioner was entitled to all consequential benefits.

3. The appellants before us are the Cane Commissioner, Uttar Pradesh, Lucknow and others.

4. The facts of the case reveal that the writ petitioner was appointed as a Class-IV employee at Sahkari Ganna Vikas Samiti Ltd. Dhaulana, District Ghaziabad in terms of an appointment order dated 3rd January, 1984. This appointment order which is annexed to the papers before us, reveals that his engagement was purely temporary and adhoc in nature. Thereafter on 22nd February, 1990 for reasons stated in the order issued on that date, his services were terminated.

5. For convenience, the said order dated 22nd February, 1990 is reproduced hereinbelow along with the official English translation:-

''सहकारी गन्ना विकास समिति लि0
धौलाना, जिला गाजियाबाद

रजिस्टर्ड

दिनांक 22.02.90

पत्रांक 559/60

आदेश

श्री अदालत सिंह

दैनिक स्टोर मैन

जोनल गन्ना सेवा प्राधिकारण की बैठक दिनांक 1.12.90 के प्रस्ताव संख्या 6 के अनुसार आपकी सेवायें लम्बी अवधि से अपनी ड्यूटी से अनुपस्थित रहने व अनुशासन हीनता बरतने के कारण दिनांक 01.08.89 से ही समाप्त की जाती है।

ह0अ0/22.02.90

सचिव

सहकारी गन्ना विकास
समिति लि0

धौलाना (गाजियाबाद)

कार्यालय सहकारी गन्ना विकास समिति लि0 धौलाना (गाजियाबाद)
पत्रांक... दिनाकः...

प्रतिलिपिः— 1. जिला गन्ना अधिकारी गाजियाबाद को सूचनार्थ जोनल गन्ना सेवा प्राधिकारण के प्रस्ताव संख्या 6 की सत्य प्रतिलिपि सहित प्रेषित।

सचिव

सहकारी गन्ना विकास

समिति लि0

धौलाना (गाजियाबाद)

(सत्य प्रतिलिपि)''

(English Translation)--

"Cooperative Sugarcane
Development Societies Ltd.
Dhaulana, District Ghaziabad

Registered

Date-22/02/90

Letter No.559/60

Order

Sri Adalat Singh
Daily Store man

As per resolution no.6 of the meeting of Zonal Sugarcane Service Authority held on 01.12.90, your service is terminated w.e.f. 01.08.89 itself due to being absent from duties for a long period and lack of discipline.

Sd/Illegible/22.02.90

Secretary

Cooperative
Sugarcane Development Societies Ltd.

Dhaulana (Ghaziabad)

Office of the Cooperative Sugarcane Development Societies Ltd. Dhaulana (Ghaziabad).

Letter No... Date:...

Copy to:- 1. Forwarded to the District Sugarcane Officer, Ghaziabad for information along with the copy of resolution no.6 of Zonal Sugarcane Service Authority.

Secretary

Cooperative
Sugarcane Development

Societies Ltd.

Dhaulana (Ghaziabad)

(True copy)"

6. The writ petitioners filed the writ petition on 11th July, 2000. The principal prayers made in the writ petition are as follows:-

(i) Issue a writ, order or direction in the nature of mandamus directing the respondent no.5 and 6 to pay the entire payment of the petitioner w.e.f. Nov. 1998 to May 1998 and also the bonus, allowances etc. and also direct the respondent no.6 to pay the current payments of the petitioner alongwith revised pay scale and increments.

(ii) Issue a writ, order or direction in the nature of Mandamus

directing the respondent no.3 to promote the petitioner on the post of Clerk and to pay the Pay Scale of Clerks as admissible on the rules.

Prayer (after amendment)

(iv) To issue a writ, order or direction in the nature of Certiorari quashing the impugned termination order dated 22.02.1990 passed by respondent no.5 already attached as C.A.-4 in counter affidavit filed on behalf of respondent no.5."

7. The learned Single Judge upon considering the respective contentions of the parties as well as pleadings on record, proceeded to allow the writ petition by setting aside the order of termination dated 22nd February, 1990, with a further observation that the petitioner shall be entitled to all consequential benefits. The reasoning assigned by the learned Single Judge to support the order, is in the following terms:-

"4. For the purpose of present case, whether petitioner is 'temporary' or 'permanent' employee, the facts remains that by means of impugned order, he has been terminated with allegation that he has been unauthorizedly absent and therefore, has committed misconduct.

5. If that be so, such a termination is not a termination simplicitor but punitive in nature and such termination cannot be made without holding inquiry in accordance with Rules i.e. Rules 84 and 85 of U.P. Co-operative Societies Employees Service Regulations, 1975 (hereinafter referred to as "Regulations, 1975".

x x x

9. The termination of petitioner, therefore, is founded on alleged misconduct hence punitive in nature and without holding any inquiry. Hence, order of termination passed by respondents authorities cannot be sustained.

10. In the result, writ petition is allowed. Impugned order dated 22.02.1990 (Annexure 25 to writ petition) is hereby set aside. The petitioner shall be entitled to all consequential benefits."

8. A plain reading of the impugned judgment and order dated 29th May, 2019 reveals that the learned Single Judge did not go into the moot question as to whether discretionary jurisdiction of this Court under Article 226 of the Constitution of India is available to a person who sleeps over his rights for a considerably long period of time.

9. This answer is not forthcoming from a plain reading of the impugned judgment and order. While it is true that even a temporary servant may be entitled for protection if his/her services are sought to be terminated on account of misconduct, negligence, inefficiency or like, such a protection can only be afforded to a person who demonstrates palpable bona fides while approaching the writ Court.

10. The records of the case reflect that the writ petition was initially filed for the purpose of seeking a direction upon the respondent authorities for payment of his dues from November, 1989 to May, 1998, which was based on pleadings to the effect that payments had not been made to him from the month of August, 1989 onwards. To support the aforesaid contention, a copy of a representation

addressed to the Cane Commissioner, U.P., was appended as annexure-2 wherein a claim was stated to have been made for payment of salary and other dues from the month of August, 1989.

11. A counter affidavit dated 9th August, 2004 on behalf of the respondent no.5-Secretary, Sahkari Ganna Vikas Samiti Ltd. Dhaulana, District Ghaziabad, was filed wherein it was stated that the petitioner had been terminated by means of an order dated 22nd February, 1990, in terms of a resolution passed by Sahkari Ganna Samiti and a copy thereof had been sent to him under a registered cover on the same date.

12. After a considerable lapse of time, an amendment application dated 14th July, 2017, came to be filed by the petitioner wherein it was stated that the counter affidavit dated 9th August, 2004 filed by the respondent no.5 indicated that his services stood terminated on 22nd February, 1990 and accordingly necessary amendments were being sought in the pleadings and the prayer clause so as to raise a challenge to the said termination order dated 22nd February, 1990.

13. The stand taken by the petitioner that he was not aware of passing of the termination order dated 22nd February, 1990, does not appear to be plausible. The non-payment of salary and other dues from November, 1989 onwards, which was set up as the basis for filing of the writ petition, seems to have a connection to the fact that the services of the petitioner stood terminated in the year 1990. The various representations, stated to have been submitted before the authorities, in the year 1998, raising a claim in respect of dues for the period 1989 onwards appear to have been made in order to create cause of action for filing of the petition.

14. Even if one goes by the pleadings in the writ petition, there is no explanation whatsoever as to why the petitioner chose to remain silent for a considerably long period of time before setting up a challenge to the termination order passed in the year 1990. The amendment sought by the petitioner seeking to incorporate the relief raising a challenge to the termination order was some time in the year 2017, whereas, as per the own case of the petitioner, the counter affidavit enclosing the termination order had been received by him in the year 2004 itself.

15. The stand taken by the petitioner with regard to knowledge of the termination order is ambivalent. On the one hand it is stated in paragraph 31 of the affidavit filed by the petitioner alongwith the first amendment application dated 14th July, 2017 that he became aware of the order of termination dated 22nd February, 1990, after the same was received by his counsel on 9th August, 2004, and on the other, it has been sought to be contended in paragraph 42 of the same affidavit that prior to 14th July, 2017 the petitioner was not aware of the termination order.

16. This apart, the principal relief as sought by the writ petitioner at the time of filing of the writ petition having been founded on pleadings to the effect that he had not been made any payment by the Sahkari Samiti in question since August 1989 onwards, and the petitioner choosing to raise a grievance in that regard by filing a writ petition in the year

2000, also does not inspire confidence as to the *bona fides* of the petitioner.

17. Inordinate delay in approaching the writ Court for reasons of want of bona fides or inaction or negligence would deprive a party from his rights of invoking the extraordinary discretionary jurisdiction of the Court. We may refer to the broad principles laid down in this regard in the decision in the case of Esha Bhattacharjee v Raghunathpur Nafar Academy and others1, which are being extracted below:-

"21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

18. The exercise of jurisdiction under Article 226 is essentially discretionary in nature and in a case of negligence or deliberate gross-inaction or lack of bona fides on part of the party approaching the Court, it may not be appropriate to exercise such discretionary jurisdiction. An explanation which is ex facie concocted and based on fanciful grounds, would be liable to be rejected. Lack of bona fides imputable to a party would be a relevant and material consideration while granting reliefs to the party who approaches the writ Court.

19. We do not find from the judgment and order impugned before us any discussion or consideration on this aspect of the matter.

20. As such, the impugned judgment and order cannot be sustained and is liable to be set aside and is accordingly set aside.

21. Consequentially, the writ petition is liable to be dismissed and is, accordingly, dismissed.

22. This Special Appeal stands allowed.

(2020)06ILR A784
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2020
BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 187 of 2020

Dhruv Kumar Pandey & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
Sri Ankit Gaur

A. Civil Law - Intermediate Education Act, 1921 – Regulations framed under Act of 1921 – Regulation 101 – Appointment of Class III and Class IV Employees – Prior Approval of DIOS – Where selection is made by direct recruitment by the Principal or the Committee of Management, prior approval of the DIOS would be mandatory and would be a condition precedent before issuance of an appointment order to the selected candidate. (Para 19 and 24)

B. Civil Law -Intermediate Education Act, 1921 – Regulations framed under Act of 1921 – Regulation 101 to 107 – Appointment of Class III and Class IV Employees – Intimation of vacancy to DIOS – Regulation 102 is specifically enjoined upon the appointing authority, which as per Regulation 100 is the Committee of Management for the clerical posts and the Principal/Head Master for Class IV posts, to intimate the Inspector regarding occurrence of vacancy – The provisions do not contemplate that the Principal or the Committee of Management, upon occurrence of a vacancy against nonteaching post, would straight away proceed to initiate the selection process for direct recruitment without any intimation to the DIOS – Such action, if permitted, would frustrate the very scheme as provided for under Regulations 101 to 107. (Para 22 and 25)

C. Interpretation of Statute – Purposive Construction – The object of interpretation of a set of statutory rules/regulations is to ascertain the intent of the rule making authority and to ensure that the provisions are interpreted so as to subserve the intent – There is a general presumption that the statutory provisions have to be given a purposive construction that best gives effect to the purpose for which the provision had been made. (Para 33)

Special Appeal dismissed (E-1)

Cases relied on :-

1. Dingur Vs D.I.O.S. Mirzapur & ors. (1997) 2 UPLBEC 1250

2. Jagdish Singh Vs St. of U.P. & ors. (2006) 3 UPLBEC 2765

3. R (on the application of Quintavalle) Vs Secy. of St. for Health (2003) UKHL 13, (2003) 2 AC 687, (2003) 2 All ER 113

4. Pollen Estate Trustee Co. Ltd. Vs Revenue & Customs Comm. (2013) EWCA Civ 753

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

1. The present intra court appeal has been filed against the judgment and order dated 29.11.2019 passed in Writ A No. 59653 of 2015 (Dhruv Kumar Pandey and another Vs. State of U.P. and others), in terms of which the writ petition has been dismissed.

2. The writ petitioners are the appellants before us.

3. The records of the case reflect that the writ petition had been filed primarily seeking to challenge an order

dated 15.7.2015 passed by the District Inspector of Schools1, Basti, whereunder the approval to the appointments of the appellants/writ petitioners had been declined. A further prayer was made for issuance of a mandamus commanding the DIOS to consider the grant of approval afresh to the appointments of the petitioners on Class IV posts made by the Committee of Management of the Janta Inter College Nagar Bazar, Basti2.

4. Learned Senior Counsel appearing for the appellants has sought to assail the judgment of the learned Single Judge by contending that the writ petition has been dismissed upon noticing the fact that the order impugned therein being the order dated 15.7.2015 passed by the DIOS had recorded that no prior permission had been obtained and the procedure prescribed under law had not been followed before making the appointments, whereas there is no requirement under the relevant regulations with regard to the obtaining any prior permission. He has submitted that the judgment of the writ court having been passed on an erroneous legal premise, the same cannot be sustained.

5. Per contra, learned Standing Counsel appearing for the State respondents has supported the judgment of the learned Single Judge and has submitted that the appointments of the appellants/petitioners had been made without following the procedure as prescribed under the relevant regulations and as such the same could not have been approved, and accordingly the DIOS had rightly refused to accord the approval to their appointments.

6. In order to appreciate the rival contentions, it would be necessary to advert to the relevant statutory provisions.

7. The Institution in question is governed by the provisions of the Intermediate Education Act, 19213 and it receives grants-in-aid under the provisions of the Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1974 .

8. The Intermediate Education Act, 1921 was enacted to establish the Board of High School and Intermediate Education for the purposes of regulating and supervising the system of High School and Intermediate Education in the State of Uttar Pradesh, and to prescribe courses therefor.

9. The conditions of service of heads of institutions, teachers and other employees in an institution recognised under the Act, 1921 are provided for under Chapter III of the Regulations made thereunder, which are referable to powers under Section 16-G of the said Act.

10. The provisions with regard to appointment of Class III and Class IV employees in institutions recognised under the Act, 1921 were brought into force with effect from 30th July, 1992 with the insertion of Regulations 101 to 107 under Chapter III of the Regulations framed under the Act, 1921.

11. For ease of reference, Regulations 100 to 107 (as they stood at the relevant point of time) are being extracted below:-

रु100 लिपिक, जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित है, के सम्बन्ध में प्रबन्ध समिति तथा चतुर्थ श्रेणी कर्मचारी के सम्बन्ध में आचार्य/प्रधानाध्यापक नियुक्ति प्रधिकारी होगा। लिपिकों, जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित हैं, तथा चतुर्थ श्रेणी कर्मचारियों की नियुक्ति परिवीक्षा (जिसकी अवधि एक वर्ष होगी) स्थायीकरण एवं सेवा नियम आदि के सम्बन्ध में आवश्यक परिवर्तनों सहित ऊपर के विनियम 1, 4 से 8, 10, 11, 15, 24 से 26, 30, 32 से 34, 36 से 38, 40 से 43, 45 से 52, 54, 66, 67, 70 से 73 तथा 76 से 82 लागू होंगे, किन्तु चतुर्थ श्रेणी कर्मचारियों के सम्बन्ध में विनियम 77 से 82 के प्राविधान तभी लागू होंगे जब इस सम्बन्ध में राज्य सरकार द्वारा आवश्यक निर्देश निर्गत किये जायेंगे। इन कर्मचारियों के सम्बन्ध में विनियम 9, 12, 13, 14, 16 से 20, 27, 28, 54, 55 से 65 तथा 97 के प्राविधान लागू नहीं होंगे।

101 नियुक्ति प्राधिकारी, निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यताप्राप्त, सहायताप्राप्त संस्था के शिक्षणेत्तर स्टाफ में किसी रिक्ति को नहीं भरेगा :

प्रतिबंध यह है कि जमादार के पद की रिक्ति को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है।

102 किसी मान्यताप्राप्त, सहायताप्राप्त संस्था में शिक्षणेतर पद धारण करने वाले किसी कर्मचारी की सेवानिवृति के फलस्वरूप होने वाली रिक्ति की सूचना उसकी सेवानिवृति के दिनांक से तीन मास पूर्व दी जाएगी और मृत्यु, पद त्याग के कारण या किन्हीं अन्य कारणों से हुई किसी रिक्ति की सूचना उसके होने के दिनांक से सात दिन के भीतर नियुक्ति प्राधिकारी द्वारा निरीक्षक को दी जाएगी।

103 इस नियमावली में दी गई किसी बात के होते हुए भी जहां किसी मान्यताप्राप्त सहायताप्राप्त संस्था का अध्यापक या शिक्षणेतर कर्मचारी वर्ग के किसी कर्मचारी की, जो विहित प्रक्रिया के अनुसार नियुक्त किया गया हो, सेवा काल में मृत्यु हो जाये, तो उसके कुटुम्ब के एक सदस्य को,जो 18 वर्ष से कम आयु का न हो, प्रशिक्षित स्नातक की श्रेणी में अध्यापक के पद रूप में या किसी शिक्षणेतर पद पर, यदि वह पद के लिये विहित अपेक्षित शैक्षिक प्रशिक्षण अर्हताएं, यदि कोई हों, रखता हो और नियुक्ति के लिये अन्यथा उपयुक्त हो, नियुक्त किया जा सकता है :

स्पष्टीकरण– इस विनियम के प्रयोजनार्थ ''कुटुम्ब का सदस्य'' का तात्पर्य मृतक की विधवा/विधुर, पुत्र, अविवाहित या विधवा पुत्री से होगा।

टिप्पणी– यह विनियम और विनियम 104 से 107 उन मृत कर्मचारियों के संबंध में भी लागू होगा जिनकी मृत्यु 1 जनवरी, 1981 को या उसके पश्चात् हुई हो।

104 किसी मान्यताप्राप्त, सहायताप्राप्त संस्था का प्रबधं तंत्र या यथास्थिति, प्रधानाचार्य या प्रधान अध्यापक मृत्यु होने की दशा में मृत्यु होने के सात दिन के भीतर निरीक्षक को एक रिपोर्ट प्रस्तुत करेगा जिसमें मृत कर्मचारी का नाम, धृत पद, वेतनमान, नियुक्ति का दिनांक, मृत्यु का दिनांक उसके नियोजक संस्था का नाम और उसके कुटुम्ब के सदस्यों का नाम, उनकी शैक्षिक अर्हताएं और आयु आदि दिया जाएगा। निरीक्षक अपने द्वारा रखे जाने वाले रजिस्टर में मृतक की विशिष्टियां दर्ज करेगा।

105 विनियम 103 में विनिर्दिष्ट मृत कर्मचारी के कुटुम्ब का कोई सदस्य सम्बन्धित निरीक्षक को यथास्थिति प्रशिक्षित स्नातक श्रेणी में अध्यापक या शिक्षणेतर संवर्ग के किसी पद पर नियुक्ति के लिए आवेदन करेगा। आवेदन–पत्र प्रस्तुत पर समिति द्वारा विचार किया जायेगा और यदि समिति उनकी नियुक्ति की संस्तुति करे, तो निरीक्षक मान्यताप्राप्त सहायताप्राप्त उस संस्था के, जिसमें आवेदन को नियुक्ति किया जाना है, प्रंबधतंत्र को आवेदन–पत्र विनियम 106 और 107 के अनुसार नियुक्ति आदेश जारी करने के लिये भेजेगा।

समिति में निम्नलिखित होंगे :

1. निरीक्षक

– अध्यक्ष

2. जिला विद्यालय निरीक्षक के कार्यालय में लेखाधिकारी

–सदस्य

3. जिला बेसिक शिक्षा अधिकारी

–सदस्य

106 मृत कर्मचारी के कुटुम्ब के सदस्य की नियुक्ति उसकी शैक्षिक अर्हताओं के अनुसार प्रशिक्षित स्नातक श्रेणी में या किसी शिक्षणेतर पद पर यथासम्भव उसी संस्था में की जायेगी जहां मृत कर्मचारी अपनी मृत्यु के समय सेवारत था। यदि ऐसी संस्था में प्रशिक्षित स्नातक श्रेणी में किसी अध्यापक या शिक्षणेतर संवर्ग में कोई पद रिक्त न हो तो उसकी नियुक्ति जिले की किसी अन्य मान्यताप्राप्त, सहायताप्राप्त संस्था जहां ऐसी रिक्ति हो, की जायेगी।

प्रतिबंध यह है कि यदि जिले के किसी मान्यताप्राप्त, सहायताप्राप्त संस्था में कोई रिक्ति तत्समय विद्यमान न हो तो उस संस्था में जहां मृतक अपनी मृत्यु के समय सेवारत था, नियुक्ति प्रशिक्षित स्नातक श्रेणी के अध्यापक के या चतुर्थ श्रेणी के शिक्षणेतर पद के प्रति किसी अधिसंख्य पद के प्रति तुरंत की जायेगी। ऐसे अधिसंख्य पद को इस प्रयोजन के लिये सृजित किया गया समझा जायेगा और उसे तब तक जारी रखा जायेगा जब तक कोई रिक्ति उस संस्था में या जिले की किसी अन्य मान्यता प्राप्त, सहायताप्राप्त संस्था में उपलब्ध न हो जाए और ऐसी स्थिति में अधिसंख्य पद के पदधारी द्वारा की गई सेवा की गणना वेतन निर्धारण और सेवानिवृति लाभों के लिए की जाएगी।

107 उस मान्यताप्राप्त, सहायताप्राप्त, संस्था के प्रबंधतंत्र द्वारा, जिसका विनियम 105 के अधीन निरीक्षक द्वारा आवेदन–पत्र भेजा गया या आवेदन पत्र की प्राप्ति के दिनांक से एक माह की अवधि के भीतर निरीक्षक को सूचना देते हुए नियुक्ति–पत्र जारी किया जायेगा।"

(English Translation)

"100. The appointing authority in respect of clerks, including librarian, would be the Committee of Management and in respect of Class IV employees the appointing authority would be the Principal/Head Master.The regulations mentioned above, with necessary amendments, 1, 4 to 8, 10, 11, 15, 24 to 26, 30, 32 to 34, 36 to 38, 40 to 43, 45 to 52, 54, 66, 67, 70 to 73 and 76 to 82 shall be applicable in respect to appointment, probation (the duration of which will be one year), confirmation and service rules etc. of clerks including librarian and the fourth class employees; however in relation to the fourth class employees, the provisions of regulations 77 to 82 shall be applicable only when the necessary directions are issued in this regard by the State Government. Provisions of regulations 9, 12, 13, 14, 16 to 20, 27, 28, 54, 55 to 65 & 97 shall not be applicable in respect to those employees.

101. The appointing authority, except with the prior approval of the Inspector, shall not fill up any vacancy in a non-teaching staff of a recognized aided institution.

Provided that permission for filling up the vacancy against the post of Jamadar may be granted by the Inspector.

102. A vacancy falling vacant on account of retirement of an employee holding non-teaching post in a recognized aided institution shall be intimated three months before from the date of his retirement and any vacancy falling vacant due to death, resignation or for any other reasons, shall be intimated within seven

days from the date of its occurrence to the Inspector by the appointing authority.

103. Notwithstanding anything contained in this regulation, where teacher of any recognized aided institution or an employee of the non-teaching staff who, as per the prescribed procedure, dies during service period, then one member of his family, who is not less than 18 years, may be appointed on the post of a teacher in the category of trained graduate teacher or on any non-teaching post, if he possesses requisite educational training eligibility prescribed for the post, if any, and is otherwise suitable for appointment.

Explanation:- For the purposes of this regulation 'member of family' shall mean widow/widower, son, unmarried or widow daughter of the deceased.

Comment:- This Regulation and Regulation 104 to 107 shall be applicable in respect of those deceased employees also who died on 1st January, 1981 or thereafter.

104. The Management or the Principal or the Head Master, as the case may be, of any recognized aided institution shall submit a report to the Inspector within seven days in case of death, which shall include the name of deceased employee, designation of the post he held, pay-scale, the date of appointment, the date of his death, the name of employing institution, names of his family members, his educational qualifications, age etc. The Inspector shall mention specification of the deceased person in the register he maintains.

105. Any member of the family of the deceased employee specified in the regulation-103 shall apply to be Inspector for teaching cadre in the trained graduate category, or for non-teaching cadre, as the case may be. The Committee shall decide on the application submitted and if the Committee makes a recommendation for his appointment, the Inspector under the regulations of 106 and 107, shall send the application for issuance of appointment order to the Management of the Institution where the appointment is to be made. The following shall be the members of the committee.

1- Inspector-Chairman

2- Account Officer in the Office of District Inspector of Schools-Member

3- District Basic Education Officer-Member

106. The appointment of any member of the deceased employee shall be made in the trained graduate category, or in the non-teaching staff of the institution where the employee was in service at the time of his death. If no post in the teaching or non-teaching staff is vacant in such institution, then his appointment shall be made against the similar vacancy in any other recognized aided institution of the district.

Provided that if such vacancy does not exist for the time being in any recognized aided institution of the district, the appointment on the supernumerary post against the post of teacher or the non-teaching staff of class four in the institution where the employee was in service shall be deemed to have been made with immediate effect. The supernumerary post for such purpose shall be taken to be created and shall

continue till the availability of the vacancy in the same institution or any other recognized aided institution of the district, and the services of such post holder shall be taken into account while considering pay-fixation and retirement benefits.

107. The appointment letter shall be issued by the Management, in relation to those recognized aided institution whose application, under regulation 105, has been sent by the Inspector within one month from the date of receipt of application by intimating to the inspector."

12. Regulations 101 to 107, referred to above, provide for a scheme for filling up the vacancies of non-teaching posts i.e. (Class III and Class IV posts) in any institution recognised under the Act, 1921.

13. Regulation 102 which may be seen as a first step in the process provides that intimation regarding vacancy as a result of retirement of any employee holding a non-teaching post in any recognised and aided institution shall be given three months before the date of retirement and information about any vacancy falling due to death, resignation or for any other reasons shall be intimated to the Inspector by the appointing authority within seven days of the date of such occurrence.

14. The language under Regulation 102 is couched in a mandatory form and it enjoins upon the appointing authority, which as per Regulation 100 is the Committee of Management for the clerical posts and the Principal/Head Master for Class IV posts, to intimate the Inspector regarding occurrence of vacancy arising out of retirement of an employee holding a non-teaching post three months prior to the date of his retirement, and in case of a vacancy arising due to death, resignation or for any other reasons, within seven days of such occurrence.

15. Regulations 103 creates a provision for appointment on compassionate grounds to be granted to the dependents of a teaching/non-teaching employee in a recognised and aided institution. In terms of Regulation 104 the Committee of Management or the Principal/Head Master, as the case may be, is required to submit a report furnishing necessary particulars to the Inspector within seven days from the death of the employee concerned. As per Regulation 105, an application is to be submitted by the dependent of the deceased employee before the Inspector, which is to be placed for consideration before a Committee constituted for the purpose, and upon recommendation made by the Committee the same is to be forwarded by the Inspector to the institution concerned whereupon appointment order is to be issued as per Regulations 106 and 107.

16. Regulation 106 provides that the appointment of any member of the family of a deceased employee shall be made in the trained graduate category, or against a non-teaching post in the institution where the employee was in service at the time of his death, and if no post in the teaching or non-teaching cadre is vacant in such institution, then the appointment shall be made against a similar vacancy in any other recognized and aided institution in the district. In terms of the proviso to

Regulation 106, if such vacancy does not exist for the time being in any recognized and aided institution in the district, the appointment would be made immediately on a supernumerary post in the institution where the employee was in service. The supernumerary post shall be deemed to be created for the purpose and shall continue till the availability of a vacancy in the institution in question or in any other recognized and aided institution of the district.

17. The requirement under Regulation 101 of obtaining a 'prior approval' for appointments of a non-teaching post was considered in the case of **Dingur Vs. District Inspector of Schools, Mirzapur and others5,** and after noticing the statutory scheme under the Act, 1921 and the U.P. Act No. 24 of 1971, it was stated as follows :-

"17. Taking into consideration the provisions contained in the U. P. Act No. 24 of 1971, there is no escape from the conclusion that a statutory duty stands cast upon the competent authority envisaged therein to ensure that there is no wasteful expenditure of the public money and in that view of the matter, it has to be ensured taking into consideration the norms fixed by the State Government for continuance of a post, as to whether the filling up of the vacancy is infact necessary. It has further to be ensured as to whether the appointment has been made taking into consideration the provisions contained in the U. P. Intermediate Education Act and the Regulations framed thereunder regulating the procedure for the appointment and the manner in which the appointment has to be made and further whether the person appointed satisfies the minimum eligibility criteria and his appointment is in accordance with law. In such a circumstance in order to discharge the statutory duty, it is incumbent upon the authority functioning under the U. P. Act No. 24 of 1971 to grant financial approval to the appointment reported to it after examining all the aspects as indicated above. In the absence of such a financial approval, the State Government cannot be saddled with any liability in regard to the payment of salary etc. to the appointee of the management as against the vacancy in a post sanctioned for the High School or any intermediate college. In fact the provisions contained in Regulation 101 of the Regulations which have now come into force ensure that no financial liability is cast upon the State in respect of any appointment made by the appointing authority unless the appointment is made after obtaining the prior approval from the District Inspector of Schools.

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21. With the insertion of Regulation 101, the position stands further clarified that any appointment as against non-teaching post cannot be made by the management without obtaining prior approval of the District Inspector of Schools with the consequential result that if the management acts in contravention of the provisions of this provision, it would be liable to be vitiated with the penalty of de-recognition or of any other action and further the District Inspector of Schools or any other competent authority stands authorised to withhold payment of salary to such an appointee refusing to recognise his appointment which is sought to be made the basis for such an entitlement. This provision is in effect a check to prevent an appointment

becoming effective in the sense of saddling the State with the responsibility of payment of salary etc. in case it is against the cannons of financial propriety or suffers from any procedural defect or is otherwise vitiated in law. The District Inspector of Schools by virtue of this provisions stands vested with ample jurisdiction to examine above aspects and on being satisfied that the appointment has infact been made in accordance with the provisions contained in the Act and the Regulations framed therein, he may grant the approval whereupon the appointment becomes effective so as to saddle the State with the liability in regard to the payment of salary etc. to the appointee and extending to him the benefits envisaged under the U. P. Intermediate Education Act and the Regulations framed thereunder ensuring the security of tenure of service etc.

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23. Further, the prior approval which has been referred to in the Regulation 101 in question has to be granted or refused by the competent authority not in an arbitrary manner but after examining the proceedings relating to the appointment and finding out as to whether the appointment was really necessary taking into consideration the norms fixed by the State Government justifying the continuance of the post and after satisfying as to whether the appointment was made after following the prescribed procedure in a fair manner and is in accordance with the provisions regulating the procedure which is prescribed for making such an appointment. It is only after the competent authority is satisfied that there is no defect in the procedure followed for making the appointment and such an appointment is infact necessary and further all the requisite conditions including the eligibility criteria etc. stand complied with and further the selection proceedings have been conducted in a fair manner that the District Inspector of Schools has to accord the prior approval which on the requisite conditions being satisfied cannot be withheld keeping in view the public interest involved as the State having undertaken to take the liability for payment of salary etc. of the teaching as well as non-teaching staff employed in a recognized Intermediate College or High School is bound to ensure that its smooth functioning is not hampered on account of refusal to grant approval to an appointment made by the Committee of Management in the interest of the institution."

18. The provision with regard to 'prior approval' of the DIOS contemplated under Regulation 101 again came up for consideration in the case of J**agdish Singh Vs. The State of U.P. and others6,** and after taking note of the provisions contained under Regulations 101 to 104, it was observed as follows:-

"10. Regulations 103 and 104, as quoted above, provide that the Appointing Authority shall intimate vacancy falling on account of retirement before three months of the date of retirement. In other cases vacancy was required to be communicated within 7 days from occurrence. Regulation further provides for appointment on compassionate ground to dependent of teaching or non-teaching employee in a recognized aided institution. The management was also enjoined to inform about the death of employee, dependents

of the employees and the District Inspector of Schools was to put up the application, received from the member of the deceased employee for appointment, to a Committee as contemplated under Regulation 105 to consider the case and thereafter the application was to be sent to the Management for issuing appointment letter. Regulations 101 to 107 have to be read in a manner to give effect/and meaning to the provisions incorporated with effect from 30th July, 1992. The entire provisions requires harmonious construction, so all the regulations become workable and every part of it is given meaning.

11. Regulation 101, which is to be interpreted, uses a word "Inspector shall not fill up any vacancy". The word 'fill up', for the purpose of appointment, embraces in itself a procedure, which initiates from intimation of vacancy till selection of a candidate...

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18. Regulation 101, as quoted above, uses two words, namely, ^iwokZuqeksnu* and ^vuqefr*. The first part of the Regulation provides that appointing authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution whereas second part of the Regulation provides that permission for filling of post of sweeper (Jamadar) can be given by Inspector. Second part of the Regulation is in the nature of proviso. The main part of the Regulation contains word ^iwokZuqeksnu* i.e. prior approval whereas second part of the Regulation uses word ^vuqefr*] i.e. permission. Thus, the Statute uses both the word 'prior approval' and 'permission'. The meaning of both the word cannot be the same. In view of this, the submission of the learned Counsel for the appellant that Regulation 101 requires only permission to issue advertisement by Appointing Authority and if such permission is granted by Inspector, the Appointing Authority can fill up the post. Regulation 101 provides prior approval with regard to vacancy of non-teaching staff and permission is contemplated only for filling the post of sweeper. Regulation thus indicates that when the permission is given to the Appointing Authority to fill up post of sweeper. There is no further prior approval is required. This provision being in nature of proviso to the main Regulation shall operate as an inception to the first part of Regulation. Thus, the use of two words in Regulation 101 i.e. 'prior approval' and 'permission' itself negates construction of Regulation as contended by the counsel for the appellant."

19. When the prior approval of the Inspector is contemplated in Regulation 101, that prior approval embraces itself an examination of all aspects of the matter including existence of the vacancy, nature of the vacancy whether vacancy is to be filled up by management or it be filled by appointing the dependent of deceased employee who has claimed for appointment under the scheme of the Regulations 101 to 107.

20. Scheme of Regulations 101 to 107 makes it clear that after receiving an intimation of vacancy, the District Inspector of Schools is empowered to send the application of member of deceased employee, who is entitled for compassionate appointment to the

institution, who has to issue appointment letter to such candidate. It is, however, implied in the scheme that in the event there is no candidate entitled for compassionate appointment to fill a particular vacancy, the intimation of which has been received by the District Inspector of Schools, the District Inspector of Schools can direct the Appointing Authority to fill up vacancy by direct recruitment but even in a case the selection is made by direct recruitment by the Principal/Committee of Management, prior approval is required of the District Inspector of Schools before issuing an appointment letter to the selected candidate. Without prior approval of the Inspector, the Principal or the Committee of Management cannot issue an appointment letter or permit joining of any candidate. The requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory. The observation of the learned single Judge in the case of Dingur v. District Inspector of Schools, Mirzapur (supra) as quoted above, is also to the effect that approval has to be considered by the District Inspector of Schools after examining the proceeding relating to appointment and after examining as to whether prescribed procedure in a fair manner has been followed or not."

19. Taking into consideration the scheme under Regulations 101 to 107 it was held in the case of **Jagdish Singh** that an intimation of the vacancy is required to be sent to the DIOS whereafter the Inspector is empowered to send the application, if any, for compassionate appointment which may have been submitted by a member of the family of a deceased employee, upon due recommendation of the Committee constituted for the purpose, for issuance of an order of appointment, and in the event there is no candidate entitled for compassionate appointment, the Inspector can direct the appointing authority to fill up vacancy by direct recruitment, but even in such a case, prior approval of the Inspector is required before issuance of an order of appointment to the selected candidate. The requirement of prior approval under Regulation 101 was held to be mandatory and a condition precedent before issuance of an appointment order. Although, an observation was made that there is no requirement for taking previous approval under Regulation 101 before issuance of advertisement and that prior approval of the Inspector is required after completion of the process of the selection but it was made clear that there was no prohibition for the Principal or the Management to seek permission of the Inspector for filling up the vacancy by direct recruitment and such permission may or may not be granted by the Inspector. The observations made in the judgment, in this regard,

"21. The observation of the learned single Judge in Ram Dhani's case (supra) that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy does not lay down correct law. We, however, make it clear that although prior approval is required from the District Inspector of Schools after completion of process of selection but there is no prohibition in the Principal/Management to seek permission of the District Inspector of Schools for filling up vacancy by direct recruitment. The permission may or may not be

granted by the District Inspector of Schools but even if such permission to start the selection process or to issue advertisement is granted that is not akin to prior approval as contemplated under Regulation 101.

22. In view of the aforesaid, we are of the considered opinion that prior approval contemplated under Regulation 101 is prior approval by the District Inspector of Schools after completion of process of selection and before issuance of appointment letter to the selected candidate."

20. We may take note of the fact that the earlier judgment rendered by a Single Judge of this Court in the case of Dingur was duly noticed and approved by the subsequent Division Bench in the decision in Jagdish Singh and referring to para 23 of the judgment in the case of Dingur the Division Bench held that the prior approval, which has been referred to in Regulation 101, has to be granted by the DIOS after examining as to whether the prescribed procedure had been followed in a fair manner and also finding out as to whether the appointment was really necessary.

21. In the case at hand, in terms of the order dated 15.07.2015 which was under challenge in the writ petition the DIOS had declined to grant approval to the appointments said to have been made by the Selection Committee at a meeting held on 20.06.2010 by assigning the reason that no permission had been taken from the department and that the papers which had been submitted did not contain the signatures of the Principal of the Institution. It was also stated that approval could not be granted almost after five years of holding of selection proceedings.

22. The provisions under the Regulations 101 to 107 though do not require any permission to be taken before issuance of the advertisement but the language under Regulation 102 is couched in a mandatory form and it is specifically enjoined upon the appointing authority, which as per Regulation 100 is the Committee of Management for the clerical posts and the Principal/Head Master for Class IV posts, to intimate the Inspector regarding occurrence of vacancy arising out of retirement of an employee holding a non-teaching post three months prior to the date of his retirement, and in case of a vacancy arising due to death, resignation or for any other reasons, within seven days of such occurrence.

23. The material on record does not reflect that any intimation as mandated in terms of Regulation 102 with regard to occurrence of the vacancies, was sent by the management or the Principal of the Institution to the Inspector.

24. The scheme under the Regulations 101 to 107 contemplates intimation of vacancy occurring due to retirement or due to death or resignation or for any other reason within a stipulated time. This would be for the reason that the regulations provide for appointment on compassionate grounds to a dependent of a teaching/ non-teaching employee of a recognised institution and for the said purpose the management or the Principal of the Institution is enjoined to intimate the Inspector regarding the death of the employee and the particulars of the dependents of the deceased employee so

that the application submitted by the dependent of the deceased employee may be considered and upon a recommendation being made by the Committee set up for the purpose the application may be forwarded by the Inspector to the management or the Principal of the Institution concerned for issuance of an appointment order. It is only in the event that there is no claim of any candidate seeking appointment on compassionate grounds for filling up of a particular vacancy that the DIOS can direct the appointing authority to fill up vacancy by direct recruitment, and even in such a case where selection is made by direct recruitment by the Principal or the Committee of Management, prior approval of the DIOS would be mandatory and would be a condition precedent before issuance of an appointment order to the selected candidate.

25. The provisions do not contemplate that the Principal or the Committee of Management, upon occurrence of a vacancy against non-teaching post, would straight away proceed to initiate the selection process for direct recruitment without any intimation to the DIOS. Such action, if permitted, would frustrate the very scheme as provided for under Regulations 101 to 107.

26. The claim of any candidate seeking compassionate appointment and the discretion to be exercised by the DIOS in that regard, in such circumstances where the management proceeds to straight away initiate the selection process without any intimation to the Inspector, would stand defeated.

27. As we have already noticed, Regulation 106 provides that the appointment of any member of the family of a deceased employee shall be made in the trained graduate category, or in the non-teaching category of the institution where the employee was in service at the time of his death, and if no post in the teaching or non-teaching cadre is vacant in such institution, then the appointment shall be made against a similar vacancy in any other recognized and aided institution in the district. In terms of the proviso to Rule 106, if such vacancy does not exist for the time being in any recognized and aided institution in the district, the appointment would be made immediately on a supernumerary post in the institution where the employee was in service. The supernumerary post shall be deemed to be created for the purpose and shall continue till the availability of a vacancy in the institution in question or in any other recognized and aided institution of the district.

28. It is therefore seen that under the scheme provided for in terms of Regulations 101 to 107, the DIOS, before proceeding to direct the appointing authority i.e. the management or the Principal of the institution, to fill up any vacancy by direct recruitment, would be required to consider not only the claims of the dependents of the deceased employee of the institution concerned but also the claims of the dependents of the deceased employees of all recognized and aided institutions in the district. This object, as envisaged under the regulations, is for providing immediate succour to claims for appointment on compassionate grounds and the same would stand totally frustrated in case the institution is permitted to proceed with

the selection process without any intimation of the occurrence of the vacancy to the Inspector.

29. We may also observe that in terms of the statutory scheme governing the appointments to posts in recognized and aided institutions, as per the terms of the Act 1921 and payment of salaries against the said posts in terms of the U.P. Act No. 24 of 1971, a statutory duty is cast upon the educational authorities to ensure that the appointments are made taking into consideration the provisions under the Act, 1921 and the regulations framed thereunder governing the procedure for appointments and also to ensure that the filling up of the vacancy is in fact necessary taking into consideration the norms fixed by the State Government. The financial approval required under the U.P. Act No. 24 of 1971 for the purposes of ensuring payment of salaries is to be granted after examining all the aforementioned aspects.

30. The 'prior approval' which is contemplated under Regulation 101 before issuance of an order of appointment is therefore required to be granted by the DIOS after examining the proceedings relating to the appointment and verifying as to whether the appointment was required as per the norms fixed by the State Government and being satisfied that the same had been made after following the prescribed procedure in a fair manner. It is only thereafter that the Inspector is to accord prior approval whereafter the order of appointment is to be issued by the appointing authority i.e. the Committee of Management or the Principal of the institution as the case may be.

31. In taking this view we are fortified by the observations made by the earlier Division Bench in the case of **Jagdish Singh** where in para 11 of the judgment it was stated as follows:-

"11. Regulation 101, which is to be interpreted, uses a word "Inspector shall not fill up any vacancy". The word 'fill up', for the purpose of appointment, embraces in itself a procedure, which initiates from intimation of vacancy till selection of a candidate..."

32. Further, in para 19 of the aforesaid judgment, the observations made are as follows:-

"19. When the prior approval of the Inspector is contemplated in Regulation 101, that prior approval embraces itself an examination of all aspects of the matter including existence of the vacancy, nature of the vacancy whether vacancy is to be filled up by management or it be filled by appointing the dependent of deceased employee who has claimed for appointment under the scheme of the Regulations 101 to 107."

33. It is beyond question the duty of courts in construing a statutory provision to give effect to the intent of the rule making authority and to seek for that intent in every way. The object of interpretation of a set of statutory rules/regulations is to ascertain the intent of the rule making authority and to ensure that the provisions are interpreted so as to subserve the intent. There is a general presumption that the statutory provisions have to be given a purposive construction that best gives effect to the purpose for which the provision had been made.

34. Reference may be had to the judgment in **R (on the application of Quintavalle) Vs. Secretary of State for Health7**, for the proposition that in construing an enactment effort should be made to give effect to the purpose of the enactment. The observations made by Lord Bingham in the aforesaid judgment are as follows:-

"8. The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. ... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

35. Similar observations were made by **Lewison LJ in Pollen Estate Trustee Company Ltd. Vs. Revenue and Customs Commissioners8.** It was stated thus :-

"24. The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose..."

36. In the instant case, in addition to there being no material to show that any intimation was sent by the Committee of Management or Principal of the Institution to the DIOS with regard to occurrence of the vacancy, the other reason which has been assigned by the DIOS while declining to grant approval is that the relevant papers seeking approval had been received after almost five years from the date of the alleged selection. This casts a further doubt on the selection process undertaken by the management of the Institution.

37. For the aforementioned reasons, we do not find any reason to interfere with the judgment of the learned Single Judge in terms of which the writ petition has been dismissed.

38. That apart and in any event, in an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order. In the facts and circumstances of the instant case, as stated hereinbefore, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. For reasons stated above, we are not inclined to interfere with the impugned judgment and order dated 29.11.2019.

39. The Special Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2020)06ILR A797
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.06.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 673 of 2016

Sri Anil Kumar Sharma ...Petitioner
Versus
Lalta Prasad Jain ...Respondent

Counsel for the Petitioner:
Sri Ranjit Saxena, Sri A.K. Asthana

Counsel for the Respondent:
Sri Rajesh Tripathi, Sri Hari Nath Tripathi, Sri A.K.Upadhyay

A. Civil Law - UP Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21 (1) – Third proviso – Release of residential building for Commercial purpose – Prohibition – A reading of Clause (ii) to the Third Proviso to Section 21(1) makes it amply clear that it is mandatory and puts an embargo upon the court to entertain an application under clause (a) where the release of a residential building is sought for commercial purpose – Residential building cannot be released for commercial purposes. (Para 22 and 26)

Writ Petition allowed (E-1)

Cases relied on :-

1. Dr Piyush Kumar Chaturvedi Vs Spl. Judge (SC/ST Act) Lucknow & ors. (2005) 2 AWC 1784

2. Rajesh Kumar Gupta Vs Deepak Tandon & anr. (2016) 8 ADJ 652

3. Kush Sahgal & ors.Vs M.C. Mitter & ors. (2000) 4 SCC 526

4. Shanti Devi & ors.Vs Swami Asthanand & ors. (2003) 2 SCC 26

5. Harrington House School Vs S.M. Ispahani & ors. (2002) 5 SCC 229

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Ranjit Saxena, learned Senior Counsel for the petitioner and Sri H.N. Tripathi, learned counsel for the respondent.

2. The petitioner-tenant (hereinafter referred as 'Petitioner') through present petition has assailed the judgement and order dated 05.12.2015 passed by Additional District Judge, Court No.8, Firozabad in P.A. Appeal No.20 of 2009 (Lalta Prasad Jain Vs. Smt. Narvada Devi) whereby the appellate court has allowed the release application of respondent-landlord (hereinafter referred as 'Respondent') under Section 21 (1)(a) of the U.P. Act No.13 of 1972 (hereinafter referred to as 'Act, 1972').

3. The respondent preferred release application under Section 21 (1) (a) & (b) of the Act, 1972 against the petitioner on the ground that petitioner is a tenant of the first floor of the building situated at Sadar Bazar Main Road, Tundla (hereinafter referred to as 'disputed property') as described in the release application @ Rs.100/- per month and the house tax. It was further stated that disputed property is an old building and is in a dilapidated condition, and as such, it is required for demolition and reconstruction.

4. The personal need set up by the respondent in the release application was that the son and grandson of the respondent are running their business on the disputed property at the ground floor and require the disputed property for its use and occupation.

5. The aforesaid application was contested by the petitioner by filing written statement contending inter-alia that disputed property is not in a dilapidated condition. The disputed property is in good condition and does not require demolition and reconstruction. The petitioner also denied the fact that the need of the respondent is bonafide and genuine.

6. The Prescribed Authority based on pleadings on record, framed several issues. On the issue whether the disputed property is in a dilapidated condition, the Prescribed Authority found that respondent has failed to establish that the disputed property is in dilapidated condition. On the issue of bonafide need,

it held that the release application has been filed in the year 2004 and it is evident from the averments in the affidavit of the respondent that son of the landlord has established business in the same premises in the year 2005 and grandson in September 2005, therefore, the need of the respondent is satisfied. The Prescribed Authority returned the finding on the issue of comparative hardship against the respondent. Consequently, the Prescribed Authority rejected the release application by order dated 27.03.2009.

7. The respondent feeling aggrieved by the order dated 27.03.2009 preferred P.A. Appeal No.20 of 2009. The Appellate Authority rejected the application under Section 21(1) (b) of the Act, 1972 on the ground that though the respondent has established that disputed property is in a dilapidated condition but has failed to satisfy the compliance of Rule 17 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction), Rules, 1972.

8. The appellate court while considering release application under Section 21(1) of the Act,1972 placed reliance on the judgment of this court in the case of ***Dr Piyush Kumar Chaturvedi Vs. Special Judge (SC/ST Act) Lucknow and Others 2005 (2) AWC 1784*** and held that the release application is not barred by Clause (ii) to the Third Proviso to Section 21 (1) of the Act, 1972. The appellate court also noticed that petitioner has an alternative accommodation within the municipal limit of Kasba Tundla for residential purposes, and therefore, he cannot object to the release application because of the Explanation (i) to the Fourth Proviso to Section 21(1) of the Act, 1972.

9. The appellate court further considered the bonafide need of respondent and after appreciating the evidence on record held that the need of the respondent is pressing and bonafide and comparative hardship lay in his favour. Accordingly, it allowed the release application by order dated 05.12.2015.

10. Challenging the aforesaid order, learned Counsel for the petitioner has contended that it is admitted on record that disputed property is being used for residential purposes and its release is sought for commercial purpose. Therefore, the application under Section 21 (1) (a) is barred by clause (ii) to the Third Proviso to Section 21 (1) of the Act, 1972. He further submits that the finding of the appellate court that petitioner has an alternative residential accommodation within the municipal limit of Kasba Tundla is perverse and against the record.

11. Refuting the aforesaid submission, learned counsel for the respondent has submitted that the appellate court has held on the appreciation of evidence on record that the petitioner has an alternative residential accommodation within the municipal limit of Kasba Tundala, which being a finding of fact is not liable to be interfered with under Article 226 of the Constitution of India, therefore, the petitioner is debarred from objecting to the release application because of Explanation (i) to the Fourth proviso to Section 21 (1) of the Act,1972. He further contends that the appellate court rightly relied upon the judgement of this Court in the case of ***Dr Piyush Kumar Chaturvedi Vs. Special Judge (SC/ST Act) Lucknow and Others 2005 (2) AWC 1784*** to hold that clause (ii) to the Third Proviso to

Section 21 (1) of the Act, 1972 does not apply to the facts of the present case.

12. It is also urged that jurisdiction conferred upon the court under Section 21 (1) (a) is wide and proviso does not supersede the spirit of the main section of Vdv the Act, hence, application of respondent under Section 21 (1) (a) of the Act, 1972 was maintainable and finding of the appellate court in this regard is correct and based upon the proper understanding of the law.

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

14. In the present case, it is not in dispute between the parties that the disputed property under the tenancy of the petitioner has been let out for a residential purpose and is being used as residential.

15. Now, to appreciate the contention of learned counsel for the petitioner that the releases application was barred by Clause (ii) of the Third Proviso to Section 21(1) of Act,1972, it would be pertinent to refer paragraph 2 of the release application wherein the averments concerning the personal need of the respondent is stated. paragraph 2 of the release application is reproduced herein:-

"2. That the property in dispute is a very old building and in dilapidated condition and as such it requires for demolitions and reconstructions. As the applicant's son and grandson, who are running their business in the same property at ground floor are also needful for its own occupation."

16. It would also be relevant to notice that Vijay Kumar Jain, the son of the respondent, in paragraph 4 of the affidavit has stated that disputed property is needed for the establishment of godown and office. Paragraph 4 of the affidavit is reproduced hereinbelow:-

"4. यह कि उल्लेखनीय यह भी है कि मुझ शपथकर्ता के अपने थोक व्यवसाय के लिए एक सुव्यवस्थित कार्यालय एवं गोदाम के लिए सख्त आवश्यकता है, जिसके लिए कि वादग्रस्त संपत्ति सर्वथा उपयोगी है, जिसका कि पुर्ननिर्माण करके अपने निजी उपयोग में लाया जायेगा."

17. Sonalji, the grandson of the respondent, has reiterated the averments of paragraph no. 4 of the affidavit of Vijay Kumar Jain in paragraph no. 4 of his affidavit.

18. It is discernible from the pleadings of the respondent extracted above that the release of disputed property is sought for godown and establishment of an office. Hence, the purpose for which release of the disputed property is sought is commercial.

19. The Appellate court has held that that the petitioner has acquired an alternative residential accommodation within the municipal limit of Kasba Tundla. On the strength of the said finding, the counsel for the respondent argued that petitioner is debarred from raising any objection to release application in view of Explanation (i) to the Fourth Proviso to Section 21(1) of the Act,1972.

20. Now, the question which arises for consideration is whether clause (ii) to the Third Proviso to Section 21(1) of Act,1972 prohibits the release of the residential building for commercial purpose, even if the tenant has acquired an alternative accommodation and cannot object to the release application because of Explanation (i) to the Fourth Proviso to Section 21(1) of Act, 1972.

21. The relevant clause of the third proviso & Explanation (i) to the Fourth Proviso to Section 21(1) of the Act,1972 is quoted below:

"Provided also that no application under clause (a) shall be entertained-

(i)

.....

(ii) in the case of any residential building, for occupation for business purposes;

(iii)

.....

Provided also that the prescribed authority shall, except in cases provided for in the Explanation, take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application and for that purpose shall have regard to such factors as may be prescribed.]

Explanation.-In the case of a residential building:-

(i) where the tenant or any member of his family 2[(who has been normally residing with or is wholly dependent on him)] has built or has otherwise acquired in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained;

....."

22. A reading of Clause (ii) to the Third Proviso to Section 21(1) makes it amply clear that it is mandatory and puts an embargo upon the court to entertain an application under clause (a) where the release of a residential building is sought for commercial purpose.

23. This court in the case of ***Rajesh Kumar Gupta Vs. Deepak Tandon and Another 2016 (8) ADJ 652*** has considered the identical issue and held that a residential building cannot be released for commercial purposes. Paragraphs 20 to 22 of the aforesaid judgement are being extracted herein below:-

"20. Explanation (i) to the fourth proviso to Section 21(1) of the Act stipulates that where the tenant or any member of his family has built or has otherwise acquired in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained. In other words, it provides that if a tenant of a residential premises has acquired another residential premises in vacant state he would not be entitled to raise any objection against the release application.

21. The aforesaid provision only debars the tenant from raising

objection against the release application but it does not debars the court from considering the maintainability of the release application on the pleadings made in the release application itself. Thus, notwithstanding any objection to the release application by the tenant the release application on the face of it was not maintainable in so far as it seeks the release of a residential portion for business purposes.

22. In the above circumstances, as the landlords sought release of three rooms residential portion with a drawing room, courtyard, kitchen, toilet and bathroom for business purposes, the release application to that effect was barred by clause (ii) to third proviso to Section 21(1) of the Act."

24. The Apex Court in the case of ***Kush Sahgal and Others Vs. M.C. Mitter & Others 2000 (4) SCC 526*** while considering the scope of Section 21 of the Act, 1972 held that a residential building cannot be released for business or commercial purposes. Paragraph 32 of the judgement is being extracted hereinbelow:-

"32. Under Sub-section (1) of Section 21, a landlord can apply for eviction of a tenant on the ground that the building was bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family either for residential purposes or for purposes of any profession, trade or calling or on the ground that the building which was in a dilapidated condition was required for purposes of demolition and new construction. The second Proviso to Sub-section (2) however provides that "An application under Clause (a) shall not be entertained in the case of any Residential building for occupation for business purposes". Thus, if an application is made by the landlord for eviction of the tenant on the ground that the building in occupation of that tenant which was used exclusively for residential purposes was required for business purposes or for any other commercial activity, it would not be a ground within the meaning of Section 21(1) of the new Act for the eviction of the tenant and the application will not be entertained. This we say because the normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. (See: Kedarnath Jute Manufacturing Co. Ltd. v. Commercial Tax Officer). Since the natural presumption is that but for the proviso, the enacting part of the section would have included the subject matter of the proviso, the enacting part has to be given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided (See: Justice G.P. Singh`s "Principles of Statutory Interpretation" Seventh Edition 1999, p-163). This principle has been deduced from the decision of the Privy Council in Govt. of the Province of Bombay v. Hormusji Manekji as also the decision of this Court in Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories."

25. This court in the case of ***Rajesh Kumar Gupta (supra)*** repelled the contention of the landlord that the tenant is debarred from objecting to released

application in view of Explanation (i) to the Fourth Proviso to Section 21(1) of Act,1972 as he has acquired alternative accommodation in a vacant state and held that the release of a residential building for a commercial purpose is barred by clause (ii) of the Third Proviso to Section 21(1) of Act,1972.

26. In the present case, it is established from the pleadings of the respondent that the disputed property is residential and its release is sought for commercial purpose. Therefore, in the light of principles laid down in the aforesaid judgements which are binding precedent, this Court finds substance in the argument of counsel for the petitioner that residential building cannot be released for commercial purposes.

27. The judgement of this Court in the case of ***Dr Piyush Kumar Chaturvedi (supra)*** relied upon by the appellate court is not applicable in the facts of the present case since the said judgement has not considered the effect of the Clause (ii) to the Third Proviso to Section 21 (1) of the Act, 1972 which prohibits the court from entertaining an application for release of a residential building for commercial purpose.

28. The other two judgements i.e. ***Shanti Devi & Others Vs. Swami Asthanand and Others 2003 (2) SCC 26*** and ***Harrington House School Vs. S.M. Ispahani and Others 2002 (5) SCC 229*** relied upon by the appellate court were not the cases where the release of a residential building was sought for commercial purpose and the tenant had set up the defence that the release application was barred by Clause (ii) of the Third Proviso to Section 21(1) of the Act,1972. Therefore, the aforesaid two judgments having been rendered in a different factual context are not applicable in the present case and appellate court has erred in placing reliance on the said judgments.

29. Since this court has held that the release application is barred by Clause (ii) to the Third Proviso to Section 21(a) of the Act,1972, therefore, this court does not find it necessary to consider the other submissions of the counsel for the petitioner challenging the impugned order.

30. Thus, for the reasons given above, the order of the appellate court dated 05.12.2015 in P.A. Appeal No.20 of 2009 allowing the release application cannot be sustained and is accordingly, set aside.

31. Consequently, the writ petition is ***allowed*** with no order as to costs.

(2020)06ILR A803
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

WRIT A No. 806 of 2007

Mohd. Ayub Khan ...Petitioner
Versus
U.P. State Road Transport Corp. Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. Chaubey, Sri R.K.S. Chauhan

Counsel for the Respondents:

Sri Vivek Saran, Sri Anuj Srivastava, S.C., Sri Sunil Kumar Mishra

A. Punishment – Inquiry Report – Effect of its being non-speaking – Legality of proceeding – An inquiry report which is nonspeaking, if has not discussed evidence and material before it and simply recorded its conclusions, it is no inquiry report in the eyes of law and is vitiated – Since petitioner has been held guilty of all the six charges without showing any evidence and without any discussion, entire proceedings are vitiated in law. (Para 12 and 16)

Writ Petition allowed (E-1)

Cases relied on :-

1. Anil Kumar Vs Pres. Officer & ors.; AIR (1985) SC 1121

2. Special Appeal No. 1196 of 1999 (Commt. of Mang. Vs Abdul Cadeer @ Abdul Qadir & ors.) decided on 14.07.2006

3. Special Appeal No. 533 of 2004 (Chandra Pal Singh & ors. Vs Mang. Director, U.P. Co-operative Federation & ors.) decided on 12.10.2006

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

1. This writ petition under Article 226 of Constitution of India has been filed by petitioner Mohd. Ayub Khan praying for issue of a writ of certiorari to quash order dated 30.04.2002 (Annexure 9 to the writ petition) passed by Regional Manager, U.P. State Road Transport Corporation (hereinafter referred to "RM,UPSRTC") imposing punishment of recovery of Rs.1,40,876/- and denial of full salary paid during period of suspension except amount of subsistence allowance, already paid and order dated 11.10.2006 (Annexure 15 to the writ petition) passed by Managing Director, U.P.State Road Transport Corporation (hereinafter referred to as "MD, UPSRTC") dismissing petitioner's appeal.

2. The facts in brief giving rise to present writ petition are that petitioner was appointed as Senior Clerk in U.P. State Road Transport Corporation (hereinafter referred to as "UPSRTC") and posted at Civil Lines, Allahabad Depot. He was placed under suspension vide order dated 09.10.2001 (Annexure 1) in a contemplated disciplinary proceeding. A preliminary inquiry was conducted and in the report dated 20.09.2001, four persons including petitioner were held prima facie responsible. Consequently, a charge sheet dated 29.10.2001 was issued by RM, UPSRTC levelling following six charges upon petitioner :

''1. डिपों टिकट भण्डार से मार्ग पत्र सं0 8488001 से 8488500 तक प्राप्त करने के बाद मार्ग पत्र 8488051 से 848800 तक गायब करने,

2. डिपो स्टाक से प्राप्त किये गये मार्ग पत्रों में से एक पैड मार्ग पत्र गायब कर झूठी सूचना देने,

3. मार्ग पत्र गायब कर परिवहन निगम को रू0 5,63,504/– की आर्थिक क्षति पहुंचाने।

4. भ्रष्टाचार में संलिप्त रहने।

5. कर्तव्यों एवं दायित्वों के निर्वाहन में पूर्ण रूप से विफल रहने

6. कर्मचारी आचार संहिता के विपरीत कार्य व आचरण करने।''

3. Disciplinary Authority referred to only preliminary inquiry report dated 20.9.2001 as evidence sought to be relied in support of charges. Petitioner submitted reply and denied all the charges. Thereafter, Enquiry Officer submitted report (Annexure 7 to writ petition) holding all the charges proved. Agreeing with inquiry report, disciplinary

authority i.e. RM, UPSRTC supplied copy of inquiry report to petitioner vide letter dated 01.4.2002 and directed to give his explanation, if any, and also to show cause why penalty of 'Removal' from service, denial of full salary during period of suspension and recovery of Rs.1,40,876/- be not imposed upon petitioner.

4. Petitioner submitted reply to show cause notice. Thereafter order of punishment was passed on 30.04.2002 whereby disciplinary authority i.e. RM, UPSRTC confined punishment only to the extent of recovery of Rs.1,40,876/- and denial of full salary during period of suspension except subsistence allowance, already paid. Petitioner preferred appeal but the same has been rejected vide order dated 11.10.2006.

5. I have heard Sri S.K.Chaubey, learned counsel for petitioner, Sri Sunil Kumar Mishra, learned counsel for respondents and perused the record.

6. Learned counsel for petitioner submitted that enquiry report is wholly non-speaking and unreasoned one, inasmuch as, six charges were levelled against petitioner but Enquiry Officer has not discussed individual charges, evidences relied in support thereof as also petitioner's defence and instead, in a surreptitious and abrupt manner, all the charges have been held proved.

7. Learned counsel appearing for UPSRTC though sought to support orders impugned I
n present writ petition but when questioned, find it difficult to show as to how Enquiry Officer has found each charge proved and also could not show as to what evidence was relied to hold all the said charges proved.

8. Entire findings in respect of six charges recorded by Enquiry Officer read as under :

"मैंने मामले की रिपोर्ट पत्रावली उपलब्ध समस्त कागजातें अभिलेखों उत्तर तथा जांच के समय किये गये प्रश्नों का भली भांति अवलोकन एवं परिशीलन किया गया तो श्री अयूब ने अपने आरक्षी को मार्ग पत्रों के पैडों की संख्या कहां से कहां तक एक छोटे कागज के टुकडे पर लिखकर चिपकाया रहता था तथा उक्त सील्ड बण्डलों के ऊपर चिपकाये गये कागज के टुकडे पर लिखे गये टिकटों की धनराशि पर एवं संख्या कहां सें कहां तक मार्ग पत्र संख्या के बण्डलों में बिना गणना किये ईशू कर दिया जाता है। मार्ग पत्रों के खोल कर ही इशू किया जाता है। श्री चिन्तामणि ने अपने उत्तर में दर्शाया कि दिनांक 18.4.2001 को सम्बन्धित मार्ग पत्र के 10–10 के चार बण्डल दिये गये थे। जो डिपो टिकट भण्डार के पंजिका में 40 चालीस मार्ग पत्र अंकित किया गया। नकवी ने अपने उत्तर में दर्शाया कि परम्परागत द्वारा पैड बण्डल एवं मार्ग पत्र निर्गत किया। दिनांक 9.5.2001 को मार्ग पत्र सं0 8488001 से 8488500= दस पैड बण्डल में निर्गत किया गया दिनांक 9.5.2001 को मार्ग पत्र सं0 8488001 से 8488500 तक के 10 पैड बण्डल में सम्बन्ध कम पाये जाने की सूचना मुझको तथा चन्द्रभान राम वरिष्ठ केन्द्र प्रभारी को देने पर उनके द्वारा रोकने का आदेश दिया। श्री चन्द्रभान ने भी अपने उत्तर में यह दर्शाया कि मार्ग पत्र सं0 8488001 से 8488100 तक पैड बण्डल में कम पाये जाने की सूचना उसी दिन श्री अयूब लिपिक द्वारा दिया गया। **सहायक क्षेत्रीय प्रबन्धक (वित्त) रिपोर्ट कर्ता ने अपने उत्तर में यह अवगत कराया कि क्षेत्रीय टिकट भण्डार में बण्डलों में रक्खे हुए मार्ग पत्र एवं टिकटों को गिनना कर्मचारियों की कमी के कारण सम्भव नही है फिर भी पारदर्शी पैकिंग होने के कारण जारी करते समय गिनकर ही दिया जाता है।** इस सम्बन्ध में मुख्यालय के द्वारा जारी नियमावली में जांच रिपोर्ट में उल्लेख में स्पष्ट किया हुआ है कि

क्षेत्रीय भण्डार से प्राप्त किये गये मार्ग टिकटों को भली भांति गिना जायेगा श्री वर्मा सहा0 क्षे0 प्रबन्धक ने अपने उत्तर में दर्शाया कि मैंने 7 अगस्त 2001 को कार्यभार ग्रहण किया गया है। यह भी अवगत कराया कि कार्यभार ग्रहण के पश्चात वरिष्ठ को प्रभारी लेखा ने अपने पत्र में सम्पर्क श्री अयूब ने अपने उत्तर में यह दर्शाया यह स्वीकार किया है कि 9.5.2001 को मार्ग पत्र सं0 8488001 से 8488500 के मार्ग पत्र का पैड प्राप्त किया था साथ ही भण्डार रजिस्टर में हस्ताक्षर भी किया था। जबकि मार्ग पत्र सफेद पालीथीन पैकिंग में पैक रहता है सूचना एकता पत्र में 10 मार्ग पत्र के पैड होते हैं जो बिना प्राप्त हुए भी करायी से गिना व देखा जा सकता है। कि उक्त पैक्ड बण्डल में 10 मार्ग पत्र है अथवा नहीं यदि कम पाया जाता है तो उसी समय भण्डार लिपिक से प्राप्त ही नहीं करनी चाहिए था। **जो कि श्री अयूब द्वारा न करके मार्ग पत्र के बण्डल के ऊपर लिखा नम्बर को देखकर प्राप्त किया गया।**

अतः उपरोक्त विवेचना से यह स्पष्ट है कि श्री मो0 अयूब खां (वि0) वरिष्ठ लिपिक सिविल लाइन डिपों द्वारा डिपो भण्डार से मार्ग पत्र ईशू करते समय बण्डल पर चिपकाये गये **स्लिप के अनुसार प्राप्त कर लिया उसे मिला नहीं और मण्डल लाकर खोल दिया।** जबकि मार्ग पत्र के पैक्ड बण्डल व सफेद पालीथीन के पारदर्शी पैक में पैक रहता है **जिसे आसानी से गिना जा सकता है। ऐसा श्री अयूब खां द्वारा नहीं किया गया।** अतएव श्री अयूब लिपिक पर लगाये गये राजस्व आरोप सिंद्ध पाये जाते हैं जिसके लिये श्री मो0 अयूब (वि0) कार्य लिपिक दोषी हैं।''
(Emphasis Added)

9. First charge levelled against petitioner is that he is responsible for missing Way Bills No.8488051 to 8488100 after receiving Way Bill No.8488001 to 8488500 from Depot Ticket Store. The third charge state that by causing loss to aforesaid Way Bills, he has caused loss to UPSRTC to the extent of Rs.5,63,504. Charges 1 and 3 are connected with each other and basically state that petitioner is responsible for disappearance of 50 tickets and thereby caused loss of Rs.5,63,504/- to UPSRTC. Annexure 5 to writ petition i.e. Issue Slip of Tickets dated 09.5.2001 shows that aforesaid Way Bills No.8488001 to 8488500 were in ten pads. Ali Ahmad Naqvi, Senior Clerk, as per department, opened pads and found one pad missing in the bundle of 10 pads. Entire enquiry report nowhere shows that all the ten pads were made to receive to petitioner and thereafter he lost one pad containing Way Bills No.8488051 to 8488100. No witness was examined to prove aforesaid charge; no document is referred to in enquiry report to prove the same and even in respect of alleged loss, I do not find any evidence as to how loss was computed and has been proved to be suffered by UPSRTC. It is not even a charge that those tickets were actually issued for travel but no revenue come to be deposited with UPSRTC causing actual loss. Findings in respect of charges 1 and 3 are based on no evidence whatsoever, hence cannot be sustained.

10. Now charge No.2 also relates to alleged loss of one pad of Way Bills and thereafter giving wrong information. Here also I do not find any evidence whatsoever discussed by Enquiry Officer to prove that petitioner has given any false information to anyone. In fact chargs 2 and 3 have not at all been discussed by Enquiry Officer and there is no finding in respect thereof.

11. Now coming to charges 4, 5 and 6. I find that there is no discussion, nothing has been stated by Enquiry Officer and without recording any finding, Enquiry Officer has held all the charges proved. Unfortunately, similar

error has been committed by Disciplinary Authority as well as Appellate Authority. I do not find anything to show as to what material or evidence has been examined by them and in what manner. In fact inquiry report is wholly unreasoned and non speaking and so are the orders of disciplinary and appellate authorities to hold all the charges proved.

12. It is well established in law that an inquiry report which is non-speaking, if has not discussed evidence and material before it and simply recorded its conclusions, it is no inquiry report in the eyes of law and is vitiated.

13. In **Anil Kumar Vs. Presiding Officer and others reported in AIR 1985 SC 1121,** Court set aside an inquiry report which did not contain discussion of evidence and material on record as also the stand taken by both the parties and simply recorded its conclusion.

14. Relying on the aforesaid decision in **Anil Kumar (supra)**, a Division Bench of this Court in **Special Appeal No. 1196 of 1999 (Committee of Management Vs. Abdul Cadeer @ Abdul Qadir and others)** decided on 14.07.2006, while setting aside a similar inquiry report said;

"In the instant case, as noticed above, ***the inquiry officer has not said anything as to what was the material or evidence on record on which her applied his mind and thereupon reached to the conclusion that the charges stand proved.*** *It is true that in the matter of departmental proceeding scope of judicial review is limited and the only thing to be seen is as to whether there is any error in the decision making process or there is denial of adequate opportunity to the delinquent in defending the charges or there is any violation of substantive provision of law but this Court will reappraise the evidence and sit on appeal over the order passed by the departmental authority but i****t has to be seen whether finding or conclusion is based on some evidence or not.*** *This Court can interfere where it is found that proceeding is conducted in violation of principle of natural justice or of statutory rules prescribing the mode for holding enquiry or* ***where the conclusion or finding reached by the Inquiry Officer and the disciplinary authority is based on no evidence or where the conclusion or finding is such that no prudent person would have ever reached the same.*** *As noticed above, it does not appear from the report of the inquiry officer that any record or evidence was brought before him by the department in support of the charges on the basis of which he has found him guilty of the charges. He has held the petitioner-respondent no. 1 guilty only on the ground that he did not appear before him despite notice and, therefore, the charges stand proved. This, in fact, is no inquiry in the eye of law and, therefore, the order of dismissal based on such inquiry report cannot sustain and has to be quashed."*

(Emphasis added)

15. This view has been followed and reiterated by another Division Bench in **Special Appeal No. 533 of 2004 (Chandra Pal Singh and others vs. Managing Director, U.P. Co-operative Federation and others**) decided on 12.10.2006.

16. In the present case, since petitioner has been held guilty of all the

six charges without showing any evidence and without any discussion, entire proceedings are vitiated in law.

17. In the result, writ petition is allowed. Impugned orders dated 30.04.2002 (Annexure 9 to the writ petition) and 11.10.2006 (Annexure 15 to the writ petition) are hereby set aside. Petitioner shall be entitled to all consequential benefits. However, this judgment shall not prevent competent authority to proceed afresh after the stage of reply to charge sheet if it so decide, in accordance with law.

(2020)06ILR A808
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

WRIT A No. 881 of 2020

Manoj Kumar & Ors. ...Petitioners
Versus

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

Counsel for the Petitioners:
Sri Navin Kumar Sharma

Counsel for the Respondents:
C.S.C., Sri Santosh Kumar

A. Civil Law - U.P. Basic Education (Teachers) Service Rules, 1981 – Rule 21 – Transfer Policy dated 02.12.2019 – Policy Decision – Power of the Court to interfere – The government policy dated 02.12.2019 is in the nature of concession permitting inter district transfer – It give some weightage or preference to female assistant teachers or to physical disable teacher for transfer which may be for variety of reasons including social reasons – It is a policy decision of the State Government – A policy decision is in the domain of the executive authority of the State – The court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long it does not offend any of the provisions of the Constitution of India or Statute – Held – The aforesaid policy decision of the State Government is logical. (Para 8, 9, 10 and 13)

Writ Petition dismissed (E-1)

Cases relied on :-

1. U.O.I. Vs Shankar Lal Soni, (2010) 12 SCC 563

2. Ehsan Khalid Vs U.O.I. & ors., (2014) 13 SCC 356

3. Netai Bag Vs St. of W.B., (2000) 8 SCC 262

4. Ram Singh Vijay Pal Singh Vs St. of U.P. & ors., (2007) 6 SCC 44

5. Balco Employees Union (registered) Vs U.O.I., (2002) 2 SCC 333

6. Pearless General and Investment & ors. Vs R.B.I., (1992) 2 SCC 343

7. Premium Granites Vs St. of Tam., (1994) 2 SCC 691

8. R.K. Garg Vs U.O.I., (1996) 2 SCC 405

9. Bhavesh D. Parish Vs U.O.I., (2000) 5 SCC 471

10. Narmada Bachao Andolan & ors. Vs U.O.I., (2000) 10 SCC 664

11. M.P. Oil Extraction Vs St. of M.P. (1997) 7 SCC 592

12. St. of Punjab Vs Ram Lubhaya Bagga, (1998) 4 SCC 117

13. U.O.I. Vs Shankar Lal Soni, (2010) 12 SCC 503

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

1. Heard Sri Navin Kumar Sharma, learned counsel for the petitioners,

learned standing counsel for respondent No.1 and Sri Santosh Kumar, learned counsel for respondent Nos.2 and 3.

2. This writ petition has been filed praying for the following relief:

"(i) Issue a writ, order or direction in the nature of mandamus directing the respondents to delete the column-8 (4) clause of Government Order (Transfer Policy) dated 02.12.2019.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondents not to extend the benefit of 05 additional quality points to the female teachers."

3. Learned counsel for the petitioners submits that the impugned policy decision of the State-Government for the transfer of Assistant Teachers in Basic Schools run by the U.P. Basic Education Board, is discriminatory inasmuch as a discrimination has been made between male assistant teachers and female assistant teachers in matters of transfer since five marks under Clause 8(4) of the Transfer Policy has been allotted to female teachers and they have been permitted to opt for transfer after one year of service while the same facility has not been extended to male assistant teachers.

4. Learned counsels for the respondents supports the policy decision.

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

6. It is well settled that transfer is not a right of an employee. The service conditions of assistant teachers are provided in the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as 'the Rules 1981'). Rule 21 provides that there shall be no transfer of any teacher from the rural local area to an urban local area or vice versa or from one local urban area to another of the same district or from local area of one district to that of another district **except on the request of or with the consent of the teacher himself and in either case, approval of the board shall be necessary.**

7. Rule 8(2) of U.P. Basic Education (Teachers) (Posting) Rules, 2008 specifies minimum years to be served by a newly appointed male teacher and female teacher in backward areas. Clause (c) permits mutual transfer subject to certain conditions, within the district from general block to backward block or vice versa only after the teacher has served for minimum prescribed period. Clause (d) enables the board to entertain application for inter district transfer as an exception with some relaxation to female teachers. Thus, inter district transfer is not a right of any male or female assistant teachers as per rules aforementioned.

8. The government policy/ government order in question dated 02.12.2019 is in the nature of concession permitting inter district transfer. None of the petitioners have any statutory right of inter district transfer. The State Government may even withdraw this concession. The assistant teachers intending to take benefit of the aforesaid government order dated 02.12.2019 granting concession subject to certain conditions, have no right to dictate conditions or to say that a particular condition or conditions should be deleted.

This view is supported by law laid down in the case of **Union of India vs. Shankar Lal Soni, (2010) 12 SCC 563.**

9. The impugned **transfer policy dated 02.12.2019** is a policy decision of the State Government. The State Government has taken a policy decision in its wisdom to give some weightage or preference to female assistant teachers for transfer which may be for variety of reasons including social reasons. Clause (2) of para-8 provides for 10 quality point marks to differently abled assistant teachers. Clause (3) provides for 10 point quality marks to those teachers who is either himself or his/ her spouse or children are suffering from the specified critical diseases. Clause (4), which has been challenged in the present writ petition, provides for 5 quality point marks to female teachers. Clause (5) provides for 10 quality point marks to such male or female teachers whose spouse is in government service. Clause (6) provides for five quality point marks to single parents, e.g. widow/ widowed/ divorced etc. Clause (7) provides for 5 quality point marks to teachers who received national award and 3 quality point marks to teachers who received State award.

10. Thus, clause (2) to (6) of paragraph-8 of the impugned policy decision provides for some weightage by means of quality point marks to eligible teachers for transfer who eighter on account of physical disability or serious ailments or special circumstances or social reasons, need to be given some preference in transfer of the districts opted by them for transfer. The aforesaid policy decision of the State Government is logical. It is neither grossly arbitrary nor unfair nor unreasonable nor irrational. It is not violative of any of the provisions of the Constitution or contrary to the statutory provisions. Therefore, the clause (4) of paragraph-8 of the policy decision/ government order dated 02.12.2019, cannot be interfered. This is also the ratio of decision of Hon'ble Supreme court in the case of **Ehsan Khalid vs. Union of India and others, 2014 (13) SCC 356 (Paras-8 and 9).**

11. Thus, the State Government is entitled to make pragmatic adjustments and policy decision, which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision or any clause thereof, merely because it feels that another decision would have been fairer or wiser or more scientific or logical. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. The court cannot strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Reference in regard to the aforesaid settled principles of law may be had to the judgments of Hon'ble Supreme Court in the case of **Netai Bag vs. Stae of West Bengal, (2000) 8 SCC 262 (para-20), Ram Singh Vijay Pal Singh vs. State of U.P. and others, (2007) 6 SCC 44 (para-12), Balco Employees Union (registered) vs. Union of India, (2002) 2 SCC 333 (para-33 to 46), Pearless General and Investment and others vs. Reserve Bank of India, (1992) 2 SCC 343 (para-31), Premium Granites vs. State of Tamilnadu, (1994) 2 SCC 691,**

R.K. Garg vs. Union of India, (1996) 2 SCC 405 (para-7) and Bhavesh D. Parish vs. Union of India, (2000) 5 SCC 471 (para-26), Narmada Bachao Andolan and others vs. Union of India, (2000) 10 SCC 664 (para-229) and M.P. Oil Extraction vs. State of M.P. (1997) 7 SCC 592 (para-41) and State of Punjab vs. Ram Lubhaya Bagga, (1998) 4 SCC 117 (para-25).

12. In the case of **Union of India vs. Shankar Lal Soni, (2010) 12 SCC 503 (para-18)** Hon'ble Supreme Court explained its judgment in the case of Ram Singh (supra) and held that **decision to grant a certain concession or certain benefit and the conditions for their grant are matters for the administrators alone and the court should not interfere in the matter on the premise that it was of the opinion that some of the conditions imposed were not justified.**

13. In view of the above discussion and considering the law laid down by the Hon'ble Supreme Court in various judgments including in the case case of **M.P. Oil Extraction (supra)**, it can be safely concluded that the executive authority of the State must be held to be within its competence to frame a policy for the administration in basic schools unless the policy framed is absolutely capricious and not being informed by reason whatsoever and arbitrary. A policy decision can also not be sustained if policy offends constitutional provisions or comes into conflict with any statutory provision. In other words, a policy decision is in the domain of the executive authority of the State. The court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long it does not offend any of the provisions of the Constitution of India or Statute.

14. The impugned paragraph of the government order/ policy decision dated 02.12.2019 neither offends Article 14 of the Constitution of India nor offends other constitutional provisions nor it is in conflict with any of the provisions of the Rules. Therefore, no interference can be made by this court.

15. For all the reasons afore-stated, I do not find any merit in this writ petition. Consequently, **the writ petition** fails and is hereby **dismissed.**

(2020)06ILR A811
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

WRIT A No. 909 of 2020

Committee of Management & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri J.P.N. Singh

Counsel for the Respondents:
C.S.C., Sri Arvind Srivastava III

A. Civil Law - Intermediate Education Act, 1921 – Section 16(G) – Regulations framed under Act, 1921 – Regulation 39 of Chapter III – Suspension of Teacher – Approval or Disapproval by DIOS – Opportunity of Hearing – If all the required

papers and information as prescribed under sub-section (7) of Section 16G of the Act, 1921 and Regulation 39 have been submitted by the Management to the District Inspector of Schools to obtain approval of suspension, then opportunity of hearing at the stage of granting approval or disapproval is not required to be afforded to the Management or the employee – But if the employee has submitted any representation or objection against the order of suspension, then the District Inspector of Schools shall afford an opportunity of hearing to the Management and the concerned employee while passing the order of approval or disapproval which must contain brief reasons Section 16-FF. (Para 20)

Writ Petition disposed off (E-1)

Cases relied on :-

1. Mang. Commt., Dayanand Inter College, Gorakhpur & anr. Vs D.I.O.S. & ors. (1980) UPLBEC 168

2. Commt. of Mang. of Maharajganj Inter College Vs D.I.O.S., Maharajganj (1999) 3 UPLBEC 1765

3. Hari Singh Rajpoot Vs St. of U.P. (2015) 2 UPLBEC 1362

4. Ram Autar Verma Vs St. of U.P. (2006) 65 ALR 592

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

1. Heard the learned counsel for the petitioner, learned standing counsel for the State respondents and the learned counsel for the respondent no. 4.

2. Briefly stated facts of the present case are that the respondent no. 4 is an Officiating Principal in Janta Inter College, Ahmadpur, Brahman, Saharanpur. From the averments made in paragraphs 4 & 5 of the writ petition, it appears that there are two rival groups in Committee of Management. One such group is led by the petitioner no. 2. It appears that a Writ-C No. 25966 of 2019 was filed by the Committee of Management in which an order dated 13.9.2019 was passed by this Court directing that the petitioners shall publish an election notification forthwith announcing the election programme and the District Inspector of Schools shall appoint an election observer whenever a demand is made by the petitioner and the election shall be held as per election programme.

3. In the aforenoted facts, it appears that the petitioners issued notices to the respondent No.4 dated 24.10.2019 and 24.10.2019 followed by reminders dated 11.11.2019 and 26.11.2019 making allegations of misbehavior (indiscipline) and use of vulgar words against the Manager. The respondent no. 4 submitted a reply dated 24.10.2019 denying the allegations and submitted that he made the request to the Manager to sign the salary bill of teachers and non teaching staff for the months of September and October, 2019 which was not signed till 23.10.2019 and after persuasion and on request of the Deputy Manager, it was signed by the Manager. He also submitted that if the request so made has been felt otherwise by the Manager in any way, then he submits apology. He also submitted that on 22.10.2019, he was on election duty.

4. The aforesaid notices dated 24.10.2019 and 11.11.2019 issued by the petitioners to the respondent No.4 are confined only on two points; **firstly** the allegation of misbehaviour (indiscipline) by the respondent no. 4 for getting signature on salary bills and **secondly**

absence on 22.10.2019 and use of vulgar words.

5. The notice dated 11.11.2019 issued by the petitioners to the respondent no. 4 is reproduced below:-

"प्रेषक, सेवा में,
प्रबन्धक प्रधानाचार्य
जनता इण्टर कालेज जनता इण्टर कालेज
अहमदपुर ब्राह्मण, पो0 अलीपुरा(सहारनपुर) अहमदपुर ब्राह्मण,स0पुर
जनपद कोड–16 विद्यालय संख्याः–1015

————————————————————

पत्रांक–जे0ए0बी0/प्र0स0–210–75/2019–20 दिनांक 11–11–2019

द्वितीय नोटिस

विषयः– आप द्वारा दिनांक 23.10.2019 को अनुशासनहीनता अभद्रता के सम्बन्ध में।

उपर्युक्त विषयक द्वितीय नोटिस के माध्यम से आपको सूचित किया जा रहा है कि **दिनांक 24.10.2019** को पत्र संख्या जे0ए0बी0/प्र0स0/262–67/2019–20 के द्वारा आपसे अनुशासनहीनता, अभद्रता एवं अपशब्दों का प्रयोग किये जाने के सम्बन्ध में स्पष्टिकरण मांगा गया था जिसके लिए आपको एक सप्ताह का समय दिया गया था। परन्तु आपने इसके सम्बन्ध में आज तक भी कोई स्पष्टिकरण नहीं दिया। जिससे प्रतीत होता है कि आप आदेशों की अवहेलना कर रहे हैं। (दिनांक 24.10.2019 को किये गये स्पष्टिकरण की छायाप्रति पत्र के साथ संलग्न है।)

अतः आपको इस नोटिस के माध्यम से पुनः सूचित किया जा रहा है कि दिनांक 24.10.2019 को मांगे गये **स्पष्टिकरण का जवाब पत्र प्राप्ति के पांच दिन के अन्दर प्रस्तुत करें**। अन्यथा की स्थिति में आपके विरूद्ध अनुशासनात्मक कार्यवाही करने के लिए मुझे बाध्य होना पड़ेगा जिसके लिए आप पुर्णत्याः उत्तरदायी होंगे।

संलग्नकः– उपरोक्तानुसार
भवदीय

डा0 विजय कुमार शर्मा (प्रबन्धक)

जनता इण्टर कालेज अहमदपुर ब्राह्मण

सहारनपुर

पत्रांकः–जे0ए0बी0/प्र0स0–2019–20
दिनांक ..... तदैव .....

प्रतिलिपिः– निम्नवत् सभी की सेवा में सूचनार्थ प्रेषित।

1. श्रीमान आयुक्त मण्डल, सहारनपुर।
2. जिलाधिकारी महोदय, सहारनपुर।
3. संयुक्त शिक्षा निदेशक सहारनपुर मण्डल, स0पुर।
4. जिला विद्यालय निरीक्षक, सहारनपुर।

डा0 विजय कुमार शर्मा (प्रबन्धक)

जनता इण्टर कालेज अहमदपुर ब्राह्मण

सहारनपुरष

6. It is the case of the petitioners that the Committee of Management by resolution dated 12.12.2019 has suspended the respondent no. 4 and issued a suspension order dated 13.12.2019 informing the respondent no.

4 that he has been suspended with immediate effect.

7. The petitioners sent a letter dated 13.12.2019 to the District Inspector of Schools for approval of suspension of the respondent no. 4 which is reproduced below:-

ष्प्रेषक, सेवा में,

प्रबन्धक श्रीमान जिला विद्यालय निरीक्षक

जनता इण्टर कालेज सहारनपुर

अहमदपुर ब्राह्मण, पो0 अलीपुरा(सहारनपुर)

जनपद कोड–16 विद्यालय संख्याः–1015

————————————————————

पत्रांक–जे0ए0बी0/प्र0स0–305–06/2019 –20 दिनांक 13–12–2019

विषयः– **कार्यवाहक प्रधानाचार्य श्री राममित्र मिश्र के निलम्बन का अनुमोदन दिये जाने के सम्बन्ध में।**

महोदय,

सूचनार्थ निवेदन है कि इस विद्यालय के कार्यवाहक प्रधानाचार्य श्री राममित्र मिश्र द्वारा की गई अनुशासनहीनता, दुराचरण एवं अन्य कारणों से प्रबन्ध समिति ने अपनी बैठक दिनांक 12–12–2019 के प्रस्ताव सं0–02 के द्वारा श्री राममित्र मिश्र, कार्य0 प्रधानाचार्य को निलम्बित कर दिया है।

अतः आवश्यक पत्राजात संलग्न करते हुऐ अनुरोध करना है कि निलम्बन का अनुमोदन प्रदान करने की कृपा करें। आपकी अति कृपा होगी।

संलग्नकः– निम्नानुसार प्रेषित हैं।

1. श्री राममित्र मि़श्र, कार्य0 प्रधानाचार्य के निलम्बन पत्र की छायाप्रति।
2. श्री राममित्र मिश्र, कार्य0 प्रधानाचार्य के स्पष्टिकरण की छायाप्रति।
3. साक्ष्य की सी0डी0।
4. श्री राममित्र मि़श्र, कार्य0 प्रधानाचार्य के विरूद्ध अनुशासनहीनता, दुराचरण आदि के सम्बन्ध में छात्र/छात्राओं, अध्यापक/कर्मचारियों व अन्य से पूर्व में प्राप्त शिकायती पत्रों की छायाप्रतियां।
5. एजेण्डे की प्रमाणित छायाप्रति।
6. दिनांक 12.12.2019 की बैठक की कार्यवाही की प्रमाणित छायाप्रति।

प्राप्त
16.12.2019

प्रबन्धक

डा0 विजय कुमार शर्मा (प्रबन्धक)

जनता इण्टर कालेज अहमदपुर ब्राह्मण

सहारनपुरष

8. By the impugned order dated 4.1.2020, the District Inspector of Schools, Saharanpur disapproved the suspension of the respondent no. 4. Aggrieved with this order, the petitioners have filed the present writ petition.

Submissions:-

9. Learned counsel for the petitioners submits that the **impugned order dated 4.1.2020 has been passed by the respondent without affording opportunity of hearing to the Committee of Management.** He relied upon two Division Bench judgments of

this Court in ***Committee of Management of Maharajganj Inter College Vs. District Inspector of Schools, Maharajganj (1999) 3 UPLBEC 1765 and Hari Singh Rajpoot Vs. State of U.P. (2015) 2 UPLBEC 1362.*** He further submits that before disapproving the suspension, it was mandatory by the respondent no. 3 under Section 16(G)(7) of the U.P. Intermediate Education Act to afford an opportunity of hearing to the Committee of Management. Thus, the impugned order of disapproval is in breach of principles of natural justice, and therefore, deserves to be quashed.

10. **Learned counsel for the respondent no. 4 submits** that there is a serious dispute between two rival groups of Committee of Management. He submits that the resolution was defective inasmuch as only seven members have passed the alleged resolution dated 12.12.2019 whereas on the same day eight members of the Committee of Management passed another resolution. An Enquiry Officer was appointed by the District Inspector of Schools who inquired into the matter and submitted a report to the District Inspector of Schools, Saharanpur that there is serious dispute between two rival groups of Committee of Management. He submits that the impugned resolution is merely a paper work and it was technically defective as observed in the impugned order, and therefore, the impugned order cannot be said to suffer from any error of law. He furthers submits that the other technical defect was that the resolution was not in accordance with Regulation 39 Chapter III framed under the U.P. Intermediate Education Act, 1921.

Discussion and Findings:-

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

12. The relevant provisions having bearing on the controversy involved in the present writ petition are the provision of sub sections 5, 6, 7 & 8 of Section 16(G) of the U.P. Intermediate Education Act, 1921 (herein after referred to as the Act '1921') and Regulation 39 of Chapter III of the Regulations framed under the Act 1921 which are reproduced below:.

"Section-16(G)

(5) No Head of Institution or teacher shall be suspended by the management, unless in the opinion of the management--

*(a) the c**harges** against him are **serious enough to merit his dismissal, removal or reduction in rank;** or*

*(b) **his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him**; or*

(c) any criminal case for an offence involving moral turpitude against him is under investigation, inquiry or trial.

(6) Where any Head of Institution or teacher is suspended by the Committee of Management, it shall be reported to the Inspector within thirty days from the date of the commencement of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975, in case the order of suspension was passed before such commencement, and

within seven days from the date of the order of suspension in any other case, and the report shall contain such particulars as may be prescribed and be accompanied by all relevant documents.

(7) ***No such order of suspension shall, unless approved in writing by the Inspector, remain in force for more than sixty days from the date of commencement of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975, or as the case may be, from the date of such order,*** *and the order of the Inspector shall be final and shall not be questioned in any Court.*

(8) If, at any time, the Inspector is satisfied the disciplinary proceedings against the Head of the Institution or teacher are being delayed, for no fault of the Head of the Institution or the teacher, the Inspector may, after affording opportunity to the management to make representation to revoke an order of suspension passed under this section."

Regulation 39-

*(a) The r****eport regarding the suspension of the head of institution*** *or of the teacher to be submitted to the Inspector* ***under sub-section 6 of Section 16-G shall contain the following particulars and be accompanied by the following document-***

(a) the ***name of the persons suspended*** *along with, particulars of the)posts including grades) held by him since the date of his original appointment till the time of suspension including particulars as to the nature of tenure held at the time of suspension, e.g., temporary permanent or officiating:*

(b) a ***certified copy of the report*** *on the basis of which such person was last confirmed or allowed to cross efficiency bar, whichever later;*

(c) ***details of all the charges*** *on the basis of which such person was suspended;*

(d) ***certified copies of the complaints, reports and inquiry report, if any,*** *of the inquiry officer on the basis of which such person was suspended;*

(e) ***certified copy of the resolution of the Committee of Management*** *suspending such person;*

*(f) c****ertified copy of the order of suspension*** *issued to such persons;*

(g) in case such person was suspended previously also, details of the charges, on which and the period for which he was suspended on previous occasions accompanied by certified copies of the orders on the basis of which he was reinstated.

(2) An employee other than a head of institution or a teacher may be suspended by the appointing authority on any of the grounds specified in Clauses (a) to (c) of sub-section (5) of Section 16-G."

*[(3) mi&fofue; (2) ds vUrxZr fuyEcu dk dksbZ vkns'k izHkko esa ugha jgsxk] tc rd fd ,sls vkns'k ds fnukad ls lkB fnu ds Hkhrj fujh{kd }kjk bldk fyf[kr :i esa vuqeksnu u dj fn;k tk;A***

13. In the case of the **Managing Committee, Dayanand Inter College, Gorakhpur (through Sri Uma Shankar,**

Manager) and another vs. The District Inspector of Schools and others, 1980 UPLBEC 168 (paras 4, 6, 10, 11 and 17), a Division Bench of this court has observed that **no opportunity of hearing is required at the time of approval or disapproval** of a resolution under Section 16(G)(7) of the Act, 1921. It **held as under:**

*"10. We are hence inclined to read in sub-section (7) the power of Inspector to disapprove the order of suspension. I**n our opinion, the power of approval embraces within it the power to also disapprove**. This is a well understood rule of general law. The principle underlying Section 16 of the U.P. General Clauses Act would also, in our view, apply. In this connection, we may usefully refer to the decision of the Federal Court in Rayarappan v. Madhavi Amma (A.I.R. 1950 F.C. p.140)*

*17. In regard to the next submission of the learned counsel that in absence of any opportunity having been afforded to the management, the impugned order against respondent no.3 would stand vitiated in law. Here again we are unable to agree. In view of our analysis of the provisions above, **we are clearly of the view that at the stage where the Inspector considers the question of approval or disapproval of the order of suspension,** the management, apart from the requirement of sending the report containing particulars as may be prescribed and the relevant documents, **it has in law no right to be afforded an opportunity as contemplated in sub-section (8). T**he present was not a case of revocation of an already approved order of suspension."*

(Emphasis supplied by me)

14. In the case of ***Committee of Management of Maharajganj Inter College & another Vs. District Inspector of Schools, Maharajganj & another (1999) 3 UPLBEC 1765,*** a Divivion Bench judgment of this Court considered a case ***where on receipt of papers for approval of suspension of the Principal, the District Inspector of Schools received objections of the Principal and without examining the papers submitted by the Committee of Management along with the resolution, declined to approve the suspension relying upon the letter addressed to him by the Principal. On such facts, the Division Bench quashed the order of disapproval passed by the District Inspector of Schools*** and remitted back the matter to him to decision afresh. The Division Bench held as under:-

*"In fact, the question was not examined by the learned single Judge in the above perspective and instead the learned single Judge dismissed the writ petition holding that while considering the approval or disapproval of suspension order, no opportunity of hearing was required to be given by the District Inspector of Schools. **It is true that a Division Bench of this Court has held in the case of Managing Committee, Dayanand Inter College v. District Inspector of Schools and others, 1980 UPLBEC 168, that at the stage of approval or disapproval of the suspension order, the Inspector is not required to afford any opportunity of hearing to the management and that he is only to consider the relevant material referred to in Registration No. 39 of Chapter III of the Regulations.** The said decision, in our opinion, is of no avail. In the instant case, however, as pointed out*

above, ***the District Inspector of Schools did not address himself to the charges and the relevant documents and disapproved the suspension order on the basis of the representation made by the teacher concerned. If the suspension is to be disapproved on consideration of any defect pointed out by the concerned teacher by means of a representation, opportunity has to be afforded to the Management before disapproving of the suspension on any such defect in the proceedings."***

(Emphasis supplied by me)

15. In the case of ***Hari Singh Rajpoot Vs. State of U.P. (2015) 2 UPLBEC 1362 (paragraphs 4, 6 & 8)*** a Division Bench of this Court held as under:-

"4. When the District Inspector of Schools considers whether to approve an order of suspension under Section 16-G of the Act, it is a well settled principle of law that an opportunity of being heard ought to be granted to the teacher, the Principal and the Management. Moreover, it is also a well settled principle of law that the District Inspector of Schools must pass a reasoned order indicating at ***least brief reasons for granting his approval or, as the case may be, disapproval to the suspension of a teacher*** *(See: Committee of Management, Maharajganj Inter College Vs. District Inspector of Schools, 1999 (3) UPLBEC 1765. I****n the present case, ex facie the order of the District Inspector of Schools dated 9 December 2014, which was in question before the learned Single Judge, did not indicate any reasons.***

6. We have duly perused the order of the District Inspector of Schools dated 9 December 2014. The first paragraph of the order contains only a recital of the fact that following ***the enquiry report, the Management had resolved on 16 November 2014 to place the appellant teacher under suspension and, accordingly, an application was submitted on 4 December 2014 for approval.*** *The second paragraph of the order only contains his conclusion granting approval.* ***Not even brief reasons were indicated in the order,*** *which is totally bereft of any reasons whatsoever. Moreover, it is not in dispute that the* ***appellant was not given an opportunity of being heard,*** *which has been held to be required in the judgment of the Division Bench noted above.*

8. For these reasons, we allow the special appeal and set aside the impugned judgment and order of the learned Single Judge dated 9 February 2015. We set aside, in consequence, the order of approval granted by the District Inspector of Schools on 9 December 2014 and direct that the ***District Inspector of Schools shall pass a fresh order in accordance with law after furnishing to the appellant a reasonable opportunity of being heard. We however, decline to accede to the prayer of the appellant that the appellant should be reinstated in service pending a decision by the District Inspector of Schools."***

(Emphasis supplied by me)

16. In the case of **Ram Autar Verma vs. State of U.P. (2006) 65 ALR 592 (All) (Para-11),** a bench of this court considered the provisions of Section 16G(7) of the Act and Regulation 39 and held as under:-

"By necessary corollary the District Inspector of Schools is required to consider the approval of the suspension

effected by the Management in the light of the documents which are so forwarded to him under Regulation 39. He is not expected to take into consideration any other documents which is not required to be transmitted under Regulation 37, subject however to the condition that any other document may be filed by the delinquent employee for alleging malafides, non-consideration of martial evidence which may already be on record as well as any other document relevant (the list is not exhaustive and may vary in facts of particular case). **However, consideration of such foreign documents must be proceeded by opportunity of hearing to the Committee of Management."**

17. A careful reading of Section 16G(7) of the Act, 1921 read with Regulations 39 and 40 leads to an irresistible conclusion that where any head of the Institution or teacher is suspended by the Committee of Management, it shall be reported to the Inspector within seven days from the date of order of suspension. The report sent by the Committee of Management shall contain such particulars and shall be accompanied with such documents as are prescribed in Regulation 39. The order of suspension is subject to approval of the inspector under sub-Section (7). Neither sub-section (7) of Section 16G nor Regulation 39 require any opportunity of hearing to the Committee of Management or the employee for approval of the order of suspension. However, the question of affording opportunity of hearing either to the Committee of Management or the suspended employee has been judicially interpreted by three Division Benches of this Court as mentioned in paragraphs-13, 14 and 15 above. At first glance, there appears to be some conflict between these judgments on the point of affording opportunity of hearing but on deeper examination, I find that there is no conflict between these judgments.

18. In the case of the **Managing Committee, Dayanand Inter College, Gorakhpur** (supra), the Division Bench held that where the report and papers as required under Sub-section (7) of Section 16G of the Act, 1921 read with Regulation 39 of the regulation are sent by the Committee of Management, then at that stage while considering the question of approval or disapproval of the order of suspension, no opportunity of hearing is to be afforded to the Committee of Management. In the case of ***Committee of Management of Maharajganj Inter College & another (supra),*** the Division Bench considered a case where the District Inspector of Schools received objections of the Principal and without examining the papers submitted by the Committee of Management along with the resolution, declined to approve the suspension relying upon the letter addressed to him by the Principal, then in that situation, the Division quashed the order of disapproval and distinguished the Division Bench judgment in the case of the **Managing Committee, Dayanand Inter College, Gorakhpur** (supra) and held that **if the suspension is to be disapproved on consideration of any defect pointed out by the concerned teacher by means of a representation, then an opportunity has to be** afforded to the Management before disapproving of the suspension.

19. In the case of **Hari Singh Rajpoot Vs. State of U.P. (supra)**, the Division Bench laid down the law that

while granting approval or disapproval to the suspension of a teacher, brief reasons should be recorded in the order of approval or disapproval. The judgment in the case of the **Managing Committee, Dayanand Inter College, Gorakhpur** (supra) was noticed in the case of **Committee of Management of Maharajganj Inter College & another** (supra) and it was distinguished inasmuch as an objection was received by the District Inspector of Schools from the suspended employee and on that fact, it was held that while considering the objection of the suspended employee, the Inspector should have afforded opportunity of hearing to the Management. The aforesaid judgment in the case of **Committee of Management of Maharajganj Inter College & another** (supra) has been followed in the case of **Hari Singh Rajpoot Vs. State of U.P.** (supra).

20. Scope of consideration under Section 16G(7) read with Regulation 39 is very limited as has also been explained in the case of Ram Autar Verma (supra). Thus, a conjoint reading of the afore-noted four judgments reveal that **if all the required papers and informations as prescribed under sub-section (7) of Section 16G of the Act, 1921 and Regulation 39 have been submitted by the Management to the District Inspector of Schools to obtain approval of suspension, then opportunity of hearing at the stage of granting approval or disapproval is not required to be afforded to the Management or the employee. But if the employee has submitted any representation or objection against the order of suspension, then the District Inspector of Schools shall afford an opportunity of hearing to the Management and the concerned employee while passing the order of approval or disapproval which must contain brief reasons.** This view is further supported by the provisions of sub-Section (8) of Section 16G, which specifically provides for an opportunity of hearing at the subsequent stage to the Management by the District Inspector of Schools while considering to revoke an order of suspension passed under sub-section (7) when the Inspector is satisfied that the disciplinary proceedings against the head of the Institution or teacher, is being delayed for no fault of the head of the Institution or the teacher.

21. Undisputedly, the respondent No.3 has neither required the respondent No.4 to submit any objection nor any objection was submitted by the respondent No.4 before the respondent No.3 and as such in view of the law laid down by the Division Bench in the case of the **Managing Committee, Dayanand Inter College, Gorakhpur** (supra), the respondent No.4 has not committed any manifest error of law to pass the impugned order without affording opportunity of hearing to the Management and the respondent No.4.

22. Learned counsel for the petitioners has not made any submission on merits of the impugned order and confined his submissions only on the point that the impugned order is violative of principles of natural justice as it has been passed without affording opportunity of hearing. His submission has been rejected by me for reasons stated in paragraphs above. Therefore, I do not find any good reason to interfere with the impugned order, in view of the position settled by the Division Bench of this court

in the case of **the Managing Committee, Dayanand Inter College, Gorakhpur** (supra). However, to meet the ends of justice, it is directed that the petitioners/ Competent Authority shall conclude the disciplinary proceedings against the respondent No.4, in accordance with law, expeditiously preferably within two months if not completed so far, keeping in mind the time frame provided in Regulation 40.

23. With the aforesaid directions, **the writ petition is disposed off.**

(2020)06ILR A821
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2020

BEFORE
THE HON'BLE GOVIND MATHUR, J.
THE HON'BLE SAMIT GOPAL, J.

Special Appeal No. 1136 of 2018

Shivam Maurya ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

A. Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2000 – Object – The Act is a beneficial legislation. The principles of such beneficial legislation are to be applied only for the purpose of interpretation of this statute – It does not envisage incarceration of a juvenile which clearly shows that the intention and object was not to shut the doors of a disciplined and decent civilised life. It provides him an opportunity to mend his life for the future. (Para 14)

B.Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2000 – Section 2(k), 2(l) & 19 – Juvenile in conflict with Law – Effect of conviction under the Act – Section 19 has been incorporated in order to give a juvenile an opportunity to lead his life with no stigma and to wipe out the circumstances of his past – It thus provides that a juvenile shall not suffer any disqualification attaching to conviction of an offence under such Act – It protects a juvenile and any stigma attached to his conviction is also removed. (Para 10 and 14)

C. Civil Law - Juvenile Justice (Care and Protection of Children) Act, 2000 – Concealment of pendency of criminal case – Cancellation of candidature – The concealment of the pendency of criminal case against the appellant-petitioner was of no consequence – As per the requirement of law a conviction in an offence will not be treated as a disqualification for a juvenile – The intention of the legislature is clear that in so far as juveniles are concerned their criminal records is not to stand in their way in their lives – Held, the cancellation of the candidature of the appellant-petitioner is bad. The authority concerned failed to appreciate the fact that the appellant-petitioner was entitled to benefit of the provisions of Act of 2000.

Special Appeal allowed; Writ Petition allowed (E-1)

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

Heard Sri Siddharth Khare, learned counsel for the appellant and the learned Standing Counsel and perused the records.

2. The present appeal is directed against the judgment dated 05.10.2018 passed in Writ A No. 21337 of 2018 by which the learned Single Judge has dismissed the said writ petition on the ground that the petitioner therein cannot be given benefit for suppression of an

information despite specific question in the affidavit along with the application form / verification form as to whether he had been convicted by any court of law. The said information as supplied by the petitioner was found to be incorrect by the authorities and as such the authorities concerned were well within their authority to cancel the candidature of the petitioner. The facts of the present matter are as follows:-

i. In the year 2015, the U.P. Police Recruitment and Promotion Board, Lucknow notified an appointment of police Constable and Constable in PAC (Male) Direct Recruitment, 2015.

ii. The appellant-petitioner applied in the same and on the basis of his academic qualifications he stood selected.

iii. The petitioner as was required to participate in a physical efficiency test who participated therein on the scheduled date and time and was declared qualified for the same.

iv. The appellant-petitioner was allotted district Deoria for training. He was required to file a declaration affidavit being a notarial affidavit / verification form which was filled by him which is dated 30.05.2018.

v. The appellant-petitioner vide communication dated 09.06.2018 issued by the Superintendent of Police, Azamgarh was required to participate in medical examination which was scheduled on 17.06.2018 where the appellant-petitioner participated and was declared fit and thus passed the said medical examination.

vi. Vide order dated 04.09.2018 the candidature of the appellant- petitioner was cancelled on the ground of material concealment of pendency of a criminal case against him which was not disclosed in the affidavit / verification form, which is the impugned order in the writ petition before the learned Single Judge.

3. A First Information Report was lodged on 28.06.2013 being Case Crime No. 173 of 2013 under Sections 147, 323, 308, 325, 504, 506 I.P.C., P.S. Kundrapur, District Azamgarh in which the appellant-petitioner was also named as an accused. The appellant-petitioner as was declared a juvenile, his case was taken up by the Juvenile Justice Board, Azamgarh which vide order dated 07.07.2018 convicted the appellant and directed him to be kept under probation for a period of one year along with fine under Section 147 I.P.C. of Rs. 2000/-, under Section 323 I.P.C. of Rs. 1000/-, under Section 308 I.P.C. of Rs. 20,000/-, under Section 325 I.P.C. Rs. 10,000/-, under Section 504 I.P.C. of Rs. 1000/- and under Section 506 I.P.C. of Rs. 2000/- to be paid by the custodian of the appellant-petitioner in view of his committing the offence. It was further ordered that as per the provisions of Section 357 Cr.P.C., 50 % of the fine as realised shall be paid to the victim.

4. An order dated 04.09.2018 was passed by the District Nodal Officer, Recruitment Centre, Azamgarh cancelling the candidature of the petitioner on the

ground that he has filed a false affidavit / self-disclosure letter in which in Para 2 pertaining to the disclosure of involvement in a criminal case, the candidate has disclosed as follows:-

(2) यह की मेरे विरुद्ध कोई आपराधिक मुकदमा / मामला मेरी जानकारी में कभी पंजीकृत नहीं हुआ है और न ही कोई पुलिस विवेचना (Investigation) लंबित है।

The said information is incorrect as on verification it came to light that a criminal case is registered against him on which he has been released on probation for one year along with fine. The said information was intentionally concealed and the affidavit is based on false facts.

5. In the present case date of birth of the appellant-petitioner is 05.02.1997. The First Information Report was lodged on 28.06.2013. The appellant-petitioner was thus aged about 16 years (to be more precise 16 years, 4 months & 23 days old) at the time when the F.I.R was lodged.

6. An affidavit / declaration as given by the appellant-petitioner states to be disclosed in its column 2 that there is no criminal case registered in the knowledge of the declarant / deponent and there was never any investigation pending. Further in clause 5 of the same it was to be declared that the declarant / deponent was never challaned by the police in any criminal matter. The candidature of the appellant-petitioner was cancelled on the ground that he had furnished a false notary affidavit dated 30.05.2018 asserting wrong and incorrect facts regarding the pendency of a criminal case against him. The said information was stated to have been concealed intentionally and a false affidavit is said to have been given.

7. The appellant-petitioner at the time of lodging of the said F.I.R was a juvenile. A juvenile has been defined in Section 2 (k) of the Juvenile Justice (Care and Protection of Children) Act, 2000. The same is extracted herein below:-

"(k) "juvenile" or "child" means a person who has not completed eighteenth year of age;"

8. Section 19 of the Act of 2000 reads as under:-

"19. Removal of disqualification attaching to conviction:- (1) Notwithstanding anything contained in any other law, a juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

(2) The Board shall make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period prescribed under the rules, as the case may be."

9. Since the appellant-petitioner was under the age of 18 at the time of lodging of the said F.I.R he had to be treated as a juvenile in conflict with law. A "juvenile in conflict with law" has also been defined under Section 2 (l) of the Act of 2000. The same reads as under:-

"(l) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date f commission of such offence;"

10. Section 19 of the Act of 2000 has been incorporated in order to give a juvenile an opportunity to lead his life with no stigma and to wipe out the circumstances of his past. It thus provides that a juvenile shall not suffer any disqualification attaching to conviction of an offence under such Act. A "juvenile" on the date when the alleged offence has been committed is required to be dealt with under the Juvenile Justice Board (Care and Protection of Children) Act, 2000 which declares that all criminal charges against individuals who are described as "juvenile in conflict with law" be decided by the authorities constituted under the Act by the Juvenile Justice Board. If a conviction is recorded by the Juvenile Justice Board, Section 19 (1) of the Act of 2000 specifically stipulates that juvenile shall not suffer any disqualification attached to the conviction of an offence under such law. Further Section 19 (2) of the Act of 2000 contemplates that the Board must pass an order directing all the relevant records of such conviction to be removed after expiry of the period of appeal or reasons as prescribed under the rules as the case may be.

11. At the present moment it will not be out of place to mention that in the present case the Juvenile Justice Board while giving its judgment and order dated 07.07.2018 being conscious of the provision of Section 19 of the Act of 2000 directed that the records or papers will be dealt with as per the provisions of Rule 99 of Juvenile Justice (Care and Protection of Children) Rules, 2007. The said Rule is extracted herein below:-

"99. Disposal of records or documents.-- *The records or documents in respect of a juvenile or a child or a juvenile in conflict with law shall be kept in a safe place for a period of seven years and no longer, and thereafter be destroyed by the Officer-in-Charge or Board or Committee, as the case may be."*

12. Section 21 of the Act of 2000 prohibits publication of the name of the "juvenile in conflict with law" with the object to protect a juvenile from adverse consequences on account of his conviction for an offence committed as a juvenile. The same reads as under:-

"21. Prohibition of publication of name, etc., of juvenile involved in any proceeding under the Act.-

(1) No report in any newspaper, magazine, new-sheet or visual media of any inquiry regarding a juvenile in conflict with law under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any picture of any such juvenile be published:

Provided that for reasons to be recorded in writing the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine, which may extend to one thousand rupees."

13. The sensitivity in matters relating to a juvenile or child or juvenile in conflict with law was deep embedded in the legislation as is apparent from Chapter II of the Juvenile Justice (Care & Protection of Children) Rules, 2007. Rule 3 therein gives in detail the fundamental principles to be followed in administration of the Rules.

14. The said Act is a beneficial legislation. The principles of such beneficial legislation are to be applied only for the purpose of interpretation of this statute. The concealment of the pendency of criminal case against the appellant-petitioner was of no consequence. As per the requirement of law a conviction in an offence will not be treated as a disqualification for a juvenile. The records of the case pertaining to his involvement in a criminal matter are to be obliterated after a specified period of time. The intention of the legislature is clear that in so far as juveniles are concerned their criminal records is not to stand in their way in their lives. The cancellation of the candidature of the appellant-petitioner was thus bad. The authority concerned failed to appreciate the fact that the appellant-petitioner was entitled to benefit of the provisions of Act of 2000. The cancellation of the candidature of the petitioner goes contrary to the object sought to be achieved by the Act of 2000. Section 19 of the Act of 2000 protects a juvenile and any stigma attached to his conviction is also removed. The Act of 2000 does not envisage incarceration of a juvenile which clearly shows that the intention and object was not to shut the doors of a disciplined and decent civilised life. It provides him an opportunity to mend his life for the future.

15. We thus hold that the authority concerned fell in complete error in not extending the benefit of Act of 2000 to the appellant-petitioner particularly when there are specific provisions provided therein to take care of a juvenile being implicated, tried and / or convicted in a criminal matter. We thus extend the benefit provided under Section 19 of the Act of 2000 to the appellant-petitioner.

16. The judgment and order of the learned Single Judge is set aside. The Writ A No. 21337 of 2018 is allowed and the order dated 04.09.2018 passed by the District Nodal Officer, Recruitment Centre, Azamgarh is set aside. The respondent no. 6 is directed to reinstate the petitioner within a period of 30 days from the date of production of a certified copy of this order with all consequential benefits except for back wages following the principle of no work and no pay.

(2020)06ILR A825
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 1178 of 2019

Union Of India & Ors. ...Appellants
Versus
Raj Bahadur Singh ...Respondent

Counsel for the Appellants:
Sri Ashok Singh

Counsel for the Respondent:
Sri Divikar Rai Sharma, Sri Manphool Singh, Sri Anil Kumar Bind, Sri Akhilesh Singh

A. Civil Law - Central Civil Services (Extraordinary Pension) Rules, 1939 – Rule 3-A(1)(a) – Disability Compensation – Accident 'in the Course of Employment' – Meaning – Accident having admittedly occurred while the petitioner was already availing leave and was neither in the process of undertaking a journey home from duty or going back to duty the issue with regard to notional extension of the employers' premises would not arise in the present case – Since it was not the case of the petitioner that the accident occurred while he was undertaking a journey back home from his place of work and for the said reason the accident could not be said to have occurred 'in the course of employment' – Howsoever liberally we may attempt to construe the provisions under the CCS (EOP) Rules, 1939, the petitioner would not by any stretch be held to be 'on duty' leading to a causal connection between disablement and government service. (Para 27, 28 and 36)

B. Doctrine of Precedents – Meaning – A judgment is only an authority for what it actually decides and not what logically follows from the various observations made in the judgment – In order to fully understand and appreciate the binding force of a decision, it is always necessary to see what were the facts of the case in which the decision was given and what was the point decided. (Para 29)

Special Appeal allowed; Writ Petition dismissed (E-1)

Cases relied on :-

1. St. of Orissa Vs Sudhansu Sekhar Misra & ors. AIR (1968) SC 647

2. Earl of Halsbury LC in Quinn Vs Leathem (1901) AC 495

3. U.O.I. Vs Amrit Lal Manchandra & ors. (2004) 3 SCC 75

4. London Graving Dock Co. Ltd. Vs Horton (1951) AC 737

5. Home Office Vs Dorcet Yacht Co. (1970) 2 ALL ER 294

6. Herrington Vs British Railways Board (1972) 2 WLR 537

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

1. The present special appeal seeks to challenge the judgment and order dated 27.05.2019 passed in Writ-A No.53145 of 2004 (Raj Bahadur Singh Vs. Union of India and others) whereby the writ petition has been allowed and the orders passed by the respondent authorities in terms of which the claim of the petitioner for disability compensation under the Central Civil Services (Extraordinary Pension) Rules, 19391 stood rejected, have been set aside, and a direction has been issued to the respondents to compute the benefits payable to the petitioner under the CCS (EOP) Rules, 1939 and to pay the same within a stipulated time period as per terms of the order.

2. The Union of India through Secretary, Ministry of Home Affairs, Government of India, New Delhi, and the authorities of the Central Reserve Police Force, who were the respondents in the writ petition, are the appellants before us.

3. The principal grounds canvassed before us on behalf of the appellants is that the respondent-petitioner was not entitled to the benefit of disability compensation inasmuch as he was not 'homebound' when he met with the accident, as he had already reached home and the accident occurred when he was engaged in his personal work and as such there was no causal connection/attributability between the disablement and government service, and the interpretation given by the learned Single Judge to Rule 3-A(1)(a) of the

CCS (EOP) Rules, 1939, is erroneous and the judgment and order is legally unsustainable.

4. It has been pointed out that the respondent was sanctioned leave for 14th, 15th, and 16th December, 1998 with permission to avail 13th December, 1998, the same being a Sunday, and he had left the Unit, where he was posted, on 13th December, 1998 itself to reach his home town on the same day which is only at distance of 110 kilometers from the Unit he was posted, having a travelling time of about three hours, and in view of the same the accident having occurred on 14th December, 1998, the respondent petitioner could not in any manner be said to be 'homebound' at the relevant point of time.

5. *Per contra*, learned counsel appearing for the respondent-writ petitioner has supported the order passed by the learned Single Judge by submitting that the petitioner having met with an accident on 14th December, 1998 while he was on leave for a short period, the same would be considered to be on duty, and he would be entitled to get the disability benefit.

6. The facts of the case, which are reflected from the records before us, indicate that as per the case set up in the writ petition, the petitioner was on leave from 14th December, 1998 to 16th December, 1998, when he met with an accident, which occurred on 14th December, 1998 while he was going to his house by a scooter which was hit from the opposite side by a three-wheeler. The claim raised by him for disability pension under the CCS (EOP) Rules, 1939 was based on a contention that the leave being for very short period, he would be considered to be on duty and would be entitled for the disability pension.

7. The claim raised by the petitioner for disability pension under the CCS (EOP) Rules, 1939, was rejected by the Commandant of the Battalion by means of an order dated 6th April, 1999, the operative portion of which reads as follows :-

''1. चूँकि बल संख्या–911182766 सिपाही राज बहादुर सिंह का एक्सीडेंट दिनांक 14/12/98 को लगभग 17:00 बजे दिनांक 14/12/98 से 16/12/98 तक 3 दिन के अवकाश दिनांक 13/12/98 की अनुमति सहित, के दौरान अपना निजी कार्य संपन्न करते समय अपने पैतृक गॉव में हुआ है, अतः उक्त दुर्घटना के परिणाम स्वरूप हुए नुकसान अथवा भविष्य में होने वाली किसी भी असक्तता के लिए उक्त कार्मिक केरिपुबल विभाग से किसी प्रकार के दावे/प्रतिपूर्ति का हकदार नहीं होगा तथा उक्त दुर्घटना सरकारी ड्यूटी पर न मानी जा कर कार्मिक के द्वारा निजी कार्य संपन्न करते समय निजी कार्य हेतु मानी जाये।

2. कार्मिक के ईलाज की अवधि का समय समय पर कार्मिक के अवकाश की हकदारी के अनुसार नियमित कर दिया जाये।''

8. Thereafter, the respondent-petitioner submitted a representation before the Deputy Inspector General, CRPF, Rampur raising a plea that the accident having occurred during the period of casual leave the same would be considered to be as a period on duty as per the relevant rules and accordingly the accident would be deemed to be while on government duty and accordingly he was entitled to disability pension. The claim sought to be raised by the respondent-petitioner was rejected by the Deputy Inspector General, CRPF by means of an

order dated 5th April, 2004 stating therein that there was no provision under the relevant rules that the period spent on casual leave would be treated to be as that on duty and therefore the accident having occurred when the respondent-petitioner was on casual leave the same could not have been treated to be an accident while on duty.

9. Aggrieved against the aforesaid two orders, the respondent-petitioner preferred another representation before the Director General of Police, CRPF, Lucknow, reiterating his contention that the accident having occurred during a period when he was on casual leave the same would be treated to be as a period spent on duty. The representation of the petitioner was turned down by the Director General, CRPF, by assigning the reason that there was no provision under the rules to treat the period of casual leave as that on duty and therefore the respondent petitioner could not claim entitlement to disability pension.

10. The stand taken by the respondents (appellants herein) with regard to the claim set up by the petitioner, as reflected from the averments made in the counter affidavit filed in the writ petition, is being extracted below :-

"3(a). That while the petitioner was working as Constable/General Duty at 62 Bn. C.R.P.F. C/o. 56 APO. He has sanctioned three days Casual Leave i.e. for 14th, 15th and 16th December, 1998 with the permission to avail 13th December, 1998, being Sunday.

3(b). That on 14th December, 1998 when he was on leave, he met under an accident with three wheeler at his home town at Hardoi while he was doing his own work and he sustained the fracture injury in his right leg due to said accident.

x x x x x

5. That in reply to the contents of paragraph no. 3 of the writ petition, it is submitted that on 14th December, 1998 at his home town while the petitioner was on sanctioned leave the accident took place in which he receive the injury in his right leg. However, on 6.4.1999 an order has been passed that as per Rule petitioner is not entitled for disability benefits."

11. In order to appreciate the rival contentions, the provisions with regard to disability pension under the CCS (EOP) Rules, 1939, may be adverted to.

12. The relevant extracts from the CCS (EOP) Rules, 1939, are as follows :-

"3. For the purpose of these rules unless there is anything repugnant in the subject or context,

(1) 'accident' means,

(i) a sudden and unavoidable mishap; or

(ii) a mishap due to an act of devotion to duty in an emergency arising otherwise than by violence out of and in the course of service;

(2) 'date of injury' means,

(i) in the case of accident or violence, the actual date on which the injury is suffered or such date, not being

later than the date of the report of the Medical Board, as the President may fix; and

(ii) in the case of disease, the date on which the Medical Board reports or such earlier date as may be fixed by the President with due regard to the opinion of the Medical Board;

3-A. Disablement/Death.-- (1)(a) Disablement shall be accepted as due to Government service, provided that it is certified that it is due to wound, injury or disease which,

(i) is attributable to Government service, or

(ii)existed before or arose during Government service and has been and remains aggravated thereby.

(b) Death shall be accepted as due to Government service provided it is certified that it was due to or hastened by,

(i) a wound, injury or disease which was attributable to Government service, or

(ii) the aggravation by Government service of a wound, injury or disease which existed before or arose during Government service.

(2) There shall be a causal connection between,

(a) disablement and Government service; and

(b)death and Government service, for attributability or aggravation to be conceded. Guidelines in this regard are given in the Appendix which shall be treated as part and parcel of these Rules."

13. We may also refer to the 'Guidelines for conceding attributability of disablement or death to government service', referable to Rule 3-A(2), appended to the CCS (EOP) Rules, 1939.

14. In particular, we may refer to clause 4(b) and 4(c) of the aforesaid guidelines, which are as follows :-

"4(b) A person subject to the disciplinary code of the Central Armed Police Battalions, is 'on duty',

(i) When performing an official task or a task, failure to do which would constitute an offence, triable under the disciplinary code, applicable to him.

(ii) When moving from one place of duty to another place of duty irrespective of the method of movement.

(iii) During the period of participation in recreation, organized or permitted by service authorities, and during the period of travelling in a body or singly under organized arrangements.

(iv) When proceeding from his duty station to his leave station on returning to duty from his leave station at public expenses, that is, on Railway warrant, on cash TA (irrespective of whether Railway warrant/cash TA is admitted for the whole journey or for a portion only), in Government transport or when road mileage is paid for the journey.

(v) When journeying by a reasonable route from one's official residence to and back from the appointed

place of duty irrespective of the mode of conveyance, whether private or provided by the Government.

(c) An accident which occurs when a man is not strictly 'on duty' as defined above, may also be attributable to service, provided that it involved risk which was definitely enhanced in kind or degree by the nature, conditions, obligations or incidents of his service and that the same was not a risk common to human existence in modern conditions in India. Thus, for example,where a person is killed or injured by someone by reason of his belonging to an Armed Police Battalion (and in the course of his duty in such service, he had incurred wrath of such person) he shall be deemed to be 'on duty' at the relevant time.

This benefit will be given more liberally to the claimant in cases occurring on 'active service' as defined in the relevant Acts/Rules (e.g., those applicable to BSF/CRPF, etc., Personnel)."

15. I t may be noted that the CCS (EOP) Rules, 1939, are applicable to all Central Government servants paid from Civil Estimates other than those to whom the Workmen's Compensation Act, 1923, applied, whether their appointments are permanent or temporary on a scale of pay or fixed pay or piece-work rate.

16. The CCS (EOP) Rules, 1939, provide for the grant of award in the form of monthly pension or lump sum compensation in certain circumstances, including a case, where a government servant is boarded out of government service on account of his disablement due to wound, injury or disease and the disablement is accepted as due to government service, the government servant would be granted disability pension. This disability pension would be in addition to invalid pension/gratuity, if admissible under CCS (Pension) Rules, 1972.

17. As we have already noticed the appellants/respondent have taken a specific stand that the respondent-petitioner had been sanctioned three days' casual leave for 14th, 15th, and 16th December, 1998 with a permission to avail 13th December, 1998 being a Sunday, and during the period when he was on leave on 14th December, 1998, he met with an accident at his home town while on his own work and there would be no entitlement to disability benefit to a person in a case where disability had occurred other than on government duty and accordingly orders were passed by the authorities rejecting his claim. It was also stated that there was no provision in terms of which a period of casual leave is to be treated as a period on duty, as claimed by the petitioner.

18. The stand taken by the respondents/appellants in their counter affidavit has been taken note of by the learned Single Judge in the judgment under appeal in the following manner :-

"A Counter Affidavit has been filed by respondents admitting that petitioner was working as Constable (General Duty) at 62 Battalion, CRPF, C/o 56 APO. He was sanctioned three days casual leave, i.e., 14th, 15th and 16th December, 1998 with the permission to avail 13th December 1998 being Sunday. On 14.12.1998 while riding a Scooter and going to his hometown at Hardoi, petitioner met an accident with a three-wheeler causing fracture in his right leg."

19. Similarly, the order dated 6th April, 1999 passed by the Commandant, CRPF, rejecting the claim of the respondent petitioner for disability pension has been taken note of in the judgment under appeal, as follows :-

"Whenever a person is granted leave, it cannot be said that as soon as he is relieved at the place of posting or moves towards his hometown, process of journey would not be attributable to Government service inasmuch this journey is also being undertaken by the employee concerned which is directly attributable to his service inasmuch as a part of service conditions, he was posted at a place other than his hometown. Therefore, till the incumbent reaches his hometown on official leave, in my view, the entire process of journey will be part of official duty being attributable to Government service and has casual connection to such service."

20. The judgment under appeal proceeds on the premise that the claim of the petitioner had been rejected for the reason that the petitioner had met with an accident while proceeding on leave and that the accident occurred on 14th December, 1998 while the petitioner was on his way to his home town. It is on the basis of this presumption that the learned Single Judge proceeded to formulate the issue in dispute and also to record his view in the following manner :-

"7. In the present case, petitioner met an accident when he was granted leave and going to his Hometown from the place of his posting. "Whether an employee when returns to Home from his Office or place of posting, if meets and accident, can it be said to have occurred during the course of employment and in the present case can it be said that it has connection with Government duty" is the moot question to be answered."

8. In my view, it cannot be said that returning to Hometown from place of posting has no direct connection with the Government duty inasmuch, leave when granted to a Government servant is part of service condition and when Government servant is returning to his house from the place of posting, it is an incident of service having direct connection with the Government duty otherwise there would not have been any occasion for the Government Servant to undertake journey to return to his Hometown.

9. When an Government Servant is granted leave and he proceeds from his place of Posting to his residence, can it be said that as soon as he leaves the place of postings, he ceased to be a Government Servant and there is no connection with Government duty at all is also an issue which has to be examined in the light of spirit of Rules with which Rules, 1939 have been framed.

10. The aforesaid Rules are for the welfare of employees who sustain injuries, disease etc. during course of duty or when they are doing something which has any connection with the Government Duty."

21. On a plain reading of the pleadings in the writ petition, as are evident from the records, it is seen that the issue which was formulated by the writ court did not at all arise in the facts of the case.

22. In the counter affidavit filed in the writ petition, the appellants/respondents nowhere took a stand that the accident occurred on 14th December, 1998 while the petitioner was going to his home town and that his claim for disability pension was turned down for that reason. The order dated 6th April, 1999 passed by the Commandant, CRPF, rejecting the claim of the petitioner for disability pension, is also not for the reason that the accident occurred when the petitioner was proceeding on leave as has been noted in the judgment under appeal.

23. It is also not the stand of the writ petitioner in the writ petition, or at any stage when he raised his claim for disability pension before the authorities, that the accident occurred on 14th December, 1998 while he was proceeding on leave or was on way to his home town. On the contrary, the admitted case of the petitioner was that the accident occurred while he was on leave and the basis of the claim set up by him was that the leave being for a very short period he would be considered to be on duty and would be entitled for disability pension on the basis thereof.

24. It thus emerges from the admitted stand of the parties that the petitioner had been sanctioned three days' casual leave for 14th, 15th and 16th December, 1998 with permission to avail 13th December, 1998, being a Sunday, and it was on 14th December, 1998 during the period when the petitioner was on leave that the accident occurred. The claim set up by the petitioner was based on the ground that the leave being for a short period, the petitioner ought to have been considered to be on duty when the accident occurred.

25. The precedents which have been referred to in the judgment under appeal, are mostly in respect of matters relating to the Workmen Compensation Act, 1923, and the interpretation of the expression 'in the course of employment' which term as per the settled legal position has been held to connote not only actual work but also any other engagement, natural and incidental thereto.

26. There can be no quarrel with the aforesaid proposition of law and in particular that the expression 'in the course of employment' would stand reasonably extended both as regards work-hours and work-place by applying the doctrine of notional extension as to time and place. The narrow interpretation that an accident would be said to have arisen 'out of and in the course of employment' only if the workman sustained injuries at the place of his employment, would be totally out of sync with the present times where modern management methods and developments have made it wholly unnecessary to consider a workman on duty only when he reaches his place of work or starts working and the principle of notional extension of the employers' premises has been adopted in the context of claims relating to workmen compensation. It is in this context of notional extension of the employers' premises that in a case where an employee dies while going to join his duty or while coming back from duty, would be deemed to be 'in the course of his employment'.

27. As we have already noticed, in the facts of the present case, the accident having admittedly occurred while the petitioner was already availing leave and was neither in the process of undertaking a journey home from duty or going back to duty the issue with regard to notional

extension of the employers' premises would not arise in the present case.

28. The question which was therefore posed by the learned Single Judge while deciding the writ petition does not arise in the facts of the case at hand since it was not the case of the petitioner that the accident occurred while he was undertaking a journey back home from his place of work and for the said reason the accident could not be said to have occurred 'in the course of employment'.

29. The law with regard to applicability of the doctrine of precedents is well settled. It has been consistently held that a judgment is only an authority for what it actually decides and not what logically follows from the various observations made in the judgment. In order to fully understand and appreciate the binding force of a decision, it is always necessary to see what were the facts of the case in which the decision was given and what was the point decided.

30. In the case of **The State of Orissa Vs. Sudhansu Sekhar Misra and Ors.2** referring to the observations made by **Earl of Halsbury LC in Quinn Vs. Leathem3,** it was stated thus :-

"12. ...A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury L.C. said in Quinn v. Leathem, 1901 AC 495.

"Now before discussing the case of Allen v. Flood, (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

31. A similar view was taken in **Union of India Vs. Amrit Lal Manchandra and others4,** and after referring to the decisions in **London Graving Dock Co. Ltd. Vs. Horton5, Home Office Vs. Dorcet Yacht Co.6** and Herrington Vs. British Railways Board7, it was stated that observations of Court must be read in the context in which they appear and that one additional or different fact may make a world of difference :-

"15. ...Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.

Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated.

Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Pock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judges."

16. In Home Office v. Dorset Yacht Co.(1970 (2) All ER 294), Lord Reid said, "Lord Atkin's speech....is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed:

"One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

17. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

18. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

x x x

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

32. The precedents which have been referred to in the judgment under appeal being on a point of law which does not arise in the facts and situation of the present case reliance placed on the said decisions to arrive at a conclusion on a question which was not at issue is therefore misplaced and the judgment of the writ court cannot be sustained for the said reason.

33. We may now refer to the provisions of the CCS (EOP) Rules, 1939 to advert to the question as to whether the petitioner would be entitled to the benefit of disability pension in terms of the provisions contained therein.

34. The grant of disability pension under the CCS (EOP) Rules, 1939 is admissible in a case where government servant is boarded out of government service on account of his disablement due to wound, injury or disease. In terms of Rule 3-A(1)(a), disablement shall be accepted as due to government service, provided it is certified that it was due to wound, injury or disease which is attributable to government service, or existed before or arose during government service and has been and remains aggravated thereby. Further, sub-rule (2) of Rule 3-A provides that there has to be a causal connection between disablement and Government service for attributability to be conceded.

35. The guidelines for conceding attributability of disablement of government service, in the context of persons subject to the disciplinary code of the Central Armed Police Battalions (CAPB), have included the case of an accident which occurs while proceeding from duty station to leave station and on returning to duty from leave station at public expense. An accident which occurs when a person is not strictly 'on duty' as defined under clause 4(b), may also be attributable to service, provided it involved risk which was definitely enhanced in kind or degree by the nature, conditions, obligations or incidents of his service and that the same was not a risk common to human existence in modern conditions.

36. In the case at hand, the accident having occurred on a day when the petitioner was availing leave, howsoever liberally we may attempt to construe the provisions under the CCS (EOP) Rules, 1939, the petitioner would not by any stretch be held to be 'on duty' leading to a causal connection between disablement and government service for attributability to be conceded in any manner.

37. As per the petitioner's case also there is no assertion that the accident occurred while he was on his journey back home from his duty station, and the sole basis of the claim being founded on the stand that the leave being for a short period the petitioner may be considered 'on duty', the accident can in no manner be held to be attributable to Government service as per the provisions of the CCS (EOP) Rules, 1939, so as to sustain a claim for disability pension in terms thereof.

38. The judgment under appeal whereby directions have been issued to compute benefits payable to the petitioner in terms of the CCS (EOP) Rules, 1939, and to make payment of the same, therefore, cannot be sustained. The judgment of the learned Single Judge is liable to be set aside and is accordingly set aside.

39. The special appeal is allowed.

40. The writ petition stands dismissed.

(2020)06ILR A836
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

WRIT A No. 1846 of 2020

Ramesh Kumar ...Petitioner
Versus

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

Counsel for the Petitioner:
Sri Paras Pandey

Counsel for the Respondents:
C.S.C., Sri Jay Ram Pandey

A. Service Law – Pension - Compassionate Appointment – Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Rule 5 – The mere fact that an application was made when the old scheme was in force will not by itself create a right in favour of the applicant to be considered under the old scheme. (Para 14)

Petitioner prayed for enforcement of provisions of Old Pension Scheme on him instead of New Pension Scheme dated 28.3.2005, which was enforced from 1.4.2005, on the ground that at the time of application for compassionate appointment, the old scheme was operative and therefore, he deserves to be considered under the old scheme. (Para 2, 14)

Court held that under the Rules, 1974, there cannot be 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. (Para 12)

A compassionate appointee enters in a Government service and becomes part of the cadre only when he is appointed under the Rules, 1974. Therefore, the service conditions and other benefits as applicable as on the date of his appointment shall alone be available to him and shall govern his service conditions. The Old Pension Scheme which was abolished, prior to the appointment of the petitioner shall not be applicable to the petitioner. At the time of his appointment, i.e.,15.4.2005/joining on 21.4.2005, the New Pension Scheme which came into force on 1.4.2005, was in operation. Therefore, the petitioner can get the benefit of only the New Pension Scheme and not the Old Pension Scheme, which was operative prior to 01.4.2005. (Para 13)

Writ petition dismissed. (E-4)

Precedent followed:

1. Pitta Naveen Kumar & ors. Vs Raja Narasaiah Zangiti & ors., (2006) 10 SCC 261 (Para 7)

2. S.B.I. & anr. Vs Raj Kumar, (2010) 11 SCC 661 (Para 11, 12, 14)

Precedent distinguished:

1. Mahesh Narayan & ors. Vs St. of U.P. & ors., 2020 (4) ADJ 172; 2020 (2) ALJ 518 (Para 6)

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

1. Heard learned counsel for the petitioner, the learned standing counsel for the State-respondent Nos.1 and 3, and learned counsel for the respondent Nos.2 and 4.

2. This writ petition has been filed praying for a direction in the nature of mandamus to the respondent-authorities to enforce the provisions of Old Pension Scheme on the petitioner and not the New Pension Scheme dated 28.03.2005, which was enforced from 01.04.2005.

3. Briefly stated, undisputed facts of the present case are that father of the petitioner Sri Bhagwan Prasad was an assistant teacher in Junior High School,

Majhigawan, District Mirzapur. During tenure of his service, he died on 30.01.2005. It is alleged in paragraph-7 of the writ petition that the petitioner has filed application on 28.02.2005 for appointment under Rule 5 of Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974. However, no proof in support of the averments made in the aforesaid paragraph-7 of the writ petition, has been filed along with the writ petition.

4. The District Basic Education Officer issued an order dated 15.04.2005 for appointment of the petitioner as Assistant Teacher on compassionate ground. It is stated by the learned counsel for the petitioner that the petitioner joined on 21.04.2005.

5. Undisputedly, the appointment of the petitioner on compassionate ground was made on 15.04.2005 and as per his allegation, he joined on 21.04.2005. The Old Pension Scheme was operative prior to 30.03.2005. The New Pension Scheme was notified on 28.03.2005 and it came into force from 01.04.2005. Prior to 01.04.2005, the petitioner was not a member of the service cadre. He came in the service as Assistant Teacher on or after 15.04.2005. Therefore, Old Pension Scheme is not applicable to the petitioner.

6. The judgment in the case of Writ-A No.55606 of 2008 (Mahesh Narayan and others vs. State of U.P. and others), decided on 19.12.2019 is on entirely different set of facts.

7. It is settled law that a candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India, has only a right to be considered therefor, vide **Pitta Naveen Kumar and others vs. Raja Narasaiah Zangiti and others, (2006) 10 SCC 261 (para-32).**

8. **Compassionate appointment is a need based concept. Immediate financial disruption is a dominating consideration in matters on compassionate appointment, which is an exception to the general rule of appointment on merit in public employment through open invitation.**

9. It is well settled that appointment on compassionate grounds is not a source of recruitment. It is an exception to the general rule that recruitment to public services should be made on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process.

10. The dependants of employees who died in harness, do not have any special claim or right to employment, except by way of concession, which has been extended by the State Government for dependants of deceased employee under the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 to enable the family of the deceased to get over the sudden finance crisis. Thus, claim for compassionate appointment is traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme.

11. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/ withdrawn. In the case of **State Bank of India and another vs. Raj Kumar,**

(2010) 11 SCC 661 (Para-8), Hon'ble Supreme Court reiterated the aforementioned settled principles and further held that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, 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.

12. In the case of **Raj Kumar (supra)** (paras-11 and 12), Hon'ble Supreme court further held that normally schemes contemplate compassionate appointment on an application by a dependent family member, subject to the applicant fulfilling the prescribed eligibility requirements, and subject to availability of a vacancy for making the appointment. The applicant 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 under the Rules, 1974, subject to the eligibility for the post, verification of the eligibility and the financial capacity of the family. The appointments under the Rules, 1974 is not automatic but an applicant has to wait in a queue for a vacancy to arise, or for a selection committee to assess the comparative need of other applicants under the Rules so as to fill a limited number of earmarked vacancies. Thus, there can be 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.

13. A compassionate appointee under the Rules, 1974 enters in government service enters in a government service and becomes part of the cadre only when he is appointed under the Rules, 1974. Therefore, the service conditions and other benefits as applicable as on the date of his appointment shall alone be available to him and shall govern his service conditions. The Old Pension Scheme which was abolished, prior to the appointment of the petitioner shall not be applicable to the petitioner. At the time of his appointment, i.e. 15.04.2005/ joining on 21.04.2005, the New Pension Scheme which came into force on 01.04.2005, was in operation. Therefore, the petitioner can get the benefit of only the New Pension Scheme and not the Old Pension Scheme, which was operative prior to 01.04.2005.

14. In the case of **Raj Kumar (supra)**, deceased employee's mother made application dated 06.06.2005 and 14.06.2005 requesting for appointment of his son on compassionate grounds. When the applications were being processed and verified the compassionate appointment scheme was substituted by "the SBI scheme for payment of ex-gratia lump sump amount" w.e.f. 04.08.2005. The New Scheme abolished Old Scheme for compassionate appointments and needs to be provided for payment of ex-gratia lump sump amount as per its terms. The applicant took the stand that at the time of application for compassionate appointment, the old scheme was operative and therefore, he deserves to be considered under the old scheme. On these facts, Hon'ble Supreme Court held that 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**. It further held that only the new scheme shall be

applicable and the applicant may get benefit under the new scheme and not under the old scheme.

15. For all the reasons afore-stated, I hold that the petitioner is not entitled for the benefit of old pension scheme. **The writ petition** is devoid of merit and is, therefore, **dismissed.**

(2020)06ILR A839
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

WRIT A No. 2776 of 2020

Sanjay Kumar Singh ...Petitioner
Versus

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

Counsel for the Petitioner:
Sri Pradeep Kumar Bhardwaj

Counsel for the Respondents:
C.S.C.

A. Service Law – Transfer Policy – In effecting transfer, the fact that the children of an employee are studying should be given due weight, if the exigencies of the service are not urgent.
Petitioner submits that in the impugned order the place of transfer is not mentioned and the education of his son, who is studying in Class 11, will get disturbed, and he will not get admission anywhere in the mid-term. The Hon'ble Court held that the Court has limited powers u/Art. 226 to interfere in the transfer order, but issued direction to respondent to consider and decide the representation of the petitioner by passing a speaking and reasoned order. (Para 2, 5, 7, 8)

Writ Petition disposed of. (E-4)

Precedent followed:

1. Director of School Education Madras . & ors.Vs O. Karuppa Thevan, 1994 Supp. (2) SCC 666 (Para 3, 7)

Petition challenges order dated 04.02.2020, passed by Additional Superintendent of Police, Establishment U.P.

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This writ petition has been filed by the petitioner with the following relief:-

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 04.02.2020 passed by respondent no.6 against the petitioner only. (Annexure No.1 to this writ petition).

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent no.1 to formulate a Uniform Annual transfer policy with regard to the entire police force.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondents not to transfer/relieve the petitioner from his respective place of posting in pursuance of the impugned order and also direct the respondents to decide the representation of the petitioner dated 06.02.2020 within stipulated period as fixed by this Hon'ble Court.

(iv) 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.

(v) Award the cost to the petitioner from the respondents.

2. Learned counsel for the petitioner submits that in the impugned transfer order the place of transfer is not mentioned where the petitioner has been transferred. Learned counsel for the petitioner further submits that the son of the petitioner is studying in Class-11 in Bharat Ram Globel School, Greater Noida and if he is transferred in the mid term, the education of the petitioner's son will disturb and he will not get admission anywhere in the mid term. In the next year the son of the petitioner is appearing in Class-12 and as per the Rules of Central Board of Secondary Education, Class-11 & 12 has to be appeared from the same School.

3. Learned counsel for the petitioner further submits that in view of the Hon'ble Apex Court judgment in the case of ***Director of School Education Madras and Others Vs. O. Karuppa Thevan, reported in 1994 SCC, Supl. (2) 666***, no mid term transfer can be done except if the exigencies of the service are not urgent.

4. It is contended by learned counsel for the petitioner that the petitioner has already filed a detailed representation dated 06.02.2020 against the transfer order, which is still pending before the respondent no.6 and no final order has been passed.

5. Learned Standing Counsel submits that the transfer order is rightly passed and this Court under Article 226 of the Constitution of India have limited powers to interfere in the transfer order.

6. I have heard the learned counsel for the parties. From the perusal of the transfer order dated 04.02.2020, it appears that the name of the petitioner was find place at serial no.1 and the place of transfer is not mentioned in the impugned order. Further the son of the petitioner is studying in Class-11 in District Gautam Budh Nagar and if the petitioner is disturbed in the mid session, the education of his son will be disturbed and there is very-less chance that the son of petitioner will get admission in any college during mid session at the newly transferred place.

7. The Hon'ble Apex Court in the case of Director of School Education Madras and Others Vs. O. Karuppa Thevan, reported in 1994 SCC, Supl. (2) 666 was pleased to observe as under:-

"Although there is no such rule, we are of the view that in effecting transfer, the fact that the children of an employee are studying should be given due weight, if the exigencies of the service are not urgent. The learned counsel appearing for the appellant was unable to point out that there was such urgency in the present case that the employee could not have been accommodated till the end of the current academic year."

8. In view of the discussion made above, the respondent no.6 is directed to consider and decide the representation dated 06.02.2020 of the petitioner by passing a speaking and reasoned order in view of the law laid down by the Hon'ble Apex Court within a period of six weeks from the date of production of certified copy of this order.

9. The petitioner shall not relieved from the place of his present posting, if he has already not been relieved till the decision taken by the respondent no.6 on the representation filed by the petitioner.

10. With the aforesaid observation, the writ petition is finally **disposed of.**

(2020)06ILR A841
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

WRIT A No. 2881 of 2020

Smt. Neha Saxena ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment – U.P. Recruitment of Dependent of Government Servants Dying in Harness Rules, 1974: Section 2(c) – Married daughter is entitled to be considered for compassionate appointment. Exclusion of married daughter from the ambit of the expression 'family' in Rule 2(c) is illegal and unconstitutional being violative of Articles 14 and 15 of the Constitution of India. (Para 8, 10)

Writ Petition allowed. (E-4)

Precedent followed:

1. Neha Srivastava Vs St. of U.P. & anr. , Special Appeal (D) No. 863 of 2015 (Para 8, 10)

2. The State of U.P. & anr. Vs Neha Srivastava, Special Leave to Appeal (C) No. 22646 of 2016 (Para 8, 10)

Petition challenges order dated 31.01.2020, passed by Superintending Engineer, Budaun/Pilibhit Zone, P.W.D. Bareilly.

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This writ petition has been filed by the petitioner before this Court, under Article 226 of the Constitution of India with the following prayers;

"(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 31.01.2020 (Annexure No.4) passed by respondent No.4 to this writ petition.

(ii to issue a writ, order or direction in the nature of mandamus commanding the respondents to appoint the petitioner under Dying-in-Harness Rules on suitable post forthwith.

(iii) to issue a writ, order or direction in the nature of Mandamus commanding the respondents to appoint the petitioner under Dying-in- Harness Rules on suitable post forthwith.

(iv) Award costs of the petition to the petitioner."

2. Learned counsel for the petitioner submitted that the father of the petitioner late Krishna Kumar Saxena was a regular employee posted as Administrative Officer in the office of P.W.D. and while being in service he died on 15.11.2019 leaving behind the petitioner and her mother Smt. Mamta Saxena, the father of the petitioner was only earning member

of the family. The mother of the petitioner is a housewife and she is an old lady.

3. Learned counsel for the petitioner further submits that the petitioner was married in the year 2009 but being the only heir of late Krishna Kumar Saxena and Smt. Mamta Saxena has been residing with her mother Smt. Mamta Saxena to look after her being an old lady who was suffering from several diseases and after the death of the father, she is the only person to look after her mother.

4. Learned counsel for the petitioner further submits that the mother of the petitioner, thereafter, moved an application on 27.01.2020 before the respondents to give appointment to the petitioner, under the Dying-in-Harness Rules on suitable post. The petitioner is fully qualified to be appointed on Group-C post as she has completed her graduation in the year 2006 in Commerce streame and she is also entitled to get the benefits of Government Orders issued from time to time and the benefits under the Dying in Harness Rules, 1974.

5. Learned counsel for the petitioner further submits that the respondent No.4 vide order dated 31.01.2020 rejected the application of the petitioner for appointment on compassionate ground only on the ground that the petitioner being a married daughter is not covered under the definition of family under Rule 2(c) of the U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974, therefore, she is not entitled to be appointed under the Dying-in-Harness Rules, 1974 as amended in 2011.

6. Learned counsel for the petitioner further submits that the ground taken by the respondent No.4 while rejecting the application of the petitioner is arbitrary and without application of mind, the petitioner is covered under the definition of family as contemplated under Rule 2(c) of the U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974 and the impugned order was passed totally in mechanical manner.

7. Learned Standing Counsel has countered the arguments advanced by the petitioner and submitted that the petitioner is not entitled for being appointed on compassionate ground as the petitioner is not covered under the definition of family under Rule 2(c) of the U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974.

8. In reply to the arguments raised by the learned Standing Counsel, learned counsel for the petitioner submits that the Division Bench of this Court has dealt with this controversy and entitled married daughter for compassionate appointment this view is taken by the Court in Special Appeal (D) No.863 of 2015 ***(Neha Srivastava Vs. State of U.P. and another)*** and was pleased to hold that exclusion of married daughters from the ambit of the expression family in Rule 2(c) of the U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974 is illegal and unconstitutional. It was further submitted that aggrieved by the judgment passed in Special Appeal (D) No.863 of 2015 dated 23.12.2015, the State of U.P. has filed Special Leave to Appeal (C) Nos.22646 of 2016 (The State of U.P. and another Vs. Neha Srivastava), which was dismissed by the

Hon'ble Apex Court vide judgment and order dated 23.07.2019.

9. Having heard learned counsel for the petitioner, learned Standing Counsel for the State and perused the record. It is not disputed that the petitioner is the married daughter of late Krishna Kumar Saxena, working on the post of Administrative Officer in the office of P.W.D. and after the death of her father, the petitioner applied for compassionate appointment and she is living with her widow mother to look after her and there is no source of her livlihood and no other family members made any objection on petitioner's appointment on compassionate ground in place of late father.

10. It is also not out of place to mention here that the only objection taken by the respondents is that the petitioner being married daughter is not covered under the definition of family under Rule 2(c) of the U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974, as such petitioner is not entitled for reliefs sought in the writ petition. This Court is not satisfied with the objection raised by the respondents, whereas this controversy has already been attained finality in Special Appeal (D) No.863 of 2015 (***Neha Srivastava Vs. State of U.P. and another)*** and this Court has held that exclusion of married daughters from the ambit of the expression family in Rule 2(c) of the U.P. Recruitment of Dependent of Government Servant Dying-in-Harness Rules, 1974 is illegal and unconstitutional being violative of Articles 14 and 15 of the Constitution of India and further held that the married daughter is entitled to be considered for compassionate appointment. It is relevant to mention here that the Hon'ble Apex Court also dismissed the Special Leave to Appeal (C) No.22646 of 2016 vide judgment and order dated 23.07.2019 confirming the judgment passed in Special Appeal (D) No.863 of 2015 dated 23.12.2015 ***(Neha Srivastava Vs. State of U.P. and another).***

11. In view of the aforesaid discussions and considering the judgement passed by this Court in Special Appeal (D) No.863 of 2015 dated 23.12.2015 (Neha Srivastava Vs. State of U.P. and another) and the judgment passed by the Hon'ble Apex Court in Special Leave to Appeal (C) No.22646 of 2016, the present writ petition is **allowed** and the impugned order dated 31.01.2020 is quashed. The Superintending Engineer, Budaun/ Pilibhit Zone, P.W.D. Bareilly, respondent No.4 is directed to consider and decide the claim of the petitioner in the light of the observations made above and the judgment passed by this Court expeditiously, preferably within a period of six weeks from the date of production of a certified copy of this order before him and the respondent No.4 may also communicate the decision to the petitioner forthwith.

12. No order as to cost.

(2020)06ILR A843
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

WRIT A No. 3751 of 2020

Mudresh Kumar & Ors. ...Petitioners
Versus
State of U.P.& Ors. ...Respondents

Counsel for the Petitioners:

Sri Vinod Kumar Singh, Sri Om Prakash Gupta

Counsel for the Respondents:
C.S.C.

A. Education/Service Law – Benefit of Old Pension Scheme - The Uttar Pradesh Subordinate Educational (Trained Graduate Grade) Service Rules, 1983: Rules 3(g), 3(h), 3(i) 4, 15 - Petitioners are not entitled for the benefit of the old pension scheme which was not in existence at the time of their appointments.

Petitioners, in the present writ petition, claim the benefit of Old Pension Scheme which was abolished in March 2005. Under the Rules 1983, the petitioners No. 1 to 5 became "Member of Service" on their substantive appointments on the posts in the cadre of service on 3.10.2006, 07.01.2006, 29.10.2005, 10.03.2006 and 03.10.2005 respectively (i.e. on dates when their appointment letters were issued), while the pension scheme was abolished much earlier in the month of March 2005. Therefore, the petitioners are not entitled for the benefit of the old pension scheme which was not in existence at the time of their appointments. (Para 3, 11)

B. Conditions to become "Member of Service" - In order to become "Member of Service", a candidate must satisfy four conditions, namely, (i) the appointment must be in a substantive capacity; (ii) to a post in service i.e. in a substantive vacancy; (iii) made according to rules; (iv) within the quota prescribed for the source. An order of appointment will be effective only on communication. Although origin of Government Service is contractual but on appointment on a post or office, the person so appointed acquires a 'Status', then his rights and obligations are determined by statute or statutory rules which may be framed and may be altered unilaterally by the Government. (Para 12)

Writ Petition dismissed. (E-4)

Precedent followed:

1. State of Rajasthan Vs Jagdish Narain Chaturvedi, (2009) 12 SCC 49 (Para 18) (Para 12)

2. Tagin Litin Vs St. of Arunachal Pradesh, (1996) 5 SCC 83 (Para 12)

3. Roshan Lal Tandon Vs U.O.I., AIR 1967 SC 1889 at 1894 (Para 12)

4. U.O.I. Vs Tulsi Ram Patel, AIR 1985 SC 1416 at 1437 (Para 12)

Precedent distinguished:

1. Mahesh Narayan and others Vs St. of U.P. . & ors., 2020 (4) ADJ 172; 2020 (2) ALJ 518 (Para 3, 4, 7, 8)

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

1. Heard Sri Vinod Kumar Singh, learned counsel for the petitioners, learned standing counsel for the respondents.

2. This writ petition has been filed praying for the following relief:-

"I . a writ, order or direction, in the nature of mandamus, directing the respondent no.2 to extend the benefit of Old Pension Scheme to the petitioners in terms of the judgment and order dated 19.12.2019 passed in Writ Petition No.55606 of 2008 (Mahesh Narayan and others Vs. State of U.P. and others).

II. a writ, order or direction, in the nature of mandamus, directing the respondent no.2 to consider the decide the representation of the petitioners dated 14.02.2020."

3. Briefly stated facts of the present case are **that Advertisement No.1/2004**

was issued inviting applications for recruitment of Trained Graduate Teachers in different subjects. Learned counsel for the petitioner states that the interview of the petitioners depending upon the subjects were held between July to September 2005 and final results were declared between September 2005 to February 2006 depending upon the subjects. However, particulars regarding date of interview and dates of final result have neither been disclosed in the writ petition nor the learned counsel for the petitioner could make a statement in this regard. The dates of appointment letters given in paragraphs 7 to 11 of the writ petition and copies of appointment letters filed as Annexure 2 to the writ petition shows that immediately after declaration of results final select list was declared and allocation of colleges were made by the competent authorities. Thereafter, Managers of the respective colleges issued appointment letters to the petitioners. From perusal of copies of appointment letters collectively filed by the petitioners as Annexure 2 to the writ petition, it appears that appointment letters were issued by the concerned colleges to the petitioner nos. 1 to 5 on 03.10.2006, 07.01.2006, 29.10.2005, 10.03.2006 and 03.10.2005, respectively. Thus, undisputedly, the final select list was declared and the petitioners were appointed much after the Old Pension Scheme was abolished in the month of March 2005. The petitioners have now filed the present writ petition claiming benefit of Old Pension Scheme on the basis of judgment of this court dated 19.12.2019 in in **WRIT - A No. - 55606 of 2008 (Mahesh Narayan and others Vs. State of U.P. and others).**

Submissions

4. Learned counsel for the petitioner submits that in view of judgment in the case of **Mahesh Narayan and others (supra)** the petitioners are entitled for the benefit of old Pension Scheme.

5. Learned standing counsel submits that the petitioners are not entitled for the benefit of Old Pension Scheme inasmuch as they were appointed without any delay and much after the Old Pension Scheme was abolished.

Discussion and Findings

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

7. The sole basis of filing the present writ petition is the judgment of this Court in the case of **Mahesh Narayan and others (supra).** The relevant portion of the judgment in the case of **Mahesh Narayan and others (supra)**, is reproduced below:-

"From the perusal of judgments of Satyesh Kumar Mishra (Supra) and Firangi Prasad (Supra), there is no doubt on the point that similar dispute was before this Court in the matter of Satyesh Kumar Mishra (Supra), which was dismissed by this Court against which Special Appeal Defective No. 480 of 2016 is pending. It is also not disputed that legal issue involved in the matter of Satyesh Kumar Mishra (Supra) was also before Division Bench of this Court in the matter of Firangi Prasad (Supra) where the Court has clearly held that on the fault of appointing authority in issuing appointment letter, petitioners cannot be put any type of disadvantage. It appears that at the time of deciding the matter of

Satyesh Kumar Mishra (Supra), judgement of Firangi Prasad (Supra) was not placed before this Court, therefore, without considering the same, decision was given in the matter of Satyesh Kumar Mishra (Supra). Under such facts and circumstances, judgement of Satyesh Kumar Mishra (Supra) is per incuriam and cannot be treated as precedent in the present case and will not come in the rescue of respondents.

The controversy and question of law involved in the present case is squarely covered with the judgement of Firangi Prasad (Supra) as well as other judgments relied upon by learned counsel for the petitioners and Courts have taken consistant view that respondents cannot by their inaction deprive a candidate to his legitimate right.

So far as facts of the case are concerned, there is no dispute on the point that pursuant to advertisement No. A-3/E-1/2000, *advertisement was issued in news paper on 22.12.2000 and as per order of this Court dated 29.12.2001 passed in Special Appeal No. 485 (S/B) of 2001 (supra), there was no legal impediment in completition of recruitment process,* ***but dut to inaction on the part of respondents, it was completed only after dismissal of writ petition on 05.07.2005.*** *Final selected list of selected candidate was published in daily newspaper 'Dainik Jagran' dated 12.03.2006 and thereafter appointment letters were issued.* ***It is also not disputed that in between again in subsequent advertisement No. A-3/E-1/2002, recruitment was completed and candidates had been granted appointment prior to 01.04.2005 and getting the benefit of 'Old Pension Scheme'.***

Therefore, considering the facts and circumstances of the case and legal position discussed herein above, writ petition is partly allowed and petitioners are excluded from the effect and operation of Notification dated 28.03.2005 and 07.04.2005 as it is in violation of Article 14 of Constitution of India as well as law laid down by the Courts.

Respondents are directed to include the petitioners under 'Old Pension Scheme' as provided in Rules, 1961 before amendment and be given all other consequential benefits."

8. Thus, in the case of **Mahesh Narayan and others (supra)** the facts were that Advertisement No. A-3/E-1/2000 was issued on 22.12.2000 for recruitment on the post of Junior Engineer (Civil) in irrigation department. As per order dated 29.12.2001 in Special Appeal No.485 (S/B) of 2001 there was no legal impediment in completion of recruitment process but due to inaction on the part of the authorities it was completed only after dismissal of writ petition No.57 of 2005 and the list of finally selected candidate was published in news paper on 12.3.2006 and thereafter appointment letters for the posts of Junior Engineer (Civil) Irrigation were issued. It has also been observed by this Court in the aforesaid case of **Mahesh Narayan and others (supra)** that during pendency of selection process a **subsequent advertisement No.A-3/E-1/2002** was issued and recruitment was completed and appointment letters were issued prior to 1.4.2005 and **the candidates so appointed under the subsequent advertisement were getting benefit of Old Pension Scheme.** On these facts a coordinate Bench in the case of **Mahesh**

Narayan and others (supra) granted benefit of Old Pension Scheme to the petitioners of that writ petition holding that the action of the State in not giving benefit is violative of Article 14 of the Constitution of India.

9. **Facts of the present case are entirely different. Neither there was any inaction on the part of the U.P. Secondary Education Services Selection Board or any authority of the State Government nor there was any delay in conducting the examination or declaring the result or completing the selection process. The selection process initiated by advertisement dated 30.9.2004 was expeditiously completed and appointment letters were issued to the petitioners as per admitted facts noted in Para 3 above. Therefore, the judgment in the c**ase of Mahesh Narain and others (supra) does not support the case of the petitioners.

10. Undisputedly the advertisement in question for recruitment on the post of Trained Graduate Teachers in Non Government Aided High Schools and Inter Colleges was issued under the provisions of The Uttar Pradesh Subordinate Educational (Trained Graduate Grade) Service Rules, 1983 (hereinafter referred to as "The Rules 1983"). The petitioners participated in the recruitment process and were appointed under the aforesaid Rules 1983. **Rule 4** provides for **cadres of service. Rule 15 provides the procedure of direct recruitment. Rule 18** provides for **appointment. Rule 3(g)** defines **"Member of the Service"**. It provides "Member of the Service" means a person **substantively appointe**d under these rules or the rules or orders in force prior to the commencement of these rules to a **post in the cadre of service. Rule 3(h) defines th**e word **"service"** to mean the Uttar Pradesh Subordinate Educational (Trained Graduate Grade) Service. **Rule 3(i)** defines the word **"Substantive appointment"** to mean an appointment not being an adhoc appointment, **on a post in the cadre of service, made after selection in accordance with the rules** and if there are no rules, in accordance with the procedure prescribed for the time being executive instructions issued by the Government.

11. Thus, under the Rules 1983, the petitioners No.1 to 5 became "Member of Service" on their substantive appointments on the posts in the cadre of service on 03.10.2006, 07.01.2006, 29.10.2005, 10.03.2006 and 03.10.2005 respectively, while the pension scheme was abolished much earlier in the month of March 2005. Therefore, the petitioners are not entitled for the benefit of the old pension scheme which was not in existence at the time of their appointments.

12. The view taken be me above, is also supported by the law laid by Hon'ble Supreme Court in **State of Rajasthan Vs. Jagdish Narain Chaturvedi (2009) 12 SCC 49 (Para 18) in which it has been held that in order to become "Member of Service"**, a candidate must satisfy four conditions, namely, (i) the appointment must be in a substantive capacity; (ii) to a post in service i.e. in a substantive vacancy; (iii) made according to rules; (iv) within the quota prescribed for the source. An order of appointment will be effective only on communication vide **Tagin Litin Vs. State of Arunachal Pradesh (1996)5 SCC 83**. Although

origin of Government Service is contractual but on appointment on a post or office, the person so appointed acquires a 'Status'. Then his rights and obligations are determined by statute or statutory rules which may be framed and may be altered unilaterally by the Government. Similar view has been taken by Hon'ble Supreme Court in **Roshanlal Tandon Vs. Union of India AIR 1967 SC 1889 at 1894 approved in Union of India Vs. Tulsi Ram Patel AIR 1985 SC 1416 at 1437.** Thus petitioners can not get benefit of old pension scheme which was abolished much prior to their appointments. The Old Pension Scheme was not part of the rules governing conditions of service of the petitioners.

13. For all the reasons aforestated, I do not find any merit in this writ petition. Consequently, the writ petition is **dismissed**. However, there shall be no order as to costs.

(2020)06ILR A848
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2020

BEFORE
THE HON'BLE PRAKASH PADIA, J.

WRIT A No. 4070 of 2020

Ashotosh Kumar Srivastava & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Seemant Singh, Sri Pankaj Kumar

Counsel for the Respondents:
C.S.C., Sri P.D.Tripathi

A. Education/Service Law – Recruitment - Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. (Para 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. The error/errors committed by the petitioners are neither minor nor are human error/errors. (Para 11, 20)

Writ petition dismissed. (E-4)

Precedent followed:

1. Km. Richa Pandey Vs Examination Regulatory Authority & anr., Special Appeal Defective No. 117 of 2014 decided on 18.02.2014 (Para 12)

2. Ram Manohar Yadav Vs St. of U.P. and 3 ors., Special Appeal No. 834 of 2013 decided on 30.05.2013 (Para 13)

3. Arti Verma Vs St.of U.P. & 2 ors., (2014) ILR 1 All 145; 2014 (104) ALR 154 (Para 14)

4. Kanchan Bala & 172 ors. Vs St. of U.P. & 4 ors., 2018 (4) ADJ 264; 2018 (2) ALJ 689 (Para 15)

5. Jai Karan Singh & 52 ors Vs St. of U.P. & 4 ors., Special Appeal No. 90 of 2018 (Para 16, 19)

6. Karnataka Public Service Commission & ors. Vs B.M. Vijaya Shankar & ors., AIR 1992 SC 952 (Para 17)

Precedent distinguished:

1. Satyendra Kumar Shukla Vs St. of U.P. & ors., Writ Petition No. 21117 of 2018 (Para 7)

2. Sachin Sharma & ors. Vs State of U.P. & ors., Writ Petition No. 19162 of 2018) (Para 7)

3. Km. Archana Rastogi Vs State of U.P. & ors., 2012 (3) ADJ 219 (Para 7)

(Delivered by Hon'ble Prakash Padia, J.)

1. During lockdown period keeping in view the (COVID-19) pandemic, this case has been listed today in my chamber under the order of Hon'ble the Chief Justice.

2. Heard Sri Seemant Singh, learned counsel for the petitioner and Sri M. C. Chaturvedi, learned Additional Advocate General/learned Senior Counsel assisted by Sri Suresh Singh, learned Additional Chief Standing Counsel and Sri Rajesh Kumar Mishra, and Sri Vijay Shanker Mishra, learned Standing Counsel for the State and Sri P. D. Tripathi, learned counsel for the respondent-Basic Education Board through Video Conferencing.

3. The petitioner has preferred the present writ petition inter-alia with the following prayer-

"(a) Issue a writ, order or direction in the nature of Mandamus directing the respondents to accord an opportunity to rectify the incorrect entries made by the petitioners in their online application forms of Assistant Teacher Recruitment Examination 2019 submitted before the Secretary, Examination Regulatory Authority, U.P. Prayagraj relating to the details of different education qualifications.

(b) Issue a writ, order or direction in the nature of Mandamus directing the respondents to consider the petitioners on the basis of their original educational testimonials in the instant selection of 69000 posts of Assistant Teacher to be appointed in different Primary Schools of different districts of the State of Uttar Pradesh initiated vide Government Order dated 01.12.2018 issued by the Additional Chief Secretary, Government of U.P., Lucknow."

4. The facts in brief as narrated in the writ petition are that the petitioners applied for Assistant Teacher Recruitment Examination-2019. The petitioners duly appeared in the examination on 06.01.2019 and the result was declared on 12.05.2020 in which all the petitioners have been declared qualified having obtained the qualifying marks prescribed by the respondents. The petitioners have committed some human errors with regard to filling of their B.Ed marks inclusive of B.Ed. Theory and Practical, with regard to filling of B.Ed Roll Numbers, with regard to filling of marks of Graduation, High School and Intermediate and with regard to filling of marks relating to 2 year B.T.C. Training Course.

5. Learned counsel for the petitioners argued that the aforesaid human errors crept in the online application forms of the petitioners submitted by them online at the official website of the respondents. It is further argued that the mistakes committed by the petitioners are only human error. It is further argued that the direction be given to the concerned authority to decide the representation made by the petitioners as has been done in several cases by the different Coordinate Benches of this Court.

6. In paragraph 6 of the writ petition, it is contended that the petitioners no.1 to 45 are having the qualification of B.Ed, petitioners no.46 to 60 are having the qualification of two

years B.T.C. Training Course and petitioner no.61 is having a qualification of D.Ed. and as such all the petitioners are fully eligible to apply for the examination in question. It is further stated in the writ petition that in the notification dated 12.5.2020 all the petitioners were declared qualified having obtained the qualifying marks in their respective category. The applicants, who have been declared qualified in the examination are eligible to apply further online application forms for the appointment on the post of Assistant Teachers to be appointed in different primary schools of different districts in the state of U.P. It is further stated in the writ petition that while submitting the online application forms for appointment on the post of Assistant Teacher, the petitioners will be required to mention their marks of the examination in question and the preference of district but the petitioners cannot make any change or correction with regard to the alleged incorrect entries made by them with regard to their educational testimonies.

7. Learned counsel for the petitioners also relied upon the two judgements delivered by two different Coordinate Benches of this Court in the following cases :-

(i) Writ Petition No.21117 of 2018 (Satyendra Kumar Shukla Vs. State of U.P. and others.)

(ii) Writ Petition No.19162 of 2018 (Sachin Sharma and others Vs. State of U.P.

Apart from the same, learned counsel for the petitioners also relied upon a Division Bench judgement of this Court in ***Special Appeal No.2312 of 2011 (Km. Archana Rastogi Vs. State of U.P. and others) reported in 2012 (3) ADJ 219*** decided on 13.1.2012.

8. In view of the same it is contented by learned counsel for the petitioners that once any mistake has committed by the petitioners, the same should be rectified. In this regard the petitioners have also submitted representations to the Basic Education Board Prayagraj on 08.05.2020, 12.5.2020 and 17.3.2010. Copies of the said Representative are appended collectively as Annexure-7 to the writ petition.

9. From perusal of the facts as narrated above it appears that all the petitioners committed mistake while filling up their application forms. The basic mistakes were committed in respect of the marks adjudicated to them pertaining to B.Ed Examination, (Practical as well as Theory).

10. It further appears from perusal of the chart appended along-with the writ petition (Annexure 5 to the writ petition) that the petitioner no.1, Ashutosh Kumar Srivastava obtained 582 marks out of 1000 in respect of his B.Ed Examination but in the application form it is stated by him that out of total 400 marks he obtained 250 marks. It further appears from perusal of the chart that the petitioner no.2, Ajendra Singh obtained 682 marks out of 1115 in theory and 494 marks out of 635 in practical pertaining to his B.Ed examination but in the application form it is mentioned by him that he obtained 759 marks out of 1215 in respect of theory and 418 marks out of 535 in respect of practical examination.

Almost the similar mistakes were committed by all the petitioners.

11. From perusal of the record, the Court is of the opinion that the aforesaid mistakes are not a kind of human error but deliberately and willfully mistakes were committed by the petitioners while filling up their application forms.

12. This issue has also been examined in ***Special Appeal Defective No.117 of 2014 (Km. Richa Pandey v. Examination Regulatory Authority and Another)*** decided on 18.02.2014. The relevant observation is as follows:-

"The OMR sheets are provided to the candidates to speed up evaluation through help of computer. In case we accept the argument of learned counsel for the petitioner that the language in which the petitioner had written essay could be checked up by the examiner before feeding answer book into computer, the entire process of expediting the results will be lost. Where OMR sheets are to be examined with aid of the computer, it is not advisable and practical to direct that each OMR sheet should be checked by the examiners and the columns, which have not been filled up may be filled up by the examiner himself with the aid of the language used by the candidates for writing essay. We are informed by Standing Counsel that about seven lacs candidates had appeared in the test.

With such large number of candidates appearing in TET Examination 2013 it would not have been possible nor it was feasible for examiners to look into the answer sheets individually before feeding them into computer for correcting any mistakes.

We agree with the reasoning given by the learned Single Judge that where the applicant is not capable of correctly filling up the form, she is not entitled to any discretionary relief from the Court.

The special appeal is dismissed."

13. In Special Appeal No.834 of 2013 (Ram Manohar Yadav v. State of U.P. and 3 Ors.) decided on 30.05.2013, the Division Bench of this Court observed as follows:-

"We are not inclined to interfere in this special appeal because interference in such matters would result in thoroughly incompetent or utterly negligent persons becoming teachers and spoiling the future of the children whom they will teach.

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

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

14. In ***Special Appeal Defective No.123 of 2014 (Arti Verma v. State of U.P. and 2 Ors.),*** a Division Bench of this Court observed that:-

"The appellant made an on-line application for engagement as Shiksha Anudeshak (Arts) for 2012-13 on a contract basis. In the application, the appellant claimed to have belonged to the Freedom Fighters' category, which was admittedly not the category to which the appellant could have claimed. The name of the appellant was shown in the select list of candidates belonging to the Freedom Fighters' Category. The Secretary to the State Government rejected the representation filed by the appellant for correcting the error in the on line application. The learned Single Judge dismissed the petition filed by the appellant under Article 226 of the Constitution for setting aside the order passed by the Secretary noting that under the declaration given by the appellant while filling up the application, it was stated that the candidature could be rejected if any discrepancy was found. The learned Single Judge has also relied upon a judgment of the Division Bench rendered in ***Ram Manohar Yadav Vs. State of U.P. & three Ors., (Special Appeal-834 of 2013).***

In the judgment of the Division Bench in Ram Manohar Yadav (supra) it was observed that where an applicant has shown his incompetence or negligence in not not even correctly filling up a simple on line application form for employment, interference of the High Court under Article 226 of the Constitution was not warranted.

*However, learned counsel appearing on behalf of the appellant relied upon a judgment of a Division Bench in P****uspraj Singh Vs. State of U.P. & Ors., (Special Appeal-75 of 2013).*** *That is a case where the appellant had wrongly described himself as a female candidate. On these facts, the Division Bench accepted the contention that human error had caused an incorrect on line entry, since there was no reason for the appellant to make such a declaration and that he did not stand to gain anything by making such an incorrect entry.*

In the present case, the appellant claimed the benefit of Freedom Fighters category. The contention that this was as a result of an error committed by the Computer Operator cannot simply be accepted for the reason that the appellant would necessarily be responsible for any statement which he made on line. If the Courts were to accept such a plea of the appellant, that would result in a situation where the appellant would get the benefit of a wrong category if the wrong claim went unnoticed and if noticed, the appellant could always turn around and claim that this was as a result of human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. No fault can, therefore, be found in rejecting the application for correction when the candidate himself has failed to make a proper disclosure or where, as in the present case, the application is submitted under a wrong category. Interference of the High Court under Article 226 of the Constitution is clearly not warranted in such matters as it creates grave uncertainty since the selection process cannot be finally completed. Moreover, in the present case, the appointment was of a contractual nature for a period of eleven months. Hence, considering the matter from any perspective, the learned Single Judge was not in error in dismissing the petition under Article 226 of the Constitution.

The Special Appeal is, accordingly, dismissed."

15. This Court cannot permit another window of argument as an alternative one to grant an appropriate relief of alternative remedy of representation prayed for. Even otherwise this Court has already taken view in ***Writ - A No. 841 of 2018 (Kanchan Bala & 172 Ors v. State of U.P. & 4 Ors)*** thus:-

"23. The Court has proceeded to examine the record in question and found that clear instructions were given in the first page of question booklet directing the candidates to correctly fill up the OMR sheet and any error committed by the candidate cannot be corrected by the authority. The petitioners could not successfully mark the circle/bubble on the answer sheet showing correct registration number, roll number, booklet series or language-II attempted. Consequently, the result of the petitioners have been declared as invalid registration number/roll number. After the declaration of the result in question, they have proceeded to make a request that the correction is required. It is too late in the day to make such request by the petitioners, inasmuch as, OMR sheet is examined by the computer on the basis of columns that have been filled up by an incumbent and, in view of this, once final result has been declared and there is no provision to carry out any correction in the OMR sheet, then no relief can be accorded to the petitioners, especially keeping in view the dictum of Division Bench of this Court in Smt. Arti Verma Vs. State of U.P. & others and the judgment of learned Single Judge in Ritu Chauhan's case (supra), wherein once the Division Bench as well as learned Single Judge had already rejected the similar arguments as well as the claim set up by the candidates appeared in the TET-2013, 2016 and 2017, then there is no reason or occasion for this Court to take a different view in the matter.

24. The Court is also conscious that in the garb of minor discrepancy for rectifying such human error in the OMR sheet, the Court cannot give any liberty to the respondent to intervene in the matter at this stage, which would also have very serious consequence for the fairness of entire selection. Coupled with the above, I am clearly of the view that the action taken by the respondent is neither arbitrary nor illegal. In such circumstances, it is not legally permissible to interfere with the decision of the respondent."

16. The said judgment has come to be affirmed in ***Special Appeal No. 90 of 2018 (Jai Karan Singh And 52 Ors v. State of U.P. And 4 Ors.)*** in following terms:

"The error committed by the candidates cannot be said to be minor in nature. It is the Registration Number, Roll Number that determines identity of the candidates. The candidates who appeared in the examination were mature students and were to be appointed as Assistant Teachers in institution. They should have read the instructions that was issued time and again and should have correctly filled the entries relating to Roll Number, Registration Number, Question Booklet Series and Language attempted. The entries were, however inaccurately filled as a result of which the scanner has not been able to process the result.

The learned Judge was, therefore, justified in dismissing the writ petitions. The Special Appeal is, accordingly, dismissed."

17. The law in this connection is also well settled by the Supreme Court in the case of ***Karnataka Public Service Commission and Ors. Vs. B. M. Vijaya Shankar and Ors. reported at AIR 1992 SC 952.*** The Supreme Court was pleased to hold that the Competitive examinations are required to be conducted by the Commission for public service in strict secrecy to get the best brain. It was held that the instructions contained in the answer-sheet should be complied with in its letter and spirit. The operative portion of the aforesaid judgment is quoted below:-

"Competitive examinations are required to be conducted by the Commission for public service in strict secrecy to get the best brain. Public interest requires no compromise on it. Any violation of it should be visited strictly. Absence of any expectation of hearing in matters which do not affect any interest and call for immediate action, such as the present one, where it would have delayed declaration of list of other candidates which would have been more unfair and unjust are rare but well recognised exceptions to the rule of natural justice. It cannot be equated with where a student is found copying in the examination or an inference arises against him for copying due to similarity in answers of number of other candidates or he is charged with misconduct or misbehavior. Direction not to write roll number was clear and explicit. It was printed on the first page of every answer book. Once it was violated the issue of bonafide and honest mistake did not arise. Its consequences, even, if not provided did not make any difference in law. The action could not be characterised as arbitrary. It was not denial of equal opportunity. The reverse may be true."

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.

19. In so far as the Division Bench judgement cited by the counsel for the petitioners are concerned, the aforesaid judgement has already been dealt with by another Division Bench of this Court in ***Special Appeal No. 90 of 2018 (Jai Karan Singh And 52 Ors v. State of U.P. And 4 Ors.).*** The following observations were made by the Division Bench in the aforesaid case :-

"Likewise, in Archana Rastogi v. State of U.P. and Others reported in 2012 (3) ADJ 219, the appellant had mentioned the marks obtained in the High School as '256' whereas he had actually obtained '356'. It is, in such circumstances, the Court directed marks could be corrected. Here also, there was only one candidate and no process by electronic scanning had been undertaken."

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.

21. In view of the facts as narrated above as well as the law laid down by the differnt Division Bench of this Court from time to time as well as by the Apex Court, no relief could be granted to the petitioners.

22. The writ petition is dismissed.

(2020)06ILR A855
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

WRIT A No. 4178 of 2003

Ram Sanehi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri W.H.Khan, Sri Gulrez Khan, Sri J.H.Khan

Counsel for the Respondents:
C.S.C., Sri C.P. Awasthi, Sri J.N. Maurya, Sri P. Awasthi.

A. Service Law – Selection/Appointment/Regularization - U.P. Regulation of Daily Wages Appointments on Group 'D' Posts Rules, 2001; U.P. Group 'D' Employees Service Rules, 1985: Rules 4(i), 9(3) – If there is no provision for regularization the same cannot be directed – Selection is not found to be vitiated on account of nepotism and favouritism, as alleged by the petitioners, in absence of any material on record. No illegality could be found in the selection in question. Court held that it is not a case of regularization since selection and appointments have already been made. Unless those appointments have been nullified, petitioners cannot claim any benefit. (Para 13, 15, 56, 57)

B. U.P. Group 'D' Employees Service Rules, 1985: Rules 4(i), 19(3) – "Retrenched Employees" - No provision in Rules, 1985 has been shown providing any preference to be given to petitioners on account of the fact that they have worked as daily wage employees or otherwise in the Department. Some weightage has been provided for "retrenched employees" but petitioners do not satisfy the definition of "retrenched employees". (Para 16)

C. Words & Phrases – "Preference" – A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence - U.P. Police Headquarters, Allahabad vide order dated 30.11.2002 directed to give preference for regular appointment to persons who were already working but question of preference arise only when all other things are satisfied and preference cannot be treated as right of appointment to exclusion of others. Petitioners could not be given preference if other candidates performed better. (Para 6, 34 to 37)

Writ Petition dismissed. (E-4)

Precedent followed:

1. State of U.P. Vs Chaturth Shreni Karmachari Sangh . & ors., 2006(4) ESC 2888 (All) (Para 13, 56)

2. Sayed Mohammad Mahfooj Vs St. of U.P. . & ors., 2007(2) ALJ 628 (Para 32)

3. Ajit Raizada . & ors.Vs St. of U.P. through Secy. & ors., 2011 (6) ADJ 511 (Para 32)

4. State of U.P. & anr. Vs Om Prakash . & ors.AIR 2006 SC 3080 (Para 35)

5. Secretary, Andhra Pradesh Public Service Commission Vs Y.V.V.R. Srinivasulu . & ors. (2003) 5 SCC 341 (Para 36)

6. Daya Ram Singh Vs St. of U.P. . & ors., 2007(5) ADJ 359 (Para 37)

7. State of Karnataka Vs Uma Devi . & ors., (2006) 4 SCC 1 (Para 56)

Precedent distinguished:

1. Jagannath Prasad Sharma Vs The State of U.P. . & ors., AIR 1961 SC 1245 (Para 12, 41)

2. Ajay Hasia . & ors.Vs Khalid Mujib Sehravardiand . & ors., (1981) 1 SCC 722 (Para 12, 46, 50)

3. Manjul Kumar & anr. Vs St. of U.P., 2007(7) AWC 7712 (Para 12, 51)

4. Krishna Murari Vs St. of U.P. . & ors., 2012(6) AWC 5571 (Para 12, 52, 55)

5. Satyendra Kumar Singh . & ors.Vs St. of U.P. & ors., 2013(3) ESC 1226 (All) (Para 12, 53)

6. Vijay Kumar Gaur Vs St. of U.P. & anr., 2017(1) AWC 552 (Para 12, 55)

Present petition prays for quashing Office Memorandums dated 08.01.2003, 09.01.2003 and 10.01.2003, issued by Superintendent of Police, Banda.

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

1. This writ petition under Article 226 of the Constitution of India has been filed by eleven petitioners, namely, Ram Sanehi, Mool Chandra, Siv Ram, Usman Khan, Kamlesh Kumar, Jamal Khan, Dharmdas, Shiv Ratan, Ram Kripal Yadav, Lakhan Lal and Ganga Ram, praying for issue of a writ of certiorari to quash Office Memorandums dated 08.01.2003, 09.01.2003 and 10.01.2003 (Annexures-2, 3 and 4 to the writ petition respectively). Petitioners have also prayed for issue of a writ of mandamus commanding respondents to regularize them on the post of Follower, a Group-D post.

2. Petitioners have pleaded that a press notification dated 21.12.2002 was issued by Superintendent of Police, Banda inviting applications for filling 25 vacancies of Group-D posts in Police Department in District Banda. The break up of vacancies are given as under:

Name of Post	Number of vacancies
Follower/Cook/Kahar	23
Waterman	01
Safai Karmchari	01

3. The notified vacancies were in the scale of Rs. 2550-3200. It was stated that selection shall be made on the basis of interview which shall be held on 08.01.2003 at Police Lines, Banda. The selection was held and Respondents-4 to 28 were declared selected vide office Memorandums dated 08.01.2003, 09.01.2003 and 10.01.2003.

4. Aforesaid selection has been challenged on the ground that petitioners were engaged to discharge duties of various nature, namely, Cook, Barbar, Carpenter etc. Petitioners-1 and 2 were engaged from time to time since 1990; Petitioners-3 and 4 since 1995; Petitioner-5 since 1996; Petitioners-6 to 8 since 1997 and Petitioners-9 to 11 since 1998. Most petitioners worked as Cook while Petitioner-2 worked as Barber and Petitioner-11 as Carpenter. Initially petitioners were paid a consolidated pay of Rs. 540/- per month which later increased to Rs. 1050/- per month. Engagement and working of petitioners continued with a break of two or three days just to defeat their claim of continuous service. Respondent-2, for regular appointment was directed to give preference by U.P. Police Headquarters, Allahabad vide order dated 30.11.2002 to persons who were already working but that was ignored while making selection of Respondents-4 to 28. Petitioners, who are Scheduled Castes, were interviewed on 08.01.2003, those who are Other Backward Class were interviewed on 09.01.2003 and General candidates were interviewed on 10.01.2003. Selection Committee consisted of Sri S.N. Upadhyay, the then Superintendent of Police, Banda as Chairman. Sub-Divisional Magistrate, Attarra and Circle Officer, Baberru were Members. Selection was made in a very arbitrary manner inasmuch as Respondent-4, Ashok Kumar is brother-in-law of Sri Dev Dutt, DIG, Chitrakoot Dham; Respondent-5, Narendra Pal is recommendee of Sri Dinkar, Minister; Respondent-6, Ramesh Kumar's brother-in-law is in Secretariat; Respondent-7, Girija Kumar is a man of Sri R.N. Srivastava, I.G. Banda; Respondent-8 is a man of S.O. Maton and similarly other selectees are connected with persons enjoying high position in Government. Besides petitioners, who were working as Follower in Banda, some others similarly working, have also not been selected except, Respondents-7, 9, , 12, 14, 17, 21 and 22. With regard to relationship of some respondents, and the factum that those who were selected and earlier working for lesser period, averments are contained in paras 11 and 12 to writ petition, which read as under:

"11. That the respondent no. 4 Ashok Kumar is brother-in-law of DIG Shri Dev Dutt Chitrakoot Dham, respondent no. 5 Narendra Pal is recommendee of Shri Dinkar Minister, respondent no. 6 Ramesh Kumar is brother-in-law in Secretariat, respondent no. 7 Girijia Kumar is a man of Shri R.N. Srivastava I.G. Banda, respondent no. 8 is a man of S.O. Maton who brought him at the time of interview and similarly other persons who have been selected are men of the Selection Committee are of some other persons enjoying high position.

12. That, in addition to the petitioner there were other persons working as Followers in Banda who appeared in the interview but have not been selected except Girija Kumar respondent no. 7 who was working for one year, respondent no. 9 who was working as Sweeper, respondent no. 12 Mohd. Rafiq worked for two or three months and was personal Barber to DIB, respondent no. 14 Rajesh Kumar was working since 1998, respondent no. 17 Shri Krishan Gupta was working quite long time, respondent no. 21 Abdul Hafiz

was working sine 1996, respondent no. 22 Raj Narain was working since 1999."

5. It is said that selection is vitiated on account of favouratism and nepotism; Petitioners-1 and 2 were entitled to be considered for regularization under U. P. Regularization of Daily Wages Appointments on Group 'D' Posts Rules, 2001 *(hereinafter referred to as the "Rules, 2001");* Selection held on 8th, 9th and 10th January, 2003 is neither fair nor impartial but vitiated on account of arbitrariness; Petitioners ought to have been given preference but denied; Petitioners were entitled for 15 marks on the ground of their working for more than three years as Followers as per Rule 9(3) of U.P. Group 'D' Employees Service Rules, 1985 *(hereinafter referred to as "Rules, 1985")* but said benefit has not been given hence entire selection is bad and illegal.

6. A counter affidavit has been filed on behalf of Respondents-1 to 3 sworn by Sri Ram Bodh, Additional Superintendent of Police, Banda. With regard to engagement of petitioners from time to time facts are not disputed but allegations of favouratism, nepotism and arbitrariness are denied. It is said that petitioners could not secure qualifying marks and having not been found suitable, not selected. Allegations of relationship with high officials are denied and it is said that selection has been made as per performance of candidates before Selection Committee; there was no restriction with respect of districts to which candidates belong and claim of regularisation of petitioners is denied. It is not disputed that under U.P. Police Headquarters order dated 30.11.2002 those who were worked as substitute were required to be given preference but not if other candidates have performed better. Petitioners do not satisfy the definition of "retrenched employee" and, therefore, claim set up on the basis of Rules, 1985 has been denied.

7. Respondents-4 to 28 have also filed a collective counter affidavit which is sworn by Respondent-4, Ashok Kumar. Herein also allegations of relationship, favouratism and nepotism are denied and it is said that allegations have been made by petitioners mala fide.

8. Copy of Police Headquarters letter dated 30.11.2002 has been filed as Annexure-1 to supplementary counter affidavit and said letter reads as under:

''उपर्युक्त विषयक शासनादेश संख्याः 445 एम/6–पु–1–2002, दिनांक 15.11.2002 की संलग्न छायाप्रति का अवलोकन करें एवं निहित शर्तों को दृष्टिगत रखते हुये संलग्न प्रपत्र में पदवार दर्शायी गयी रिक्तियों एवं अधिकता के विवरण के अनुसार तथा शासन के पत्रांक : 20/7/1986–कार्मिक–2 (1) दिनांक 0–9–86 द्वारा अधिसूचना समूह ''ग'' कर्मचारी सेवा (प्रथम संशोधन) नियमावली 1986 के अन्तर्गत दिये गये प्राविधानों के अनुसार अपने अधीनस्थ जनपदों के प्रभारियों को दिनांक 15.01.2003 तक शासन द्वारा समय≤ पर निर्गत वर्तमान में प्रचलित आरक्षण नीति को ध्यान में रखते हुए भर्ती की कार्यवाही सुनिश्चित करने हेतु निर्देशित करने की कृपा करें।

2. रिक्ति एवं अधिकता के संलग्न विवरण में दर्शाये गये पदों की संख्या में इस बीच स्थानान्तरण, मृत्यु, सेवानिवृत्ति एवं मृतक आश्रित की भर्ती के फलस्वरूप पदों की संख्या की स्थिति में परिवर्तन का हो जाना स्वाभाविक है, ऐसी स्थिति में अपने जोन के समस्त जनपदों की रिक्ति एवं अधिकता को समायोजित करते हुये भर्ती हेतु निर्देश निर्गत करने की कृपा करें। **प्रकरण में यह भी उल्लेखनीय है कि यदि कोई**

कर्मचारी पूर्व से अस्थायी पदों पर एवं एवजी पर कार्यरत हों या कार्य किया हो तो ऐसे कर्मी को भर्ती हेतु अवश्य वरीयता प्रदान करें। पुलिस मुख्यालय के संज्ञान में बहुत से जनपदों में चतुर्थ श्रेणी के पद पर भर्ती हेतु कर्मियों द्वारा रिट याचिकाएं भी दायर की गयी है यदि ऐसे प्रकरण आपके अधीनस्थ जनपदों में लम्बित हो, उसे प्राथमिकता के आधार पर सेवायोजित किये जाने पर नियमानुसार अवश्य विचार करें ताकि रिटों का निस्तारण हो सके। दिनांक 31.12.2001 के पश्चात हुयी रिक्तियों को इस भर्ती में समावेश न किया जाय।''

"Kindly peruse the enclosed photocopy of the government order no. 445M/6-Pu-1-2002, dated 15.11.2002 on the aforementioned subject; and in view of the conditions vested therein and considering the details of post-wise vacancies and over-staffing shown in the enclosed format, and also according to the provisions of Group 'D' Employees Service (First Amendment) Rules, 1986, notified through the Government Letter No. 20/7/1986-Personnel-2(1) dated 0.09.86, kindly instruct in-charges of the districts under your subordination to ensure the process of recruitment to be held till 15.01.2003, while keeping into account the currently existing reservation policy issued by the government from time to time.

*2. In the number of posts shown in the enclosed details of vacancies and excess staff, the number of posts is quite natural to change due to transfer, death, retirement and recruitment on compassionate ground. In such a situation, while adjusting all the vacancies and excess staff in your zone, kindly issue instructions for the recruitment process. I**n the matter, it is also worthwhile to mention that if any employee is working or has worked on the temporary basis or as replacement; then such employees must be given preference.** It is in the cognisance of the police headquarters, writ petitions have been filed by employees for the recruitment to the class IV posts in many districts. If such matters are pending in the districts under your subordination, then due consideration must be had to according employment on priority basis so that the writs can be disposed of. The vacancies arisen after 31.12.2001 shall not be included in this recruitment."*

(English translation by Court)

9. Petitioners have filed rejoinder affidavit reiterating the averments made in writ petition but with regard to allegations of relationship of some of selected candidates, no material has been placed on record to substantiate the same.

10. A further supplementary counter affidavit has been filed wherein para 11 of writ petition has been replied more specifically as under:

"5. That it is further submitted humbly that the facts mentioned in paragraph no. 11 of the writ petition are also denied vide counter affidavit sworn on 26.2.2003 (dated 3.3.2003). It is further humbly submitted that the allegations made in paragraph 11 of the writ petition are totally false and frivolous having no substance. It is wrong to state that respondent No. 4 Ashok Kumar is selected because of her is brother in law of DIG Sri Dev Dutt, Chitrakoot Dham. It is further wrong to state that respondent no. 5 Narendra Pal is recommendee of Sri Dinkar Kumar. It is further wrong to state that respondent no. 6 Ramesh Kumar is brother in law in

Secretariat. It is further humbly submitted that in paragraph under reply the allegations with regard to selection of respondent no. 6 prima facie appears false allegation, as a matter of fact non can be the brother in law in Secretariat. It is further wrong to state that respondent no. 7 Girija Kumar is main of Sri R.N. Srivastava I.G. Banda and his candidature is considered as such. It is further humbly submitted that there was no post existing as I.G. Banda. It is further wrong to state that respondent no. 8 is a man of S.O. Maton who brought him at the time of interview. It is further wrong to state that other persons who have been selected are man of selection committee. It is further humbly submitted that none of the selected candidate is family member, relative, friend of the member of the selection committee. It is further wrong to state that some other selected candidates have been selected on account of the persons enjoying high posts. It is further humbly submitted that no appointment is made

11. A select list of all the candidates has also been placed on record as Annexure-8 to aforesaid supplementary counter affidavit sworn on 03.12.2011.

12. Sri W.H. Khan, learned Senior Advocate appearing for petitioners has submitted a written submission and reiterated the same orally also. He also placed reliance on **Jagannath Prasad Sharma vs. The State of U.P. and others, AIR 1961 SC 1245; Ajay Hasia and others vs. Khalid Mujib Sehravardi and others, 1981(1) SCC 722; Manjul Kumar and another vs. State of U.P., 2007(7) AWC 7712; Krishna Murari vs. State of U.P. and others, 2012(6) AWC 5571; Satyendra Kumar Singh and others vs. State of U.P. and others, 2013(3) ESC 1226 (All); and, Vijay Kumar Gaur vs. State of U.P. and another, 2017(1) AWC 552.**

13. On the contrary, learned Standing Counsel appearing for Respondents-1, 2 and 3 contended that selection has been made fairly; there is no material to substantiate the allegations of favouratism nepotism etc.; pleadings are vague and unsubstantiated; and, petitioners have not shown any legal right of regularization under any statute. These arguments are adopted by learned counsel appearing for Respondents-4 to 28 and he has also placed reliance on this Court's decision in **State of U.P. vs. Chaturth Shreni Karmachari Sangh and others, 2006(4) ESC 2888 (All).**

14. The rival submissions of the counsels, in my view, give rise to following questions:

(i) Whether selection is vitiated on account of favouritism and nepotism by selecting the candidates who are allegedly related to highly placed officials, as stated in paras 11 and 12 of the writ petition.

(ii) Whether selection of Respondents-4 to 28 is otherwise vitiated in law.

(iii) Whether there is any illegality in selection justifying inference of this Court.

15. Coming to first question, I find that specific relationship has been stated by petitioners in respect of some of the candidates but the same has been denied by respondents in counter affidavit and

again in para 5 of supplementary counter affidavit. Petitioners have not placed any material to demonstrate and prove the alleged relationship except oral assertions made in paras 11 and 12 of writ petition which have been denied by respondents very categorically. In these facts and circumstances and in absence of any material on record to prove the alleged relationship of some selected candidates with superior officials, I find no substance in the allegation that selection is vitiated on account of nepotism and favouritism. **Question (i) is answered against petitioners.**

16. Now coming to Question (ii), the claim is that petitioners are entitled for preference as stated vide Police Headquarter's letter dated 30.11.2002. It is not disputed by learned counsel for petitioners that regular selection was to be made in accordance with Rules, 1985. No provision in the said Rules has been shown providing any preference to be given to petitioners on account of the fact that they have worked as daily wage employees or otherwise in the Department. Some weightage has been provided for "retrenched employees" but I find that petitioners do not satisfy the definition of "retrenched employees". Here I may consider the relevant provision deal with Retrenched Employees so as to find out whether petitioners can be said to Retrenched Employees or not.

17. U.P. Retrenched Employees Recruitment Rules, 1967 *(hereinafter referred to as the "Rules 1967")* was the first to be framed in this regard providing certain benefits to retrenched employees. The "retrenched employee" was defined in Rule 2(b). Rule-3 of Rules, 1967 provides that the said rules shall remain in force for a period of three years and thereafter for such period as notified by the Governor in consultation with the Commission. The said rules were applicable to all services and posts under the rule making control of the Governor, which were to be filled in wholly, or partly by direct recruitment. The aforesaid rules continued to remain in force upto October, 1971.

18. In 1975, for recruitment in Ministerial Cadre in the Subordinate Offices, statutory rules under proviso to Article 309 of the Constitution of India were framed, namely, "The Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975" *(hereinafter referred to as "Rules, 1975")* published in the Gazette dated 29.7.1975. The rule-making authority declares that the said rules are being enacted in supersession of all existing rules and orders on the subject and for recruitment of ministerial staff in the subordinate Government offices in the State. The preface of Rules, 1975, reads as under:

"In exercise of powers conferred by the proviso to Article 309 of the Constitution, and in supersession of all existing rules and orders on the subject, the Governor is pleased to make the following rules for recruitment of ministerial staff in the subordinate Government offices in the State."

19. Rule 3 of Rules, 1975, which give it overriding effect, reads as under:

"3. Effect of inconsistency with other rules.- In the event of any inconsistency between these rules and any specific service rules:

(1) the provisions contained in these rules prevail to the extent of the inconsistency in case the specific rules were made prior to the commencement of these rules; and

(2) the provisions contained in the specific rules shall prevail in case they are made after the commencement of these rules."

20. Rule 4(gg) of Rules, 1975 provides the definition of "Retrenched Employee" and reads as under:

"(gg) "Retrenched Employee" means a person who was employed on a post under this rule making power of the Governor-

(i) in permanent, temporary or officiating capacity;

(ii) for a total minimum period of one year, out which at least 3 months service must have been continuous service.

(iii) whose services were or may be dispensed with due to reduction in or winding up of the establishment; and

*(iv) in respect of whom a certificate of being a retrenched employee has been issued by the Appo*inting Authority but does not include a person employed on ad hoc basis only."

21. Rules, 1975 initially, as enacted, did not specifically contain any provision giving any relaxation to "Retrenched Employee" but Rule 13-A was inserted by Notification dated 06.07.1977 for a period of three years from the date of its commencement and it reads as under:

"13 A. Relaxation for retrenched employees.-(1) A retrenched employee shall be given exemption from the upper age-limit to the extent of the period of service rendered by him to the State Government together with the period spent without a Government job as a result of the retrenchment.

(2) A retrenched employee, who on the date of his first appointment in the service of the State Government possessed the academic qualifications prescribed on such date for the post now being applied for, shall be deemed to satisfy the requirement of academic qualifications for such post.

(3) For the purposes of this rule, the expression "retrenched employee" means a person who was employed in any service or on any post under the rule-making control of the Governor whether in a substantive, officiating or temporary capacity, and had served continuously for a period of not less than one year, and whose services are, whether before or after the commencement of these rules, terminated or liable to termination, on account of reduction of establishment, and in respect of whom a certificate of being a retrenched employee has been issued by the appointing authority concerned, but does not include a person who was appointed on an ad hoc basis.

Explanation- A person appointed in accordance with the procedure prescribed in the recruitment rules or orders applicable to the service or post concerned shall be deemed to have been appointed on an ad hoc basis."

22. Consistent with 1975 Rules a Government Order No. 27/2/1974-Karmik-2 dated 6.7.1977 was published containing definition of "retrenched employee" and on the same date, another Government Order No. 41/2/1967-Karmik-2 dated 6.7.1977 was published for giving effect to the provisions of 1975 Rules and for guidance and clarification of the concerned officials. The aforesaid Government Order relevant for the present purpose is reproduced as under:

''शा० सं०–41/2/67–कार्मिक–2,
दिनांक जुलाई 6, 1977

विषयः राज्याधीन सेवाओं में वर्ग–3 व 4 के छंटनीशुदा कर्मचारियों को खपाने की व्यवस्था।

राज्याधीन कार्यालयों के छंटनीशुदा कर्मचारियों को भावी रिक्तियों में खपाने के लिए वर्ष 1967 में एक नियमावली बनाई गई थी, जो अक्टुबर, 1971 तक प्रभावी रही। उसके पश्चात मितव्ययिता के आधार पर अधिष्ठानों में कमी किये जाने अथवा अन्य प्रशासनिक कारणों से राज्य के विभिन्न कार्यालयों में वर्ग 3 तथा 4 के कर्मचारियों की छंटनी करना अनिवार्य हो गया तथा छअनीशुदा कर्मचारियों को खपाने का प्रश्न शासन के समक्ष पुनः उपस्थित हो गया।

2. इस सम्बन्ध में मुझे यह कीने का निर्देश हुआ है कि इस समस्या पर सम्यक् विचार करने के उपरान्त छंटनीशुदा कर्मचारियों को राज्याधीन कार्यालयों (अप्राविधिक तथा लोक सेवा आयोग की परिधि के बाहर के पदों) में होने वाली रिक्तियों मे खपाने के लिए शासन ने अब निम्नलिखित निर्णय लिये हैंः

(क) आयु सीमा के छूट–

ऐसे कर्मचारियों ने जितने वर्ष की सेवा अपनी छअनी के पूर्व की हो तथा जितनी अवधि के लिए वह छअनी के कारण सेवा से बाहर रहे हों उतने वर्ष की आयु सीमा से उन्हें छूट प्रदान कर दी जाय।

(ख) शैक्षिक योग्यता के छूट–

यदि ऐसे कर्मचारी अपनी पूर्व नियुक्ति के समय, जिस पद के लिए वह अब अभ्यर्थी हैं उस समय उस पद की निर्धारित शैक्षिक अर्हता पूरी करते हैं।

(ग) सुविधाओं की अवधि–

उपर्युक्त सुविधायें इस शासनादेश के जारी होने के दिनांक से 3 वर्ष के लिए ही मान्य रहेंगी।

(घ) छटनीशुदा कर्मचारियों की परिभाषा–

छटनीशुदा कर्मचारी की परिभाषा वही होगी जो कार्मिक अनुभाग–2 की अधिसूचना संख्या 27/2/1974 –कार्मिक (2) दिनांक 6 जुलाई, 1977 में दी हुई है और जो सुलभ सदर्भ हेतु नीचे उद्धृत की जाती है।

''छटनी किया गया कर्मचारी'' का तात्पर्य उस व्यक्ति से है जो राज्यपाल के नियम बनाने के नियन्त्रण में किसी सेवा में या किसी पद पर मौलिक सीनापन्न, या अस्थायी रूप से नियोजित था और जिसने कम से कम एक वर्ष की अवधि तक लगातार सेवा की हो और जिसकी सेवायें इस नियमावली के प्रारम्भ होने के पूर्व या पश्चात अधिष्ठान में कमी किये जाने के कारण समाप्त की जा सके और जिनके सम्बन्ध में सम्बद्ध नियुक्ति प्राधिकारी द्वारा छटनी किया गया कर्मचारी होने का प्रमाण–पत्र जारी किया गया हो, किन्तु इसमें ऐसा व्यक्ति सम्मिलित नहीं है जिसे तदर्थ आधार पर नियुक्त किया गया हो।

स्पष्टीकरण– सम्बद्ध सेवा या पर पर प्रयोग भर्ती नियमावली या आदेशों में विहित प्रक्रिया के अनुसार नियुक्त व्यक्ति को तदर्थ आधार पर नियुक्त किया गया नहीं समझा जायेगा।

3. ऐसे छटनीशुदा कर्मचारी जो वर्ग 3 (टपबम बेंदबमससवत समूह ग) के लिपिक वर्गीय पदों, जिनका न्यूनतम वेतनमान 200–320 रूपये

हैं तथा चतुर्थ वर्ग (अब समूह घ) के वे पद जिनका वेतनमान 165–215 रूपये हैं और जिस पर भर्ती जिला स्तरीय चयन समितियों के माध्यम से की जाती है, में भर्ती के इच्छुक हों उनको उपर्युक्त सुविधा के अन्तर्गत केवल नियमित चयनों में अर्हता देने के लिए छूट दी जायेगी परन्तु उन्हें चयन में कोई प्राथमिकता प्रदान नहीं होगी। शासनादेश संख्या 8/कार्मिक–1975 दिनांक 22 नवम्बर, 1975 में जारी किये गये आरक्षण सम्बन्धी आदेशों पर कोई प्रभाव नहीं पड़ेगा और पूर्व की भांति ही उनको कार्यान्वित किया जायेगा। तद्नुसार ''अधीनस्थ कार्यालय लिपिक वर्ग (सीधी भर्ती) नियमावली, 1975'' तथा ''चतुर्थ वर्ग कर्मचारी सेवा नियमावली, 1975'' में आवश्यक संशोधन कर दिये गये हैं।''

"GO No. 41/2/67-Karmik-2

Dated: July 06, 1977

Subject: Provision for absorption of retrenched employees of Class -III and IV in the services under the State.

In order to absorb the retrenched employees of the offices under the State against future vacancies, rules had been framed in the year 1967 which remained in force upto October 1971. Thereafter, on account of reduction in the establishments necessitated by frugality or for other administrative reasons, it has become necessary to go for retrenchment of Class -III and IV employees in several offices of the State, and the question of absorbing the retrenched employees has arisen again before the Government.

2. In this respect I am directed to say that upon due consideration to this problem, the following decisions have now been taken for the absorption against the vacancies (except the technical post and the posts beyond the purview of the Public Service Commission) occurring in the offices under the State:

(A) Exemption in age limit-

Exemption in the age limit be accorded to the employees to the extent of the period of service rendered by him prior to retrenchment together with the period of his being out of service due to such retrenchment

(B) Relaxation in academic qualification-

If such an employee, at the time of his prior appointment, possessed the educational qualification prescribed for the post for which he is now a candidate.

(C) Period of relaxations -

The aforesaid relaxations shall be effective up to three years from the date of issuance of this Government order

(D) Definition of retrenched employees:

The definition of retrenched employee shall be the same as given in Notification No. 27/2/1974-Karmik (2), dated July 6, 1977 and as reproduced herein below for ready reference:

"Retrenched employee" means a person who was employed in any service or on any post under the rule making control of the government, whether in a substantive, officiating or temporary capacity, and had served continuously for a period of not less than one year, and whose services are, whether before or after the commencement of these rules, terminated or certified by concerned appointing authority to have been terminated due to reduction in the establishment but does not include a

person who was appointed on an adhoc basis.

Explanation - A person appointed in accordance with the procedure prescribed in the recruitment rules or orders applicable to the service of the post concerned shall not be deemed to have been appointed on adhoc basis.

3. In case of those retrenched employees who are desirous of recruitment to Class III (now called Group C) clerical cadre posts carrying the minimum pay scale of Rs. 200-320 or to the posts of Class IV (now called Group D) carrying the pay scale of Rs. 165-215, recruitments whereto are conducted by the district level selection committees, exemptions as part of the aforesaid relaxations shall be given to them in respect of qualifications only in regular selections but no preference shall be given to them in selections. It shall not have any effect on the orders related to reservation issued through government order no. 8/karmik-1975 dated 22nd November, 1975 and such orders shall be executed as earlier. Accordingly, necessary amendments have been effected in the "Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975" and "Class-IV Employees Service Rules, 1975."

(English Translation by Court)

23. Rule 13-A expired after three years and so the Government Order dated 06.07.1977. In order to continue with the relaxation in age, educational qualification and other the GO No. 41/2/67-Karmik-2 dated 23.05.1981 was issued for a period of three years wherein the definition of "retrenched employee" as notified on 06.07.1977 and modified on 18.10.1979 was reiterated. For ready reference the aforesaid is being re-produced as under:

''शा.सं. 41/2/67–कार्मिक–2,
दिनांक 23 मई, 1981

विषयः राज्याधीन सेवाओं में वर्ग 3 व 4 के छंटनीशुदा कर्मचारियों को खपाने की व्यवस्था।

उपर्युक्त विषयक समसंख्यक शासनादेश दिनांक 6 जुलाई, 1977 में प्रदत्त सुविधाओं की मान्य अवधि 5 जुलाई, 1980 को समाप्त हो गई है। शासन की जानकारी में यह बात आई है कि छटनी शुदा कर्मचारियों की समस्या का निदान पूर्ण रूप से नहीं हो सका है अतः इस विषय पर पुनः विचार किया गया।

2. मुझे यह कहने का निर्देश हुआ है कि इस समस्या पर समुचित विचारोपरान्त छंटनीशुदा कर्मचारियों को राज्याधीन कार्यालयों में होने वाली भावी रिक्तियों (अप्राविधिक तथा लोक सेवा आयोग की परिधि से बाहर के पदों) में खपाने के लिये शासन ने निम्नलिखित निर्णय लिये हैः

(क) अधिकतम आयु सीमा से छूटः

ऐसे कर्मचारियों ने जितने वर्ष अपनी छंटनी से पूर्व की हो तथा जितनी अवधि के लिये वह छंटनी के कारण सेवा से बाहर रहे हों उतने वर्ष की अधिकतम आयु सीमा से उन्हें छूट प्रदान कर दी जाय परन्तु प्रतिबन्ध यह है कि यह अवधि किसी भी दशा में 10 वर्ष से अधिक नहीं होगी।

(ख) शैक्षिक योग्यता से छूटः

यदि ऐसे कर्मचारी अपनी पूर्व नियुक्ति के समय, जिस पद के लिये वह अब अभ्यर्थी हैं, उस पद की निर्धारित शैक्षिक अर्हता रखते थे, तो यह समझा जायेगा कि वे वर्तमान पद के लिये निर्धारित शैक्षिक अर्हता पूरी करते हैं।

(ग) सुविधाओं की अवधिः

उपर्युक्त सुविधाये इस शासनादेश के जारी होने की तिथि से तीन वर्ष के लिये मान्य रहेगी।

(घ) परिभाषाः

छटनीशुदा कर्मचारी की वही परिभाषा होगी जो शासनादेश संख्या41/2/67–कार्मिक–2 दिनांक 6 जुलाई, 1977 में दी हुई है और समसंख्यक शासनादेश दिनांक 18 अक्टूबर, 1979 द्वारा यथा संशोधित है और जो सुलभ सन्दर्भ हेतु नीचे उद्धृत की जाती हैः

''छंटनी किया गया कर्मचारी'' का तात्पर्य उस व्यक्ति से है जो राज्यपाल के नियम बनाने के नियंत्रण में किसी सेवा में या पद पर मौलिक, सीानापन्न अथवा अस्थायी रूप से नियोजित था और जिसने कम से कम 3 मास की निरन्तर सेवा की हो परन्तु कुल मिलाकर यह फुटकर खण्डित सेवा भी एक वर्ष की पूरी हो गई हो और जिसकी सेवायें अधीनस्थ कार्यालय लिपिक वर्ग (सीधी भर्ती) (चतुर्थ संशोंधन) नियमावली, 1979 तथा चतुर्थ वर्ग कर्मचारी सेवा (तृतीय संशोधन) नियमावली 1979 के प्रभावी होने के पूर्व या पश्चात अधिष्ठान में कमी के कारण समाप्त कर दी गई हो या समाप्त कर दी जाये और जिसके सम्बन्ध में सम्बद्ध नियुक्ति प्राधिकारी द्वारा छटनी किया गया कर्मचारी होने का प्रमाण–पत्र जारी किया गया हो किन्तु उसमें ऐसा व्यक्ति सम्मिलित नहीं होगा जिसे तदर्थ आधार पर नियुक्त किया गया हो।

स्पष्टीकरण – सम्बद्ध सेवा या पद पर प्रयोज्य भर्ती नियमावली या आदेशों में विहित प्रक्रिया के अनुसार नियुक्त व्यक्ति को तदर्थ आधार पर नियुक्त किया गया नहीं समझा जायेगा।

3. ऐसे छटनीशुदा कर्मचारियों को उपर्युक्त सुविधा के अन्तर्गत केवल नियमित चयनों में अर्हता देने के लिये छूट दी जायेगी परन्तु उन्हें चयन में कोई प्राथमिकता प्रदान नहीं होगी।

सचिव''

"GO No. 41/2/67-Karmik-2
Dated: 23rd May, 1981

Subject: Provision for absorption of retrenched employees of Class -III and IV in the services under the State.

The period of applicability of the relaxations provided in the even numbered Government Order dated 6th July, 1997 on the subject above mentioned, has elapsed on 5th July, 1980. It has come to the notice of the government that the problem of the retrenched employees has not been completely resolved and hence, this issue has been reconsidered.

2. In this respect I am directed to say that upon due consideration to this problem, the following decisions have now been taken for the absorption against the vacancies (except the technical post and the posts beyond the purview of the Public Service Commission) occurring in future in the offices under the State:

(A) Exemption from upper age limit-

Exemption in the age limit be accorded to the employees to the extent of the period of service rendered by him prior to retrenchment together with the period of his being out of service due to such retrenchment;however, this period of relaxation shall not exceed 10 years at any cost.

(B) Exemption from academic qualification-

If such employees, at the time of their prior appointment, possessed the educational qualifications prescribed for

the post for which they are now candidates, they shall be taken to have academic qualifications prescribed for the current posts.

(C) Period of relaxations -

The aforesaid relaxations shall be effective up to three years from the date of issuance of this Government order.

The aforesaid relaxations shall be effective for three years from the date of issuance of this government order.

(D) Definition:

The definition of retrenched employee shall be the same as given in government order 41/2/67-Karmik-2, dated July 6, 1977 and as amended by the even numbered government order dated October 18, 1979 and as reproduced herein below for ready reference:

"Retrenched employee" means a person who was employed in any service or on any post under the rule making control of the government, whether in a substantive, officiating or temporary capacity, and had served continuously for a period of not less than three months, but had completed one year of total service period including several spells of interrupted service, and whose services are, whether before or after the commencement of the Subordinate Offices Clerical Staff (Direct Recruitment) (Fourth Amendment) Rules, 1979 and the Class-IV Employees Services (Third Amendment) Rules, 1979, terminated, or certified by concerned appointing authority as liable to termination but does not include a person who was appointed on an adhoc basis.

Explanation - A person appointed in accordance with the procedure prescribed in the recruitment rules or orders applicable to the service of the post concerned shall not be deemed to have been appointed on adhoc basis.

3. As part of the aforesaid relaxation to such retrenched employees, exemptions shall be given to them in respect of qualifications only in regular selections but no preference shall be given to them in selection.

Secretary"

(English Translation by Court)

24. The aforesaid government order was extended for a further period of three years vide Government Order No. 41/2/1967-Karmik-2 dated 12.4.1983, which reads as under:

"शा० संख्या42 / 2 / 1967–कार्मिक–2,
दिनांक 12 अप्रैल, 1983

विषयः– जनगणना विभाग के छटनी किये जाने वाले कर्मचारियों को राज्याधीन सेवाओं / पदों में नियुक्ति हेतु रियायत।

उपर्युक्त विषयक समसंख्यक शासनादेश दिनांक 12 फरवरी, 1982 के क्रम में मुझे यह स्पष्ट करने का निदेश हुआ है कि उपरोक्त शासनादेश में दी गई सुविधाये राज्य सरकार के अधीन केवल उन सेवाओं / पदों पर नियुक्ति हेतु अनुमन्य होंगी जिन पर सीधी भर्ती लोक सेवा के माध्यम से नहीं होती है।

उप सचिव।"

"Government Order No. 42-2-1967-Karmik-2,
Dated 12th April, 1983

Subject: Exemptions to the retrenched employee of the census department for appointment to the services/posts under the State.

In pursuance of the even numbered government order dated 12th February, 1982 on the subject above mentioned, I am directed to make it clear that the relaxations given in the aforesaid government order shall be given in respect of appointments only to those services/posts under the state government direct recruitments whereto are not held by the Public Service Commission.

Deputy Secretary"
(English Translation by Court)

25. Vide Notification dated 16.03.1985 the Governor promulgated a new set of Rules, namely, The U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985 (in short 'Group C Rules, 1985'), in supersession of existing rules and orders on the subject as is apparent from the following:

"In pursuance of the provisions of Clause (3) of Article 348 of the Constitution, the U.P. Governor is pleased to order the publication of the following English translation of Notification No. 20/3-82-Personnel-2-85, dated March 16, 1985.

In exercise of the powers conferred by the proviso to Article 309 of the Constitution, and in supersession of all existing rules and orders on the subject, the Governor is pleased to make the following rules regulating recruitment of ministerial staff in the Subordinate Government Offices in the State."

26. Rule-3 of Group C Rules, 1985 also gives it overriding effect over any inconsistent existing rule and Rule-4(i) defines "retrenched employee" which reads as under:

"Retrenched employee" means a person-

(i) who was employed on a post under the rule making power of the Governor, in permanent, temporary or officiating capacity for a total minimum period of one year, out of which at least three months' service must have been continuous service;

(ii)whose services were or may be dispensed with due to reduction in or winding up of the establishment; and

(iii) in respect of whom a certificate of being retrenched employee has been issued by the appointing authority;

but does not include a person employed on ad hoc basis only."

27. Similarly for Group D Employees, Rules, 1985 were framed wherein also the concept of Retrenched Employees is same as in Rules means for Group C Employees.

28. Thereafter U.P. Procedure of Direct Recruitment for Group-C Posts (Outside the Purview of U.P. Public Service Commission) Rules, 1998 *(hereinafter referred to as the "Group C Rules, 1998")* were promulgated on

09.06.1998. It would be appropriate to refer the declaration made under the aforesaid rules which was not in the same terms as it was in Rules, 1975 and Group C Rules, 1985 that the same are being enacted in supersession of all the existing provisions and on the contrary, Group C Rules, 1998 only makes a declaration of making of the rules by the Hon'ble Governor and reads as under:

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Governor is pleased to make the following rules:"

29. Rule-2 of Group C Rules, 1998 gives these rules overriding effect over inconsistent existing rules. Rule 5(3)(c) provides weightage which is admissible to a "retrenched employee" for recruitment in Rules, 1998. Admittedly, Rules 1998 did not contain any definition of "retrenched employee". For the purposes of the case in hand, since recruitment has been made in Rules 1998, the subsequent enactment came into force on 20.08.2001 may not be necessary but since the argument has been advanced referring to the provisions of the subsequent enactment also, I may notice the same.

30. The Hon'ble Governor further promulgated another set of rules in 2001, namely, The Uttar Pradesh Procedure for Direct Recruitment for Group "C" posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2001 (in short the "Rules, 2001"). The aforesaid rules have been framed in supersession of all the existing rules and orders on the subject as is apparent from the following declaration made under the Rules:

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution and in suppression existing rules and other on the subject, the Governor is pleased to make the following rules."

31. Rules, 2001, admittedly does not contain any definition of 'retrenched employee' but provides certain concessions in recruitment to a 'retrenched employee' vide Rule 6(6)(b) etc.

32. The history and the effect of rules pertaining to retrenched employees has been considered in detail by a Division Bench of this Court in **Sayed Mohammd Mahfooj Vs. State of U.P. and others, 2007(2) ALJ 628** and a Single Judge judgment of this Court in **Ajit Raizada & Others Vs. State Of U.P. Thru' Secy. & Others, 2011(6) ADJ 511 and I** find the view taken hereinabove is in conformity to the aforesaid binding precedents.

33. Learned counsel for petitioners also could not show any provision under which Police Headquarter has any power to give direction to selection committee to do something which is not provided under Rules and/ or to give some priority or preference which is not contemplated in Rules.

34. Lastly, the question of preference arise only when all other things are satisfied and preference cannot be treated as a right of appointment to the exclusion of others. "Preference" does not mean that candidate claiming preference is entitled to be preferred to the extent of ouster of all other candidates.

35. In **State of U.P. and another Vs. Om Prakash and others AIR 2006 SC 3080,** Court interpreting the word 'preference' held that only when one or more persons are found equally positioned, then the additional qualification may be taken as a tilting factor as against others.

36. In S**ecretary, Andhra Pradesh Public Service Commission Vs. Y.V.V.R. Srinivasulu and others (2003) 5 SCC 341**, Court held:

"The 'preference' envisaged in the rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence."

37. The above authorities have been referred to and relied on by a Full Bench of this Court in **Daya Ram Singh Vs. State of U.P. and others, 2007(5) ADJ 359.**

38. Question (ii), therefore, is also answered against petitioners.

39. Now coming to third question, neither petitioners have shown anything otherwise nor I could find any illegality in the selection in question.

40. I also find that authorities relied by petitioners do not help them on the issues involved in this petition.

41. **Jagannath Prasad Sharma (supra)** was a case where validity of order of dismissal was up for consideration before Supreme Court. Jagannath Prasad Sharma was admitted in U.P. Police Force in 1931 as Sub-Inspector. He was promoted subsequently to the rank of Inspector. In 1947 he was given officiating rank of Deputy Superintendent of Police. Some complaints were received, whereupon a preliminary inquiry was conducted and Inspector General of Police, forming an opinion that prima facie case was made out, directed for regular inquiry against Jagannath Prasad Sharma. Simultaneously, he also passed an order reverting him to his substantive rank of Inspector. He was also placed under suspension. A formal departmental inquiry was conducted by Superintendent of Police (Anti-Corruption) and on the inquiry report submitted by Inquiry Officer, Governor under Rule 4 of Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 *(hereinafter referred to as "Rules, 1947")* referred the matter for inquiry to Tribunal appointed under Rule 3 of Rules, 1947 on the charge of corruption, personal immorality and failure to discharge duties properly. Tribunal framed three charges and after survey of evidence recommended dismissal of service vide report dated 04.02.1950. Governor then served a notice to show cause why he should not be dismissed from service and after considering explanation, order of dismissal was passed on 05.12.1950. It is this order which was challenged in writ petition before High Court on the ground that no departmental inquiry was conducted under Rule 55 of Civil Services (Classification, Control and Appeal) Rules, 1930 *(hereinafter referred to as "Rules, 1930")* as applicable in State of U.P. High Court dismissed writ petition. Thus matter came to Supreme

Court wherein Jagannath Prasad Sharma raised following three issues:

"1. that the order dismissing the appellant from the police force was unauthorised, because the Governor had no power under Section 7 of the Police Act and the regulations framed thereunder to pass that order;

2. that even if the Governor was invested with power to dismiss a police officer, out of two alternative modes of enquiry, a mode prejudicial to the appellant having been adopted the proceedings of the Tribunal which enquired into the charges against him were void, as the equal protection clause of the Constitution was violated; and

3. that the proceedings of the Tribunal were vitiated because of patent irregularities which resulted in an erroneous decision as to the guilt of the appellant. To appreciate the first two contentions, it is necessary briefly to set out the relevant provisions of the laws procedural and substantive in force, having a bearing on the tenure of service of members of the police force in the State of Uttar Pradesh."

42. Answering first question Supreme Court, in para 9 of judgment, said as under:

"The Tribunal Rules were framed in exercise of various powers vested in the Governor including the power under Section 7 of the Police Act, and by those rules, the Governor was authorised to pass appropriate orders concerning police officers. By virtue of Article 313, the Police Regulations as well as the Tribunal Rules in so far as they were not inconsistent with the provisions of the Constitution remained in operation after the Constitution. The authority vested in the Inspector-General of Police and his subordinates by Section 7 of the Police Act was not exclusive. It was controlled by the Government of India Act, 1935, and the Constitution which made the tenure of all civil servants of a Province during the pleasure of the Governor of that Province. The plea that the Governor had no power to dismiss the appellant from service and such power could only be exercised by the Inspector-General of Police and the officers named in Section 7 of the police Act is therefore without substance."

43. Second question was also answered against petitioner observing that no discrimination was practiced by continuing inquiry under Tribunal Rules after Constitution was brought into force.

44. Then for third question Supreme Court held that though appeal was filed with a certificate of Article 132 of the Constitution and Court was to consider, whether High Court has wrongly decided a substantial question as to the interpretation of Constitution unless leave is granted to other issue but only to satisfy itself Court considered third question also and answered the same against petitioner.

45. I do not find anything in the aforesaid judgment which may help petitioners in any manner in the present case.

46. **Ajay Hasia (supra)** is a judgment of a Constitution Bench wherein issue of admission in professional College, namely,

Engineering College, was up for consideration. In Regional Engineering College, Srinagar applications were invited for admission to First Semester of B.E. Course in 1979 for Academic Year 1979-80. Petitioners Ajay Hasia and others applied for admission and appeared in written test held in June, 1979. Thereafter they also appeared for viva voce test and interviewed. In the result declared petitioners found that they secured good marks in qualifying examination but could not get adequate marks in viva voce/ interview. The candidates who had secured less marks in qualifying examination, but higher marks in viva voce, got admission. Challenging process of selection writ petition was filed in Supreme Court. Various grounds were raised. At the time of hearing, Supreme Court found that some grounds were concluded by its earlier judgment in **Nishi Maghu Etc. Etc vs State Of Jammu And Kashmir And Ors, AIR 1980 SC 1975** hence those grounds were not pressed. One of the ground considered by Supreme Court was regarding maintainability of writ petition. It was argued on behalf of respondents that College is being run by a Society which is not a Corporation created by statute but registered under Jammu and Kashmir Registration of Societies Act, 1989 hence is not an 'authority' within the meaning of Article 12 of Constitution and no writ petition is maintainable. This issue was considered in detail and answered against College holding that even an instrumentality of 'State' is within the meaning of State under Article 12 of Constitution. In para 15 of judgment, Court said that the Society running College is an instrumentality or agency of Government. It said:

"We must, therefore, hold that the Society is an instrumentality or agency of the State and the Central Governments and it is an 'authority' within the meaning of Article 12."

47. Selection process was challenged on the ground that higher marks secured in qualifying examination could not have been ignored for giving admission and higher marks in interview and viva voce are arbitrary. Court said:

"We would not, therefore, regard the procedure adopted by the society as arbitrary merely because it refused to take into account the marks obtained by the candidates at the qualifying examination, but chose to regulate the admissions by relying on the entrance test."

"It is therefore not possible to accept the contentions of the petitioners that the oral interview test is so defective that selecting candidates for admission on the basis of oral interview in addition to written test must be regarded as arbitrary. The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse. We would, however, like to point out that in the matter of admission to college or even in the matter of public employment, the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover,

great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, calibre and qualification."

"We must, therefore, regard the allocation of as high a percentage as 33 1/3 of the total marks for the oral interview as infecting the admission procedure with the vice of arbitrariness and selection of candidates made on the basis of such admission procedure cannot be sustained."

48. Having said so, Court ultimately held that since 18 months have already passed and other candidates who have been given admission are near to complete three semesters, therefore, it would not be justified to cancel the selection already made. Court said that it is not interfering for selection for Academic Year 1989-90 but for future the higher percentage of marks should not be allowed for interview. It also said that allocation of 15% marks for interview would be arbitrary and unreasonable.

49. This judgment also, in my view, does not help petitioners at all.

50. Learned counsel for petitioners placed reliance on paras 20 and 21 of judgment in **Ajay Hasia (supra)** to suggest that interview was not properly conducted but I find that no material has been placed in this regard before this Court and it would not be justified for the Court in making a roving and fishing inquiry in the matter.

51. In **Manjul Kumar (supra)** again I find that on the basis of facts demonstrated therein Court found that selection was not properly made. Therein more than twelve thousands candidates are called for interview and almost 500 candidates were called on, every day, for interview. In para 16 Court recorded a finding that in 26 days 8023 candidates appeared in interview and if it is assumed that eight hours time was given for interview every day, then for interviewing 500 candidates every day, only one minute could have been given to each candidate. If eight hours are enhanced to 10 hours then time allotted to every candidate would be almost 1.5 minutes which reveals that actually no interview was held and it was virtually a formality. Court interfered with selection holding that it was farce and sham. To the facts as discussed in present case, in my view, aforesaid judgment also has no application.

52. In **Krishna Murari (supra)** petitioner was a Cook appointed vide order passed in March, 1982 in 43rd Battalion, Etah wherefrom he was transferred to 35th Battalion PAC, Lucknow. On some allegations made against him, disciplinary inquiry was conducted under U.P. Police Officers of Subordinate Rank (Punishment and Appeal), Rules, 1991 *(hereinafter referred to as "Rules, 1991")* and after holding inquiry a show cause notice was issued on 09.10.2010 as to why he should not be dismissed from service. Show cause notice was challenged in Writ Petition No. 7743 (SS) of 2010 but learned Single Judge dismissed writ petition. Since no writ petition pending, petitioner-Krishna Murari was dismissed from service and final order of dismissal was passed. Question of applicability of Rules, 1991 was challenged on the ground that Kirishna Murari was not a Police Official but a civil class-IV

employee hence Rules, 1991 were not applicable and he could have been proceeded only under U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999"). Court clearly said that U.P. Police Group-D Employees Service Rules, 2009 (hereinafter referred to as "Rules, 2009") came into force on 28.08.2009, hence the same will not apply retrospectively to a person who was already appointed and inquiry proceedings were going on. This judgment also, in my view, has no application in the present case.

53. **Satyendra Kumar Singh (supra)** is a case where Court found that 1871 candidates were interviewed in a single day which shows that selection was virtually a sham. Observations made by Court in paras 30 and 31 are reproduced as under

"30. Even if it is presumed that the interview was conducted since morning to night, as stated by the petitioners, maximum 16 hours in a day can be spent. Even if 1817 candidates are interviewed, although this figure is too improbable, then too maximum approx. 31 seconds are spent on a single candidate. And astonishingly this time also includes period of preparing appointment letter on the basis of result of this interview. In nutshell, this single day include, interview of 1817 candidates, then result of this interview, then preparation of appointment letter.

31. This whole transaction is beyond human imagination and it is so preposterous that it becomes itself evidence against it for the glaring illegalities committed therein. "

54. Above judgment also does not help petitioner at all.

55. **Vijay Kumar Gaur (supra)** was a case where proceedings were initiated against him who was a Follower, having been appointed on 27.01.1995 by Senior Superintendent of Police, Lucknow after due selection as per Rules, 1985. He was sought to be proceeded against as per Rules, 1991 and punishment order was passed under Rule 4(1)(a) of Rules, 1991. Relying on judgment in **Krishna Murari (supra)** it was contended that inquiry under Rules, 1999 could have been held and not under Rules, 1991. Court held that Rules, 1999 are applicable for the purpose of inquiry but found that inquiry was conducted in the manner provided under Rules, 1999 and mere reference of Rules, 1991 will not vitiate punishment order. Thus writ petition was dismissed. This judgment also, in my view, is of no assistance to petitioners.

56. On behalf of Respondents-4 to 28 the Division Bench judgment in **Chaturth Shreni Karmachari Sangh (supra)** has been cited wherein it is held that if there is no provision for regularization the same cannot be directed and reliance has been placed on Constitution Bench judgment in **State of Karnataka and others vs. Uma Devi and others, 2006(4) SCC 1.**

57. In the present case petitioners are actually challenging selection already made. It is not a case of regularization since selection and appointed was already made. Unless those appointments are nullified, petitioners cannot claim any benefit. In any case, even otherwise, only Petitioners-1 and 2 are claimed to have engaged since 1990 and rest are subsequent to 29.06.1991 which is a cut off date for attracting U.P. Regularization of Daily Wages Appointment on Group 'D' Posts Rules, 2001 *(hereinafter*

referred to as "Rules, 2001"). The aforesaid Rules are not applicable to all petitioners except Petitioners-1 and 2.

58. In the present case since selection and appointments have already been made, I do not find that the same can be undone at this stage after almost 17 years.

59. In the circumstances, I do not find that petitioners are entitled for any relief. Writ petition is accordingly dismissed.

60. Interim order, if any, stands vacated.

(2020)06ILR A875
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 6333 of 2018

Pramod Kumar Maheshwari & Anr. ...Petitioners
Versus

Rent Control & Evicition Officer, Lalitpur & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manish Kumar Jain, Sri Ramendra Singh, Sri P.K. Jain

Counsel for the Respondents:
C.S.C., Sri A.K. Maheshwari(In Person), Sri Parmendra Singh, Sri B.P.Singh

A. Civil Law - Rent Control and Eviction – Cancellation of Allotment - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 15, 16, 18(3) – After setting aside the order of allotment, the landlord should be put back in possession.

The Hon'ble Court held that there is no material irregularity or jurisdictional error committed by Rent Control and Eviction Officer, who by the impugned order dated 29.03.2011, allowed application u/s 18(3) of respondent no. 2 and held that Hon'ble High Court while dismissing the earlier writ petitions (against the orders which upheld the cancellation of allotment and recorded respondent no. 2 and 3 as owners) recorded that Late Durga Devi was not the owner and landlord of the shop, therefore, the petitioners who are the heirs of Smt. Durga Devi are not entitled to get the possession of the shop, rather the respondent nos. 2 and 3 are entitled to the possession being the owner and landlord of the property. (Para 12, 18)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Gauesh Chandra Gupta Vs Prescribed Authority, 1990 (2) AWC 1455 (Para 19)

Petition challenges orders dated 29.03.2011 and 07.02.2018, passed by Rent Control and Eviction Officer, Lalitpur and Additional District Judge (FTC-II), Lalitpur.

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri P.K. Jain, learned Senior Counsel assisted by Sri Manish Kumar Jain, learned counsel for the petitioners, respondent No. 2- Sri A.K. Maheshwari (in person) and Sri Parmendra Singh, learned counsel for the respondent No. 3.

2. The petitioner by means of the present writ petition has assailed the order dated 29.3.2011 passed by Rent Control and Eviction Officer, Lalitpur in Case No. 94/1979 wherein application of the respondent No. 2 (Ashok Kumar

Maheshwari) under Section 18 (3) of U.P. Act No. 13 of 1972 has been allowed and the order dated 7.2.2018 passed by Additional District Judge (FTC-II), Lalitpur in Rent Control Revision No. 11 of 2011 affirming the order of the Rent Control and Eviction Officer, Lalitpur dated 29.3.2011.

3. Brief facts of the case are that one Sukhpal Maheshwari was the owner of the shop No. 48/4, Subhaspura, Lalitpur (hereinafter referred as 'shop'). He had two sons namely Ashok Kumar Maheshwari-respondent No. 2 and Prakash Narayan Maheshwari-respondent No. 3.

4. It appears that one Shripat s/o Jujhar Singh was the tenant of the shop owned by Sukhpal Maheshwari . He submitted an application to the Rent Control and Eviction Officer, Lalitpur that he would vacate the disputed shop on 30.6.1979. On the said application, the Rent Control and Eviction Officer registered Case No. 94 of 1979 under Section 16 of U.P. Act No. 13 of 1972 (hereinafter referred as 'Act,1972') and sought a report from Rent Control Inspector. The Rent Control Inspector submitted a report on 28.4.1979 that the shop in question is vacant, and accordingly, the vacancy can be declared and the shop can be allotted. The Rent Control and Eviction Officer, Lalitpur after obtaining report of Rent Control Inspector vide order dt. 30.4.1979 declared the vacancy for allotment of shop.

5. It seems that respondent No. 4 (Anil Kumar Alya) on 27.4.1979 filed an application in Misc. Case No. 94 of 1979 for allotment of the shop. On the said application, One Smt. Durga Devi w/o Kailash Narayan Maheshwari filed an application on 27.4.1979 before the Rent Control and Eviction Officer, Lalitpur giving consent for the allotment of shop to the respondent No. 4. Thereafter, the shop was allotted to respondent No. 4 by the order dated 27.5.1979 of Rent Control and Eviction Officer, Lalitpur. Accordingly, the allotment order in prescribed form was issued in favour of respondent No. 4.

6. The respondent No. 2 filed an application under Section 15 and 16 of the Act,1972 in Misc. Case No. 94 of 1979 praying for cancellation of allotment order dated 21.5.1979 in favour of respondent No. 4.

7. The Rent Control and Eviction Officer, Lalitpur by order dt. 30.6.2007 set aside the order of allotment dated 21.5.1979 in favour of respondent No. 4 . The Rent Control Officer held that Sukhpal Maheshwari was the owner of the shop. After his death, there was family partition in which shop fell in the share of respondent No. 2 (Ashok Kumar Maheshwari) and respondent No. 3 (Prakash Narayan Maheshwari). Thus, the respondent Nos. 2 and 3 are the owner and landlord of the shop.

8. The order dated 30.6.2007 of Rent Control and Eviction Officer, Lalitpur was challenged by Smt. Durga Devi as well as respondent No. 4 in Rent Control Revision No. 32 of 2007 and 33 of 2007 respectively. The Additional District Judge, Lalitpur by judgment and order dated 25.5.2010 dismissed both the revisions.

9. The respondent No. 4 thereafter preferred Writ A No. 42276 of 2010 (Anil

Kumar Alya Vs. Ashok Kumar Maheshwari and others) against the order of the Revisional Court dated 25.5.2010 and order of Rent Control and Eviction Officer dated 30.6.2007 before this court. The writ petition was dismissed by this Court by the judgement and order dated 22.7.2010. The relevant extract of the aforesaid judgement is extracted herein:-

"It is urged that the courts below did not consider the fact that the disputed property was bought by Smt. Durga Devi, who was the owner and landlord in an auction and the application for allotment was made only with respect to that property.

Both the courts below have gone into this aspect in detail and after analyzing the evidence, including the admission of Durga Devi in a partition suit no. 137 of 1999 and the sale deed in the alleged auction, have returned a finding of fact that she was never the owner or landlord of the premises and the entire exercise in collusion with her husband was illegal and fraudulent. Counsel for the petitioner has failed to point out any error of law. Thus, the argument cannot be accepted.

It is also urged that the allotment was made way back in 1979 and therefore the application for recall was not maintainable and the decision of the Apex Court in the case of Madhu Gopal Vs. VI Additional District Judge [1988 (4) SCC 644) do no apply.

No doubt there was delay, but the courts below have considered the facts and found that the landlord was unaware of the proceedings. Assuming there was delay, but fraud can be challenged at any stage as fraudulent actions are void and thus has no limitation.

No other point has been urged.

For the reasons above, this is not a fit case for interference under Article 226 of the Constitution of India. Rejected. "

10. Smt. Durga Devi also preferred Writ A No. 51341 of 2010 (Smt. Durga Devi Vs. Ashok Kumar Maheshwari and others) against the order dated 30.6.2007 and 25.5.2010. It appears that during the pendency of aforesaid writ petition, Smt. Durga Devi died. Therefore, her heirs were substituted. This Court by the judgement and order dated 22.7.2020 dismissed the aforesaid writ petition on the ground that as the two orders challenged in the said writ petition have been challenged by respondent No. 4 in Writ A No. 42276 of 2010 (Anil Kumar Alya Vs. Ashok Kumar Maheshwari and others) and as those two orders have been upheld by this Court, therefore, it is not proper for this Court to take a different view.

11. After dismissal of the aforesaid writ petitions, the respondent No. 2 filed an application under Section 18 (3) of U.P. Act No. 13 of 1972 in Case No. 94/1979 registered as Misc. Case No. 1 of 2005 praying for recovery of possession of the shop.

12. The Rent Control and Eviction Officer, Lalitpur by the order dated 29.3.2011 after hearing the counsel for the parties allowed the application of respondent no.2. The Rent Control and

Eviction Officer, Lalitpur held that this court while dismissing the writ petitions against the order dated 30.6.2007 of Rent Control and Eviction Officer and order dt. 25.05.2010 dismissing the revision of the petitioner held that late Durga Devi was not the owner and landlord of the shop, therefore, the petitioners who are the heirs of Smt. Durga Devi are not entitled to get the possession of the shop. It further held that since the order dated 30.6.2007 cancelling the allotment of disputed shop in favour of respondent No. 4 was passed on the application of respondent No. 2, consequently, the respondent

13. The petitioner preferred Rent control Revision NO. 11 of 2011 against the order of the Rent Control and Eviction Officer, Lalitpur dated 29.3.2011 which was dismissed by the revisional court on 07.02.2018.

14. Challenging the aforesaid orders, learned Senior Counsel contended that according to Section 18 (3) of U.P. Act No. 13 of 1972 after the cancellation of allotment order, the property in question is to be restored back to the person who was in the possession of the shop before allotment in favour of respondent no.4. He contends that since Smt. Durga Devi was in possession of the shop, therefore, the petitioners being legal heirs of Smt. Durga Devi are entitled to the possession of the shop after the cancellation of allotment order. Thus, the court below has misinterpreted Section18(3) of Act,1972 in allowing the application of the Respondent No.2.

15. Per contra, respondent No. 2 (Ashok Kumar Maheshwari), who appeared in person, submits that the Rent Control and Eviction Officer, Lalitpur while cancelling the allotment order in favour of respondent No. 4 has held that Smt. Durga Devi was not the owner and landlord of the disputed shop and respondent Nos. 2 and 3 are the joint owner of the shop which finding has been affirmed by this Court in two writ petitions referred above and the judgements of this Court in the aforesaid two writ petitions have attained finality. Accordingly, he submits that the respondent Nos. 2 and 3 are joint owner of the shop, therefore, the Rent Control and Eviction Officer, Lalitpur has correctly allowed the application and directed the delivery of possession of the disputed shop to the respondent Nos. 2 and 3. He further submits that the revision court after appreciating the law correctly dismissed the revision. Thus, he submits that finding of the Rent Control and Eviction Officer as well as revisional court are based upon the proper appreciation of the fact and evidence on record, and as such are not liable to be interfered with by this court in exercise of its power under Article 226 of the Constitution of India being finding of fact.

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

17. The facts as emerge out from the record are that the allotment of the disputed shop in favour of the respondent No. 4 was made by the Rent Control and Eviction Officer, Lalitpur on the consent of Smt. Durga Devi. The allotment of respondent No. 4 was challenged by the respondent No. 2 contending inter-alia that Smt. Durga Devi was not the owner of the disputed shop and could not give consent for allotment of shop and the

allotment of the shop was obtained by playing fraud by the respondent No. 4 in collusion with Smt. Durga Devi.

18. The application of respondent No. 2 for cancellation of allotment in favour of respondent No. 4 was allowed by Rent Control and Eviction Officer, Lalitpur by the order dated 30.6.2007 wherein finding on the basis of material and evidence on record had been recorded that Smt. Durga Devi was not the owner of the disputed shop and the respondent Nos. 2 and 3 are the joint owner of the disputed shop. The aforesaid finding has been affirmed by the Revisional Court as well as by this Court in the Writ A No. 51341 of 2010 and Writ A No. 42276 of 2010. The judgment of this Court in the aforesaid two writ petitions have attained finality as they have not been assailed by the petitioners before the Apex Court. Accordingly, the finding of Rent Control and Eviction Officer, Lalitpur in the order dated 30.6.2007 that Smt. Durga Devi was not the owner of the disputed shop in question and the respondent Nos. 2 and 3 are the joint owner of the disputed shop is binding upon the parties. Therefore, Rent Control and Eviction Officer, Lalitpur has rightly come to the conclusion that the petitioner being legal heirs of late Smt. Durga Devi have no right to seek possession of the disputed shop rather the respondent Nos. 2 and 3 are entitled to the possession being the owner and landlord of the property. The Revisional Court after appreciating the facts and evidence on record found that the Rent Control and Eviction Officer, Lalitpur has not committed any material irregularity or jurisdictional error in issuing direction for delivery of possession of shop to the respondent no.2. Consequently, it found no merit in the revision and dismissed it by order dt. 07.02.2018.

19. This court in the case of **Gauesh Chandra Gupta Vs. Prescribed Authority, 1990(2) AWC 1455** has held that after setting aside the order of allotment, the landlord should be put back in possession. Paragraph 5 of the judgment is extracted hereinbelow:

"The short question which requires consideration is as to the right of the landlady to be put back in possession. The legal position does not appear in doubt and is quite clear that after the setting aside of the order of notification of vacancy and that of the allotment in favour of respondent, it is necessary that the landlady be put back in possession. The person who got possession in pursuance of the order of allotment has to deliver back the possession to the landlord after the setting aside of the order of allotment- Section 18 (3) of the Act is clear in this regard. It provides that where the order under Section 16 of the Act is rescinded, the District Magistrate shall place the parties back in the position which they would have occupied but for such allotment and may for that purpose use or caused to be used such force as may be necessary."

20. In view of the aforesaid discussion, this Court finds no illegality in the orders impugned in the writ petition as findings recorded therein are finding of fact based upon the proper appreciation of material and evidence on record. Consequently, the writ petition lacks merit and is dismissed with no orders as to cost.

(2020)06ILR A880
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 13933 of 2019
&
WRIT A 13936 of 2019

M/s Sangam Travels & Ors. ...Petitioners
Versus
The State of U.P. & Anr. ...Respondents

A. Civil Law – Motor Vehicles - Fixation of age - Motor Vehicles Act, 1988: Sections 3, 28, 59, 64, 65, 95, 96, 107, 111, 138, 176, 213; General Clauses Act, 1897: Section 21; **U.P. Motor Vehicles Rules, 1998: Rule 222(D)**; **U.P. Motor Vehicles (Twenty Sixth Amendment) Rules, 2019 –** Petitioners are aggrieved by reduction of age limit of public service vehicles from 15 years to 10 years which has been introduced by the State Government in the Rule 222(D) of Rules, 1998 by Amending Rules, 2019, whereas the age limit of educational institutional buses has been fixed as 15 years from the date of original registration.

B. The classification of the two categories of vehicles is a reasonable and valid classification. There is no arbitrariness or discrimination and is not hit by Article 14 of Constitution of India – *Anurudh Kumar and Others Vs State of U.P. & Others, 2019 (9) ADJ 79 (DB) (Paras 5 to 7)* - The categorisation is for the reason that the two categories of vehicle form a separate class and cannot be equated. The use and running of educational institutional vehicles is very limited whereas other private/commercial or contract vehicles have a very wide and expensive use resulting in their speedy wear and tear. Therefore, the life of the two categories of vehicle has been provided differently.

The submission that nature of activity for which petitioners' buses are being used is similar to the use of school buses owned by the schools, as the petitioners' buses are engaged in transporting the students from their homes to school and back to their homes and as such are not different from educational institution vehicles/buses cannot be accepted for the simple reason that the educational institutional bus has been defined U/S. 2(11) of the Motor Vehicles Act and the nature of activity would not bring them within the purview of educational institutional buses as defined under the Act. (Para 8, 9, 11, 15)

C. Competence of State government to amend Rule 222(D) of Rules, 1998 – State Transport Authority is empowered to fix the age limit of the vehicle - It is a well-established proposition of law that where a specific power is conferred without prejudice to the generality of the general powers already specified, the particular power is only illustrative and does not in any way restrict the general power. (Para 21, 26)

Section 65(1) puts only rider upon the State Government not to make rules with respect to matters specified in section 64. Thus, under section 65(1) of the Act, 1988, the State Government is free to make any rule for the purpose of carrying into effect the provisions of Chapter VI of the Act 1988 except the matters specified in section 64. Further, the power under section 65(1) is general power conferred upon the State Government to make rules and thus, the source of power making rules is derived from sub-section 1 of section 65 and sub-section 2 merely provides illustration for the general power conferred by sub-section 1 as sub-section 2 of section 65 of the Act, 1988 commences with the words 'without prejudice to the generality of the foregoing powers'. It is manifest that sub-section 2 of section 65 of the Act, 1988 confers no such fresh powers but is merely illustrative of the general powers conferred by sub-section 1 of section 65. (Para 25, 27)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Anurudh Kumar & ors.Vs State of U.P. & ors., 2019 (9) ADJ 79 (DB) (Para 11, 15)

2. Surise Public School through Caretaker & ors.Vs St. of U.P. Through Principal Secretary & ors., Writ-A No. 9950 of 2013 (Para 13, 26)

3. Om Prakash & ors.Vs Union of India & ors., (1970) 3 SCC 942 (Para 20)

4. Academy Nutrition Improvement & ors.Vs Union of India (2011) 8 SCC 274 (Para 20, 22)

5. General Officer Commanding-in-Chief and Another Vs Dr. Subhash Chandra Yadav & anr., (1988) 2 SCC 351 (Para 23)

Precedent distinguished:

1. The State Transport Authority & Another Vs Auto Rickshaw Vikram Union & anr., Uttrakhand High Court in Special Appeal No. 534 of 2015, delivered on 04.07.2017 (Para 10, 28)

(Delivered by Hon'ble Pankaj Mithal, J.
&
Hon'ble Saral Srivastava, J.)

1. Heard Sri Hanuman Prasad Dube, learned counsel for the petitioners and Sri Neeraj Tripathi, learned Additional Advocate General for the State of U.P.

2. These two writ petitions involve common question of law, therefore, are being decided by the common judgement.

3. The issue in the writ petitions is as to whether the State Government is empowered to fix the age limit of motor vehicles.

4. For convenience, the facts are being delineated from Writ C- No.13933 of 2019.

5. The petitioners are registered owners of public service vehicles. The vehicles of the petitioners are covered under the permit granted by the Transport Authorities and they are engaged by different schools being run in the Kanpur City under the agreements arrived at between them and the concerned school to carry the students from their homes to schools and back i.e. to and fro.

6. The state government in exercise of its power under Sections 28, 38, 65, 95, 96, 107, 111, 138, 176 and 213 of the Motor Vehicles Act, 1988 (Act No.59 of 1988) (hereinafter referred to as "Act, 1988') read with Section 21 of the General Clauses Act, 1897 issued a notification dated 27 May, 2019 bringing about amendments in various rules of the U.P. Motor Vehicles Rules, 1998 by U.P. Motor vehicles (Twenty Sixth Amendment) Rules, 2019 (hereinafter referred to as 'amending rules, 2019'). The amending rule 2019 by which age limit of school vehicle is fixed reads as under:-

Age limit of School Vehicle	"222 (D) (1) The educational institution bus (diesel and clean fuel driven) shall not be more than 15 years old from the date of initial registration. (2) The diesel/CNG driven private bus (contract carriage) shall not be more than 10 years old from the date of initial registration. (3) The school van, driven by diesel/petrol/CNG or any other clean fuel, shall not be more than 10 years old from the date of initial registration."

7. Petitioners are aggrieved by the reduction of the age limit of public service vehicles from 15 years to 10 years which has been introduced by the State Government in the Rule 222(D) of Rules, 1998 by Amending Rules, 2019.

8. The challenge to the amendment in Rule 222(D) of Rules 1998 has been laid by the petitioners on two grounds; firstly it amounts to hostile discrimination inasmuch as the age limit of the educational institution buses has been fixed as 15 years from the date of original registration whereas the age limit of private buses like buses owned by petitioners has been fixed 10 years from the date of initial registration. The second ground of attack is that the State Government is not competent to fix the age of the vehicles inasmuch as the field of fixation of age of a motor vehicle is with the Central Government in view of Section 59 of the Act, 1988 and, therefore, the Amending Rules, 2019 by which Rule 222(D) of Rules of 1998 has been amended is beyond the competence of the State Government.

9. Elaborating the arguments, learned counsel for the petitioners has contended that the petitioners buses are engaged in transporting the students from their homes to school and back to their homes and, therefore, nature of activity for which their buses are being used is similar and akin to the use of school buses owned by the schools. Thus, the different age fixed by the respondent-State with respect to buses owned by the educational institutions and private individuals is arbitrary and amounts to hostile discrimination, and thus being in violation of Article 14 of the Constitution of India deserves to be declared as ultra vires.

10. It is further contended that under Section 59 of the Act, 1988 Central Government is vested with the powers to fix the age limit of motor vehicles and there is no provision under the Act which contemplates the powers of the State Government to fix the age limit of motor vehicles. Therefore, amendment in Rules of 2019 is beyond the competence of State Government and thus, the same is liable ***Uttrakhand High Court in Special Appeal No.534 of 2015 (The State Transport Authority & Another Vs. Auto Rickshaw Vikram Union & Another) delivered on 04.07.2017.***to be declared as ultra vires. In support of the said contention, learned counsel for the petitioners has relied upon the judgement of ***Uttrakhand High Court in Special Appeal No.534 of 2015 (The State Transport Authority & Another Vs. Auto Rickshaw Vikram Union & Another)*** delivered on 04.07.2017.

11. Refuting the aforesaid submissions, learned Additional Advocate General contends that this Court by judgement dated 08.07.2019 in the case of ***Anurudh Kumar and Others Vs. State of U.P. & Others 2019(9) ADJ 79 (DB)*** has repelled the contention of private bus owners that amendment in Rule 222 (D) of Rules, 1988 is ultra vires to Article 14 of the Constitution of India, and thus, the argument of learned counsel for the petitioners with respect to hostile discrimination fixing the age limit of different motor vehicles owned by educational institutions and private individuals does not stand to merit.

12. As regards the second contention with respect to competence of State Government to fix the age of a motor vehicle by amending rules, 2019,

learned Additional Advocate General would submit that under Section 65 (1) the Act of 1988, State Government is conferred with the powers to make rules for the purposes of carrying into effect the provisions of chapter VI of the Act, 1988 other than the matters specified in Section 64 of the Act, 1988. He submits that the Central Government has not issued any notification specifying the age limit of motor vehicles and further the power to fix the age limit of motor vehicles is not contemplated under Section 64 of the Act, 1988, therefore, State Government is well within its competence under Section 65(1) of the Act to frame rules to carry out the purposes of chapter VI of the Act which includes fixation of age limit of motor vehicles. The fixation of age limit of motor vehicles falling in different category as contemplated in the Act, 1988 is done by the State Government with an object to further the purpose of carrying into effect the provisions of chapter VI of the Act. He further submits that the power under Section 65 (1) of the Act, 1988 is general power and power under Section 65 (2) is only illustrative and does not restrict the power of the state government under Section 65(1) of the Act, 1988 to frame rules to carry out the purpose of chapter VI of the Act .

13. He submits that this Court in the case of ***Surise Public School through Caretaker and Others Vs. State of U.P. Through Principal Secretary and Others (Writ A- No.9950 of 2013)*** has held that the State Transport Authority has power to fix the age limit of a vehicle.

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

15. The argument of the petitioners that that amendment in fixing the different age limit for the buses owned by the educational institutions and the buses owned by the private individuals amounts to hostile discrimination and is hit by Article 14 of the Constitution of India lacks merit in view of judgment of this court in the case of ***Anurudh Kumar and Others (supra)*** wherein this court has considered the similar argument and found no merit in it .

16. Before adverting to the second submission of the petitioners, it would be useful to have a glance at Sections 59, 64 and 65 of the Act, 1998:-

"59 ***Power to fix the age limit of motor vehicle. -*** *(1) The Central Government may, having regard to the public safety, convenience and objects of this Act, by notification in the Official Gazette, specify the life of a motor vehicle reckoned from the date of its manufacture, after the expiry of which the motor vehicle shall not be deemed to comply with the requirements of this Act and the Rules made thereunder:*

Provided that the Central Government may specify different ages for different classes or different types of motor vehicles.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, having regard to the purpose of a motor vehicle, such as, display or use for the purposes of a demonstration in any exhibition, use for the purposes of technical research or taking part in a vintage car rally, by notification in the Official Gazette, exempt, by a general or special order,

subject to such conditions as may be specified in such notification, any class or type of motor vehicle from the operation of sub-section (1) for the purpose to be stated in the notification.

(3) Notwithstanding anything contained in section 56, no prescribed authority or authorized testing station shall grant a certificate of fitness to a motor vehicle in contravention of the provisions of any notification issued under sub-section (1).

64. ***Power of the Central Government to make rules.*** *- The Central Government may make rules to provide for all or any of the following matters, namely:-*

(a) the period within which and the form in which an application shall be made and the documents, particulars and information it shall accompany under sub-section (1) of section 41;

(b) the form in which the certificate of registration shall be made and she particulars and information it shall contain and the manner in which it shall be issued under sub-section (3) of section 41;

(c) the form and manner in which the particulars of the certificate of registration shall be entered in the records of the registering authority under sub-section (5) of section 41;

(d) the manner in which and the form in which the registration mark, the letters and figures and other particulars referred to in sub-section (6) of section 41 shall be displayed and shown;

(e) the period within which and the form in which the application shall be made and the particulars and information it shall contain under sub-section(8) of section 41;

(f) the form in which the application referred to in sub-section (14) of section 41 shall be made, the particulars and information it shall contain and the fee to be charged;

(g) the from in which and the period within which the application referred to in sub-section (1) of section 47 shall be made and the particulars it shall contain;

(h) the form in which and the manner in which the application for "No Objection Certificate" shall be made under sub-section (1) of section 48 and the form of receipt to be issued under sub-section (2) of section 48;

(i) the matters that are to be complied with by an applicant before no objection certificate may be issued under section 48;

(j) the form in which the intimation of change of address shall be made under sub-section (1) of section 49 and the documents to be submitted alongwith the application;

(k) the form in which and the manner in which the intimation of transfer of ownership shall be made under sub-section (1) of section 50 or 87 under sub-section (2) of section 50 and the document to be submitted alongwith the application;

(l) the form in which the application under sub-section (2) or sub-section (3) of section 51 shall be made;

(m) the form in which the certificate of fitness shall be issued under sub-section (1) of section 56 and the particulars and information it shall contain;

(n) the period for which the certificate of fitness granted or renewed under section 56 shall be effective;

(o) the fees to be charged for the issue or renewal or alternation of certificates of registration, for making an entry regarding transfer of ownership on a certificate of registration, for making or cancelling an endorsement in respect of agreement of hire-purchase or lease or hypothecation on a certificate of registration, for certificates of fitness for registration marks, and for the examination or inspection of motor vehicle, and the refund of such fees;

(p) any other matter which is to be, or may be, prescribed by the Central Government.

*65. **Power of the State Government to make rules**. - (1) A State Government may make rules for the purpose of carrying into effect the provisions of this Chapter other than the matters specified in section 64.*

(2) Without prejudice to the generality of the foregoing power, such rules may provide for -

(a) the conduct and hearing of appeals that may be preferred under this Chapter (the fees to be paid in respect of such appeals and the refund of such fees);

(b) the appointment, functions and jurisdiction of registering and other prescribed authorities;

(c) the exemption of road-rollers, graders and other vehicles designed and used solely for the construction, repair and cleaning of roads from all or any of the provisions of this Chapter and the rules made thereunder and the conditions governing such exemption;

(d) the issue or renewal of certificate of registration and fitness and duplicates of such certificates to replace the certificates lost, destroyed or mutilated;

(e) the production of certificates of registration before the registering authority for the revision of entries therein of particulars relating to the gross vehicle weight;

(f) the temporary registration of motor vehicles, and the issue of temporary certificate of registration and marks;

(g) the manner in which the particulars referred to in sub-section (2) of section 58 and other prescribed particulars shall be exhibited;

(h) the exemption of prescribed persons or prescribed classes of persons from payment of all or any portion of the fees payable under this Chapter;

(i) the forms, other than those prescribed by the Central Government to be used for the purposes of this Chapter;

(j) the communication between registering authorities of particulars of certificates of registration and by owners of vehicles registered outside the State of particulars of such vehicles and of their registration;

(k) the amount or amounts under sub-section (13) of section 41 or sub-section (7) of section 47 or sub-section (4) of section 49 or sub-section (5) of section 50; applications for their renewal;

(m)the extension from the provisions of this Chapter, and the conditions and fees for exemption, of motor vehicles in the possession of dealers;

(n) the form in which and the period within which the return under section 62 shall be sent;

(o) the manner in which the State Register of Motor Vehicles shall be maintained under section 63;

(p) any other matter which is to be or may be prescribed."

17. Section 59 (1) of the Act provides that the Central Government is empowered to fix age limit of vehicles reckoned from the date of its manufacture having regard to the public safety, convenience and object of the Act. Proviso to said section further provides that the Central Government may fix different ages for different classes or different types of motor vehicles.

18. The petitioners though in paragraph 6 of the writ petition have stated that the age limit of petitioners vehicles was fixed under the notification issued by the Central Government in exercise of powers conferred under Section 59 of the Act, 1998, but when the counsel for the petitioners was confronted to place the said notification on record, he admitted that in fact no such notification has been issued by the Central Government. However, he maintains that even if no such notification has been issued by the Central Government the field of fixing the age limit of vehicle is within the domain of the Central Government under Section 59(1) of the Act and not with the State Government.

19. A bare reading of Section 64 of the Act, 1988, extracted herein above, clearly shows that the said section does not envisage any provision which confers exclusive power upon the Central Government to make rules with respect to fixation of age of a motor vehicle.

20. The only rider which has been put upon the State Government to make rules under Section 65(1) of the Act, 1988 is that rule making power with respect to matters specified in Section 64 of the Act, 1988 is beyond the competence of the State Government otherwise it is empowered to make rules on all subjects for the purpose of carrying into effect the provisions of chapter VI of the Act,1988. The power of State Government under Section 65(1) is general in its terms and authorizes inter-alia of making or amending any rule in so far as it is necessary or expedient so to do for carrying into effect the provision of chapter VI of the Act, 1988. At this juncture, it would be apt to refer the two judgements of the Apex Court namely, ***Om Prakash and Others Vs. Union of India and Others 1970 (3) SCC 942 and Academy Nutrition Improvement and***

Others Vs. Union of India (2011) 8 SCC 274.

21. In the case of Om Prakash (supra) Apex Court had occasion to consider the powers of the Chief Settlement Commissioner under sub Section (1) of Section 24 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 to cancel the allotment of land made in favour of a person. Paragraph 6 of the judgement being relevant in the context of the present case is being extracted herein below:-

"6. It is therefore contended relying on Sub-section (2) that in as much as no fraud or false representation or concealment of any material fact has been alleged or proved in this case, the Chief Settlement Commissioner cannot exercise the revisionary power Under Section 24. This contention in our view has no validity. *I*t is a well established proposition of law that where a specific power is conferred without prejudice to the generality of the general powers already specified, the particular power is only illustrative and does not in any way restrict the general power. The Federal Court had in Talpade's case indicated the contrary but the Privy Council in King Emperor v. Sibnath Banerjee Indian Appeals-Vol. 72 p. 241 observed at page 258 :

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of Sub-sections 1 and 2 of Section 2 of the Defence of India Act, and Counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of Sub-section 2 is merely an illustrative one: the rule-making power is conferred by Sub-section 1, and "the rules" which are referred to in the opening sentence of Sub-section 2 are the rules which are authorised by, and made under, Sub-section 1; the provisions of Sub-section 2 are not restrictive of Sub-section 1, as, indeed is expressly stated by the words "without prejudice to the "generality of the powers conferred by Sub-section 1."

22. In the case of ***Academy Nutrition Improvement and Others (supra***), the challenge to Rule 44-I inserted in the Prevention of Food Adulteration Rules 1955 was made by the petitioners. The Apex Court dealt with the validity of statutes delegating the powers of making rules. Paragraph 66 of the judgement relevant in the present case is being extracted herein below:-

"66. Statutes delegating the power to make rules follow a standard pattern. The relevant section would first contain a provision granting the power to make rules to the delegate in general terms, by using the words `to carry out the provisions of this Act' or `to carry out the purposes of this Act'. This is usually followed by another sub-section enumerating the matters/areas in regard to which specific power is delegated by using the words `in particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters." Interpreting such provisions, this Court in a number of decisions has held that where power is conferred to make subordinate legislation in general terms, the subsequent particularisation of the

matters/topics has to be construed as merely illustrative and not limiting the scope of the general power. Consequently, even if the specific enumerated topics in section 23(1A) may not empower the Central Government to make the impugned rule (Rule 44-I), making of the Rule can be justified with reference to the general power conferred on the central government under section 23(1), provided the rule does not travel beyond the scope of the Act.

"But even a general power to make rules or regulations for carrying out or giving effect to the Act, is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the Act. Therefore, such a power "will not support attempts to widen the purposes of the Act, to add new and different means to carrying them out, to depart from or vary its terms."

23. It would not out of place to refer the judgement of Apex Court in the case of **General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another 1988 (2) SCC 351** wherein Apex Court has laid down the test when a rule can have the effect of a statutory provisions. Paragraph 14 of the judgement is extracted herein below:

"14. This contention is unsound. It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. The position remains the same even though sub-section (2) of section 281 of the Act has specifically provided that after the rules are framed and published they shall have effect as if enacted in the Act. In other words, in spite of the provision of sub-section (2) of section 281, any rule framed under the Cantonment Act has to fulfil the two conditions mentioned above for their validity. The observation of this Court in Jestamani v. Scindia Steam Navigation Company, [1961] 2 SCR 811, relied upon by Mr. Aggarwal, that a contract of service may be transferred by a statutory provision, does not at all help the appellants. There can be no doubt that a contract of service may be transferred by statutory provisions, but before a rule framed under a statute is regarded a statutory provision or a part of the statute, it must fulfil the above two conditions. Rule 5-C was framed by the Central Government in excess of its rule making power as contained in clause (c) of sub-section (2) of section 280 of the Cantonment Act before its amendment by the substitution of clause (c); it is, therefore, void. "

24. Keeping in view the principles laid down by the Apex Court in the judgement referred above regarding the validity of a rule, the Court now proceed to consider the arguments of learned counsel for the petitioners in respect of the competence of the State Government to amend Rule 222 (D). The petitioner does not dispute the fact that no notification fixing the age limit as contemplated under Section 59 (1) of the

Act, 1988 has been issued by the Central Government. Section 64 (1) of the Act does not provide any provision from which it is explicit or it can be inferred that rule making power with respect to fixation of age is conferred upon the Central Government under said section .

25. Section 65(1) puts only rider upon the State Government not to make rules with respect to matters specified in Section 64. Thus, under Section 65(1) of the Act, 1988, the State Government is free to make any rule for the purpose of carrying into effect the provisions of chapter VI of the Act 1988 except the matters specified in Section 64. Further, the power under Section 65(1) is general power conferred upon the State Government to make rules and thus, the source of power making rules is derived from sub-Section 1 of Section 65, and sub-Section 2 merely provides illustration for the general power conferred by sub Section 1 as Sub-Section 2 of Section 65 of the Act, 1988 commences with the words "without prejudice to the generality of the foregoing powers'. It is manifest that sub-Section 2 of Section 65 of the Act, 1988 confers no such fresh powers but is merely illustrative of the general powers conferred by sub-Section 1 of Section 65.

26. This Court in the case of **Surise Public School (supra)** has also held that the State Transport Authority is empowered to fix the age limit of the vehicle. Paragraphs 6 and 7 of the said judgement are being extracted herein below:-

"6. It is submitted by learned Standing Counsel, that in Mahraj Uddin's case all the aspects relating to the powers of the State Transport Authority fixing the age of the vehicles including State carriage, school buses, taxis and three wheelers was considered and while upholding the power of STA to fix the age of the vehicles and to put model condition in the permit, the decision of the STA dated 23.2.2010 was upheld. He submits that in the present case the vehicles are plying as school buses and for which there is no exemption. The school buses carrying children should strictly ensure to safety standard. He submits that the petitioners' vehicles are about more than 15 years' old and in view of the decision of the STA, no further permit shall be granted to such vehicles. Any relaxation will be hazardous to the safety of the children, who will be travelling in the school buses.

7. We are of the view, that the order dated 7.12.2012 in Omwati Sarswati Junior High School's case was passed without the benefit of the Division Bench judgment in Mahraj Uddin's case. We further find that no new ground has been taken nor there is any justification to allow the old vehicles to ply on the road. The decision of STA in this regard should not be lightly interfered."

27. It is worth mentioning that it is not the case of the petitioner in the writ petition that amendment in Rule 222 (D) does not further the object of Chapter VI of the Act and as the State Government is not empowered to bring the amendment in Rule 222D of Rules 1998 in exercise of power under Section 65 of the Act,1988. Thus, it can't be said that the object of bringing amendment in Rule 222 (D) is not to further the object of Act, 1988 more particularly chapter VI of the Act,1988.

28. The judgment of the Uttrakhand High Court in **The State Transport Authority (Supra)** does not help the petitioners for the simple reason that it has not considered Section 65(1) of the Act, 1988 which vest the state government with power to frame rules subject to the restriction put under Section 66(1) of the Act,1988.

29. Consequently, for the reasons given above, we do not find any substance in the argument of learned counsel for the petitioners that the State Government is not competent to amend Rule 222 (D) of Rules, 1998.

30. Thus, both the writ petitions lack merit and are ***dismissed***. There shall be no order as to costs.

(2020)06ILR A890
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2020

BEFORE
THE HON'BLE PIYUSH AGARWAL, J.

WRIT A No. 14138 of 2019

Heena Bisht ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suresh Kumar Maurya

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment – Uttar Pradesh Reorganization Act, 2000; Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex Serviceman) Act, 1993: Section 2(b), 2(d) – Under the provisions of the Act of 1993, the benefit of being a dependent of freedom fighter can be extended only in a case where a freedom fighter was a domicile of the State of Uttar Pradesh. (Para 18)

Petitioner had applied for the post of Constable in Civil Police and had claimed the reservation under the category of "dependent of freedom fighter". In support her claim, the petitioner had filed a certificate issued by the District Magistrate, Pithoragarh, State of Uttarakhand. The certificate of dependent of freedom fighter should be issued in the prescribed format, duly issued by the authorities of the State of Uttar Pradesh; whereas, in the case in hand, the certificate has been issued from the authority of the State of Uttarakhand. (Para 16, 17)
The petitioner failed to file the certificate of dependent of freedom fighter as per the clause 7(2)(ga)(4) of the advertisement in question. Therefore, no interference is called for under Article 226 of the Constitution of India. (Para 20)

Writ petition dismissed. (E-4)

Precedent followed:

1. State of U.P. & ors. Vs Tejaswi Kumar Pandey (Special Appeal No. 137 of 2016, decided on 19..07.2017) (Para 13, 15, 18)

Precedent distinguished:

1. Anmol Deep Vs St. of U.P. & 3 ors., 2018 (10) ADJ 94; 2018 (131) ALR 931 (Para 10, 11, 14)

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

1. This writ petition has been filed, inter alia, for the following reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari to quash the order of delisting as informed by the respondent vide the information letter dated 19.08.2019 and 21.08.2019 uploaded on the jansunvai portal.

(ii) Issue a writ, order or direction, in the nature of mandamus commanding the respondent no. 2 to accept her freedom fighters certificate issued in favour of her grandfather and allow her to continue and complete her training for the post of the U.P. Constable (Civil).

(iii) Issue a writ, order or direction, in the nature of mandamus commanding the responded to dcecide the application/representation dated 05.08.2019 and 27.05.2019, 29.05.2019 and allowed her to complete her training and take joining as constable."

2. Heard Shri Suresh Kumar Maurya, learned counsel for the petitioner and Shri Vineet Pandey, learned Chief Standing Counsel assisted by Dr. Amarnath Singh, learned Standing Counsel and Shri Sharad Chandra Upadhyaya, learned Brief Holder for the State - respondents.

3. The brief facts of the case are that the Uttar Pradesh Police Recruitment & Promotion Board (hereinafter referred to as, "the Board') issued an advertisement bearing Adv. No. PRPB: ONE - 1 (112)2017 on 14.01.2018 for the direct recruitment of Constable in Civil Police and Constable in PAC. In the said advertisement, the total vacancy for the post of Constable in Civil Police & PAC was 41520 posts, out of which 23520 posts were reserved for Constable in Civil Police and 18000 posts were reserved for Constable in PAC. Out of 23520 posts for Constable in Civil Police, 11761 posts were reserved for unreserved category, 6360 posts were reserved for OBC, 4939 posts were reserved for SC category and 470 posts were reserved for ST category. The minimum qualification prescribed for the aforesaid post was Intermediate or equivalent approved from the Government. The advertisement further provided 2% horizontal reservation for dependent of freedom fighter and 20% for the women candidates. It was further provided in the advertisement that the reservation would be applicable as per the Government Orders issued by the Karmik Vibhag from time to time. The minimum age for the women candidate was 18 years and maximum age was 25 years from 01.07.2018.

4. The petitioner applied for the post of Constable in Civil Police and submitted online application form after getting registered on the website of the Board as per the advertisement. Thereafter, the Board issued an admit card to the petitioner for appearing in the written examination on 19.06.2018. Pursuant thereto, the petitioner appeared in the written examination and qualified. Thereafter, the petitioner was called for document verification and physical standard test by the Board fixing 09.12.2018. On 11.12.2018, the petitioner was sent for physical standard test and she qualified. Pursuant to the physical standard test, the petitioner was sent for medical test on 23.04.2019, in which she succeeded and secured place in JTC Meerut Merit List and the petitioner was allotted the District - Bareilly, where the training of the petitioner was started from 12.05.2019.

5. It is averred that during training, the files of all successful candidates were received in the Office of the training center at Bareilly, except the petitioner's file. On enquiry, the petitioner came to know that she has to go back to Meerut during training session for document and

in absence of the same, the Department at Bareilly will not permit her to complete her training for the post in question.

6. It is further averred that after running from pillar to post to know the reason for not sending her file to the training center at Bareilly, it transpired that the certificate of dependent of freedom fighter was issued from the State of Uttarakhand, whereas, it should have been issued from the State of Uttar Pradesh and therefore, her file was not sent to Bareilly. Hence, the present writ petition.

7. Learned counsel for the petitioner submits that the petitioner is dependent of freedom fighter and as such, has rightly claimed the reservation under the category of "dependent of freedom fighter" and the same cannot be denied merely because the certificate has been issued from the authority of Uttarakhand.

8. He further submits that the State of Uttar Pradesh was reorganized with effect from 09.11.2000 by coming into effect the Uttar Pradesh Reorganization Act, 2000. Prior to the said Act, the Uttrakhand was the part of the State of Uttar Pradesh and therefore, the benefit of dependent of freedom cannot be denied to her. He further submits that the petitioner is residing in the State of Uttar Pradesh at Meerut and therefore, her grandfather, who was a freedom fighter, was the resident of Gangoli Ghat, District - Pithoragarh (State of Uttarakhand). The petitioner has rightly filed certificate which indicate that her grandfather was a freedom fighter within the meaning of the Reservation Act and that is sufficient for claiming benefit under the Reservation Act and also, sufficient to seek benefit under the Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex Serviceman) Act, 1993 (hereinafter referred to as, "the Act of 1993').

9. It is further submitted that clause (b) of section 2 of the Act of 1993 defines "dependent" with reference to freedom fighter, which includes son and daughter (married or unmarried) and grandson (son of a son) and unmarried granddaughter (daughter of a son), of the freedom-fighter. He further submits that in view of the aforesaid provision, the petitioner, being a granddaughter of the freedom fighter, is entitled for the reservation.

10. Learned counsel for the petitioner has placed reliance upon the decision of a Division Bench of this Court in ***Anmol Deep Vs. State of U.P. & 3 Others*** (Writ C No. 23936 of 2018, decided on 07.09.2018); wherein, while permitting the petitioner for admission in the MBBS course, it has been held that the law cannot exclude freedom fighters domiciled outside the Uttar Pradesh from their status of a freedom fighter and therefore, the condition of domicile contained in section 2(d) of the Act of 1993 has to be ignored to bring it within the fundamental framework of principle of equality contained in Articles 14 & 15 of the Constitution of India.

11. Learned counsel for the petitioner further submits that the case of ***Anmol Deep (supra)*** is also squarely covered the issue in question and submits that a freedom fighter living in any place in India would remain a freedom fighter and he/she does not lose his/her status by shifting domicile from one place to another. The nation recognizes him to be

a freedom fighter irrespective of his place of birth or residence, etc. and therefore, the petitioner is entitled for the benefit of her being dependent of freedom fighter.

12. Per contra, learned chief standing counsel submits that the advertisement issued on 14.01.2018 for the post in question is very clear and the conditions mentioned therein has to be fulfilled in letter and spirit. No deviation can be permitted from the said condition. He further submits that the candidates claiming benefit of reservation has to comply with the conditions enumerated in the advertisement. The candidate claiming the benefit of reservation under the "Dependent of Freedom Fighter" has to file the certificate issued by the competent authority of the State of Uttar Pradesh. He has relied upon the contents of paragraph no. 5 of the counter affidavit and submits that there is a discrepancy in the certificate of dependent of freedom fighter submitted by the petitioner. He further submits that in serial no. 1 of paragraph 5.4 of the advertisement, it was clearly mentioned that the format of certificate for dependent of freedom fighter has to be according to format - 3, which shall be issued by the District Magistrate concerned of the State of U.P. He further submits that the Board by its letter/order dated 23.04.2019 has recommended for cancellation of the petitioner's candidature, which is on record as Annexure No. CA-3 to the counter affidavit, which has not been challenged by the petitioner. It is further submitted that vide order dated 09.10.2019, the Board has rejected the candidature of the petitioner. The said order has not been challenged by the petitioner.

13. Learned chief standing counsel further submits that the benefit of reservation has been allowed as per the provisions of Act of 1993 and if the petitioner is aggrieved, then she should have challenged the vires of the Act of 1993. In support of his contention, learned chief standing counsel has placed reliance upon the decision of this Court in ***State of U.P. & Others Vs. Tejaswi Kumar Pandey*** (Special Appeal No. 137 of 2016, decided on 19.07.2017); wherein, the Division Bench of this Court, while setting aside the order passed by the learned Single Judge, has held that so far as the Act of 1993 is concerned, it has extended the benefit of reservation only in respect of such freedom fighters who were the domicile of the State of U.P.

14. He further submits that by the Act of 1993, the benefit of freedom fighter has been extended to the persons, who were domicile of the State of Uttar Pradesh and the said Act is binding upon the State authorities. He further submits that the judgement relied upon by the learned counsel for the petitioner in ***Anmol Deep*** (supra) is distinguishable on the fact that the aforesaid matter pertains to grant of benefit for admission in MBBS course.

15. Learned chief standing counsel further submits that the case in hand also pertains to service matter and the decision in ***Tejaswi Kumar Pandey*** (supra) covers the issue and in view of the said fact, the writ petition deserves to be dismissed on this ground alone.

16. It is undisputed fact that the petitioner had applied for the post of Constable in Civil Police and had claimed the reservation under the category of "dependent of freedom fighter". In support her claim, the petitioner had filed

a certificate issued by the District Magistrate, Pithoragarh, State of Uttarakhand. In the said certificate, some discrepancies have been pointed out by the State authorities, which have not been clarified by the petitioner. More precisely, the certificate of dependent of freedom fighter, which has been filed as Annexure No. 9 of the writ petition, has been doubted to be correct. Further, clause 7(2)(ga)(4) of the advertisement reads as under:-

((4) Lora=rk laxzke lsukuh vkfJr izek.k i= jkT; ljdkj }kjk fu/kkZfjr izk#i fuxZr gksuk pkfg;s A"

17. From the perusal of the aforesaid clause, it transpires that the certificate of dependent of freedom fighter should be issued in the prescribed format, duly issued by the authorities of the State of Uttar Pradesh; whereas, in the case in hand, the certificate has been issued from the authority of the State of Uttarakhand.

18. It is further not in dispute that under the provisions of the Act of 1993, the benefit of being a dependent of freedom fighter can be extended only in a case where the freedom fighter was a domicile of the State of Uttar Pradesh. The Division Bench of this Court in the case of ***Tejaswi Kumar Pandey*** (supra) has held as follows:

`"It is not in dispute that as per Section 2(Gha) of the Act, 1993, the benefit of being the dependent of a freedom fighter can be extended only in case where the freedom fighter was a domicile of the State of U.P. This provision is not under challenge in the writ petition. The learned Single Judge has lost sight of said fact and has proceeded to opine that the freedom fighter is a freedom fighter for the entire nation, he cannot be termed to be a freedom fighter of the State of U.P. or Jharkhand. Therefore, the status of a freedom fighter is not diluted merely because his dependants have started living in a different State.

`Although the learned Single Judge is correct that the freedom fighter, had fought for the entire country, his place of domicile is not relevant, but so far as the Act, 1993 is concerned it has extended the benefit of reservation only in respect of such freedom fighters who were the domicile of State of U.P. The said definition under the Act is binding upon the State authorities. The vires of Section 2(Gha) was not under challenge.

`In view of above, the judgment impugned of the learned Single Judge is hereby set aside. The writ petition is restored to its original number. The petitioner, if so advised, may challenge the vires of section 2(Gha) of the Act, 1993 by filing an appropriate application before the writ court.

`The special appeal is allowed subject to observations made hereinabove."

19. The learned counsel for the petitioner has relied upon the judgement in ***Anmol Deep*** (supra). In the said judgement itself, the Court was of the view that the case of the ***Tejaswi Kumar Pandey*** (supra) was in respect of service matter and had strictly applied the definition; whereas, the case of ***Anmol Deep*** (supra) was not related to the service matter, but for getting admission

in MBBS Course. Therefore, the said decision is of no help to the petitioner herein. The present case pertains to the service matter, which, even as per the decision in ***Anmol Deep*** (supra), has to be strictly applied with the definition of the Act of 1993.

20. In view of the aforesaid facts and circumstances of the case, the petitioner has failed to file the certificate of dependent of freedom fighter as per the clause 7(2)(ga)(4) of the advertisement in question. Therefore, no interference is called for under Article 226 of the Constitution of India.

21. The writ petition is devoid of merits and it is, accordingly, dismissed.

(2020)06ILR A895
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 18711 of 2019

Rajendra Kumar & Ors. ...Petitioners
Versus
Raj Kumar ...Respondent

Counsel for the Petitioners:
Sri Manish Kumar Nigam

Counsel for the Respondent:
Sri Arpit Agarwal

A. Practice & Procedure - Release Application - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 21(1)(a), (b) - The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972: Rule 17 - The landlord is not required to establish his financial capacity to reconstruct the building if the release is sought on the ground that the building is bonafide required after demolition and new construction for use and occupation of the landlord. However, if the tenant disputes the financial capacity of the landlord to reconstruct the building, the tenant ha to plead in the written statement challenging the financial capacity of the landlord and prove it with by leading cogent evidence. (Para 19, 20)
The landlord in a proceeding under Section 21(a) of the Act has to establish that his need is bonafide and genuine, and that comparative hardship lay in his favour, once he satisfies these conditions, release application deserved to be allowed even if the release of the building is sought on the ground that building is bonafide required for use and occupation after demolition and reconstruction. (Para 19)

Writ Petition rejected. (E-10)

List of cases cited: -

1. K.N. Anantharaja Gupta Vs. D.V. Vijaykumar (smt) 2007 (13) SCC 592 *(distinguished)*

2. Shree Krishan Garg Vs. Rajendra Singh and ors. 2003 (51) ALR 209

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard learned Sri Manish Kumar Nigam, counsel for the petitioner and Sri Arpit Agrawal, Counsel for the respondent.

2. Petitioners by means of present writ petition have challenged the judgement and order dated 31.1.2017 passed by Civil Judge (Senior Division)/Prescribed Authority, Pilibhit allowing the P.A. Case No. 18 of 2014 (Raj Kumar Vs. Yashwant Singh and another) and the judgement and order dated 24.9.2019 passed by Third Additional District & Sessions Judge, Pilibhit dismissing the P.A. Appeal No. 5 of 2017 (Yashwant Singh (deceased) and

others Vs. Raj Kumar) filed by the petitioners against the order dated 31.1.2017.

3. Facts, in brief, are that the respondent-landlord (hereinafter referred as 'respondent') filed a release application under Section 21 (1) (a) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred as 'U.P.Act No. 13 of 1972') for release of a shop (hereinafter referred as 'disputed shop') situated in Mohalla Khushimal opposite Chhipiyan Masjid, Station Road, Pilibhit against petitioners-tenant (hereinafter referred as 'petitioners'). The need set up by the respondent was that the disputed shop is required for setting up a mobile phone shop and its accessories for the respondent and his son. It is further averred that the respondent has taken a shop on rent at Rs.1260/- per month for doing business opposite the disputed shop in the market of Jaiveer Singh Parmar. It is further averred that the release of the disputed shop would satisfy the need of the respondent and his son.

4. The release application was contested by the petitioners by filing written statement denying the fact that the disputed shop is bonafide required by the respondent for establishing the business for himself and his son. Besides above several other pleas were taken by the petitioners in their objection against the release application.

5. The Trial Court framed as many as three issues. Issue No. 1 was in respect to the relationship between the respondent and the petitioners as landlord and tenant. The issue No. 2 was in respect of bonafide need of the respondent, and Issue No. 3 was in respect of comparative hardship.

6. The Trial Court by placing reliance upon paragraph No. 7 of the written statement admitting the tenancy of the disputed shop held that there was a relationship of landlord and tenant between the petitioners and the respondent. The trial court after appreciating elaborately the evidence on record found that the respondent has established that he is doing business in a rented shop and his son is unemployed, therefore, the need of the respondent is bonafide and genuine and comparative hardship lay in his favour . Consequently, it allowed the release application.

7. The order of the Trial Court dated 31.1.2017 was assailed by the petitioners in appeal. The Appellate Court found no illegality in the order of the Prescribed Authority in allowing the release application. Consequently, it dismissed the appeal.

8. Challenging the aforesaid order, the only submission urged by the counsel for the petitioners is that the case of the respondent in the release application was that the disputed shop is bonafide required by the respondent for establishing the business for himself and his son after reconstruction, therefore, the authority below should have considered the financial capacity of the respondent to reconstruct the disputed shop. Thus, he submits that in the absence of any satisfaction recorded by the authorities below that the respondent has the financial capacity to reconstruct the shop, the authorities below have committed a manifest error of law in allowing the release application. In support of his

submission, he has placed reliance upon the judgement of Apex Court in the case of **K.N. Anantharaja Gupta Vs. D.V. Usha Vijaykumar (smt), 2007 (13) SCC 592.**

9. Per contra, learned counsel for the respondent submits that the issue whether the respondent has the financial capacity to reconstruct the disputed shop is a question of fact, determination of which requires necessary pleading and cogent evidence to prove the said fact. Thus, he submits that in the absence of any pleading in the written statement challenging the financial capacity of the respondent to reconstruct the shop, the said issue cannot be raised for the first time before this court in the writ petition. He further contends that averment in the release application should be read as a whole and not in isolation to ascertain on what ground release of the shop has been sought, and in the instant case, from the reading of release application as a whole, it is crystal clear that the release of the disputed shop has been sought on the ground of the bonafide need of the respondent and not that the business shall be established after the demolition and reconstruction of the shop.

10. He further contends that in a release application filed under Section 21 (1) (a) of the U.P. Act No. 13 of 1972, the landlord has to establish that his need for release is bonafide and comparative hardship lay in his favour. Thus, he urges that if the landlord established these two essential ingredients of Section 21 (1) (a) of U.P. Act No. 13 of 1972, the release application deserves to be allowed. He submits that the Court below after appreciating the shreds of evidence on record held that the need of the respondent is genuine and bonafide, and comparative hardship also lay in favour of respondent, accordingly it allowed the release application. He has placed reliance upon the judgement of this Court in the case of Shree Krishan Garg Vs. Rajendra Singh and other, 2003 (51) ALR 209.

11. I have heard the rival submission of learned counsel for the parties and perused the record.

12. The question which arises in the present case is whether, in a proceeding under Section 21 (1) (a) of U.P. Act No. 13 of 1972, the authorities below are under obligation to consider about the financial capacity of the landlord to reconstruct the disputed shop after demolition.

13. Before adverting to the aforesaid question, it would be relevant to reproduce paragraph No. 2 of the release application which has been relied upon by the counsel for the petitioners in support of his submission. Paragraph No. 2 of the release application reads as under:-

"2. यह है कि विवादित दुकान काफी पुरानी बनी हुई है. प्रार्थी को विवादित दुकान कि स्वयं व अपने पुत्र पराग अग्रवाल के लिए व्यवसाय हेतु आवश्यकता है तथा प्रार्थी दुकान का नवनिर्माण कराकर उसमे स्वयं व अपने पुत्र के साथ मोबाइल व उसके उपकरणो व अन्य सामग्रि के विक्रय करने का व्यवसाय करना चाहता है. "

14. Counsel for the petitioners has emphasized the word "नवनिर्माण" (new construction) in paragraph No. 2 of the release application to contend that use of the word "नवनिर्माण" shows that the release of the disputed shop has been sought on the ground that the disputed shop is bonfiedly required after demolition and new construction for use and occupation of the respondent, otherwise there was no reason for use of the word "नवनिर्माण" in paragraph no. 2 of the release application. Thus, his submission is that the authorities below needed to record its satisfaction about the financial capacity of the landlord to reconstruct the disputed shop after demolition in allowing the release application. Accordingly, he submits that this issue can be raised before this court in the writ petition as it goes to the root of the matter and is a question of law. He has placer reliance upon paragraph Nos. 10 and 11 of the judgement of the Apex Court in the case of **K.N. Anantharaja Gupta (supra)** which is extracted herein below:-

"10. That apart, there is another aspect of this matter. As noted hereinabove, the eviction of the tenant was sought under Section 27(2)(r) of the Act by alleging that the suit premises was required by the respondent and her children for their own use and occupation after demolition and reconstruction of the building already existing. In order to satisfy this condition, as enumerated in Section 27(2)(r) of the Act, it is essential that the court should also find that the premises let needs to be demolished and that the same would be reconstructed after demolition. It is only after this that the question of user of the same after reconstruction would be taken into consideration.

11. From the order of the High Court passed in revision, it would be evident that the only ground on which the order of the Chief Judge, Small Causes Court, Bangalore was reversed was that the respondent needed the suit premises to demolish the same and to take up new construction and obtain plans from the authority. In our view, before granting a decree for eviction on the ground of demolition and reconstruction and then for use of the same for occupation, the court must be satisfied that: -

(i) the suit premises is so dilapidated that it needs demolition;

(ii) the landlord has the capacity to reconstruct the suit premises after demolition;

(iii) the sanctioned plan has to be taken from the authority concerned."

15. To test the argument of counsel for the petitioners, it would be useful to refer Section 21 (1)(a) and (b) of the U.P. Act No. 13 of 1972 which reads as under:

*"**21. Proceeding for release of building under occupation of tenant.** - (1) The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely-*

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or

any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust :

(b) that the building is in a dilapidated condition and is required for purposes of demolition and new construction....."

16. Under Section 21 (1) (a) of the U.P. Act No. 13 of 1972, a landlord can file a release application for release of a building where a building is bonafide required either (i) in existing form or (ii) after demolition and new construction by the landlord for occupation.

17. According to the counsel for the petitioners, reading of paragraph no.2 of the release application unambiguously suggest the intention of the landlord to use the disputed shop after demolition and reconstruction, therefore, the landlord needs to establish that he has sufficient means to reconstruct the disputed shop after demolition to succeed in the release of the disputed shop. Accordingly, he submits that the authorities below were under obligation to record its satisfaction about the financial capacity of the landlord to reconstruct the disputed shop before allowing the release application.

18. At this point, it is pertinent to have a glance at Section 21(b) of the U.P. Act No. 13 of 1972 which provides that the landlord can file release application under Section 21(b) if the building is in dilapidated condition and is required for demolition and new construction. The building can be released under Section 21(b) if the conditions stipulated in Rule 17 of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction), Rules 1972 (hereinafter referred to as 'Rules, 1972') are satisfied. Rule 17 of Rule 1972 reads as under:-

***"17. Application for release on the ground far demolition and new construction [Sections 21 (1) (b) and 34 (8).**-- Before allowing an application for release of a building under Section 21 (1) (b) on the ground that it is required for purposes of demolition and new construction, the prescribed authority shall satisfy Itself :-*

(i) that the building requires demolition ;

(ii) that a proper estimate of expenditure over the proposed demolition and new construction has been prepared ;

(iii) that a plan has been duly prepared and conforms to the bye-laws or regulations of the local authority or other statutory authority under any law in that behalf for the time being in force; and

(iv) that the landlord has the financial capacity for the proposed demolition and new construction."

19. The state government has framed Rules 1972 in the exercise of power under Section 41 of U.P. Act No. 13 of 1972 to carry out the purpose of the U.P. Act No. 13 of 1972 . Rule 17 of Rule, 1972 has been framed with reference to Section 21(b) of U.P. Act No. 13 of 1972. One of the conditions beside other conditions stipulated in Rule 17 of Rules 1972 which the landlord should satisfy in order to succeed under Section

21 (b) is that he has the financial capacity for the proposed demolition and reconstruction. If the landlord failed to satisfy the condition stipulated in Rule 17(iv) of the Rules 1972, his application would fail. However, it would be pertinent to notice that the legislature has not framed any rule like Rule 17 with reference to Section 21 (a) of U.P. Act No. 13 of 1972 laying down the condition which the landlord has to satisfy to succeed in a proceeding initiated by him under Section 21 (1) (a) of U.P. Act No. 13 of 1972. Thus, it is evident that the landlord is not required to establish his financial capacity to reconstruct the building if the release is sought on the ground that the building is bonafide required after demolition and new construction for use and occupation of the landlord. The landlord in a proceeding under Section 21(a) of the U.P. Act No. 13 of 1972 has to establish that his need is bonafide and genuine, and that comparative hardship lay in his favour, once he satisfies these conditions, release application deserved to be allowed even if the release of the building is sought on the ground that building is bonafide required for use and occupation after demolition and reconstruction.

20. However, if the tenant disputes the financial capacity of the landlord to reconstruct the building, the tenant has to plead in the written statement challenging the financial capacity of the landlord and prove it by leading cogent evidence, and in case of any such plea having been raised by tenant, the Prescribed Authority may incidentally examine the question of financial capacity of the landlord to carry out the demolition and new construction. It would be worth to refer to the judgment of this Court in the case of **Shree Krishan Garg (supra)**. Paragraph Nos. 54, 55 and 56 reads as under:-

"54. It is true that under clause (a) of Sub-section (1) of Section 21 of the Act also, the landlord may seek release on the ground that the building in question is bona fide required "after demolition and new construction". However, in such a case, in my opinion, Rule 17 of the Rules framed under the Act cannot be invoked. In other words, where the landlord files release application under Section 21(1)(a) on the ground that the building in question is bona fide required "after demolition and new construction", he will not be required to establish that the requirements of Rule 17 of the Rules framed under the Act are fulfilled.

55. However, if in such a case, i.e., where the landlord files release application under Section 21(1) (a) on the ground that the building in question is bona fide required "after demolition and new construction", the tenant disputes the bona fide requirement of the landlord on the ground that the landlord lacks the financial capacity to carry out "demolition and new construction", then the Prescribed Authority, in deciding the question of bona fide need, may incidentally examine the question of financial capacity of the landlord to carry out "demolition and new construction".

56. Coming to the present case, it has not been shown that the tenant / petitioner raised any dispute / issue regarding financial capacity of the landlord to make alterations and additions in the disputed shop. Therefore, it was not necessary for the authorities below to consider the question of financial capacity of the landlord while

deciding the question of bona fide requirement. "

21. In the case in hand, counsel for the petitioners has not been able to place any averment in the written statement challenging the financial capacity of the respondent to reconstruct the shop nor he could place any material on record to support his contention that the respondent lacks the financial capacity to reconstruct the disputed shop.

22. Further, the intention of the respondent on which ground the release of the disputed shop has been sought cannot be gathered from one word "नवनिर्माण" in paragraph No. 2 of the release application, rather the release application has to be read as a whole to find out the ground on which release application has been filed. In the present case, reading of release application as a whole does not suggest that the release application has been filed by the respondent on the ground that the disputed shop is bonafide required for use and occupation after demolition and new construction.

23. If the petitioner had doubts about the financial capacity of the respondent to reconstruct the disputed shop, he should have challenged it by raising necessary pleading in the written statement and prove the same by filing cogent evidence. That would also give an opportunity to the respondent to negate the apprehension of the petitioner.

24. The matter can also be looked into from another point of view. In the instant case, respondent has laid emphasis on the word "नवनिर्माण" in paragraph No. 2 to challenge the financial capacity of the petitioner to reconstruct the shop. There is no averment in the release application that the shop is required after demolition and new construction by the respondent for occupation. Possibly the word "नवनिर्माण" has been used in the release application in the context that modification or renovation of the disputed shop is needed without demolition to give it a nice look to attract the customers. If the respondent had raised necessary pleading in the written statement in this regard, that would have enabled the petitioner to explain the circumstances and reason for use of word "नवनिर्माण" in the release application and to prove his financial capacity to carry out modification or renovation in the disputed shop. In this view of the matter, the court is of the opinion that the issue of financial capacity to reconstruct the shop is an issue of fact, determination of which requires necessary pleading and evidence to prove the same, and thus, cannot be raised for the first time in the writ petition.

25. The judgement of the Apex Court in **K.N. Anantharaja Gupta (supra)** relied upon by counsel for the petitioners is of no help to the petitioners for two reasons; in the case of **K.N. Anantharaja Gupta**, the building was sought to be released on the ground that the building was bonafide needed for use and occupation after demolition and construction whereas in the case in hand, no such case has been set up by the respondent in the release application that disputed shop is bonafide required for use and occupation after demolition and new construction. Secondly, the Apex Court was considering a dispute which arose out of a proceeding of Karnataka Rent Act and not under U.P.Act No. 13 of 1972

where the release of building sought under Section 21(b) of the Act,1972 requires the landlord to satisfy the conditions enumerated in Rule 17 of Rules 1972, but not in a case where the release is sought under Section 21(a) of the Act,1972 on the ground of bonafide need. Thus, the judgment of the Apex Court in the case of K.N. Anantharaja Gupta had been rendered in a different factual context and not applicable in the facts of the present case.

26. Thus, this court is of the view that as the petitioners have not challenged the financial capacity of the respondent before the authorities below, the same cannot be allowed to be raised for the first time in the writ petition.

27. For the reasons given above, this Court does not find any illegality in the orders impugned in this writ petition. The writ petition lacks merit and is accordingly, **dismissed** with no order as to the cost. Interim order stands vacated.

(2020)06ILR A902
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.

WRIT A No. 21055 of 2019

Suneet Kumar ...Petitioner
Versus

Krishna Kumar Agarwal ...Respondent

Counsel for the Petitioner:
Sri Divakar Rai Sharma, Sri P.K.Jain

Counsel for the Respondent:
Sri Anil Kumar Rai, Sri Pankaj Agarwal, Sri Vishnu Singh.

Civil Law - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: Section 21(1)(a) - Merely a family settlement had taken place that would not raise a presumption of it being collusive and tenant cannot prevent the family members of the landlord to partition their property. However, there is an exception to the aforesaid proposition that if the family settlement is a device to avoid rent control law or frustrate the defence of tenant available to him in rent control laws, he can raise objection in this regard in pleading and prove it by filing evidence. (Para 23)

The Court found it evident from the shreds of evidence on record that the property on which godown exist was jointly purchased by the respondent and his three brothers. The respondent became the exclusive owner of the godown on the basis of family settlement and no member of the respondent's family has claim over the godown is manifest from the joint affidavit of brothers. It was further noted that the petitioner in the written statement had failed to establish that the family settlement was collusive and was a device to avoid rent control laws which give protection to the tenant from eviction except on the ground specified in the relevant statute nor there was any evidence on record which demonstrates that family settlement was a sham transaction entered with a purpose to overcome the rent control laws. (Para 19)

It is a settled law that co-owner can maintain a suit (release application) for eviction against a tenant and the tenant cannot raise an objection to its maintainability. (Para 25,28)

Writ Petition Rejected. (E-10)

List of cases cited:-

1. Raj Vardhan Khandoori (Sri.) Vs. Additional District Judge 2003 (2) ARC 575

2. S.K. Sattar Sk. Mohd. Choudhari Vs. Gundappa Amabadas Bukate AIR 1997 SC 998

3. Managal Prasad Vs. Vth Additional District Judge, Basti 1992 AIR (All) 235

4. Sita Ram Bhama Vs. Ramvatar Bhama AIR 2018 SC 3057

5. Bhoop Singh Vs. Ram Singh Major and other AIR 1996 SC 196

6. Bankey Bihari Vs. Surya Narain alias Munno AIR 1999 (All) 167

7. Om Prakash & Another Vs. Mishri Lal (Dead) Represented by his Lr. Savitri Devi 2017 AIR (SC) 1597 (followed)

8. Achal Kumar Chaddha Vs. Santosh Kumar Kesharwani 2008 (9) ADJ 282 (followed)

9. Sajal *Kumar Jauhari Vs. District Judge, Ballia and 9 Others 2016 (2) ARC 46*

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Divakar Rai Sharma, learned counsel for the petitioner and Sri Pankaj Agarwal, learned counsel for the respondent.

2. The petitioner-tenant through the present petition has assailed the judgement and order dated 02.11.2018 passed by the Prescribed Authority/Judge Small Causes Court, Aligarh in UPUB Case No.33 of 2012 whereby application of respondent-landlord under Section 21(1)(a) of the U.P. Act No.13 of 1972 (hereinafter referred to as 'Act, 1972') for release of a godown has been allowed, and judgement and order dated 25.10.2019 passed by Additional District Judge, Court No.8, Aligarh dismissing the UPUB Miscellaneous Appeal No.10 of 2018 preferred by the petitioner against the judgement and order dated 2.11.2018.

3. The respondent-landlord (hereinafter referred as 'respondent') has filed release application under Section 21 (1)(a) of the Act, 1972 against the petitioner-tenant (hereinafter referred as 'petitioner') registered as UPUB Case No.33 of 2012 for release of a godown which exists over an area of 72 square yards in the property bearing municipal No.7/3, Patthar Bazar, Shahar Koil, Aligarh. The case of the respondent is that property bearing municipal No.7/3, Patthar Bazar, Shahar Koil, Aligarh (hereinafter referred as 'property') was purchased by the respondent and his three brothers by sale deed dated 25.06.1994 from one Upendra Kumar. A godown in an area of 72 square yards exists over the aforesaid property. It is stated that respondent and his brother Gopal Prasad Agarwal in January 1995 decided to rent out the aforesaid godown to the petitioner on rent @ Rs.1,000/- per month. The petitioner became tenant of the aforesaid godown since January 1995 @ Rs.1,000/- per month. The petitioner had paid the rent @ Rs.1,000/- to Gopal Prasad Agarwal till January 1996, thereafter, no rent was paid which led to the institution of a suit for eviction and arrears of rent by Gopal Prasad Agarwal against the petitioner.

4. It is further stated that the family settlement had entered into between the respondent, his brother Gopal Prasad Agarwal and two other brothers namely Ganga Prasad Agarwal and Atish Kumar (since deceased) on 01.09.2011 in which godown came in the share of the respondent. The respondent suffered a paralytic attack on 04.09.2011 due to which he became unemployed. The respondent has no source of income and he needs money for the education of his

eldest son Shivam Agarwal. It is further stated that the financial condition of the family of the respondent is in distress. His eldest son has experience of the business of hardware and plywood and the godown is needed for the establishment of business of his son. It is also averred that the petitioner has other shops in his possession, and he would not face hardship in shifting his business in those shop. In the aforesaid backdrop, respondent has prayed for the release of the godown.

5. The petitioner filed written statement contending inter alia that as per notice dated 12.09.2012 of the respondent, the godown had come in the share of Gopal Prasad Agarwal in a family settlement. Hence, Gopal Prasad Agarwal is the owner of the godown. The respondent has not filed any document to show his title over the godown. It is further pleaded that Gopal Prasad Agarwal had instituted Suit No.39 of 2009 against the petitioner in respect of the godown for eviction and arrears of rent in which respondent had filed an application for impleadment based on family settlement dated 01.09.2011 which was dismissed on the ground that family settlement is not registered. It is also pleaded that father of the petitioner Ganeshi Lal Prem Dayal was the tenant of the godown for the last 72 years and was doing business in the name and style of 'Shri Ganeshi Lal Prem Dayal'. The petitioner denied that respondent is the owner of the godown, therefore, release application by the respondent is not maintainable. Besides above, petitioner also denied the fact that the need of the respondent is bonafide and comparative hardship also lays in favour of the respondent.

6. On the basis of the aforesaid pleadings, the trial court framed as many as three issues. Issue no.1 was as to whether there was relationship of landlord and tenant between respondent and petitioner. Issue no.2 was in respect of bonafide need of respondent and issue no.3 in respect of comparative hardship.

7. The trial court in deciding the issue no.1 noticed that respondent alongwith his three brothers had purchased the property by sale deed dated 25.06.1994, therefore, the respondent was the co-owner of the godown. The trial court further noticed the family settlement dated 01.09.2011 and also the joint affidavit, paper no.30Ga, filed by Gopal Prasad Agarwal, Amit Agarwal acknowledging the fact that property was jointly purchased by Krishna Kumar Agarwal (respondent) with his brothers namely, Atish Kumar Agarwal and Ganga Prasad Agarwal and in family settlement dated 01.09.2011 godown fell in the share of the respondent- Krishna Kumar Agarwal. They also averred in the affidavit that respondent-Krishna Kumar Agarwal is the exclusive owner and landlord of the godown.

8. The trial court also noticed another affidavit of Bharat Kumar, who also endorsed the fact that family settlement had been entered between the family members of the respondent on 01.09.2011. The trial court further considered the evidence led by the petitioner and also the written statement filed by father of the petitioner in SCC Suit No.39 of 2009 wherein father of the petitioner had admitted the respondent as the owner of the godown. The trial court based on the aforesaid evidence and material on the record returned a finding

that the respondent is the owner of the godown and there was relationship of landlord and tenant between respondent and petitioner.

9. On the issue of bonafide need and comparative hardship, trial court after appreciating the material and shreds of evidence on record held the need of the respondent is pressing and bonafide, and comparative hardship lay in favour of the respondent.

10. The petitioner feeling aggrieved by the order of the trial court preferred an appeal under Section 22 of Act, 1972 registered as Appeal No.10 of 2018. The appellate court did not find any illegality in the order of the trial court, and accordingly, it dismissed the appeal.

11. Learned counsel for the petitioner has assailed the finding of the courts below only on the issue no.1 relating to the relationship of landlord and tenant between respondent and petitioner. He submits that it is evident from the notice dated 12.09.2012 sent by the respondent to petitioner that godown had fallen in the share of Gopal Prasad Agarwal in the family settlement arrived at between the brothers of the respondent before the death of their mother, therefore, the subsequent family settlement is collusive and a sham transaction to oust the petitioner from the possession of the godown. Thus, he submits that the tenant can challenge a collusive family settlement. In support of the said submission, he has relied upon the case of ***Raj Vardhan Khandoori (Sri.) Vs. Additional District Judge 2003 (2) ARC 575*** and ***S.K. Sattar Sk. Mohd. Choudhari Vs. Gundappa Amabadas Bukate AIR 1997 SC 998.***

12. His further submission is that a family settlement unless registered as per Section 17 of the Registration Act, 1908 can not be read in evidence. Accordingly, he submits that the family settlement, which was made part of the decree of Original Suit No.32 of 2017 (Gopal Prasad Agarwal Vs. Smt. Munni Devi and Others), cannot be read in evidence unless registered under Section 17 of the Registration Act, 1908. In support of this submission, he placed reliance upon the following judgements:-

(i). Mangal Prasad Vs. Vth Additional District Judge, Basti 1992 AIR (All) 235;

(ii). Sita Ram Bhama Vs. Ramvatar Bhama AIR 2018 SC 3057;

(iii). Bhoop Singh Vs. Ram Singh Major and Others AIR 1996 SC 196;

(iv). Bankey Bihari Vs. Surya Narain alias Munno AIR 1999 (All) 167.

13. Thus, based on above submission, it is urged that as the respondent is not the owner of the godown, therefore, there was no relationship of landlord and tenant between respondent and petitioner, and as such, the release application by the respondent was not maintainable.

14. Refuting the aforesaid submission, learned counsel for the respondent has submitted that both the courts below have placed reliance upon the written statement of the father of the petitioner in SCC Suit No.39 of 2009 wherein father of the petitioner had admitted the fact that the respondent is

the owner of the godown. He further submits that respondent was arrayed as defendant no.3 in Suit No.414 of 2002 (Firm Shri Ganeshi Lal Prem Dayal Vs. Ganga Prasad & Others) instituted by petitioners firm, and, it is manifest from paragraph no.3 and 4 of the plaint of the said suit that father of the petitioner had accepted the respondent as the owner of the property. His further contention is that the respondent was impleaded as defendant no.4 in Misc. Case No.50 of 2001 filed by the Firm Ganeshi Lal Prem Dayal in which the fact of ownership of respondent in respect of the aforesaid property was admitted by the firm. He has further placed reliance on the joint affidavit of Gopal Prasad Agarwal and Amit Agarwal wherein they admitted respondent as the owner of the godown and stated that they have no claim over it. Thus, he submits that the record of various suits contested between the firm of petitioner and respondent and joint affidavit of Gopal Prasad Agarwal and Amit Agarwal unambiguously establishes that the respondent is the owner of the godown.

15. He further submits that petitioner is the tenant and has no locus to challenge the family settlement dated 01.09.2011. Accordingly, he submits that the contention of counsel for the petitioner that family settlement dated 01.09.2011 is not admissible in evidence and could not have been relied upon by the court below unless registered as per section 17 of Registration Act is without substance. He further urges that the finding of the court below that the respondent is the owner of the godown and there was relationship of landlord and tenant between respondent and petitioner is correct and does not call for any interference by this Court. In support of his aforesaid submissions, he has placed reliance upon the following judgements:-

(i). Om Prakash & Another Vs. Mishri Lal (Dead) Represented by his Lr. Savitri Devi 2017 AIR (SC) 1597;

(ii). Achal Kumar Chaddha Vs. Santosh Kumar Kesharwani 2008 (9) ADJ 282;,

(iii). Sajal Kumar Jauhari Vs. District Judge, Ballia and 9 Others 2016 (2) ARC 46.

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

17. The court below while returning the finding on the issue of relationship of landlord and tenant has placed reliance upon the various documentary evidence viz written statement of the father of petitioner in Original Suit No.39 of 2009, the plaint of Original Suit No.414 of 2002 (Firm Shri Ganeshi Lal Prem Dayal Vs. Ganga Prasad & Others), the record of Miscellaneous Case No.50 of 2001 filed by Firm Ganeshi Lal Prem Dayal for the deposit of rent. Besides the above, the court below also considered the joint affidavit of Gopal Prasad Agarwal and Amit Agarwal, paper no.30Ga, wherein they had acknowledged the family settlement dated 01.09.2011 amongst the family members in which godown fell in the share of respondent-Krishna Kumar Agarwal, and the respondent is the landlord and owner of the godown and they have no concern with the godown. The court below elaborately considered the above evidence and other documentary evidence in recording the

finding that respondent is the owner of the godown and there exist relationship of landlord and tenant between the respondent and petitioner.

18. Thus, it is evident from shreds of evidence on record that property on which godown exist was jointly purchased by the respondent and his three brothers. The respondent became the exclusive owner of the godown on the basis of family settlement, and no member of respondent's family has claim over the godown is manifest from the joint affidavit of Gopal Prasad Agarwal and Amit Agarwal. Hence, the respondent is the exclusive owner of the godown.

19. Now the issue which arises for consideration in view of the submission of petitioner is whether a tenant can challenge the family settlement arrived at between the members of the family of the landlord.

20. The counsel for the petitioner has relied upon paragraph 12 of the judgment of Uttarakhand High Court in the case of ***Raj Vardhan Khandoori (Sri.) (supra)*** and paragraph 37 of the judgment of Apex Court in the case of ***S.K. Sattar Sk. Mohd. Choudhari (Supra)*** in support of his contention that the tenant can challenge the family settlement if it is collusive and has been arrived at to frustrate the defence of the petitioner.

21. Paragraph 12 of the judgment of Uttarakhand High Court in the case of ***Raj Vardhan Khandoori (Sri.) (supra)*** is reproduced hereunder:

"12. It has further been held in the case of Sharvan Kumar Mittal v. XVIIIth A.D.J. Meerut and others 2001 (1) ARC 456, as under:

The mere fact that a family settlement had taken place will not raise a presumption of its being collusive. Parties are free to settle their affairs of mutual agreement through family settlement. If such a settlement is a device to frustrate malafide the defence of the tenant then certainly the tenant should have lead evidence on the point and passed the plea and got it adjudicated in appeal. It will be open to the tenant to raise the objection regarding family settlement being collusive; while the appeal itself is being adjudicated. The Court below in appeal allowed amendment application. The main appeal is still pending. I find no manifest error apparent on the face of the record in view of the decision of the Supreme Court reported in MANU/SC/0016/1969: AIR 1969 SC 1267."

22. Paragraph 37 of the judgment of Apex Court in the case of ***S.K. Sattar Sk. Mohd. Choudhari (Supra)*** is also reproduced hereunder:

"37. In view of the above discussion, it is obvious that the law with regard to the spliting of tenancy is not what the High Court has set out in the impugned judgment. As pointed out earlier, a co-sharer cannot initiate action for eviction of the tenant from the portion of the tenanted accommodation nor can he sue for his part of the rent. The tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by

metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or colessors from partitioning the tenanted accommodation among themselves. Whether the Premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and that, even if he was being dealt with by only one of them on behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of Rent Control laws which protected eviction of tenants except on specified grounds set out in the relevant statute."

23. From the reading of the aforesaid two judgments, it is clear that merely a family settlement had taken place, that would not raise a presumption of it being collusive and tenant cannot prevent the family members of the landlord to partition their property. However, there is an exception to the aforesaid proposition that if the family settlement is a device to avoid rent control law or frustrate the defence of tenant available to him in rent control laws, he can raise objection in this regard in pleading and prove it by filing evidence.

24. Now coming to the facts of the present case, the counsel for the petitioner could not demonstrate from the record that it was the case of the petitioner in the written statement that the family settlement was collusive and was a device to avoid rent control laws which give protection to the tenant from eviction except on the ground specified in the relevant statute nor there was any evidence on record which demonstrates that the family settlement was a sham transaction entered with a purpose to overcome the rent control laws. It is worth noticing that the release application by the respondent has been filed under section 21(a) of Act,1972 on the grounds available to the landlord in the Act,1972 for seeking eviction of the petitioner. Thus, in the present case, family settlement cannot be termed to be a collusive and sham transaction to render petitioner defenceless as the release application has been filed under Rent Control Act i.e. Act,1972. Accordingly, this court finds no merit in the submission of counsel for the petitioner that family settlement is a device to overcome the protection available to the petitioner under rent control laws.

25. In the instant case, the question of maintainability of release application by the respondent can also be looked at from another point of view. From the facts delineated above, it is unambiguously established that the respondent was co-owner of the property

over which godown exists. It is settled law that a co-owner can maintain a suit for eviction against a tenant. Reference may be had to the case of ***Om Prakash (supra),*** wherein the apex court has held that a suit for eviction of a tenant can be maintained by one of the co-owners and tenant has no right to question the maintainability of the suit on the ground that other co-owners were not joined. Paragraphs 32 and 34 of the judgement are being extracted hereinbelow:-

"32. It is no longer res integra and is settled by this Court in Sri Ram Pasricha vs. Jagannath and Ors., (1976) 4 SCC 184, Dhannalal vs. Kalawatibai and Ors. (2002) 6 SCC 16 and India Umberalla Manufacturing Co. and Ors. vs. Bhagabandei Agarwalla (dead) by Lrs. Savitri Agarwalla (Smt.) and Ors. (2004) 3 SCC 178 that a suit for eviction of a tenant can be maintained by one of the co-owners and it would be no defence to the tenant to question the maintainability of the suit on the ground that the other co-owners were not joined as parties to the suit. The judicially propounded proposition is that when the property forming the subject matter of eviction proceedings is owned by several co-owners, every co-owner owns every part and every bit of the joint property along with others and thus it cannot be said that he is only a part owner or a fractional owner of the property and that he can alone maintain a suit for eviction of the tenant without joining the other co-owners if such other co-owners do not object. In the contextual facts, not only the compromise decree, as aforementioned, has declared the appellants to be the joint owners of the suit premises, their status as such has not been questioned at any stage by anyone interested in the title thereto.

34. That a tenant during the continuance of the tenancy is debarred on the doctrine of estoppel from denying the title of his landlord through whom he claims tenancy, as is enshrined in Section 116 of the Indian Evidence Act, 1872, is so well-settled a legal postulation that no decision need be cited to further consolidate the same. This enunciation, amongst others is reiterated by this Court in S. Thangappan vs. P. Padmavathy (1999) 7 SCC 474 and Bhogadi Kannababu and Ors. vs. Vuggina Pydamma and others (2006) 5 SCC 532. In any view of the matter, the appellants, being the son of Bhola Nath, who at all relevant time, was the landlord vis-à-vis the original defendant and the respondents in terms of Section 3(j) of the Act, their status as landlords for the purpose of eviction under the Act, could not have been questioned so as to non suit them for want of locus."

26. The judgment of this court in the case of ***Achal Kumar Chaddha (supra)*** is also relevant wherein this court dismissed the writ petition of a tenant on the ground that even if the partition is ignored, the landlord being one of the co-owner can file a release application. Paragraph 5 of the judgement is being extracted hereinbelow:-

"5. In any case, even if partition is ignored, respondent is co-owner and release application may be filed by a co-owner also vide Gopal Das v. A.D.J., 1997 (1) ARC 281 : 1987 All LJ 494 (FB). Moreover, the Supreme Court in AIR 2004 SC 1321, India Umbrella Manufacturing Co., M/s v. Bhagabandei

Agarwalla and AIR 2006 SC 1471, Mohinder Prasad Jain v. Manohar Lal Jain has held that even one of the landlords can file eviction proceedings against tenant and he need not show the consent of the other landlords. No other brother, sister or father of the respondent ever raised any objection against the partition."

27. In the case of ***Sajal Kumar Jauhari (supra)***, this Court has held that proceedings under Section 21(1)(a) of the Act, 1972 are summary in nature and question of title cannot be decided. Paragraphs 33 and 34 of the judgement are being extracted hereinbelow:-

"33. To deal with this contention of the learned counsel for the petitioner, it is note-worthy that there is no basis for his submission that the disputed accommodation exists over plot no. 59-A/1 and 50-B and the said property belonged to someone else. The sale deed of the year 1933 cannot be made basis to challenge the title of the applicants/landlord. Moreover, the disputed accommodation came in the share of the applicants by a decree of the Civil Court passed in a partition suit no. 203 of 2001 which was filed by the co-owners. This fact is not disputed by the petitioner. The rent control proceedings are summary proceeding and the question of title cannot be decided therein as it requires appreciation of oral and documentary evidences which is not permissible in a summery proceeding. Prima facie, title to the disputed accommodation can be seen by the Rent Controller only with a view to look as to whether the applicant is landlord of the accommodation, release of which is sought by him.

34. On the landlord-tenant relationship, the written statement filed by Shyam Das, the father of the petitioner in the year 2007 becomes much more relevant. In his written statement, he had denied the landlord-tenant relationship on the ground that the decree of partition obtained by the applicants/landlord was a collusive decree and they are not the owners of the disputed accommodation. The challenge was not on the ground that Gopal Das Mishra or his heirs are owners of the disputed accommodation under tenancy as suggested by the petitioners."

28. In view of the law propounded by this court and apex court in the above-referred cases, it is crystal clear that the release application by the respondent as a co-owner was maintainable and the tenant cannot raise an objection to the maintainability of release application by the respondent.

29. Coming to another submission of counsel for the petitioner that a family settlement unless registered under section 17 of the Registration Act cannot be read in evidence; the said issue, in the opinion of the court, in the facts of the present case is irrelevant and does not require any consideration for the reason that it is already held that the release application by the respondent, even if the family settlement is ignored, was maintainable. Further, the judgments relied upon by the counsel for the petitioner in support of the aforesaid submission are of no help to petitioner since none of the judgements arises out proceedings under Rent Control Act and has been rendered in different factual circumstances.

30. Therefore, in the light of the above discussion, it is held that there was relationship of landlord and tenant between the respondent and petitioner and the release application by the respondent was maintainable.

31. Accordingly, this Court does not find any illegality in the orders impugned in the writ petition. The writ petition lacks merit and is, accordingly, ***dismissed*** with no order as to costs.

(2020)06ILR A911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE
THE HON'BLE YASHWANT VARMA, J.

WRIT A No. 23578 of 2013

Shant Deo Tripathi ...Petitioner
Versus

Deputy General Manager/Appellate Authority, State Bank of India, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nigamendra Shukla

Counsel for the Respondents:
Sri Satish Chaturvedi, S.C.

Service Law - identical charge being tried in criminal trial as in disciplinary proceedings - Indian Evidence Act, 1872: Section 114 - The Court observed that a judgment of acquittal does not necessarily result in an identical charge not being tried in departmental proceedings. This is because the Courts have consistently recognized and emphasized the distinct standard of proof which apply to criminal prosecutions and disciplinary proceedings. In the former, the charge must be proved beyond all reasonable doubt, in disciplinary proceedings the standard which applies is a preponderance of probabilities. (Para 19)

The petitioner is alleged to have unauthorizedly signed a Draft thus jeopardizing the interest of the Bank and was tried at criminal court as well as in departmental proceeding. The Court noted that in criminal trial best evidence was never produced, documentary evidence available with the respondents in support of the charge was not introduced, material and crucial witnesses were never examined and most of the prosecution witnesses turned hostile. The judgment of acquittal in that sense cannot be viewed as being one exonerating the petitioner conclusively. It essentially came to be handed down on account of failure on the part of the prosecution to prove the charges beyond reasonable doubt. This was not a decision honorably acquitting the petitioner. To the contrary, in the disciplinary proceedings which were undertaken the respondents produced voluminous material in support of the charge and also examined material witnesses on whose testimony the charges were held to be proved. The petitioner not only chose not to cross-examine those witnesses, he failed to lead any oral evidence in support of his innocence.
(Para 24)

Writ Petition Rejected. (E-10)

List of cases cited:-

1. G.M. Tank Vs. State of Gujarat (2006) 5 SCC 446 *(distinguished)*

2. Commissioner of Police, New Delhi and Anr Vs. Mehar Singh (2013) 7 SCC 685

3. Deputy Inspector General of Police Vs. S. Samuthiram (2013) 1 SCC 598

4. Karnataka Power Transmission Corporation Limited represented by Managing Director (Administration and HR) Vs. C. Nagaraju and Anr. (2019) 10 SCC 367 *(followed)*

4. BHEL Vs. M. Mani (2018) 1 SCC 285

5. South Bengal State Transport Corpn. Vs. Sapan Kumar Mitra (2006) 2 SCC 584

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri Nigamendra Shukla, learned counsel for the petitioner and Sri Satish Chaturvedi, learned counsel appearing for the respondent-Bank.

2. The petitioner assails an order of dismissal dated 17 September 2012. A challenge is also laid to the order passed by the Appellate Authority on 8 January 2013 affirming the decision taken by the Disciplinary Authority. The petitioner prays for the setting aside of the aforesaid orders and for the grant of all consequential benefits including arrears of pay from the date of dismissal till he would have attained the age of retirement on 31 May 2013. The present petition represents the second foray of the petitioner before this Court. Earlier the respondents had dismissed the petitioner on 4 December 2000. That order was challenged by way of **Writ-A No. -1019 of 2002**. A learned Judge of the Court by a detailed judgment allowed that writ petition and quashed the orders of dismissal and that passed by the Appellate Authority. The Court left it open for the respondents to conduct a disciplinary enquiry afresh commencing from the stage of oral enquiry and after filing of documents by the employer. The learned Judge while allowing the writ petition noted that out of the 22 charges which were levelled against the petitioner, Charges (vii) to (xxii) also formed part of a criminal prosecution that was launched against the petitioner and in which he had been ultimately acquitted. Noticing the similarity in the charges that formed part of the departmental enquiry and the criminal prosecution, the learned Judge observed thus:

"43. The technical difference in charge was not relevant but what was relevant is that the charges are based on the same set of facts. It has been admitted by respondents that charges no.7 to 22 are based on the same facts as were involved in criminal case pending against petitioner. In this case, besides the general principles of law, as discussed above, statutory provision binding upon both the parties also contemplate that departmental enquiry shall stand deferred when criminal proceedings commenced but the said provision has been given a complete go by. I am therefore constrained to hold that continuance to proceed with the departmental enquiry in respect to charges no.7 to 22 in this matter was not legal and valid and besides the exposition of law, as laid down in Noida Entrepreneurs Assn (supra), the same was in the teeth of para 521 of Shastry Award and to this extent, it is vitiated in law."

3. The learned Judge then proceeding to deal with the validity of the enquiry which was held rendered the following observations:

"53. The procedure prescribed in para 521 contemplates an adequate opportunity of defence. Here is not a case where the petitioner had accepted his guilt, therefore it was incumbent upon department to prove charges against the petitioner and only thereafter he could have been required to place his defence to disprove the charges. Except of filing documents before Enquiry Officer, the Presenting Officer did not take any further step for proving charges. If the

charges are such which stood proved from bare perusal of documents, in such a case no formal proof or overt act on the part of the department is necessary since Enquiry Officer can peruse the documents and find out whether charges stood proved or not. In such a case onus would shift upon delinquent employee to disprove the charges. It is quite plausible and permissible but the question would be whether it is so in the case in hand. Let us examine the manner in which the Enquiry Officer had discussed the documents."

4. Insofar as Charge No. I (iv) is concerned, the Court held thus:

"58. In respect to charge no. 4 again Enquiry Officer held that to petitioner's defence "Presenting Officer did not offer any comment." "The petitioner alone cannot be held responsible for such act." Yet he has held the entire charge proved which is beyond comprehension. Once no evidence is found that there was no other officer available in the Branch to sign the draft and therefore under instructions of Branch Manager, petitioner signed the draft, unless the Bank could have shown that Bank Manager himself acted illegally, compliance of his direction by petitioner cannot constitute a misconduct on his part. Therefore, it is also difficult to hold charge no. 4 proved."

5. It was ultimately observed by the learned Judge that the enquiry had not been conducted fairly and in a manner consistent with the principles of nature justice. The aforesaid conclusions stand recorded in paragraphs 65-66 which are extracted herein below:

"65. No person from the Bank appeared and could show that signatures of petitioner on various documents were unauthorised since he was not permitted to do so. With respect to charges no. 7 to 22, on the basis of mere language of the charges contained in the charge sheet, Enquiry Officer held the same proved, since petitioner did not/could not adduce any defence for the reason that the same may cause prejudice to him in criminal proceedings pending against the charges involving same set of facts at that time.

66. In totality of the circumstances, I am clearly of the opinion that departmental enquiry, in the case in hand, has not been conducted fairly, impartially and in a manner consistent with the Principles of natural justice and also the procedure prescribed in para 521 of Shastry Award."

6. The respondent Bank assailed the decision of the learned Judge by way of **Special Appeal No. 58 of 20122.** The Division Bench however recorded the statement of the respondents that they were ready to reinstate the petitioner and to hold a fresh enquiry. In light of the statement so made the appeal was disposed of on 21 March 2012 in the following terms:

"Having considered the submissions advanced and in view of the statement given by the learned counsel for the parties the appeal stands disposed of with the observations that the appellant Bank would abide by the directions contained in the judgment of the learned Single Judge except to the extent that the direction for payment of the arrears of subsistence allowance for the period from the date of termination till reinstatement would remain stayed in the meanwhile

and would abide by the final decision that may now be taken by the Disciplinary Authority after fresh inquiry."

7. Consequent to the liberty so granted, the respondents proceeded to conduct the departmental enquiry afresh. Upon conclusion of that enquiry, the Enquiry Officer in terms of his report of 27 August 2012 concluded that Charges No. I (i) to Charges No. I (iii), Charge No. I (v), Charge No. I (vi) and Charge No. II did not stand proved. He however recorded that Charge No. I-(iv) and Charge No. I (vii)-(xxii) stood proved. The Disciplinary Authority upon due consideration of that report and taking into consideration the gravity of the charges which stood levelled reiterated the original decision of the Bank and inflicted upon the petitioner the penalty of dismissal. It was further observed that the period of suspension will be treated as such and that no further salary or allowance would be payable other than the subsistence allowance already paid to the petitioner. That order of the Disciplinary Authority was affirmed in appeal where after the present writ petition came to be preferred.

8. The order of dismissal insofar as Charges I (vii)-(xxii) are assailed principally on the basis of the judgment of acquittal which was rendered by the Criminal Court on 24 September 2002. According to the learned counsel since those charges were identical to those which formed part of the criminal prosecution, once the petitioner had been acquitted it was not open to the respondent Bank to inflict the punishment of dismissal. Insofar as Charge No. I (iv) is concerned, learned counsel submits that in light of the findings which were returned *inter partes* by the learned Judge on the earlier writ petition it was impermissible for the Enquiry Officer to have held the petitioner guilty of that charge. Learned counsel submits that in light of the categorical findings returned in the earlier decision that the petitioner alone could not be held responsible for the act, that charge could not have been held to be established against the petitioner. In view thereof, it was submitted that both the Disciplinary as well Appellate Authority clearly committed a manifest illegality in holding the petitioner guilty of the misconduct alleged and forming part of Charge I (iv). Insofar as the findings returned in respect of Charges I (vii)-(xxii) are concerned, they are assailed on the principles elucidated by the Supreme Court in **G.M. Tank Vs. State of Gujarat.** Learned counsel contends that once the charges in the criminal prosecution and the disciplinary enquiry are found to be identical, an acquittal in the criminal trial clearly denudes the respondents from the right to inflict the punishment of dismissal in respect thereof. Reliance was placed on the following principles that were laid down in **G.M. Tank:**

"30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a Departmental case against the appellant and the charge before the Criminal Court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected

against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer, Mr. V.B. Raval and other departmental witnesses were the only witnesses examined by the Enquiry Officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

31. In our opinion, such facts and evidence in the department as well as criminal proceedings were the same **without there being any iota of difference,** the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though finding recorded in the domestic enquiry was found to be valid by the Courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Paul Anthony case [(1999) 3 SCC 679 : 1999 SCC (L&S) 810] will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

9. Refuting those submissions Sri Satish Chaturvedi, learned counsel appearing for the respondent Bank, would contend that acquittal in the criminal case cannot ipso facto lead to the employer being deprived of the right to try those charges in a disciplinary enquiry. According to Sri Chaturvedi since the standard of proof in both proceedings is different and in a departmental enquiry the respondents are not obliged to prove the charges beyond reasonable doubt, a judgment of acquittal cannot in all circumstances be held to have concluded the issue nor can it be recognized as divesting the employer of the right to try those charges independently. Sri Satish Chaturvedi, learned counsel then took the Court through the judgment handed down by the criminal court in some detail to establish that the same cannot to be appreciated without bearing in mind the backdrop in which it came to be rendered. It was highlighted that most of the account holders who were complainants and produced as prosecution witnesses had turned hostile during the course of trial, the prosecution there had failed to produce the relevant documents in support of the charge and also failed to produce the Cashier and other relevant witnesses. According to Sri Chaturvedi, the criminal court acquitted the petitioner since the prosecution had failed to establish the charges beyond reasonable doubt and consequently it cannot be

viewed as a judgment exonerating or acquitting the petitioner on merits. Taking the Court through the enquiry report it was highlighted that to the contrary in the enquiry proceedings the respondent Bank had produced the Cashier and other crucial witnesses to prove the charges that were levelled against the petitioner. Viewed in that light Sri Chaturvedi submitted that the impugned order clearly did not merit any interference. Sri Chaturvedi further submitted that the petitioner was an employee of a financial institution against whom serious charges of financial misconduct and failure to abide by the policies and procedures formulated by the Bank was laid. Sri Chaturvedi submitted that the conduct of an employee in a financial institution is liable to be tested against strict standards of conduct and the imperative need of such employees being held liable to adhere to codified practices and procedures formulated. Viewed on the strength of those standards, it was submitted that the orders impugned did not merit interference by this Court.

10. Seeking to distinguish the principles laid down in **G.M. Tank**, Sri Chaturvedi placed reliance upon the following decisions. He drew the attention of the Court firstly to the judgment rendered in **Commissioner Of Police, New Delhi and Another Vs. Mehar Singh** to submit that a judgment of acquittal which comes to be rendered in the backdrop of witnesses turning hostile cannot be accepted as an acquittal on merits and consequently departmental proceedings can be justifiably taken even though the employee or officer may have been acquitted. Sri Chaturvedi placed reliance upon paragraphs 24, 25, 26 of the decision rendered in **Mehar Singh** which read thus:

"24. We find no substance in the contention that by cancelling the respondents' candidature, the Screening Committee has overreached the judgments of the criminal court. We are aware that the question of co-relation between a criminal case and a departmental inquiry does not directly arise here, but, support can be drawn from the principles laid down by this Court in connection with it because the issue involved is somewhat identical, namely, whether to allow a person with doubtful integrity to work in the department. While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. In R.P. Kapur v. Union of India [AIR 1964 SC 787] this Court has taken a view that departmental proceedings can proceed even though a person is acquitted when the acquittal is other than honourable.

25. The expression "honourable acquittal" was considered by this Court in *S. Samuthiram*. In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 IPC and under Section 4 of the Eve-Teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses turned hostile. Referring to the judgment of this Court in RBI v. Bhopal Singh Panchal [(1994) 1

SCC 541], where in somewhat similar fact situation, this Court upheld a bank's action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings. This Court observed that the expressions "honourable acquittal", "acquitted of blame" and "fully exonerated" are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted". This Court expressed that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges leveled against the accused, it can possibly be said that the accused was honourably acquitted.

26. In light of above, we are of the opinion that since the purpose of the departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of the department, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it."

11. Reliance was then placed upon another decision of the Supreme Court in **Deputy Inspector General of Police Vs. S. Samuthiram** and more particularly paragraphs 23 to 26 thereof, which are extracted hereunder:

"23. We are of the view that the mere acquittal of an employee by a criminal court has no impact on the disciplinary proceedings initiated by the Department. The respondent, it may be noted, is a member of a disciplined force and non-examination of two key witnesses before the criminal court that is Adiyodi and Peter, in our view, was a serious flaw in the conduct of the criminal case by the Prosecution. Considering the facts and circumstances of the case, the possibility of winning over PWs 1 and 2 in the criminal case cannot be ruled out. We fail to see, why the Prosecution had not examined Head Constables Adiyodi (No. 1368) and Peter (No. 1079) of Tenkasi Police Station. It was these two Head Constables who took the respondent from the scene of occurrence along with PWs 1 and 2, husband and wife, to Tenkasi Police Station and it is in their presence that the complaint was registered. In fact, the criminal court has also opined that the signature of PW 1 (complainant husband) is found in Ext.P-1 complaint. Further, the Doctor PW8 has also clearly stated before the enquiry officer that the respondent was under the influence of liquor and that he had refused to undergo blood and urine tests. That being the factual situation, we are of the view that the respondent was not honourably acquitted by the criminal

court, but only due to the fact that PW 1 and PW 2 turned hostile and other prosecution witnesses were not examined.

Honourable Acquittal

24. The meaning of the expression "honourable acquittal" came up for consideration before this Court in RBI v. Bhopal Singh Panchal (1994) 1 SCC 541. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

25. In R.P. Kapoor v. Union of India, AIR 1964 SC 787, it was held that even in the case of acquittal, departmental proceedings may follow where the acquittal is other than honourable. In *State of Assam and another v. Raghava Rajgopalachari [1972 SLR 44 (SC)]*, this Court quoted with *approval the views expressed by* Lord Williams, J. in Robert Stuart Wauchope v. Emperor ILR (1934) 61 Cal 168 which is as follows:

"8...The expression "honourably acquitted" is one which is unknown to courts of justice. Apparently it is a form of order used in courts martial and other extra judicial tribunals. We said in our judgment that we accepted the explanation given by the appellant believed it to be true and considered that it ought to have been accepted by the government authorities and by the Magistrate. Further, we decided that the appellant had not misappropriated the monies referred to in the charge. It is thus clear that the effect of our judgment was that the appellant was acquitted as fully and completely as it was possible for him to be acquitted. Presumably, this is equivalent to what government authorities term "honourably acquitted"."

26. As we have already indicated, in the absence of any provision in the service rule for reinstatement, if an employee is honourably acquitted by a criminal court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile, etc. In the case on hand the

prosecution did not take steps to examine many of the crucial witnesses on the ground that the complainant and his wife turned hostile. The court, therefore, acquitted the accused giving the benefit of doubt. We are not prepared to say that in the instant case, the respondent was honourably acquitted by the criminal court and even if it is so, he is not entitled to claim reinstatement since the Tamil Nadu Service Rules do not provide so."

12. Sri Chaturvedi then placed reliance on a recent decision of the Supreme Court in **Karnataka Power Transmission Corporation Limited represented by Managing Director (Administration And HR Vs. C. Nagaraju And Another6 where the principles laid down in G.M. Tank** were noted and explained. It is these rival submissions that consequently fall for consideration.

13. Before dealing with the charges which also formed part of the criminal trial, it would be apposite to deal with Charge I (iv). That charge alleged that the petitioner had unauthorizedly signed a Draft for Rs.85,069/- thus jeopardizing the interest of the Bank. The case set up against the petitioner was that since he was a member of the award staff he was not authorized to sign that draft. The petitioner in his defense had asserted that the draft was signed on the verbal instructions of the Branch Manager and since no other officer was present in the Branch on that date. The Enquiry Officer has held that charge proved by simply holding that since the petitioner had admittedly signed the Draft and had duly accepted having performed that act, the charge must be held to be proved. It becomes pertinent to recollect that dealing with that charge the learned Judge while allowing the earlier writ petition had unequivocally observed that once it was found that there was no other officer available in the Branch to sign the draft and that the same came to be done upon the verbal instructions of the Branch Manager, the petitioner could not have been held guilty. It was further observed that the mere act of the petitioner complying with the directive of the Branch Manager cannot constitute misconduct. It becomes relevant to note that upon remit the respondents neither assert nor did they lead any evidence to establish that the defense proffered by the petitioner was incorrect. The respondents did not lead any evidence that may have dislodged the explanation tendered by the petitioner namely that he had signed the draft on the verbal instructions of the Branch Manager and since no other officer was present in the Branch on that date. It was open to the respondents to produce the Branch Manager or other witnesses to establish that the explanation submitted was factually incorrect. However they chose not to do so. In that view of the matter as well as in light of the findings recorded in the earlier round of litigation in respect of this particular charge, this Court finds itself unable to countenance the finding of guilt as returned in this respect.

14. However, notwithstanding the conclusion recorded above, that still leaves the Court to consider the validity of the findings which were returned in respect of Charges I (vii)-(xxii). As was noted earlier, the findings of guilt returned in respect of these charges are assailed solely on the basis of the findings

returned by the criminal court. Dealing with this aspect, the Enquiry Officer observed as follows:

a) During enquiry proceeding dated 20.07.2012 the EPA had given a letter dated 20.07.2012 indexed as D.Ex-2 demanding that PO should call upon all the complainants, on the basis of whose complaint the charge No.7 to 22 are framed, for cross examination. The PO advised during the same day enquiry proceedings (page no.4) that since the complainants are from general public and beyond control of the Bank, they can not be produced as witness, however, Shri S.K. Tripathi, Accountant Bidhuna branch, who is custodian of the documents, is available who can be cross examined by the EPA but the EPA not demanded for his (the Accountant's) cross examination during enquiry proceedings on date as well as on later dates of the proceedings. I observed that contention of the PO is justified as the complainants are from public, the Banks has no right over them to call upon for cross examination. Moreover the custodian of the documents was present for cross examination but the EPA had not shown any interest to cross-examine him during enquiry proceedings. Further, at any point of time during entire enquiry proceedings the EPA had not stated that he wants to produce any defence witness despite PO's consent in this regard shown during enquiry proceedings dated 20.07.2012 (page No.4). I, therefore, find that statement written in defence brief of the EPA that he was not given time to produce the complainants as defence witness, is incorrect.

b) I find that the PO stated during enquiry proceedings dated 20.07.2012 (page No.4) that the EPA can cross-examine the custodian of the documents Shri S.K. Tripathi, Accountant Bidhuna Branch but the EPA neither on that day nor during any point of time of entire enquiry proceedings has demanded to cross examine Shri Tripathi, therefore, his contention that the Branch accountant was not produced for cross examination is not tenable.

c) I find that the standard of proof in departmental proceedings is that of "preponderance of probabilities" and not of "proof beyond reasonable doubt". Therefore, opinion of hand writing expert not necessarily required to be taken, as EPA's handwriting / signature / initials available on P.Exs. are apparently matching with those on Bank's records."

15. In order to test the veracity of the submission addressed on the strength of the judgment handed down by the criminal court it becomes necessary to analyse that decision in some detail. On a careful consideration of the judgment rendered by the criminal court, the Court notes that apart from one complainant Rajjak (P.W.-1) all the other account holders who are alleged to have made complaints against the petitioner had turned hostile. The prosecution did not produce the Cashier and other crucial witnesses. Only a Clerk (P.W.-2) was produced. The documents on the basis of which the charges could have been established were also not proved. Dealing with the evidence of P.W.-8, it was noted that his statement had also not established the charges levelled clearly and completely. The criminal court then noted the contention addressed at the behest of the petitioner accused in view of Section 114 of the **Evidence Act** on the basis of which it was contended that the prosecution had failed to prove the

charges on the basis of the best evidence which was available. It was in the aforesaid backdrop that a judgment of acquittal came to be entered.

16. On the contrary in the disciplinary proceedings, the Enquiry Officer noted that the charges were established on the strength of documentary evidence which was introduced and the oral statements of witnesses including the Branch Accountant. It has also come to be recorded that despite adequate opportunity being available for the petitioner to cross-examine the Branch Accountant, he chose not to do so. The Branch Accountant crucially was the custodian of the record. The charges were also established on the basis of voluminous internal records which do not appear to have been exhibited or introduced during the criminal trial. It is in the aforesaid backdrop that the impact of the judgment of acquittal is liable to be evaluated.

17. In **BHEL Vs. M. Mani7** the Supreme Court dealing with an identical question held as follows:

"22. This Court has consistently held that in a case where the enquiry has been held independently of the criminal proceedings, acquittal in criminal court is of no avail. It is held that even if a person stood acquitted by the criminal court, domestic enquiry can still be held - the reason being that the standard of proof required in a domestic enquiry and that in criminal case are altogether different. In a criminal case, standard of proof required is beyond reasonable doubt while in a domestic enquiry, it is the preponderance of probabilities. (See Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao-(2012) 1 SCC 442)

23. In the light of this settled legal position, the Labour Court was not right in holding that the departmental enquiry should have been stayed by the appellant awaiting the decision of the criminal court and that it is rendered illegal consequent upon passing of the acquittal order by the criminal court. This finding of the Labour Court is, therefore, also not legally sustainable."

18. In **South Bengal State Transport Corpn. Vs. Sapan Kumar Mitra8,** the Supreme Court reiterated the legal position that it would be open to an employer to remove a delinquent employee notwithstanding his acquittal in a criminal case. The Court deems it apposite to extract paragraphs 9 and 10 of that decision which read thus:

"9. We have heard the learned counsel for the parties and also examined the relevant records of this case. Although the Division Bench had not categorically said that the departmental proceeding could not be continued and punishment could not be imposed on the delinquent employee when the criminal case ended in acquittal, even then the learned counsel for the respondents sought to argue this ground before us. In our view, this ground is no longer res-integra. In Nelson Motis v. Union of India and Ors., [(1992) 4 SCC 711] a three-Judge Bench of this Court observed at paragraph 5, as follows:

"5. So far the first point is concerned, namely, whether the disciplinary proceedings could have been continued in the face of the acquittal of the appellant in the criminal case, the plea has no substance whatsoever and does not

merit a detailed consideration. The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal therefore, cannot conclude the departmental proceeding. Besides, the Tribunal has pointed out that the acts which led to the initiation of the departmental disciplinary proceeding were not exactly the same which were the subject-matter of the criminal case."

(Emphasis supplied)

10. Similarly in Senior Superintendent of Post Offices, v. A. Gopalan, [(1997) 11 SCC 239] the view expressed in Nelason Motis v. Union of India was fully endorsed by this Court and similarly it was held that nature and scope of proof in a criminal case is very different from that of a departmental disciplinary proceeding and the order of acquittal in the former, cannot conclude departmental proceedings. This Court has further held that in a criminal case charge has to be proved by proof beyond reasonable doubt while in departmental proceeding the standard of proof for proving the charge is mere preponderance of probabilities. Such being the position of law now settled by various decisions of this Court, two of which have already been referred to earlier, we need not deal in detail with the question whether acquittal in a criminal case will lead to holding that the departmental proceedings should also be discontinued. That being the position, an order of removal from service emanating from a departmental proceeding can very well be passed even after acquittal of the delinquent employee in a criminal case. In any case, the learned Single Judge as well as the Division Bench did not base their decisions relying on the proposition that after acquittal in the criminal case, departmental proceedings could not be continued and order of removal could not be passed."

19. In view of the decisions cited and noted above, it would be pertinent at this stage to advert to the salient principles enunciated by the Supreme Court in the context of a judgment of acquittal and an identical charge being tried in disciplinary proceedings. As is evident from the principles propounded in the decisions aforenoted, it must firstly be recognised that a judgment of acquittal does not necessarily result in an identical charge not being tried in departmental proceedings. This because the Courts have consistently recognised and emphasised the distinct standards of proof which apply to criminal prosecutions and disciplinary proceedings. While in the former, the charge must be proved beyond all reasonable doubt, in disciplinary proceedings the standard which applies is a preponderance of probabilities. While in disciplinary proceedings it may be open to the authorities to hold the charge as proved if evidence accurately tends to establish the correctness of the misconduct alleged, in a criminal trial the same charge would have to be proved in accordance with law and placed beyond the realm of any doubt. A finding of a charge as being proved in a departmental enquiry may still be accepted provided the finding recorded in its respect is not wholly perverse and there is some evidence which may support the ultimate conclusion arrived at. To the contrary, findings recorded in a criminal trial are not to be tested on principles of perversity. A finding of guilt in a criminal trial must come to be recorded where the Court is convinced beyond any degree of uncertainty that the evidence

unwaveringly establishes the commission of the crime. It is based on certainty of conviction.

20. The second aspect which Courts have recognised are those connected with the vagaries of a criminal prosecution. Very often, a judgment of acquittal comes to be rendered on account of a prosecutional failure to lead the best evidence available, where material witnesses are not produced or where witnesses produced turn hostile. In such situations Court have held that an acquittal granted in such circumstances cannot be viewed as "honourable". In **Samuthiram** the Supreme Court explained that expression to mean a decision of acquittal rendered upon *"full consideration of prosecution evidence"* and where it has *"miserably failed to prove the charge"*. As a necessary corollary, a judgment which hinges upon a failure on the part of the prosecution to bring home the charge conclusively or upon witnesses turning over during the course of trial cannot be viewed as an irrefutable or categorical certification of innocence.

21. There may also be situations where a failure of the prosecution stemming from either adequate evidence not being led or witnesses retracting from their original statements may be made good during the departmental enquiry. In such circumstances it would be wholly incorrect to hold the disciplinary authority denuded of the right to try the charge independently and be held obliged to accept the judgment of acquittal rendered on a technicality as a fait accompli.

22. The sheet anchor of the petitioner's case is the decision of the Supreme Court in **G.M. Tank**. The ratio of that decision was explained by the Supreme Court in **Karnataka Power Transmission Corporation Limited** as under:

" 9. Acquittal by a criminal court would not debar an employer from exercising the power to conduct departmental proceedings in accordance with the rules and regulations. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. In the disciplinary proceedings, the question is whether the Respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings, the question is whether the offences registered against him under the PC Act are established, and if established, what sentence should be imposed upon him. The standard of proof, the mode of inquiry and the rules governing inquiry and trial in both the cases are significantly distinct and different.

10. As the High Court set aside the order of dismissal on the basis of the judgments of this Court in M. Paul Anthony and G.M. Tank, it is necessary to examine whether the said judgments are applicable to the facts of this case. Simultaneous continuance of departmental proceedings and proceedings in a criminal case on the same set of facts was the point considered by this Court in M. Paul Anthony's case. This Court was of the opinion that departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar. However, it is desirable to stay departmental inquiry till conclusion of the

criminal case if the departmental proceedings and criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact. On the facts of the said case, it was found that the criminal case and the departmental proceedings were based on identical set of facts and the evidence before the criminal court and the departmental inquiry was the same. Further, in the said case the departmental inquiry was conducted ex parte. In such circumstances, this Court held that the ex parte departmental proceedings cannot be permitted to stand in view of the acquittal of the delinquent by the criminal court on the same set of facts and evidence. The said judgment is not applicable to the facts of this case. In the present case, the prosecution witnesses turned hostile in the criminal trial against Respondent 1. He was acquitted by the Criminal Court on the ground that the prosecution could not produce any credible evidence to prove the charge. On the other hand, the complainant and the other witnesses appeared before the Inquiry Officer and deposed against Respondent 1. The evidence available in the Departmental Inquiry is completely different from that led by the prosecution in criminal trial.

11. Reliance was placed by the High Court on a judgment of this Court in *G.M. Tank* whereby the writ petition filed by Respondent 1 was allowed. In the said case, the delinquent officer was charged for an offence punishable under Section 5(1)(e) read with Section 5(2) of the PC Act, 1988. He was honourably acquitted by the criminal court as the prosecution failed to prove the charge. Thereafter, a departmental inquiry was conducted and he was dismissed from service. The order of dismissal was upheld by the High Court. In the appeal filed by the delinquent officer, this Court was of the opinion that the departmental proceedings and criminal case were based on identical and similar set of facts. The evidence before the criminal court and the departmental proceedings being exactly the same, this Court held that the acquittal of the employee by a criminal court has to be given due weight by the disciplinary authority. On the basis that the evidence in both the criminal trial and departmental inquiry is the same, the order of dismissal of the appellant therein was set aside. As stated earlier, the facts of this case are entirely different. The acquittal of Respondent 1 was due to non-availability of any evidence before the criminal court. The order of dismissal was on the basis of a report of the inquiry officer before whom there was ample evidence against Respondent 1.

12. In Krishnakali Tea Estate v. Akhil Bhartiya Chah Mazdoor Sangh [(2004) 8 SCC 200] this Court was concerned with the validity of the termination of the services of workmen after acquittal by the criminal court. Dealing with a situation similar to the one in this case, where the acquittal was due to lack of evidence before the criminal court and sufficient evidence was available before the Labour Court, this Court was of the opinion that the judgment in M. Paul Anthony case cannot come to the rescue of the workmen.

13. Having considered the submissions made on behalf of the appellant and the Respondent 1, we are of the view that interference with the order of dismissal by the High Court was unwarranted. It is settled law that the acquittal by a criminal court does not preclude a departmental inquiry against

the delinquent officer. The disciplinary authority is not bound by the judgment of the criminal court if the evidence that is produced in the departmental inquiry is different from that produced during the criminal trial. The object of a departmental inquiry is to find out whether the delinquent is guilty of misconduct under the conduct rules for the purpose of determining whether he should be continued in service. The standard of proof in a departmental inquiry is not strictly based on the rules of evidence. The order of dismissal which is based on the evidence before the inquiry officer in the disciplinary proceedings, which is different from the evidence available to the criminal court, is justified and needed no interference by the High Court."

23. **G.M. Tank** was a decision which came to be rendered where on facts it was found that the evidence and material collected and utilized during the criminal trial and disciplinary proceedings was one and the same. The Supreme Court found on facts that charges, evidence, witnesses and circumstances were identical in both sets of proceedings. It was also noted that the witnesses in the criminal and disciplinary proceedings were identical. In the aforesaid background and upon the Supreme Court finding that there was no "iota of difference" between the criminal and disciplinary proceeding that it was held that the distinction which is accepted to exist between departmental and criminal proceedings would not be applicable in the facts of that case. It becomes significant, therefore, to note that **G.M. Tank** is neither an authority for the proposition nor can its ratio be recognised to be that a judgment of acquittal must necessarily lead to the employer being held to be divested of authority to try a similar charge in disciplinary proceedings. It also does not lay down an absolute proposition of a judgment of acquittal necessarily resulting in an employee being exempted or freed from the specter of facing departmental action. It would ultimately depend upon the nature of the decision rendered by the criminal court, whether the acquittal was honourable as also whether the evidence led in the two sets of proceedings was identical and indistinguishable.

24. As this Court reverts to the facts of the present case, it becomes apposite to recollect that in the criminal trial best evidence was never produced, documentary evidence available with the respondents in support of the charge was not introduced, material and crucial witnesses were never examined and most of the prosecution witnesses turned hostile. The judgment of acquittal in that sense cannot be viewed as being one exonerating the petitioner conclusively. It essentially came to be handed down on account of a failure on the part of the prosecution to prove the charges beyond reasonable doubt. This was not a decision honourably acquitting the petitioner. To the contrary, in the disciplinary proceedings which were undertaken the respondents produced voluminous material in support of the charge and also examined material witnesses on whose testimony the charges were held to be proved. The petitioner not only chose not to cross-examine those witnesses, he failed to lead any oral evidence in support of his innocence. The facts as obtaining clearly place the present case within the set of circumstances noted in **Karnataka Power Transmission Corporation**. The

petitioner consequently is held disentitled to relief. Bearing in mind the gravity of the charges which stood proved, the Court is unconvinced that the ultimate punishment inflicted warrants interference.

25. Petition is **dismissed.**

(2020)06ILR A926
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2020

BEFORE
THE HON'BLE YASHWANT VARMA, J.

WRIT A No. 23939 of 2013

Ram Niwas Sharma ...Petitioner
Versus
Union Of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arun Kumar Gupta, Sri A.G. Gupta, Sri Om Prakash Yadav, Sarita Singh, Ram Kumar Dubey

Counsel for the Respondents:
A.S.G.I., Sri A.Kumar, Sri H.N. Pandey, Rachna Dubey, S.C.,Sri Vivek Ratan

Practice & Procedure - Maintainability - "Public function", "Public duty" - Constitution of India: Article 226 - An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a *"public function"* or *"public duty"* be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognized as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions the matter would remain in the realm of an ordinary contract of service. (Para 16)

The court observed that the contracts of a purely private nature even though entered by bodies which may perform a purely private nature even tough entered by bodies which may perform a public function would be subject to judicial review. The only exception would be where such contracts are governed or regulated by statute. In present case it is the undisputed position that the byelaws and the service conditions which apply are non statutory. They are deprived of any statutory ordainment. Such a contract would remain a pure private contract of service. Therefore, the instant writ challenging the termination of such a contract would not be maintainable. (Para 18)

Writ Petition Rejected. (E-10)

List of cases cited:-

1. M.K. Gandhi and ors Vs. Director of Education (Secondary), U.P., Lucknow and ors (2005) 3 UPLBEC 187

2. Royachan Abraham Vs. State of U.P. and ors. (2009) 2 UPLBEC 1148

3. Ramesh Ahluwalia Vs. State of Punjab and ors (2012) 12 SCC 331

4. Committee of Management, Delhi Public School and anr Vs. M.K. Gandhi and ors. (2015) 17 SCC 353

5. Ramkrishna Mission and anr Vs. Kago Kunya and ors 2019 SCC OnLine SC 501 *(followed)*

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the petitioner, Sri Abhishek Kumar for the respondent No. 4, Sri H.N. Pandey for the Board and Sri Vivek Ratan Agrawal, learned counsel appearing for NTPC.

2. The respondents have raised a preliminary objection to the maintainability of the writ petition by contending that the same would not be maintainable since the petitioner assails an order of termination made by the D.A.V. Public School. It is submitted that notwithstanding the fact that the school may be said to be performing a public function or discharging a public duty since the terms and conditions of service of the petitioner are not governed by any statutory rule or regulation, a writ petition consequently would not lie. Reliance is placed principally on the Full Bench decision of the Court in **M.K. Gandhi and Others Vs. Director of Education (Secondary), U.P., Lucknow and Others1.** The attention of the Court is then drawn to a recent decision rendered by another Full Bench in **Roychan Abraham Vs. State of U.P. and Others2** in support of the objection that is raised. Counsel for the C.B.S.E. submits that the terms and conditions of service of the petitioner are governed by the byelaws framed by the Board which are not statutory and in light of the decision in **M.K. Gandhi,** the writ petition would not lie.

3. Learned counsel for the petitioner however submits that the D.A.V. Public School is funded and aided by N.T.P.C. which is a Government Corporation and State within the meaning of Article 12 of the Constitution. He submits that N.T.P.C. has set up and established schools in order to provide educational avenues to the wards of its employees and those of the C.I.S.F. personnel employed in its establishment. He submits that in light of the financial and administrative aid which is provided, it must be held to be performing a public function and consequently a writ petition would be maintainable. Apart from relying upon the ultimate conclusions recorded by the Full Bench in **Roychan Abraham,** learned counsel also places reliance upon the decision rendered by the Supreme Court in **Ramesh Ahluwalia Vs. State of Punjab And Others3** to submit that the aforesaid decision would clearly merit the objection as raised being negatived.

4. In order to evaluate the rival submissions, it would be apposite to firstly consider the judgment in **M.K. Gandhi.** The Full Bench framed 8 points for determination. Insofar as the controversy that falls for our consideration is concerned, it would be pertinent to note the following issues alone which were framed:-

"...

(i) Whether the DPS School is a State within the meaning of Article 12 of the Constitution;

(ii) Whether the Board is a State within the meaning of Article 12 of the Constitution of India;

(iii) Whether the 'Affiliation bye-laws' have statutory force;

.....

(vi) Whether a writ petition is maintainable against a privately managed school for violation of the Service Rules.

(vii) Whether a writ petition is maintainable against the Board for non-observance of its bye-laws;

....."

5. The Full Bench firstly held that C.B.S.E. is State within the meaning of Article 12 of the Constitution. It further proceeded to hold that the affiliation byelaws, of which service conditions form a part, do not have statutory force. This conclusion was recorded by the Full Bench in the following terms:

"31. There is nothing in the constitution of the Board to suggest that the affiliation bye-laws have statutory force. The service conditions are in the bye-laws. They are adopted between the parties through the agreement and are binding as a contract. Neither the bye-laws nor the agreement are statutory. If there is any breach of the service conditions then it is the breach of the contract and the parties may file suit or the Board may impose penalty prescribed under the bye-laws but this does not mean that the bye-laws or the agreement have statutory force."

6. Proceeding further the Full Bench held that the private school is not State within the meaning of Article 12 and that the affiliation byelaws being non-statutory only represent a contract between parties. In paragraph 37 of the report it observed:

"37. The Committee of Management of the DPS School is recognised by the Board but it is neither a statutory body nor a State with the meaning of Article 12. The legal obligation or duty on the DPS. School is neither imposed by any statute nor by any statutory provision; it has been imposed by the affiliation bye-laws and agreement which is a contract between the parties and non-statutory. In view of this the writ petition is not maintainable against the DPS School for violation of the affiliation bye-laws."

7. The Full Bench then proceeded to record its conclusions in paragraph 76, which read thus:

"76. Our conclusions are as follows :

(a) The DPS School is not the State within the meaning of Article 12 of the Constitution;

(b) The Central Board of Secondary Education, (the Board) is the State within the meaning of Article 12 of the Constitution;

(c) In case service conditions have not been framed, then

- Chapter VII of the affiliation bye-law relating to service condition shall be deemed to have been adopted by the school; and

- The agreement between the parties-unless any other format is prescribed by the State/UT Act-shall be deemed to be in the same format as Appendix-III to the affiliation bye-laws.

(d) The Service Rules and the agreement-whether framed by a school and agreed between the parties by an agreement or deemed to be adopted by them and agreement to be in the same format as Appendix-Ill of the affiliation bye-laws as held in this case-are merely private contract between the schools and the teachers. They do not have statutory force. The writ petition is not maintainable against the school to enforce them;

(e) In case any school does not follow the Service Rules framed by it or the bye-laws deemed to be adopted as held in this case then the school has to pay penalty for violating the same namely withdrawal of its affiliation;

(f) The Board is bound to follow its bye-laws and in case of any violation it has to take action under its bye-laws to disaffiliate the school. A writ petition is maintainable against the Board in case it fails to perform its duty; and

(g) In the present case, there has been violation of the bye-laws-deemed to be adopted as service conditions-by the DPS School. The Board has failed to perform its duty by not taking any action on the complaint filed by the petitioners. The Board should take action under the affiliation bye-laws against the DPS School."

8. It then framed directions commanding the Board to call upon the school to show cause why it not be disaffiliated for terminating the services of the petitioners contrary to the byelaws. The decision in **M.K. Gandhi** was assailed by the Committee of Management of the school before the Supreme Court. While dealing with that appeal, the Supreme Court in **Committee of Management, Delhi Public School And Another Vs. M.K. Gandhi And Others4** held thus:

"4. With great respect to the Full Bench of the High Court, we fail to understand the direction given by the Allahabad High Court. In our opinion, the direction given by the Allahabad High Court to the CBSE is totally misconceived and uncalled for. When the Allahabad High Court has already held that the DPS School is not a "State" within the meaning of Article 12 of the Constitution of India and the writ petition is not maintainable, there was no necessity for giving a direction to the CBSE which virtually amounts to granting a declaration in favour of those teachers whose services have been terminated. We fail to appreciate the view taken by the Allahabad High Court by unnecessarily complicating the issue by involving the CBSE in a private dispute between the teachers and DPS. The Allahabad High Court should have stopped short of holding that the said DPS is a private body and the writ is not maintainable.

5. Hence, we are of the view that no writ is maintainable against a private school as it is not a "State" within the meaning of Article 12 of the Constitution of India and no direction could have been given by the High Court to CBSE for interfering with the termination of the teachers. The proper remedy for the teachers was to file a civil suit for damages, if there was any.

6. Subsequently, we allow this appeal and set aside the order passed by the Allahabad High Court to the extent of giving a direction to the Board. There will be no order as to costs."

9. As is manifest from a reading of that decision, the Supreme Court allowed the appeal and set aside the judgment of the Full Bench only to the extent that it had proceeded to frame directions commanding the Board to take further action of disaffiliation. It also observed that once the High Court had come to conclude that the writ petition against the

school itself was not maintainable, it should have stopped there and left it open to the aggrieved teachers to institute a suit for damages.

10. Learned counsel for the petitioner has however sought to draw sustenance from the decision rendered in **Ramesh Ahluwalia**. In **Ramesh Ahluwalia,** the Supreme Court in paragraph 12 observed thus:

"12.We have considered the submissions made by the learned counsel for the parties. In our opinion, in view of the judgment rendered by this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani [(1989) 2 SCC 691], there can be no doubt that even a purely private body, where the State has no control over its internal affairs, would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution, for issuance of a writ of mandamus. Provided, of course, the private body is performing public functions which are normally expected to be performed by the State authorities."

11. It went on further to observe as under:

"14.In view of the law laid down in the aforementioned judgments of this Court, the judgment of the learned Single Judge Ramesh Ahluwalia v State of Punjab as also the Division Bench Ramesh Ahluwalia v State of Punjab [LPA No. 368 of 2010] of the High Court cannot be sustained on the proposition that the writ petition would not be maintainable merely because the respondent - institution is a purely unaided private educational institution. The appellant had specifically taken the plea that the respondents perform public functions, i.e. providing education to children in their institutions throughout India."

12. It becomes pertinent to notice that the Supreme Court principally held that even a purely private body over whose internal affairs the State may wield no control would still be amenable to the jurisdiction of the High Court under Article 226 of the Constitution provided it is established that it performs a public function. The conclusions as recorded in paragraph of the report also must necessarily be read bearing in mind that the same came to be entered in the context of "*...issuance of a writ of mandamus"*.

13. It was the decision rendered in **Ramesh Ahluwalia**, which led to a learned Judge doubting the correctness of the decision rendered in **M.K. Gandhi** and the subsequent reference. That reference ultimately came to be placed before another Full Bench which rendered decision in **Roychan Abraham**. In **Roychan Abraham** the Full Bench after exhaustively noticing the body of precedent that has come to exist on the question of public function and public duty as well as the scope of Article 226 of the Constitution framed its conclusions as follows:

"Conclusion:

63. We accordingly proceed to answer the reference in the following terms:

64. Question (i): Private Institutions imparting education to

students from the age of six years onwards, including higher education, perform public duty primarily a State function, therefore are amenable to judicial review of the High Court under Article 226 of the Constitution of India.

65. Question (ii): The broad principle of law which has been formulated in the judgement of the Full Bench in M.K. Gandhi and Division Bench in Anjani Kr. Srivastava is confined to the facts obtaining therein and is not an authority on the proposition of law that private educational institutions do not render public function and, therefore, are not amenable to judicial review of the High Court. The judgements do not require to be revisited.

66. The reference to the Full Bench, shall accordingly stand answered. The writ petition shall now be placed before the regular Bench according to roster for disposal in light of the questions so answered."

14. Significantly, however, the decision in **M.K. Gandhi** was not overturned and the Full Bench only observed that it was not liable to be read as an authority for the proposition that private educational institutions do not render public functions or are otherwise not amenable to judicial review. This Court bound by the principles so enunciated by the Full Bench deems it appropriate to only state that it would be wholly incorrect to assume that educational institutions do not render public functions or perform public duties. Those institutions as observed in **Roychan Abraham** act as adjuncts of the State in the context of the constitutional obligation of providing avenues of education. The question, which however merits consideration, would be whether employees of such educational institutions can assail disciplinary actions taken or petition the High Court under Article 226 of the Constitution in respect of matters relating to their service conditions where the terms and conditions of service are not governed or controlled by statutory provisions. This aspect was considered in **Roychan Abraham** where the Full Bench observed thus:

"38. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have direct nexus with the discharge of public duly. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226, either the service conditions were regulated by statutory provisions or the employer had the status of 'State' within the expansive definition under Article 12 or it was found that the action complained of has public law element.

39. We accordingly hold that a private body though not 'State', but performing public duty is amenable to the writ jurisdiction under Article 226 of the Constitution. Whether a writ would lie at the behest of an aggrieved party against the offending act of the private body performing public duty would depend upon the facts and the nature of the offending act complained against."

15. **Roychan Abraham** clearly holds that it is only a "*public law action"* which confers a right upon an aggrieved person to invoke the jurisdiction under Article 226 of the Constitution. It also notes that wherever the Courts have in fact intervened and invoked their powers conferred by Article 226, it was only in situations where service conditions were regulated either by statutory provisions or where the employer had the status of State.

16. It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke this Courts powers conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a *"public function*" or *"public duty*" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions the matter would remain in the realm of an ordinary contract of service.

17. This distinction which must necessarily be borne in mind has been eloquently explained by the Supreme Court in a decision rendered just a few days after **Roychan Abraham** in **Ramkrishna Mission and Another Vs. Kago Kunya and Others5.** After noticing the earlier decisions rendered on the subject, the Supreme Court held thus:

"35. Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.

36. Having analysed the circumstances which were relied upon by the State of Arunachal Pradesh, we are of the view that in running the hospital, Ramakrishna Mission does not discharge a public function. Undoubtedly, the hospital is in receipt of some element of grant. The grants which are received by the hospital cover only a part of the expenditure. The terms of the grant do not indicate any form of governmental control in the management or day to day functioning of the hospital. The nature of the work which is rendered by Ramakrishna Mission, in general, including in relation to its activities concerning the hospital in question is purely voluntary.

38. It has been submitted before us that the hospital is subject to regulation by the Clinical Establishments (Registration and Regulation) Act 2010. Does the regulation of hospitals and nursing homes by law render the hospital a statutory body? Private individuals and organizations are subject to diverse obligations under the law. The law is a ubiquitous phenomenon. From the registration of birth to the reporting of death, law imposes obligations on diverse aspects of individual lives. From

incorporation to dissolution, business has to act in compliance with law. But that does not make every entity or activity an authority under Article 226 Regulation by a statute does not constitute the hospital as a body which is constituted under the statute. Individuals and organisations are subject to statutory requirements in a whole host of activities today. That by itself cannot be conclusive of whether such an individual or organisation discharges a public function. In Federal Bank (supra), while deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, the court held thus:

"33. ...in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. **Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India.** The respondent is not trying to enforce any statutory duty on the part of the Bank..." (emphasis supplied)

39. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K K Saksena (supra) this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed.

...

41. For the above reasons, we are of the view that the Division Bench of the High Court was not justified in coming to the conclusion that the appellants are amenable to the writ jurisdiction under Article 226 of the Constitution as an authority within the meaning of the Article."

18. As has been lucidly explained, contracts of a purely private nature even though entered by bodies which may perform a public function would not be subject to judicial review. The only exception would be where such contracts are governed or regulated by statute. In the present case it is the undisputed position that the byelaws and the service conditions which apply are non statutory. They are deprived of any statutory ordainment. Such a contract, as noted

above, would remain a pure private contract of service. In that view of the matter the writ petition challenging the termination of such a contract would not be maintainable.

19. The preliminary objection is thus upheld and the petition is consequently **dismissed**.

(2020)06ILR A934
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE
THE HON'BLE ASHOK KUMAR, J.

WRIT A No. 35625 of 2017

Jitendra Kumar & Ors. ...Petitioners
Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Tejasvi Misra

Counsel for the Respondents:
A.S.G.I., Sri Rajnish Kumar Rai, Sri S.K Rai, Sri Vijay Kuar Rai

Civil Law - Declaration/ attestation form - disclosure of any pending case is required at two relevant periods that is, time of filling of the form and second, stage of filling up of the form of attestation.
(Para 37)

Petitioners had applied for the post of constable (GD) in Railway Protection Force in March 2011 and at that relevant point of time no case were pending against the petitioner and subsequently in year 2011 that the case against the petitioner was registered which ultimately resulted in their acquittal in 2014 which is after the submission of attestation form. Thus, both at the time of applying for the post of constable as well as at the time of filling up of the attestation form, no criminal case was pending against any of the petitioners. (Para 33, 34)

Writ Petition Partly Allowed. (E-10)

List of cases cited:-

1. Avtar Singh Vs. Union of India and others (2016) 8 SCC 471 *(followed)*

2. Kalamuddin Ansari and another Vs. Union of India and 4 others Writ A No. 33265 of 2017

3. Mohd. Imran Vs. State of Maharashtra and others Civil Appeal No. 10571 of 2018

4. Raj Bahadur Vs. Union of India and others Writ A No. 39219 of 2017

(Delivered by Hon'ble Ashok Kumar, J.)

1. Heard Sri Tejasvi Misra, learned counsel for the petitioners and Sri Vijay Kumar Rai, Advocate holding the brief of Sri Rajnish Kumar Rai, learned counsel representing all the respondents.

2. The instant writ petition has been filed by the petitioners assailing the orders dated 1.3.2017, 20.3.2017 and 27.3.2017 (Annexures 2-B, 3-B, 4-B and 5-B of the writ petition). The petitioners have prayed for issuance of a mandamus commanding the respondents to reinstate the petitioners into service with all consequential benefits.

3. Briefly the facts of the case are that the petitioners responded in pursuance of an advertisement (Advertisement No.1/11) which has been issued by the Chief Security Commissioner, Railway Protection Force (R.P.F.) Gorakhpur, U.P. (respondent no.3) for recruitment on the post of Constables (G.D.) in Railway Protection Special Force. In pursuance of the

aforesaid advertisement the petitioners applied and they have received admit cards to appear in various stages of examination and thereafter they stood qualified for the aforesaid post of Constable (G.D.)

4. An attestation form was required to be submitted by the petitioners in which there was column 12 which requires the disclosure of the character of the petitioners/ candidates and their antecedents as to whether any criminal case is pending against the candidates or had they ever been tried.

5. All the petitioners filled up the attestation form and they denied as at that point of time no criminal case was pending against them. After submission of the attestation form the petitioners were sent to their respective training centres for training. During the course of training the police verification reports of the petitioners were sought from the concerned District Magistrates. In the police verification report, which has been obtained by the District Magistrates, it was disclosed that a criminal case was lodged against the petitioners and are concluded, wherein the petitioners were acquitted. On account of said police reports, the petitioners were discharged from the services.

6. The attestation form of the petitioner no.1 was submitted on 18.6.2014 wherein, it is alleged that the petitioner no.1 did not disclose his character and antecedents in column 12 of the attestation form. Viz. a viz. Case Crime No. 283 of 2011 under Sections 279, 338 and 304-A I.P.C. (trivial in nature). After submission of the attestation form the petitioner no.1 has received an allotment letter wherein he was directed to join his training at ZTC Chink-Hill on 1.11.2014. Based on the police verification report disclosing the prosecution and acquaintance from the Court of law the petitioner no.1 was discharged amidst of training on 26.3.2015.

7. Against the order dated 26.3.2015 the petitioner no.1 filed a Writ Petition No. 35948 of 2015 and this Court vide order dated 21.11.2016 had quashed the order of discharge dated 26.3.2015 while remanding the matter back to the respondents for fresh consideration of the candidature of the petitioner in the light of law laid down by the Apex Court in the case of Avtar Singh vs. Union of India and others (2016) 8 SCC 471.

8. In pursuance of the order dated 21.11.2016 the petitioner no.1 (Jitendra Kumar) was called for personal hearing by the respondent on 12.1.2017 and after hearing the petitioner, the respondent no.4 has proceeded to cancel the candidature of the petitioner on the ground of intentional suppression of material fact at the time of filing up of attestation form, vide order dated 20.1.2017.

9. In the case of petitioner no.2 (Rishi Pal Singh) learned counsel for the petitioner submitted that the attestation form has been submitted by the petitioner no.2 on 23.5.2014 wherein, it is alleged that the petitioner no.2 did not disclose his character and antecedents in column 12 of the attestation form. Viz. a viz. a Case Crime No. 388 dated 17.10.2011 under Section 160 of I.P.C. was lodged. It is contended by the learned counsel for the petitioners that the petitioner no.2 Rishi Pal has received an allotment letter

whereby he was directed to join the training at R.P.F. T.C./ Mukamghat Patna (Bihar) on 1.11.2014.

10. In the police verification report pertaining to the character of the petitioner no.2 the District Magistrate, Jhajjhar, Haryana has sent his report that the petitioner no.2 was tried and acquitted from the Court of law under Section 160 I.P.C. Based on the said report the petitioner no.2 was discharged amidst of training on 19.6.2015.

11. Learned counsel for the petitioners submitted that the application form has been submitted by the petitioner no.2 in March 2011 while case/FIR has been lodged on 17.10.2011 that is after filling up of the application form, and the case of the petitioner no.2 was concluded/ acquitted on 29.11.2013 that is much prior to filling up of attestation form, which was admittedly filled by petitioner no.2 on 23.5.2014. Therefore, the contention of learned counsel for the petitioners is that neither any case was pending at the time of filling up of the application form nor at the time of filling up of the attestation form, as such the petitioner no.2 was under the impression that no case, on the date of filling up of the form is pending hence, has denied regarding pendency of criminal cases against him.

12. As proceeded by petitioner no.1 by approaching this Court the petitioner no.2 has also approached this Court and has challenged the discharge order dated 19.6.2015. The writ petition filed by the petitioner no.2 was allowed vide order dated 22.12.2016 and the order of discharge dated 19.6.2015 was quashed and the matter was remitted back to the respondents for fresh consideration of the candidature of the petitioner no.2 in the light of the judgment of Apex Court in the case of ***Avtar Singh (Supra)***.

13. In pursuance of the order passed by this Court dated 29.11.2016 the petitioner no.2 was called for personal hearing on 15.3.2017 and after hearing the petitioner the respondent no.5 vide order dated 27.3.2017 had proceeded to cancel the candidature of the petitioner no.2 on the ground of intentional suppression of material fact at the time of filling up of attestation form.

14. Learned counsel for the petitioners submits that the nature of the criminal case lodged under Section 160 IPC is very trivial (having only one month maximum punishment) even then the respondents not only failed to appreciate triviality of the offence but also the relevant factor pertaining to the case/ registration of the FIR which was neither lodged at the time of application form nor at the time of filling up of the attestation form.

15. Learned counsel for the petitioners further submitted that in fact the out come of the acquittal order was not benefit of doubt rather it was a clean acquittal therefore, the counsel for the petitioners submits that the order impugned passed by the respondent is wholly illegal, arbitrary and perverse as the respondent no.5 was supposed to adjudge the suitability of candidature with reference to the nature of suppression and the nature of criminal case.

16. Learned counsel for the petitioners submits that almost identical facts are involved with regard to

petitioner no.3 Manoj Kumar and petitioner no.4 Bhanu Pratap Attri, who were discharged by the respondent no.3 vide discharge orders dated 20.3.2017 and 1.3.2017 respectively.

17. Learned counsel for the petitioners therefore submitted that the respondents not only failed to appreciate the acquittal of the petitioners but also the nature of the case registered against them. Learned counsel for the petitioners submits that in fact the respondents instead of consideration as to whether the petitioners were suitable for appointment to the post of constable, they had acted mechanically by holding that the petitioners unfit for the post of constable on the basis of alleged incorrect facts furnished by the petitioners. The respondents authorities on the basis of information so furnished by the petitioners found the candidates unfit for employment in the Railway Protection Force.

18. Learned counsel for the petitioners further submits that after the remand order passed by this Court the respondents granted personal hearing to the petitioners, wherein the petitioners placed certain documents however, after hearing the petitioners the respondents found that in column 12, the petitioners in response to the question that whether they were ever arrested, or not, they had ticked 'No' and secondly, whether the petitioners were ever prosecuted, they had ticked 'No'. The authority/ respondent further found that while signing the attestation form and on oath on non-judicial stamp paper of Rs.20/- that if the fact that false information has been furnished or that there has been suppression of any factual information in the attestation form comes to the notice at any time during service, he will be ready for termination from service and he will have no right to claim against the Railway. The respondents have held that the petitioners have violated the terms and conditions so are stipulated in the attestation form.

19. The respondent authority on the basis of information so furnished by petitioners found their candidature unfit for employment in the Government. However, a brief reference was made to the Apex Court judgment in case of Avtar Singh (supra) but no reason was assigned why the said judgment was not applicable in the cases of the petitioners.

20. Learned counsel for petitioners submitted that respondent authority in a cursory manner rejected the claim of petitioners solely on the ground that they had ticked 'No' in Column 12 to two questions regarding arrest of petitioners and their prosecution, and the authorities failed to take note of guidelines as laid down by Apex Court in case of ***Avtar Singh (supra)*** in para 38.

21. He further submitted that at the time of filling up of the attestation form there was no case pending against the petitioners and further, at the time of submission of attestation form petitioners had already been acquitted of criminal cases, and looking to the trivial nature of the cases which were tried against petitioners, non-disclosure would not amount to terminating the services of petitioners, which was against the spirit of judgment in **Avtar Singh's** case.

22. Sri Misra, also contended that once this Court had remanded the matter back to decide the issue in light of Avtar Singh (supra), the authority was duty

bound to consider the case of petitioners within the parameters laid down in said case in Para 38 but respondents rejected the claim on vague ground and failed to consider the case within the parameters of aforesaid judgment, thus the orders dated 1.3.2017, 20.3.2017 and 27.3.2017 passed by respondents are against the mandate of this Courts orders dated 22.11.2016, 18.10.2016 and 22.12.2016.

23. Learned counsel for the petitioner has placed reliance of Para 31 of the judgment of the Apex Court in Avtar Singh (Supra), which reads as follows :

31. Coming to the question whether an employee on probation can be discharged/ refused appointment though he has been acquitted of the charge(s), if his case was not pending when form was filled, in such matters, employer is bound to consider grounds of acquittal and various other aspects, overall conduct of employee including the accusations which have been levelled. If on verification, the antecedents are otherwise also not good, and in number of cases incumbent is involved then notwithstanding acquittals in a case/cases, it would be open to the employer to form opinion as to fitness on the basis of material on record. In case offence is petty in nature and committed at young age, such as stealing a bread, shouting of slogans or is such which does not involve moral turpitude, cheating, misappropriation, etc. or otherwise not a serious or heinous offence and accused has been acquitted in such a case when verification form is filled, employer may ignore lapse of suppression or submitting false information in appropriate cases on due consideration of various aspects."

24. Reliance has also been placed on a judgment passed by this Court in **Writ-A No. 33265 of 2017 (Kalamuddin Ansari and another vs. Union of India and 4 others)** wherein disclosure were not made in Column 12 of the case registered against the candidate, and it was held that the case fell within the parameters of principles elucidated in Para 38 of Avtar Singh's case.

25. In support of his contention learned counsel for the petitioners has placed reliance of a recent judgment in Civil Appeal No. 10571 of 2018 (Mohd. Imran vs. State of Maharashtra and others) dated 12th October 2018. The reliance has been placed on para 8 and 9 of the judgment.

26. Learned counsel for the petitioners has also placed reliance of a recent of judgment of this Court in the case of *Raj Bahadur vs. Union of India* and others passed in Writ A No. 39219 of 2017 decided on 13.12.2019.

27. Learned counsel for the petitioners has drawn the attention of the Court by placing the orders passed by the respondents authorities in the cases of similarly situated persons.

28. In the case of one Surendra Pratap Yadav, S/o Ram Kuber Yadav, Village Poora Bahoriya Post Gaddopur, Post Maharajganj, District Jaunpur, who has also filed a writ petition against the order passed by the respondent authority discharging him from training, a speaking order dated 12.5.2017 has been passed by I.G.-cum-CSC/ RPSF, New Delhi, in

pursuance of the direction of this Court. Against Surendra Pratap Yadav a case was registered as Police Case No. 205-A/2008, under Section 147, 149, 323, 504, 506, 452 and 308 I.P.C. however, no details were given by Surendra Pratap Yadav while filling up attestation form which was signed on 16.5.2014. The I.G.-cum-Chief Security Officer/ Reserve Police Security Force, New Delhi has considered the claim of the applicant Surendra Pratap Yadav and has passed the following order :

"Keeping in view the PVR and facts represented in the statement of the candidate have come to the conclusion at the time of filling up of attestation form the character of the candidate was unblemished. Since the candidate was acquitted in the year 2012 itself hence he did not record so in the attestation form. However it is a fact that he made an incorrect statement of having been never involved in any criminal case in his life but I have a reason to believe that it must have been done in good faith since he got acquitted in the criminal case long before filling up of attestation form. Hence, his action appears to be in good faith.

Hence I have applied my mind and on evaluation of the facts on record, extant rules, and having accorded the opportunity of personal hearing and representation to the petitioner keeping with the principles of natural justice, and in light of directions of the Hon'ble Supreme Court judgment in Avtar Singh Vs. Union of India and others, I hereby come to the considered conclusion as Appointing Authority that Shri Surendra Pratap Yadav is fit for Government Service as a Constable in RPF/RPSF. The petitioner may be informed accordingly.

(Jaiaya Varmah)

IG-cum-CSC/RPSF

New Delhi."

29. Similarly, in the case of one Avneesh Kumar, S/o Rajendra Singh a speaking order has been passed by the same respondent authority following the principles laid down by the Hon'ble Apex Court in *Avtar Singh vs. Union of India* and others by declaring him to be fit for Government service as a Constable in R.P.F./ R.P.S.F.

30. Per contra learned counsel for the respondent authorities submitted that the act of the petitioners amounted to suppression of facts as neither in attestation form nor in the affidavit, which was filed subsequently, they disclosed the fact that earlier a criminal case was filed against them and that in the said criminal case they were acquitted before filling up the form, filing the application in response to the advertisement.

31. However, as far as orders passed by respondents not considering the cases of petitioners in light of **Avtar Singh (supra)** as directed by this Court, he submitted that petitioners were guilty of suppression of material fact, which is evident from their affidavits, therefore, no benefit can be accorded to them.

32. I have heard learned counsel for the parties and perused the material on record.

33. As it is evident from pleading of the parties that petitioners had applied for the post of Constable (GD) in Railway

Protection Force in March, 2011 and at that relevant point of time no case were pending against the petitioners, and it was subsequently in year 2011 that the cases under Sections 279, 338 and 304-A against petitioner no.1, under Section 160 of I.P.C. against petitioner no.2, under Sections 379, 356 IPC against petitioner no.3 and under Sections 354, 504, 506 IPC against petitioner no.4 were lodged, which ultimately resulted in their acquittal on 5.5.2014, 21.1.2014, 3.5.2014 and 16.4.2014 respectively. It is also not in dispute that petitioners had submitted their attestation form in the year 2014 that is after their acquittal.

34. Thus, both at the time of applying for the post of constable as well as at the time of filling up of the attestation form, no criminal case was pending against any of the petitioners. However, it was the duty of the petitioners to disclose about the sole criminal case lodged against them in which they were ultimately acquitted before being sent for training. However, in this regard the Apex Court in case of Avtar Singh (supra) had exhaustively laid down guidelines for consideration regarding the issue of suppression of material facts while seeking appointment. The same are extracted hereasunder:

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious

nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service,holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

35. In Para 38.4.1 the Apex Court had taken note of the fact that in a case trivial in nature in which conviction had been recorded, such as shouting slogangs at young age or for petty offences which if undisclosed would not have rendered incumbent unfit for post in question, the employer may in its discretion ignore such suppression of fact or false information by condoning the lapse. While in the case in hand, petitioners had already been acquitted of an offence under Sections 279, 338 and 304-A (petitioner no.1), under Section 160 of I.P.C. (petitioner no.2), under Sections 379, 356 IPC (petitioner no.3) and under Sections 354, 504, 506 IPC (petitioner no.4).

36. Further, in Para 38.4.3 the Apex Court while considering in matters in

which acquittal had already been recorded in a case involving moral turpitude or offence of heinous/ serious nature, on technical ground and it is not a case of clean acquittal or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee. Thus, the Apex Court in matters of heinous/ serious crime where acquittal has been granted on technical ground has also tried to give benefit to the employee as to continuance of their service and the relevant authority may consider the same taking into the fact the earlier antecedents of the concerned employee.

37. As from perusal of the case in hand, it can safely be said that two relevant periods that is, time of filling of the form and secondly, stage of filling up of the form of attestation, there was no case pending against petitioners, and an omission on their part to make disclosure as mandated would not make them unfit for consideration for the job in question.

38. The respondents while deciding claim of petitioners pursuant to remand order only took note of the form so submitted by petitioners which were also before the said authorities earlier in time but failed to advert to the fact that this Court had required the authorities concerned to look at the case of petitioners from the angle of principles laid down in case of *Avtar Singh (supra)*, which respondents failed to consider and decide in the light of the same.

39. I find that orders passed by respondent no.7 dated 1.3.2017, respondent no.4 dated 20.3.2017 and respondent no.5 dated 27.3.2017 are not in the light of directions of this Court dated 18.10.2016, 22.11.2016 and 22.12.2016 as such the same cannot be sustained and are, hereby, quashed.

40. The respondents are expected to decide the claim of petitioners in the light of directions given by this Court earlier on 18.10.2016, 22.11.2016 and 22.12.2016 as well as in light of principle laid down in case of ***Avtar Singh (supra)***. It is also expected that the entire exercise shall be completed by the respondents authorities expeditiously, preferably, within a period of one month from the date of production of certified copy of this order, in accordance with law, by reasoned and speaking order.

41. With the above direction, the writ petition stands **partly allowed.**

(2020)06ILR A942
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE VIVEK CHAUDHARY, J.

WRIT A No. 59005 of 2012
connectedwith
WRIT A No. 47512 of 2015

Lokendra Kumar & Anr. ...Petitioners
Versus

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

Counsel for the Petitioners:
Sri Siddharth Khare, Sri Ashok Khare

Counsel for the Respondents:
C.S.C., Sri Anant Vijay

Service Law - Appointment/Transfer - U.P. Intermediate Education Act, 1921:

Section 9(4) - U.P. Secondary Education Service Selection Board Act, 1982 - U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 - University Grants Commission Act, 1956: Section 2(f), 3, 22

A perusal of the U.G.C. Act shows that the same is for the purposes of creating a Commission for regulating higher education in the entire country. The same has no concern at all with the secondary education. The Universities including a Deemed University can only confer degree for higher education. The secondary education, i.e., intermediate and high school education in the State of U.P. is covered by the Act of 1921 (or Central Board of Secondary Education, Indian Certificate of Secondary Education or Indian School Certificate, with which we are not concerned here). Therefore, there is clear-cut distinction in the entire State of U.P. with regard to higher education being under exclusive domain of the Universities or Deemed Universities and secondary education being with the Intermediate Education Board of the State of U.P. Admittedly, the institution concerned was recognized under the Act of 1921 and Section 9 of the same gives ample power to the State Government to pass orders with regard to matters covered under the said Act. Appointm

ent and removal of teachers of an inter college can be made only as per the Act of 1982 and the provisions of the Act of 1921 stands superseded to the said extent. Further, neither the Act of 1982 nor the Act of 1921 confer any power upon the State Government to transfer teachers of an inter college to a University. Appointment of teachers in a University can only be as per the qualifications prescribed by the U.G.C. Act or other law applicable. The Intermediate Education Act cannot by any stretch of imagination cover appointment of teachers in a University. The transfer of petitioners, who were teachers with an inter college, to a Deemed University is in violation of the provisions of Act of 1982 as the same does not provide transfer of any teacher from an inter college to a University. (Para 6)

The petitioner has assailed the order dated 11.10.2012 by which the inter college has been disaffiliated and has been merged with a deemed university. The petitioners who are teachers of inter college also have been sent the Deemed University as teachers. They are not qualified as degree college teachers. All the Universities including the Deemed University can only dispense education and grant degree with regard to graduation and above and cannot impart education upto intermediate level. Therefore, transfer of petitioners from a recognized inter college to the Deemed University is under challenge. (Para 4)

Writ Petition disposed of. (E-10)

List of cases cited:-

1. U.P. Secondary Education Service Selection Board Vs. State of U.P. and others (2018) 13 SCC 720

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare, learned counsel for petitioner, learned Standing Counsel for the State and learned counsel for respondent Deemed University.

2. Petitioners are lecturers of R.E.I. Inter College, Dayalbagh, Agra. The said inter college was duly recognized and aided educational institution and provisions of U.P. Intermediate Education Act, 1921 (the 'Act of 1921'), U.P. Secondary Education Service Selection Board Act, 1982 (the 'Act of 1982') and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (the 'Act of 1971') were applicable on the same. Petitioners were selected by the U.P.

Secondary Education Service Selection Board and in pursuance of the recommendations made by the Selection Board, the District Inspector of Schools, Agra forwarded their names for appointment to the Management of R.E.I. Inter College. In furtherance of the said recommendations, the Management of R.E.I. Inter College issued appointment letters to the petitioners and, thus, petitioners joined the college. On 11.10.2012 the State Government issued an office order, in purported exercise of powers under Section 9(4) of the Intermediate Education Act, disaffiliating the R.E.I. Inter College, Agra from the Board of High School and Intermediate Education, U.P., Allahabad and further permitted its merger with Dayalbagh Education Institute Deemed University, Dayalbagh, Agra, subject to the conditions specified therein. The conditions imposed were:-

"(i) The High School and Intermediate Examination commencing from the year 2014 would be conducted by Dayalbagh Education Institute, Deemed University, Dayalbagh, Agra, itself which would have recognition as equivalent to High School and Intermediate Certificate Examination conducted by Board of High School & Intermediate Education.

(ii) The course curriculum and the books of study would continue to remain the same as stand prescribed by the Board of High School & Intermediate Education and in future the amendment/alteration would also be applicable with formal approval from Board of High School & Intermediate Education.

(iii) The said institution would not be affiliated to any other examining body and the examination would be conducted by the Deemed University itself.

(iv) The payment of salary to the members of the staff would be paid in accordance with the rules of the Deemed University.

(v) All liability for payment of salary, allowances, pension, G.P.F., Group Insurance, etc., would be the sole liability of the Deemed University and the State Government would have no concern with the same.

(vi) The members of the staff presently employed in the institute would be funded by the State Government and the financial liability with regard to any future increase in the staff would be borne by the Deemed University itself.

(vii) Orders would be separately issued by the Higher Education Department of the State with regard to the grant to be paid to be Deemed University.

3. Petitioners have challenged the aforesaid order dated 11.10.2012 to the extent they have been transferred under the said order to the Deemed University.

4. Sri Ashok Khare learned Senior Advocate for the petitioners submits that by the impugned order the inter college has been disaffiliated and has been merged with a Deemed University. Further, even the petitioners who are teachers of inter college also have been sent to the said Deemed University as teachers. The Deemed University has been asked to conduct examination parallel to the examination being conducted by the Education Board equivalent to high school and inter

college. The teachers would be paid salary by the Deemed University and other liabilities with regard to teachers and employees shall also shift to the Deemed University and the State Government shall have no concern with the same. Thus, conditions imposed under the impugned order are challenged and it is argued that services of the petitioners could not have been transferred from an inter college to any University including Deemed University. Counsel for the petitioners states that petitioners are qualified and selected as inter college teachers by U.P. Secondary Education Service Selection Board. They are not qualified as degree college teachers. All the Universities including the Deemed University can only dispense education and grant degree with regard to graduation and above and cannot impart education up to intermediate level. Therefore, the transfer of petitioners from a recognized inter college to a Deemed University is illegal.

5. Learned Standing Counsel and learned counsel for respondent University have strongly argued that State Government has sufficient power under Section 9(4) of the Intermediate Education Act to pass any order as it deem fit and the Education Board is bound to comply with the same. Counsel for the respondent University states that University has no objection in case the petitioners are transferred back to elsewhere. He submits that such a statement is also made in paragraph-52 of the counter affidavit filed by the University.

6. Section 2(f) of the University Grants Commission Act, 1956 (U.G.C. Act) defines University and Section 3 defines Deemed University. Admittedly, respondent no.8 is a Deemed University. Section 22 of the U.G.C. Act provides that University shall have right of conferring or granting degrees. A perusal of the U.G.C. Act shows that the same is for the purposes of creating a Commission for regulating higher education in the entire country. The same has no concern at all with the secondary education. The Universities including a Deemed University can only confer degree for higher education. The secondary education, i.e., intermediate and high school education in the State of U.P. is covered by the Act of 1921 (or Central Board of Secondary Education, Indian Certificate of Secondary Education or Indian School Certificate, with which we are not concerned here). Therefore, there is clear-cut distinction in the entire State of U.P. with regard to higher education being under exclusive domain of the Universities or Deemed Universities and secondary education being with the Intermediate Education Board of the State of U.P. Admittedly, the institution concerned was recognized under the Act of 1921 and Section 9 of the same gives ample power to the State Government to pass orders with regard to matters covered under the said Act. Appointment and removal of teachers of an inter college can be made only as per the Act of 1982 and the provisions of the Act of 1921 stands superseded to the said extent. Further, neither the Act of 1982 nor the Act of 1921 confer any power upon the State Government to transfer teachers of an inter college to a University. Appointment of teachers in a University can only be as per the qualifications prescribed by the U.G.C. Act or other law applicable. The Intermediate Education Act cannot by any

stretch of imagination cover appointment of teachers in a University. The transfer of petitioners, who were teachers with an inter college, to a Deemed University is in violation of the provisions of Act of 1982 as the same does not provide transfer of any teacher from an inter college to a University. Thus, the impugned order dated 11.10.2012 to the said extent is bad and is set aside.

7. The Supreme Court in case of ***U.P. Secondary Education Service Selection Board Vs. State of U.P. and Others reported in (2018) 13 SCC 720***, provided that the Board would have sufficient power to accommodate teachers from one inter college to another inter college in specific circumstances. In the present case, since the inter college has been de-recognized, the teachers of the inter college, who were duly selected by the U.P. Secondary Education Service Selection Board, have to be accommodated as lecturers in their respective subjects in other similar colleges. The Director of Education (Secondary), U.P., Lucknow is therefore directed to ensure that the petitioners are accommodated in other recognized inter college, on which provision of U.P. Intermediate Education Act, 1921, U.P. Secondary Education Service Selection Board Act, 1982 and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 are applicable, within the District Agra. Since, the petitioners have been continuously in service, therefore, it goes without saying that they shall be entitled to their earlier seniority also in such appropriate colleges. The Director shall ensure that such an exercise is completed within a period of four months from the date a certified copy of this order is placed before him and in case vacancies within the District Agra are not available in the aforesaid period of four months, they shall be accommodated immediately thereafter whenever such vacancies first accrue.

8. With the aforesaid, both the writ petitions stand ***disposed of.***

(2020)06ILR A946
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. - 730 of 2017

Hari Singh ...Appellant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Vikash Singh, Sri Bhagi Rathi Tiwari

Counsel for the Opposite Parties:
A.G.A., Sri Amit Mishra

Criminal Law-Indian Penal Code, 1860- Section 120B [read with section 420, 467, 468, 471 IPC and section 13(2) read with section 13(1)(d) Prohibition of Corruption Act, 1988] - Appeal against conviction.

Benefit of undergone-
Conviction upheld sentences reduced to the period of imprisonment has already undergone.

Criminal Appeal disposed of (E-2)

List of cases cited: -

1. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926.

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

3. St. of MP Vs Najab Khan, (2013) 9 SCC 509.

4. Deo Narain Mandal Vs St. of UP (2004) 7 SCC 257.

5. Shyam Narain Vs State (NCT of delhi), (2013) 7 SCC 77.

6. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323.

7. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441.

8. Raj Bala Vs St. of Har., (2016) 1 SCC 463.

9. Kokaiyabai Yadav Vs St. of Chhattisgarh(2017) 13 SCC 449.

10. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166.

11. Jameel Vs St. of UP (2010) 12 SC 532.

12. Guru Basavraj Vs St.of Karnatak, (2012) 8 SCC 734.

13. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323.

14. State of Punjab Vs Bawa Singh, (2015) 3 SCC 441.

15. Raj Bala Vs St. of Har., (2016) 1 SCC 463.

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

1. Learned counsel for the accused-appellant has submitted that the accused-appellant Hari Singh has been convicted in Special Case No. 20 of 2011, arising out of same Case Crime No. 23 of 2004 (CBI Vs. Badri Prasad and others), RC-0072004A0006, P.S. CBI Dehradun, District Dehradun and sentenced for the offence under section 120B I.P.C. [read with section 420, 467, 468, 471 IPC and section 13(2) read with section 13(1)(d) Prohibition of Corruption Act, 1988] for 05 years rigorous imprisonment and Rs. 5000/- fine each and in case of default in payment of fine 03 months additional rigorous imprisonment, for the offence under section 420 IPC for 04 year rigorous imprisonment and Rs. 2000/- fine each and in case of default in payment of fine 02 months additional rigorous imprisonment, for the offence under section 467 I.P.C. for 07 years rigorous imprisonment and Rs. 7000/- fine each and in case of default in payment of fine 06 months additional rigorous imprisonment, for the offence under section 468 I.P.C. for 04 years rigorous imprisonment and Rs. 2000/- fine each and in case of default in payment of fine 02 months additional rigorous imprisonment and for the offence under section 471 IPC for 01 year rigorous imprisonment and Rs. 1000/- fine each and in case of default in payment of fine 01 months additional rigorous imprisonment. The learned trial court has directed that the sentences in all the sections shall run concurrently.

2. The brief facts leading to this criminal appeal is that the accused persons had got employment in the Postal Department by submitting forged and fabricated educational documents of their High School, Intermediate and Graduation and those fabricated documents were prepared by the accused persons. It was also mentioned in the prosecution story that the present accused Hari Singh had submitted the marks sheet of intermediate examination, 1987 issued by Madhyamik Shiksha Parishad, Uttar Pradesh in the name of MGHM, Inter Colege, Merehra, Etah. In the forged marksheet, the marks were shown by the accused 254 out of 500 and on the basis

of fake, forged and fabricated educational documents the present accused has secured job in the postal department, Moradabad. The Central Bureau of Investigation has investigated the matter and submitted chargesheet against the present accused and the other co-accused.

3. The present accused was tried for the offence under Sections 120B, 420B read with section 120B, 467 read with section 120B, 468 read with section 120B, 471 read with section 171 and Section 3(2) read with section 13(i)(d) Prevention of Corruption Act, 1988. The trial court convicted the accused by the impugned order.

4. Learned counsel for the appellant has submitted that two accused persons who were also convicted by the trial court along with present appellant and their criminal appeals have been disposed of by another Bench of this Court and their sentence has been modified. He further submitted that although the trial court has convicted the present accused on the basis of mere conjuncture while the appellant is absolutely innocent.

5. Learned counsel for the appellant has also submitted that offence was committed in the year 1992 and the accused had been removed from service and when he was removed from service he was a young man; that there is no bread earner in the family of the appellant. He next submitted that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He further submitted that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and his age related ailments.

6. It has been pointed out that the lower court record has not been received. In this situation, where the learned counsel for the appellant has opted to argue on quantum of sentence, I do not find any restriction or any need for original record.

7. List has been revised. None is present on behalf of C.B.I., though Sri Vikash Singh, learned for the appellant and Sri Ravi Prkash Pandey and Sri S.B. Maurya, learned A.G.A. for the State are present and perused the record.

8. At the very outset, Vikas Singh, 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.

9. Learned counsel for the accused-appellant has submitted that accused-appellant is in jail since 22.12.2016 from the date of judgement and prior to that he was in jail for three years and two months and as such he was in jail about 04 years, and therefore, he has requested that considering the period he is in jail, a lenient view may be adopted and the sentence may be converted either undergone or the sentence may be substantially reduced.

10. Learned A.G.A. have vehemently opposed the prayer, he has however, submitted that if slight reduction in sentence is made, he has no objection.

11. I have perused the entire material available on record and the evidence, as well as judgement of the trial court, it is apparent from the record that the accused has submitted the forged and fabricated marks sheet just to get the employment in the Postal Department and on that basis the appeal of the present accused deserves to be rejected on merits.

12. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926**, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by re-culturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

13. In **Sham Sunder vs Puran, (1990) 4 SCC 731**, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

14. In **State of MP vs Najab Khan, (2013) 9 SCC 509**, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, the court observed as follows:

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to

the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

15. Earlier, "Proper Sentence" was explained in **Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

16. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In **Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77**, it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in **Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.**

17. In **Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449**, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

18. In Ravada Sasikala **vs. State of A.P. AIR 2017 SC 1166**, the Supreme Court referred the judgments in **Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of

its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced.

19. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

20. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive. It believes that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

21. In the facts and circumstances of the case, the highest sentence which has been awarded by the learned trial court is of 07 years under section 467 I.P.C. the remaining sentence are much less in comparison to it, therefore, the sentence awarded under section 467 I.P.C. if reduced by 02 years against the awarded sentence of 7 years, the ends of the justice will be served. From perusal of the judgement, it appears that the sentence in all other sections have been directed to run concurrently and it has also been directed that the period in which the accused persons were in jail shall be accommodated in their sentence, therefore, there is no necessity for disturbing the sentence which has been awarded in other sections.

22. So far as quantum of fine is concerned, it appears to be adequate and it is not required to be disturbed. However, the default sentence in lieu of fine may be reduced to some extent to serve the ends of justice.

23. Accordingly, the conviction is upheld. The appeal is finally **disposed of** with the modification that the sentence of 07 years rigorous imprisonment for the offence under section 467 I.P.C. is reduced by 02 years and the default sentence in lieu of fine under section 120-B IPC is reduced from 03 months rigorous imprisonment to 01 months rigorous imprisonment, under section 420 IPC is reduced from 02 months rigorous imprisonment to 01 months rigorous imprisonment, under section 467 IPC is reduced from 06 months rigorous imprisonment to 2 months rigorous imprisonment, under section 468 IPC is reduced from 02 months rigorous imprisonment to 01 months rigorous imprisonment and under section 471 IPC is reduced from 01 months rigorous imprisonment to 15 days rigorous imprisonment.

24. Office is directed to transmit the lower court record along with copy of this judgment to the learned court below for information and necessary compliance as warranted.

(2020)06ILR A952
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.06.2020

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Capital Sentence No. 1 of 2017
&
Criminal Appeal No. 358 of 2017

State of U.P. ...Appellant
Versus
Ram Gopal Saini ...Respondent

Counsel for the Appellant:
Govt. Advocate, Nagendra Mohan

Counsel for the Respondent:

Section 302 IPC- Appeal against conviction.

Standard of Proof –
Deficiency and investigation-need for establishing chain of events to prove guilty of accused.

Omission on part of investigation -
No FIR registered by police without any satisfactory explanation which adversely affect prosecution case and caused doubt.

Delay in recording-the statement of witnesses –
Caused serious doubt as to genuineness of prosecution case and rendering the investigation defective.

Section 173 (2) Cr.P.C.-Submission of charge sheet -
In absence of direct evidence or insufflated circumstantial evidence submission of charge sheet against the accused illegal. (Para 51 & 52)

Credibility of evidence -
Inimical and interested witness – Testimony – to be considered concisely by the trial.

Motive –
Death by pesticide poison – prosecution failed to prove the motive any evidence or procuring pesticide by accused.

Circumstantial evidence –
The accused were not last seen with the deceased.

Hostile witnesses –
And failure to prove other circumstances – failure to discharge initial burden of proof.

The failure of prosecution to prove it's case beyond reasonable doubt-
The conviction by trial court based only on speculation, inferences and suspicion.

Appeal allowed.

List of cases cited:-

1. Sharad Birdhchand Sarda Vs. St. of Maha. [(1984) 4 SSC 116]

2. Dhan Raj @ Dhand Vs. St. of Haryana [(2014) 6 SSC 745]

3. Gargi Vs. St. of Haryana [(2019) 9 SSC 738]

4. State of Kerala Vs. Anilachandran @ Madhu & ors. [(2009) 13 SSC 565]

5. Jose @ Pappachan Vs. Sub Inspector of Police Koyilandy & Another[(2016) 10 SSC 519]

6. Kalu @ Laxminarayan Vs. St. of M.P. [(2019) 10 SSC 211]

7. Trimukh Maroti Kirkan Vs. St. of Maharashtra [(2006) 10 SSC 681]

8. Mulakh Raj etc. Vs. Satish Kumar and others [AIR 1992 SC 1175]

9. Phula Singh Vs. St. of H.P., [(2014) 4 SSC 9]

10. Jai Narain and others Vs. St. of U.P., [(2003) Criminal Law Journal 168]

11. Vijay Pal Vs. St. (Government of NCT of Delhi [(2015) 4 SSC 749]

12. Mukesh and another Vs. St. (NCT of Delhi) & others [(2017) 6 SSC 1]

13. Swamy Shraddananda @ Murli Manohar Mishra Vs. St. of Karnataka [(2007) 12 SSC 288]

14. Jahira Habibulla H. Sheikh and another Vs. St. of Gujarat & others [(2004) 4 SSC 158]

15. Ramesh Kumari Vs. St. (NCT of Delhi) & other [(2006) 2 SSC 677]

16. Ram Das & Ors. Vs. St.of Maharashtra [(2007) 2 SSC 170]

17. Ganesh Bhavan Patel Vs. St. of Maharashtra [(1978) 4 SSC 371]

18. K. Veeraswami Vs. Union of India and others [(1991) 3 SSC 655]

19. State of Rajasthan Vs. Kalki [(1981) 2 SSC 752]

20. Raju Vs. St. of T.N. [(2012) 12 SSC 701]

21. Vijendra Singh Vs. St. of U.P. [(2017) 11 SSC 129]

22. Ramashish Rai Vs. Jagdish Singh [AIR 2005 SC 335, (2005) 10 SSC 498]

23. Kirti Pal Vs. St. of W.B. with Durga Sutradhar Vs. St. of West Bengal & ors [(2015) 11 SSC 178]

24. Virendra @ Buddhu and ors. Vs. St. of U.P. [(2008) 16 SSC 582]

25. Bodhraj @ Bodha and ors. Vs. St. of J & K [(2002) 8 SSC 45]

26. T. Shankar Prasad Vs. St. of A.P. [(2004) 3 SSC 753]

27. St. of U.P. Vs. Ramesh Prasad Misra & Anr. [(1996) 10 SSC 360]

28. Himanshu @ Chintu Vs. St. (NCT of Delhi) [(2011) 2 SSC 36]

29. R. Shaji Vs. St. of Kerala [(2013) 14 SSC 266]

30. Suresh Vs. St. of Haryana [(2018)18 SSC 654]

31. Binay Kumar Singh Vs. St. of Bihar [(1997) 1 SSC 283]

32. Jumni and others Vs. St. of Haryana, [(2014) 11 SSC 355]

33. Prem Kumar Gulati Vs. St. of Haryana [(2014) 14 SSC 646]

34. Sheo Shankar Singh Vs. St. of Jharkhand and another [(2011) 3 SSC 654]

35. Surajit Sarkar Vs. St. of W.B. [(2013) 2 SSC 146]

36. Dharam Deo Yadav Vs. St. U.P. [(2014) 5 SSC 509]

37. Tanviben Pankajkumar Divetia Vs. St. of Gujarat [(1997) 7 SSC 156]

38. Main Pal and another Vs. St. of Haryana and others, [(2004) 10 SSC 692]

39. Machhi Singh and others Vs. St. of Punjab [(1983) 3 SSC 470]

40. Bachan Singh Vs. St. of Punjab [(1980) 2 SSC 684]

41. Shivaji Vs. St. of Maharashtra alias Dadya Shankar Alhat Vs. State of Maharashtra [(2008) 15 SSC 269]

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

1. Since the Sessions Trial based on circumstantial evidences only, was culminated into conviction of the sole accused for the offence of murder punishable under Section 302 of the IPC and accordingly death sentence is awarded to him, therefore this Capital Sentence No.1 of 2017 is before us for confirmation of the sentence. The reference is admitted vide order of a Division bench of this Court dated 02.03.2017. Simultaneously a Jail Appeal on behalf of the convict detained in District Jail Faizabad sent by Jail Superintendent, is also pending before this Court bearing no. 358 of 2017.

2. The Court of third Additional Sessions Judge, Ambedkar Nagar tried the Sessions Trial no.213 of 2013 under Section 302 IPC, arisen from the case crime no.61 of 2013, registered in Police Station, 'Kotwali Tanda', District Ambedkar Nagar, against the sole accused 'Ram Gopal Saini' arraigning him for the murder of his mother, wife and a son of tender age approximately 4 years. The trial ended with the conviction and sentence of Death punishment under Section 302 IPC vide judgment and order dated 15.02.2017.

3. Sri Nagendra Mohan, Advocate has put his appearance for and on behalf of the accused appellant. Learned Government Advocate, Sri Vimal Prakash assisted by Sri Pankaj Kumar Tewari, A.G.A. represents the 'State' to contest the appeal and defend the reference case of confirmation of Death sentence awarded to the accused appellant. The Session Judge of Ambedkar Nagar District Judgeship has already sent with reference the entire record of trial Court under Section 366 of CH. XXVIII of Criminal Procedure Code 1973 for perusal. Since both, the criminal appeal and the capital sentence reference would have common questions of law and fact to be decided, therefore we think it necessary to hear and decide them simultaneously through a common judgment.

1. Facts of the case

4. Before we proceed further with the pleas for and against the impugned judgment and sentence of capital punishment or 'the Death Penalty', it would be relevant to have a brief introduction of the facts involved in the case. The facts as emerged out from perusal of the materials and evidences on record are that one 'Sunil Mali' son of the sister of the accused appellant approached the Police Station at 06:45 A.M. on 19.04.2013 to inform that his maternal grand mother Kama Devi (mother of appellant), sister in law Kanchan (wife of appellant) and their son Dhairya are lying dead on the floor in the house of the

appellant situated at Mohalla Hayatganj, P.S. Kotwali Tanda, District Ambedkar Nagar, in the absence of appellant as he went to attend a feast on the occasion of house warming (Grih Pravesh) of his sister's house in Delhi. On this information Police of Tanda Kotwali Police Station reached at the place of incident at 07:30 A.M. instantly started inquest proceeding in the presence of Tehsildar and made necessary inquiries and seizure of materials from the spot. The inquest witnesses reported to had not given any opinion as to cause of death as there was no obvious and external mark of injury on the dead bodies. However, the dead bodies were lying on the different places of the house on floor with vomits etc. In the presence of relatives, neighbours and police officers on duty the inquest of all the three dead bodies was completed by 09:45 A.M. and body was sent for postmortem. In postmortem house 'viscera' of the dead bodies was extracted and sent to Forensic Science Lab for examination. The report of FSL was received on 23.11.2013 disclosing the use of a pesticide named Aluminum Phosphate (ALP) in the incident. It is notable here that the proceeding of inquiry on spot and that of the inquest and thereafter the postmortem of the dead bodies all were done without lodging first information report (FIR) though Sunil Mali had informed the incident at earliest on 19.04.2013 in morning at 06:45 A.M. The father of Kanchan (deceased wife of the appellant) namely, "Ram Gopal Verma" was throughout remained present on the spot since the very beginning in the morning when inquest started but he neither expressed any opinion as to cause of death nor suspected any one to be culprit. He did not lodge even a complaint. On 06.05.2013, the said Ram Gopal Verma moved a written complaint to the police to the effect that Ram Gopal Saini (appellant) developed relations with his daughter Kanchan (deceased) and entered into love marriage with her about four years ago and since then they were cohabiting as husband and wife in the house of accused appellant with his mother Kama Devi (deceased). Out of their wedlock, a son was begotten namely 'Dhairya'. Accused appellant since before the marriage with Kanchan had illicit relation with wife of one Ved Prakash Gupta r/o Hanuman Garhi, kept maintained the same even after the marriage with Kanchan. In order to cherish his illicit relation and to make the same smooth and unrestrained, the appellant conspired to murder his mother, wife and son and fulfilled the same. An F.I.R. was registered on the said complaint dated 06.05.2013 and the police investigated the matter, arrested the accused appellant on 06.05.2013. Appellant had already returned on 19.04.2013 by the time of postmortem from Delhi and was present in postmortem house. It is also notable that the evidence shows the accused appellant prior to incident dated 19.04.2013 was facing a criminal prosecution on the complaint of Ram Gopal Verma with regard to alleged elopement in the year 2008, of his daughter Kanchan (deceased) on instigation of the appellant to marry with him. His daughter Kanchan had also filed a criminal writ in the High Court wherein she got stay of arrest of accused appellant. However, in the investigation of the case founded on complaint dated 06.05.2013 with regard to incident of alleged murder of Kama Devi, Kanchan and Dhairya (mother, wife and son of the appellant) on the basis of evidence of complainant and other circumstantial

evidences charge sheet in the Court was submitted against the appellant. When after examining the viscera F.S.L. gave it's report, it was disclosed that a common pesticide known as Aluminum Phosphate was the cause of death of all the three victim of the incident.

5. "Ram Gopal Verma", father of the deceased wife (Kanchan) of the accused appellant by moving complaint with regard to incident dated 19.04.2013 in writing on 06.05.2013 for the first time blamed his son in law Ram Gopal Saini to have committed the murder of Smt. Kama Devi, Kanchan and Dhairya. Though the police got first information of the incident from Sunil Mali on 19.04.2013 at 06:45 A.M. moved for the spot of incident informing the area Tehsildar and started inquest and inquiries there, but did not register the F.I.R. thereupon. F.I.R. was registered on the version of complaint by Ram Gopal Verma on 06.05.2013 only. On investigation, the investigating officer arrested the accused, got recorded his confessional statement as to his guilt and on his pointing out, prepared a sitemap on 06.05.2013 indicating the places where the dead bodies of victims of incident reported on 19.04.2013 were lying on floor of the house. Purportedly on the basis of statements given by witnesses and confessional statement of the accused appellant the investigating officer submitted chargesheet against him in the concerned court of Magistrate on 31.07.2013. The Magistrate perused the chargesheet submitted in Crime Case No.61 of 2013 aforesaid under Sections 302/120B of the IPC, finding the same exclusively triable by a Court of sessions passed order of committal to the court of sessions on 30.08.2013.

2. <u>Charge and evidences in trial</u>

6. The Court of sessions framed the following charge against the accused on 11.07.2014.

"यह कि आप अभियुक्त ने दिनांक समय अज्ञात स्थान वहद मोहल्ला हयातगंज थाना कोतवाली टाण्डा जनपद अम्बेदकर नगर में वादी मुकदमा राम गोपल वर्मा की पुत्री कंचन वर्मा जिससे आपने वर्ष 2008 में प्रेम विवाह किया था, वेद प्रकाश की औरत से अवैध सम्बन्ध होने के कारण कंचन वर्मा ,पत्नीद्ध, धैर्य ,पुत्रद्ध कामा देवी ,मॉद्ध की मृत्युकर हत्या कारित किया। इस प्रकार आपने ऐसा कार्य किया है, जो भा0द0स0 की धारा 302 के अन्तर्गत दण्डनीय अपराध है, और इस न्यायालय के प्रसंज्ञान में है।"

For the easy reference the said charge as framed above is reproduced by translator in english.

"That you, the accused <u>on date and time not known</u> the place in Mohalla 'Hayatganj' District Ambedkar Nagar by causing death committed murder of your wife 'Kanchan' with whom in the year 2003 you entered into love marriage, of your mother Kama Devi and son Dhairya, for the reason of your illicit relations with wife of one Ved Prakash Gupta. As such you committed an offence under Section 300 of the I.P.C. which is within cognizance of this Court".

7. Since the accused did not plead guilty and claimed trial. The prosecution produced materials and witnesses in evidence against the accused shown for

the purpose of easy reference in the chart appended below:-

Sl No.	Name of Witness	Produced in Court as	Material proved by the witness	Exhibit	Remark
1.	Ram Gopal Verma	PW-1 Complainant (father of deceased Kanchan)	Complaint dated 06.05.2019	Ex. Ka 1	
2.	Vinay Kumar Verma	PW-2 Brother of deceased Kanchan			
3.	Diksha Verma	PW-3 Sister of deceased Kanchan			
4.	Dhananjay Verma	PW-4 Brother of deceased Kanchan			
5.	Chhaya Verma	PW-5 Mother of deceased Kanchan			
6.	Shiv Kant Pandey	PW-6 Constable P.S. Tanda Kotwali then Head Moherrir	FIR dated 06.05.2013 GD entry of FIR	Ex. Ka 3 Ex. Ka 4	
7.	Sunil Kumar Mishra	PW-7 the Sub Inspector posted on 19.04.2013 in P.S. Tanda Kotwali, Investigating Officer	Inquest report of Dhairya Papers relating to handing over the dead body of Dhairya to constable and letter with photo of	Ex. Ka 6 Ex. Ka 7, 8, 9, 10 Ex. Ka 11, 12, 13, 14	

			dead body of Dhairya Aforesaid papers relating to dead body of Kama Devi Aforesaid papers relating to dead body of Kanchan Seizure Memo of two metal glasses and bed sheets	Ex. Ka 15, 16, 17, 18 Ex. Ka 18, 19, 20		**8.**	Om Veer Singh	PW-8 Posted as SHO, Tanda Kotwali on 06.05.2013 and took charge of investigation over then	Site map inspected the spot of incident and prepared site map on pointing out of complaint proved. Charge Sheet Material Exhibits beds heets and two metal glasses	Ex. Ka 21 Ex. Ka 22 Material Ex. 1, 2 and 3	

9.	Dr. Lal Chand	PW-9 Posted as medical officer in District Hospital, District Ambedkar Nagar on 19.04.2013	Post mortem report of deceased Kama Devi. Post mortem report of deceased Kanchan Post mortem report of Dhairya Four forensic reports of FSL	Ex. Ka 27 Ex. Ka 31 Code No.1482 to 1485 of 2013 dated 27.11.2013	

8. The prosecution witnesses PW-1 to PW-5 turned hostile during examination before the Court. The rest of the witnesses from PW-6 to PW-9 being formal police witnesses involved in doing investigation and the doctor who did atrophy on dead bodies, proved their respective documents in evidence like memos of seizure of materials collected from the spot and post mortem report respectively. The trial court after recording of evidence carved out the incriminating circumstances and facts therefrom against the accused and called him to explain those under Section 313 of the Cr.P.C. The accused submitted the incriminating evidence against him led by prosecution witnesses false due to the enmity and claimed himself absent from home (the spot of evidence) since before the date of incident, as he gone Delhi to join the feast held by his sister on the occasion of Grih Pravesh Ceremony.

3. <u>A summary of the impugned judgment</u>

9. The trial judge after hearing the prosecution and defence counsel in the light of evidence available on record framed three points of determination for it's decision over them, namely-

A) Whether the prosecution has been successful in proving the charge under Section 302 of the I.P.C.

B) Whether the accused is entitled to get benefit of prosecution witnesses PW-2 to PW-5 having been hostile against prosecution.

C) Whether the accused has been successful in giving satisfactory explanation of his absence from the spot of incident under Section 106 of the Indian Evidence Act, 1872.

In determining the aforesaid points as the discussion in judgment shows, the trial judge placed reliance on evidence as to the illicit relations of accused with the wife of one Ved Prakash Gupta holding the same a motive for the commission of

offence by him. He further relied on the statement of PW-1 charging the accused appellant that he administered poison to his mother, wife and son for the aforesaid motive and allegedly went therefrom to his sister's house in Delhi. He also held that the matter rests on the circumstantial evidence therefore referred the judgments of Hon'ble Apex Court in ***Sharad Birdhchand Sarda Vs. State of Maharashtra1*** and ***Dhan Raj @ Dhand Vs. State of Haryana***2 to keep into consideration while recording finding over the questions framed by him for determination. He has held that the First Information Report Ex. Ka 1 was given in the police station on 06.05.2013 itself discloses the fact of accused having entered into love marriage with his daughter Kanchan in the year 2008. The accused had been in illicit relationship with wife of Ved Prakash Gupta since before his marriage with Kanchan (deceased) and kept maintained the same even after his marriage. For the reason of that relationship, the accused had committed murder of Kanchan his wife, Kama Devi his mother and Dhairya his son. Ram Gopal Verma aforesaid is examined as PW-1 who has proved in his examination in chief the said exhibit ka 1. The learned trial judge further took into consideration the inquest proceeding done at spot of incident wherein PW-1 himself was a witness. Another circumstance taken by him into consideration is that all the three dead bodies were found inside the house. The FSL report pursuant to the examination of viscera contents gives the finding as to the use of poison namely Aluminum Phosphate. The test of material exhibit, the two metallic glasses and bed sheet stained with vomit also gave presence of Aluminum Phosphate over them. The learned trial Judge considered all these circumstances cumulatively reached at a conclusion that all the three victims of the incident died due to administration of poison and dead bodies were found inside the residential house of the accused. He in his statement shown unawareness about death by poisoning of his family members and explained that he was not at his house at the time of incident. Under Section 106 of Evidence Act, he had to explain the reason of his absence from the house at the relevant day, date and time. But he failed to prove his absence satisfactorily. Further his absence from the house after the death of his three family members in his house is also material as his 'conduct' is relevant to the fact in issue under Section 7 and 8 of the Evidence Act, 1872. In addition to the absence of accused as a fact relevant to the fact in issue which he need to satisfactorily prove, the learned trial judge taken into consideration the illustration (c) appended with Section 7 of the Evidence Act, 1872 that the deceased being his close relative as they were mother, wife and son of the accused, he would have been well known with their nature and habit. There was sufficient opportunity for him to administer them poison for committing their murder. All the above reasons as stated by learned trial judge were taken as satisfactory to reach at an inference of guilt on the part of accused that he bearing a motive of securing his illicit relations with another woman, killed his wife Kanchan, son Dhairya and mother Kama Devi.

So far as second question for determination is concerned it relates with the evidentiary value of testimony of a hostile witness. The learned trial judge referred the relevant judgment of Hon'ble Apex Court. He stated in his finding to

the effect that the hostile witnesses have proved absence of accused on spot after incident, the love marriage of accused with Kanchan (deceased) as well as the death of Kanchan, Dhairya and Kama Devi by poisoning, therefore, the fact of the witnesses turned hostile would not benefit the accused.

Likely, the third question for determination as to the appended of Section 106 Evidence Act, 1872 is decided by trial judge referring relevant judgments of Hon'ble Apex Court. It is held by trial judge that in the present case, the fact of the death of the victim in the house of accused is proved by medical evidence and the testimony of PW-1 and other prosecution witness that all the three victim died for the reason of poisoning. Under the said circumstances, the accused is burdened to furnish satisfactory explanation. But the accused though stated in his statement recorded under Section 313 Cr.P.C. as to the fact that he went to Delhi at the relevant date and time of incident could not be proved by solid evidence. As such, the failure to furnish satisfactory explanation would be sufficient to draw adverse inference of guilt against the accused. The conviction of the accused and sentence of capital punishment thus rest upon the aforesaid presumption and inferences drawn by the Court against him.

4. Rival contentions in appeal

Arguments by learned counsel for appellant Sri Nagendra Mohan, Advocate

10. Learned Counsel Sri Nagendra Mohan, Advocate opened his argument assailing the judgment on the ground that in despite of the prosecution remained unsuccessful in proving it's case against the accused appellant beyond reasonable doubts, the trial judge doing misinterpretation and misconstruction of the provision of Sections 7, 8, 9 and 10 of the Indian Evidence Act, 1872 drawn adverse inference and presumption of guilt against the accused.

11. The prosecution had in express words set a motive on the part of appellant for the commission of murder of his mother, wife and son so as to keep continued smoothly his "illicit relationship" with another married woman. The prosecution could not prove the motive by direct evidence or by statement of the deceased if any, made prior to her death to any of her near relative oral/written or her complaint to that effect if made to the law enforcement officers with regard to torture or cruelty exerted upon her by the appellant in connection with alleged illicit relationship .

12. It is argued further that the entire investigation suffers from several material irregularity and defects the benefit whereof could have not been given to the prosecution. He drew attention towards material facts in the case that though the information as to the three dead bodies lying in the house of appellant has already been given to the police early in the morning at 06:45 A.M. on 19.04.2013 with complete identity and introduction of the victim by Sunil Kumar Mali, the son of accused appellant's sister, first information report was not registered thereupon. When the Cr.P.C. mandatorily requires to register F.I.R. on information disclosing a cognizable offence and does not preclude from registering FIR under the circumstance of the instant case, non

registration of F.I.R. on 19.04.2013 makes a doubt as to the genuineness of the FIR registered on 06.05.2013 after a considerable lapse of time of more than fifteen days. He further drew attention towards the complainant Ram Gopal Verma of complaint dated 06.05.2013 upon which the FIR was registered that when the inquest of the dead bodies were done from 07:30 A.M. to 09:30 A.M. on spot of incident on 19.04.2013, Ram Gopal Verma was present there and he is one of the signatory as witness of the inquest proceeding but he did not complained suspicion as to the death of the victims. In the context of above, learned counsel argued that the trial court ignored as to why the complainant has not moved the complaint against appellant if the guilt on the part of accused was known to him.

13. Learned counsel submitted that prosecution has not offered to prove it's case through direct evidences and rests it solely on the circumstantial evidences. In the present case where admittedly there were 4 inmates of the house exclusively owned and possessed by the appellant where he used to reside alongwith the victims of incident dated 19.04.2013 and in his absence, rest of them were found dead, then in the given circumstances there might have been three hypothesis as to the cause of the occurrence namely 1) Suicidal death or Suicide, 2) Accidental death or 3) Homicidal death. The prosecution was therefore burdened to prove such sequence of circumstances which completely exclude the possibility of two other hypothesis namely of suicidal or accidental death of the victims trio. Further, if the prosecution rests on the hypothesis of homicidal death of the victims then to arraign therefore the appellant, the prosecution had strict burden to prove such sequence of circumstances which necessarily suggest the guilt of appellant only and no one else. In despite of that there is no such continuous chain of sequences of circumstances proved by the prosecution evidences which would have been sufficient to record conviction, learned trial judge convicted the appellant.

14. Learned counsel argued the strong possibility of false implication by the complainant for the reason of his proved enmity with the appellant. He drew attention towards the evidence of admitted fact as to the appellant's love marriage with Kanchan (deceased) against the consent and wish of the complainant. The complainant had prosecuted the appellant in that regard; whereas Kanchan (his deceased daughter) had also filed a writ petition in the High Court seeking stay and quashing of that prosecution and protection of life and liberty against her father, the present complainant. The death of three members of the family of the appellant including the complainant's daughter Kanchan given him a fresh cause to implicate him falsely.

15. Learned counsel placed reliance on the judgment of Hon'ble Apex Court in ***Gargi Vs. State of Haryana***3 to fortify his contention as to defective investigation where the very approach of the investigating officer has been shrouded in unexplained omission and irregularities which raises doubt as to the prosecution case therefore, appellant would be entitled to benefit of doubt. He also relied on the above judgment in support as to the motive of his contention as to the unproved motive that when the

prosecution was not able to prove the illicit relation of accused with another woman and no particular of such illicit relation was found in evidence on record, possibility of leveling such imputations on appellant for any malice can not be relied upon. He further argued on the point of circumstantial evidence which in the context of the crime, essentially means such facts and surrounding factors which do point towards contemporary of charged accused. Learned counsel further relied on ***State of Kerala Vs. Anilachandran @ Madhu & ors.***4 where it is held that when the accused take in defence plea of alibi, but the same is discarded, does not take away the duty of prosecution to prove it's case beyond all reasonable doubt. Learned counsel further relied on ***Jose @ Pappachan Vs. Sub Inspector of Police Koyilandy & Another***5 on the point of burden over a person of proving fact especially within his knowledge under Section 106 of the Evidence Act, 1872. In the aforesaid matter, the accused was subjected to murder trial with allegation, wife was first strangulated to death by him and then hanged in his house. Held it is impossible to cast any burden upon the accused husband under Section 106 Evidence Act, 1872 in absence of any persuasive evidence to hold that at the relevant time, accused was present in his house.

16. The learned counsel assailed the judgment of conviction and order of sentence that none of the objections raised before the trial judge are considered and conviction is solely based by him upon presumption and adverse inferences without considering that the prosecution even had not discharged it's primary burden of proving the circumstances whereupon such presumption could be raised or adverse enforce could be drawn against the accused. Therefore, the impugned judgment of conviction is liable to be rendered non sustainable and consequently be set aside and appeal be allowed with acquittal of the appellant.

5. <u>Arguments by learned Government Advocate Sri Vimal Prakash, Advocate.</u>

17. Learned G.A. in the context of the fact of death of three inmates out of four in a dwelling house, where the fourth one (appellant) claims himself not present there at the relevant date and time of the occurrence, argued that such deaths might have been caused either by accident or suicide and if the first two possibilities are ruled out then certainly it is homicide. He contended that the prosecution case is neither of suicide nor of accident, even the appellant have not claimed the deaths of victim accidental or suicidal. He emphasized that the circumstances proved by evidences during trial have not set an alternative theory of suicidal death; therefore the occurrence rests on theory of homicidal death caused by the appellant pursuant to a specific motive.

18. He further contended towards the proved circumstances.

a) Kanchan (deceased) by virtue of her love marriage with accused appellant in 2008 was, since then, in marital cohabitation with the appellant in his house (spot of incidence) where his mother Kama Devi (deceased) also ordinarily used to reside.

b) During wedlock Kanchan (deceased) and appellant, she begotten a male child who was named 'Dhairya'. The

son was approximately 4 years in age, at the relevant date and time of incident.

c) No one else was sharing the dwelling house with accused appellant, Kanchan (deceased wife), Kama Devi (deceased mother) and Dhairya (deceased son).

d) In the intervening night of 18/19 April, 2013, the three inmates of the house namely Kama Devi, Kanchan and Dhairya died in the house. The dead bodies were lying here and there on the floor of the house in perplexed state.

e) The report of Forensic Science Laboratory given on examination of 'Viscera' extracted from the dead bodies and the metallic glasses, vomits on bedsheet etc. confirmed the administration of poison "Aluminum Phosphate" as cause of death.

Learned G.A. submitted further that aforesaid are the proved circumstances wherein the accused appellant shall be presumed being fourth inmate of the house who have been in position to know very well the habits and nature of victims as well as to have full opportunity so as to administer poison to them to commit their murder.

19. Learned G.A. argued that the evidence of PW-1 is sufficient to establish motive, a persuasive factor for the commission of murder of the victims by poisoning, that is illicit relationship between accused appellant and the wife of Ved Prakash Gupta, continuing since before the appellant's marriage with Kanchan (deceased wife).

20. Learned G.A. further argued that it is the admitted and proved fact that accused appellant was not present on spot of incident at the time of inquest proceeding, which establishes his conduct subsequent to his committing the offence. He contended that accused appellant was present at the postmortem house on the same day whereas he was alleged to have gone Delhi since the day before the occurrence was reported to police (19.04.2013). The learned G.A. termed this conduct on the part of accused appellant, his 'absconding' from the seen of offence.

21. The learned G.A. lastly submitted that no doubt the prosecution has strict burden of proving it's case beyond reasonable doubt but when the prosecution has reasonably discharged it's duty to the extent the same could be done by leading evidence to prove the facts and surrounding circumstances, but for the facts especially and particularly within the knowledge of the accused himself then the burden to speak for such fact lies heavily upon him. In this context, learned G.A. argued that the accused appellant being fourth member of the dwelling house where he ordinarily used to reside with the rest of the three inmates (deceased), had offered a defence to the incriminating circumstances against him, explaining his absence from the spot of incident at relevant time that he went to Delhi on day before the incident. The failure to prove the above defence, learned G.A. argued, will amount the missing link in the chain of sequence of circumstances against him. He lastly submitted that the learned trial judge did not commit any error in recording conviction and awarded proper and adequate sentence accordingly.

22. The learned G.A. concluded his arguments referring cases decided by the Apex Court relevant on various legal

aspects and issues likely to arise in a murder trial solely based on circumstantial evidences. A short account of case law relied on by him would be relevant to be stated. He relied on ***Kalu @ Laxminarayan Vs. State of M.P.***6 where a married lady met with her homicidal death in matrimonial home. The manner in which she met her homicidal death was a fact especially and exclusively within the knowledge of appellant husband of the deceased. It is held that once prosecution established a prima facie case, appellant was obliged to furnish some explanation under Section 313 Cr.P.C. with regard to the circumstances under which deceased met an unnatural death inside the house. His failure to offer any explanation leaves no doubt for the conclusion of his being the culprit of the offence. The decision on the issue with regard to burden under Section 106, Evidence Act, 1872 in such circumstances, given by Hon'ble Apex Court in ***Trimukh Maroti Kirkan Vs. State of Maharashtra***7 was relied on. It is held in the above case that there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The decision of Apex Court reported in ***Mulakh Raj etc. Vs. Satish Kumar and others***8 was relied on where with regard to importance of motive in cases based on circumstantial evidence and effect on failure to prove the same, it is held, proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. On the issue of non submission of explanation by the accused with his statement under Section 313 Cr.P.C. was being recorded the impact thereof over the defence of accused. Learned G.A. relied on ***Phula Singh Vs. State of Himachal Pradesh***9, where it is held that if the accused had kept silence over the incriminating circumstances against him or remain in complete denial mode, rather to give any explanation thereto, the Court would be entitled to draw an inference against the accused as may be permissible in accordance with law. Learned G.A. relied on the decision in ***Jai Narain and others Vs. State of Uttar Pradesh***10, where it is held when a witness gave each and every detail of occurrence in his examination in chief but thereafter he turned hostile and stated in favour of accused, the entire evidence of the such witness cannot be discarded and doubted under the given circumstances. Learned G.A. relied on ***Vijay Pal Vs. State (Government of NCT of Delhi***11 and ***Mukesh and another Vs. State (NCT of Delhi) & others***12 where it is held, law is well settled that if such a plea of alibi is taken in defence by the accused, the burden is upon him to establish the same by positive evidence, so as to raise a reasonable doubt regarding the prosecution version.

23. After giving a careful and cautious hearing to the rival arguments raised by learned counsels for the parties and on perusal of the record, we framed the following questions for our determination;

(I) Whether investigation of the case is defective?

(II) Whether the charge against appellant is wrong and illegal for murder of his mother, wife and son, for the reason the same is framed without any evidence on record?

(III) Whether the prosecution failed to produce the 'best evidence' so as to prove it's case and without any

justification has withheld the material witness, deliberately?

(IV) Whether the trial court mis read the evidence, even omitted to read evidence on record, did not appreciate the evidence on record in right perspective and passed the impugned judgment which is not sustainable in the eyes of Law?

24. The case in hand, as noted by us, rests solely on circumstantial evidence as there is no direct evidence as to the commission of the offence by the appellant. After hearing the learned counsels and having a careful scrutiny and perusal of materials and evidences available on the record of trial court, we now proceed to discuss the circumstances, whether proved in such a manner are exclusively pointing towards the guilt of the accused and nothing else. Since the conviction in the present case is not only based on circumstantial evidence but also entailed the failure on the part of accused to discharge his burden to prove fact especially within his knowledge, consequent thereupon the adverse inference is drawn as to his guilt under Section 106 Evidence Act, 1872, therefore we have to see whether Section 106 Evidence Act, 1872 has been correctly applied in the fact and circumstances of the case.

6. <u>Conspectus of circumstances</u>

25. The conspectus of the events as noted by us from the evidence and materials on record of trial court is that accused appellant and Kanchan (deceased) entered into love marriage in the year 2008 against the wish of complainant Ram Gopal Verma (father of deceased Kanchan). Since 2008, Kanchan (deceased) was in marital cohabitation with accused appellant in his dwelling house alongwith his mother Kama Devi (deceased). Out of their wedlock, a son named 'Dhairya' was begotten. The accused appellant, his wife (Kanchan), their son Dhairya and appellant's mother Kama Devi were the inmates of the dwelling house ordinarily residing therein. On 19.04.2013, one Sunil Kumar Mali (son of appellant's sister) at 06:45 A.M. informed the local police station that the dead bodies of appellant's mother (Kama Devi), wife (Kanchan) and son Dhairya are lying on the floor of the house, whereas appellant had gone Delhi on the day before the reporting of the incident. Inquest was done by the police without registering an F.I.R. of the incident. The dead bodies had no exterior mark of any injury. Though foam was coming out from the mouth of the dead bodies, then also the witnesses of inquest including the complainant Ram Gopal Verma could not form any opinion as to the apparent cause of death, therefore, dead bodies were sent for autopsy to postmortem house. In postmortem house the vicera was extracted and sent for examination in Forensic Science Laboratory. The report of forensic expert dated 27.11.2013 confirmed the use and application of pesticide named Aluminum Phosphide (ALP) as cause of death. The postmortem was done on the same date 19.04.2013 in the afternoon 03:00 P.M., when the appellant also was present. On 19.04.2013, the complainant Ram Gopal Verma had not raised any suspicion with regard to the death of victims or any person as the possible culprit. However, on 06.05.2013, complainant moved the complaint in writing that murder of all the three victims was committed by the appellant (his son in law) so as to continue with his premarriage illicit

relationship with another married woman even after marriage with Kanchan without any obstruction and after commission of the murder, he masqueraded himself to have gone Delhi. On the complaint to above effect, the local police with inordinate and unexplained delay since the date of first information of occurrence (19.04.2013) registered an FIR on 06.05.2013 and started to investigate. Investigation culminated into chargesheet arraigning the appellant on the basis of circumstances, particularly the unproven absence of the appellant from the house at the relevant date and time of incident. The complainant and his family members though examined in court but they turned hostile. On the terms similar to that of the complaint and the chargesheet, by impugned judgment, the trial judge has recorded conviction based on circumstantial evidence.

26. Obviously the incident is of death of three persons by poisoning in their dwelling house where they ordinarily used to reside with the appellant. Appellant was allegedly absent from the house when the incident occurred. There would have been three possibility wherein the occurrence of their death would have taken place, namely accident, suicide or if earlier two possibilities have not taken place, then homicide. Since there is no eye witness of the incident therefore in absence of direct evidences, the existence of any of the three possibilities to the entire exclusion of rest of the two was to be gathered from evidence of the surrounding facts and circumstances by the investigating agency.

27. If it is proved that the three deceased died in an unnatural circumstance in the house which they were sharing with the appellant then and if the prosecution had proved that the deceased last seen with the accused in their house, the law requires him to offer an explanation in this behalf. However, Hon'ble the Supreme Court in ***Swamy Shraddananda @ Murli Manohar Mishra Vs. State of Karnataka***13 held,

34. If it is proved that the deceased died in an unnatural circumstance in her bedroom, which was occupied only by her and her husband, law requires the husband to offer an explanation in this behalf. We, however, do not intend to lay down a general law in this behalf as much would depend upon the facts and circumstances of each case. Absence of any explanation by the husband would lead to an inference which would lead to a circumstance against the accused.

35. We may, however, notice that recently in Raj Kumar Prasad Tamarkar v. State of Bihar [(2007) 10 SCC 433 : (2007) 3 SCC (Cri) 716 : (2007) 1 Scale 19 : JT (2007) 1 SC 239] this Court opined: (SCC pp. 440-41, paras 23-25)

"23. ... Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same.

24. This legal position would appear from a decision of this Court in Nika Ram v. State of H.P. [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] wherein it was held: (SCC p. 87, para 16)

''16. It is in the evidence of Girju PW that only the accused and Churi deceased resided in the house of the accused. To similar effect are the statements of Mani Ram (PW 8), who is the uncle of the accused, and Bhagat Ram, school teacher (PW 16). According to Bhagat Ram, he saw the accused and the deceased together at their house on the day of occurrence. Mani Ram (PW 8) saw the accused at his house at 3 p.m., while Poshu Ram (PW 7) saw the accused and the deceased at their house on the evening of the day of occurrence. The accused also does not deny that he was with the deceased at his house on the day of occurrence. The house of the accused, according to plan PM, consists of one residential room, one other small room and a verandah. The correctness of that plan is proved by A.R. Verma, overseer (PW 5). The fact that the accused alone was with Churi deceased in the house when she was murdered there with the khokhri and the fact that the relations of the accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt.'

25. In Trimukh Maroti Kirkan v. State of Maharashtra [(2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80 : JT (2006) 9 SC 50] the law is stated in the following terms: (SCC p. 694, para 22)

''22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.' "

28. In the case before us also the appellant has not given any explanation as to the occurrence of death of rest of three members of his family who ordinarily used to reside with him in the dwelling house in an unnatural circumstance, by administration of poison, but this alone can not conclusively rope him with the offence of murder unless the prosecution has discharged it's primary burden of proving the complicity of the accused in causing the death of the deceased (mother, wife and son) intentionally in the manner which bring his act in the category of culpable homicide amounting to murder under Section 300 of the Indian Penal Code, 1860.

29. In the aforesaid context, we think, it would be relevant and of much essence to weigh, evaluate and appreciate the proceeding of the case in hand right from the investigation upto that of trial, so as to find out what facts and circumstances were well within the reach of the prosecution and required to be proved to form a complete chain of sequences suggesting the guilt of the accused and nothing else. We therefore discuss categorically the facts and circumstances in evidence under following heads.

7. <u>Deficiency, omissions and lapses on the investigation</u>

30. Our Constitution (The Constitution of India) provides one of the constitutional guarantee under Article 21,

"fundamental right to life and liberty". In a plethora of decisions of Hon'ble the Apex Court and our High Court's, Article 21 has been interpreted with widest amplitude so as to include the right of fair trial. Right to fair trial necessarily includes right to fair investigation. In ***Jahira Habibulla H. Sheikh and another Vs. State of Gujarat & others***14 (Best Bakery Case), Hon'ble the Supreme Court has held, trial should be fair to all concerned and "denial of fair trial is as much an injustice to accused as is to the victim and the society".

31. Under the scheme of "Criminal Procedure Code, 1973", every information disclosing a cognizable offence, if given orally or in writing to an officer in charge of a police station under Section 154 of the Code, shall be reduced into writing and entered into a book kept for this purpose in every police station named as General Diary (GD or Rojnamaha). Entering the first information is igniting the key of machinery of criminal administration. The importance of earlier version of the information as to the occurrence of a cognizable offence, can not be lost sight of, and in criminal trial the earliest version of information has it's own importance for just decision in trial. It is admitted in evidence of PW-6 in the present case that earliest version of information as to the incident was received in the police station from Sunil Kumar Mali, the near relative of appellant and victims of the incident. The information though entered in G.D. by PW-6 on 19.04.2013 itself. The G.D. was not placed before trial court to show the version of the informant as to the incident. The non production of G.D. No.6 on 19.04.2013 is not satisfactorily explained by any of the concerned police officer namely PW-6, PW-7 or PW-8. The non explanation, thus amounts concealment of the earliest version of the incident on 19.04.2013, shall be considered further while deciding the role of accused in alleged commission of offence by him.

32. Information treated as FIR and steps taken by the police pursuant to such information would amount to investigation. Investigation includes inquiry as to the occurrence, the surrounding circumstance and facts with regard to it. In the present case, it is evident from the statement of PWs 7 and 8, the officers of the local Police Station, Tanda Kotwali that Sunil Kumar Mali S/o Bhim Singh has given the information as to the incident on 19.04.2013 at 6:45 A.M. in pursuance of which they reached at the spot promptly at 7:30 A.M. to make necessary inquiries which formed part of investigation into the matter of the triple deaths. Exhibits Ka-2, Ka-5 and Ka-6, the inquest report of the three dead bodies lying at the place of incident have entry of the chronological details of receiving information of occurrence, the informant, when reached on spot and proceeding of enquiry and inquest when started and finished. The PW-1, the complainant of first information report dated 06.05.2013 with regard to the same incident dated 19.04.2013 has himself stated on oath before the trial judge in his cross examination by defence counsel on 03.12.2014 that earlier to the lodging of FIR by him the son of the sister of accused Ram Gopal Saini, namely Sunil Kumar Mali S/o Bhim Kumar Mali had given the information of incident in the Police Station, Tanda Kotwali. He further affirmed to the cross-examiner that Sunil

Kumar Mali had given the information of the incident on 19.04.2013 at 6:45 A.M. PW-6-Shivakant Pandey, the then Head Moharrir posted at P.S. Tanda Kotwali, who registered the FIR on 06.05.2013 on the complaint submitted on 06.05.2013 with regard to incident dated 19.04.2013 also in his cross examination before the trial judge on 19.04.2016 stated about the earlier version of information by Sunil Kumar Mali on 19.04.2013. He stated, 'earlier to the complaint moved by Ram Gopal Verma, an application as to the information of the incident was given by Sunil Kumar Mali at 6:45 A.M. on 19.04.2013, which he entered in G.D. at entry no.6, but did not registered any crime case on the basis of that information. However, PW-6 admitted while cross-examined in same continuation, though it is true, the incident is of 19.04.2013 but the First Information Report is lodged on 06.05.2013 with extra ordinary delay. PW-7, the investigating officer who did inquiry and inquest proceeding on spot of incident on 19.04.2013 pursuant to the information of incident as Sub-Inspector in his cross-examination before the trial judge, also has accepted that the earliest information of the incident was given in the police station, Tanda Koteali by Sunil Kumar Mali on 19.04.2013 at 6:45 A.M. The fact of receiving earliest information of the incident in the police station on 19.04.2013 further finds confirmation in the evidence of PW-8, Omvir Singh, the subsequent investigating officer and then SHO of Police Station, Tanda Kotwali, in his cross-examination dated 30.08.2016. Despite of the fact, Sunil Kumar Saini has given the information of incident at earliest available opportunities to the police on 19.04.2013 at 06:45 A.M., it is noticeably surprising why first information report on the basis of that information was not registered. It is also notable here that the PW-6 had entered the said information given by Sunil Kumar Mali on 19.04.2013 at 6:45 A.M. at serial no.6 in the G.D. kept and maintained in the Police Station for the purpose of Section 154 Cr.P.C. Sunil Kumar Mali is near relative of appellant, the version as to the incident in the information given to the police at earliest could not be lost sight. But the statement of PW-6, PW-7 and PW-8 have no explanation to such ignorance or omission in registering First Information Report and lodging a criminal case accordingly casts a doubt over the investigation and it's intent.

33. Indisputably, the information given by Sunil Kumar Saini on 19.04.2013 at 6:45 A.M. in local police station was as to three dead bodies lying on the floor of the house of his maternal uncle, (the appellant) respectively of his mother, wife and son in his absence was suggestive of the commission of cognizable offence. It comes out from evidence of PWs 6, 7 and 8 respectively the Head Muharrir and the Sub Inspector in charge and the Station Head Officer all were available in the police station, then also on receiving the information, they proceed for investigation without registering the FIR.

34. The non registration of FIR on 19.04.2013 is not explained reasonably. Rather an absurd explanation is seen in the statement of PW-6 recorded by trial judge on 19.04.2016, that the FIR was not registered because of uncertainty as to offence. It is established by law that police can not sit over information on the pretext of credibility or reliability of the

informant or the same being not satisfactory or workable. The police in the present case also was under a statutory duty and mandatorily required under Section 154 (1) of the Criminal Procedure Code, to register FIR without considering the genuineness or otherwise of the information. In this regard, it would be relevant to refer the judgment of Hon'ble Apex Court in ***Ramesh Kumari Vs. State (NCT of Delhi) & other***15. The relevant extracts from para 3 of which is being quoted hereunder:-

3. "..... We are not convinced by this submission because the sole grievance of the appellant is that no case has been registered in terms of the mandatory provisions of Section 154(1) of the Criminal Procedure Code. Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case."

4. That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more res integra. The point of law has been set at rest by this Court in State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 and 32 of the judgment as under: (SCC pp. 354-55)

"31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression ''information' without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions,

''reasonable complaint' and ''credible information' are used. Evidently, the non-qualification of the word ''information' in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, ''reasonableness' or ''credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word ''information' without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that ''every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that ''every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word ''complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word ''information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence."(emphasis in original)

Finally, this Court in para 33 said: (SCC p. 355)

"33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

35. The views expressed by Hon'ble the Apex Court as quoted above thus leave no doubt that in the present case the police officer concerned (PWs 6, 7, and 8) though were mandatorily required bound to register the FIR on the information received on 19.04.2013 from Sunil Kumar Mali, did not register the same for reasons best known to them. The omission on the part of the investigator remains unsatisfactorily explained shall have a bearing on the prosecution case while it's genuineness will be considered further by us.

36. In the context of deliberate omission in registration of FIR by the concerned police officers on the information of incident in question on 19.04.2013 by Sunil Kumar Mali, we have noticed the facts coming out from the evidence on record which are as follows:-

36 (I). The police without registering FIR proceeded with investigation of the contents of that information and reached on the spot. Where the first investigating officer PW-7 started inquiry as to the surrounding facts and circumstances

including the inquest of the dead body lying on the floor of the house. During the investigation on inquest of dead bodies on 19.04.2013 the first informant Sunil Kumar Saini and Ram Gopal Verma, both were present, they participated in the inquest proceeding, witnessed the same and are also became signatory of the concerned documents of inquest prepared on spot. Further Ram Gopal Verma had also been signatory as witness on the seizure memo prepared on seizing the material exhibits on spot namely the bed sheet stained with vomiting and two metallic glasses from the spot. Ram Gopal Verma was also witness of the facts observed during inquest that the mouth of dead bodies were foaming and dead bodies were lying perturbed and perplexed physical state on floor, but he did not expressed any suspicion as to their death to the investigating officer. PW-7, the investigating officer in inquest has stated all these facts in his examination-in-chief recorded in the trial court on 26.05.2016. In cross-examination on 19.08.2016, he replied to cross-examiner learned counsel for the defence that though the Ram Gopal Verma was present during inquest and inquiry on spot of incident on 19.04.2013 but he did not complained any thing against appellant. In the same continuation he also admitted the receiving of information from Sunil Mali as the earliest information of the incident on 19.04.2013 and the complaint of incident dated 19.04.2013 by Ram Gopal Verma on 06.05.2013 Crime Case No. 01/2013 was U/s 302/120-B I.P.C. and an First Information Report was also registered by him. We are constrained to infer the fact on the basis of evidence given by the prosecution itself that the Police Officers concerned (PW-6, 7 and 8) deliberately omitted to register FIR on the basis of earliest version of information received on 19.04.2013 in utter disregard of and in violation of mandatory duty as envisaged under Section 154 (1) Cr.P.C. They illegally waited for the version of Ram Gopal Verma as to the incident till 6.5.2013.

36 (II). We further noticed from the evidence of PW-8 on record that when on the information received from Sunil Kumar Mali the concerned police did not registered the FIR, the appellant moved an application before the Magistrate having jurisdiction invoking the provision of Section 156 (3) of the Code of Criminal Procedure. PW-8, Omveer Singh, the then Station Head Officer of Police Station, Tanda Kotwali, in his cross-examination on 30.08.2016 on the one hand admitted the earliest information as to the incident was given by Sunil Kumar Mali on 19.04.2013 and that said Sunil Kumar Mali was nephew (sister's son) of the appellant, in continuation, he expressed his inability for want of official papers maintained in Police Station before him to tell the cross-examiner whether the appellant moved any application to register FIR of the incident before Superintendent of Police. However, he further admits that a report was sent to the concerned Magistrate with regard to appellant's application under Section 156 (3) Cr.P.C. The aforesaid fact has came into evidence through deposition before trial judge by a competent police officer statutorily empowered to register FIR on information disclosing a cognizable offence, therefore, the same is noted by us as lapse and illegal omission on the part of officer incharge of the Police Station.

37. It is admitted by concerned police officer PW-6, PW-7 and PW-8 respectively the Head Moharrir, Sub Inspector of Police and Station Head Officer in-charge of the Police Station Tanda Kotwali in their deposition before the trial court that they did not register FIR on the basis of information received by them from Sunil Kumar Mali. It is also admitted by them in their depositions in court that FIR was registered on 06.05.2013 belatedly on the basis of complaint when moved by Ram Gopal Verma on 06.05.2013 at 7:30 A.M. In the context of aforesaid facts proved by the evidence we observed that the case before us is not only of a belated or delayed registration of FIR but also peculiarly enough is a case of transposing another person in place of original informant and replacing the version of earlier information as to the incident of triple murder dated 19.4.2013. In other words, the concerned police officer registered the FIR of the incident only when the person of their own choice moved the complaint on 06.05.2013 namely Ram Gopal Verma, father of the deceased wife of the appellant who had nothing to state as to apparent cause of death at the time of inquest on 19.04.2013.

38. FIR of the incident dated 19.04.2013 was lodged on 06.05.2013 on the complaint of Ram Gopal Verma is not satisfactorily explained by the concerned Police officers, PW-6, 7 and 8 before the court in their evidence. Moreover, though they have not explained the delay since 19.04.2013, but we ourselves take a situation in contemplation that the investigator was doing preliminary inquiry into unnatural death, then also if the report after inquiry and inquest under Section 174 Cr.P.C. submitted to the executive Magistrate having territorial jurisdiction and nothing was reported by them so as not to proceed further, as the record is lacking any such report. In the absence of any such report, what prevented them from proceeding ahead with investigation so as to disclose facts suggesting the cause of death or facts and circumstances leading to the suspicious death and suspected culprit is not evident from record.

39. It would thus appear that there is no reasonable explanation forthcoming from the prosecution explaining (i) why on the earliest version of information an FIR was not registered despite disclosure of the commission of some cognizable offence and (ii) registering FIR of the same incident after 17 days on the complaint of Ram Gopal Verma while no further facts and circumstance were discovered after inquest and postmortem by the investigating officer. The evidence is equally unconvincing as the occurrence is of intervening period of 18/19.04.2013, why after a considerable lapse of time on the complainant's version of the same incident, FIR was lodged by the Police. In addition to above it would be relevant to consider the following fact coming from evidence of PW-1 (complainant) himself. The complainant is father of the deceased wife of the appellant against whose wish his daughter entered into marriage with the appellant about five years ago. The complainant had also prosecuted the appellant, his mother (deceased in the incident) and sister for the offence under Section 363/366 and 342 IPC. On the instance of daughter (deceased) in a writ petition filed against her father (the complainant) the proceeding of criminal prosecution was stayed against the appellant and his mother (deceased) etc.

In the context of above proven fact the delay in registering FIR and it's adverse effect on the prosecution case is to be considered as Hon'ble the Supreme Court has held in the case of ***Ram Das & Ors. Vs. State of Maharashtra***16, para-24 of the judgment cited hereunder:-

24. Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence.....

..... In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No straitjacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See Pandurang v. State of Hyderabad [(1955) 1 SCR 1083 : AIR 1955 SC 216] .) Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.

40. We thus hold that the unexplained delay in registering the FIR in context of the facts which came forth from evidence on record as pointed above by us will adversely effects the case of prosecution and cast a doubt upon it as to some collusion.

8. Delayed recording of Pre-trial statement of witness by the Investigating Officer.

41. After inquiry and inquest of the dead body on spot on 19.4.2013, the first investigating officer, PW-6 did nothing. However, the purpose of inquest was over to assess and ascertain the deaths whether suicidal, accidental or suspected to be homicidal by collecting fact and circumstances from the spot and inquiry of dead bodies. The dead bodies were found in the perplexed and distressed physical condition with foaming mouth lying on floor on different places in the house. The inquest reports Exhibits Ka-2, Ka-5 and Ka-6 proved by PW-7 in the trial court themselves show the aforesaid physical condition of the dead bodies. The informant Sunil Kumar Mali of information dated 19.04.2013 and Ram Gopal Verma the complainant of FIR dated 06.05.2013 both are witness of inquest but the opinion of witnesses of

inquest, including the two above named as to the apparent cause of death, was entered in the report as 'not clear'. It is important to note here that the aforesaid Ram Gopal Verma on 06.05.2013 at 7:30 A.M. lodged the complaint in the Police Station with the same police officers (PW-6, 7 and 8) alleging the murder of the victims of the incident committed by the appellant. PW-8, the investigating officer after registering the FIR on his complaint did not recorded his statement under Section 161 Cr.P.C. to the effect that what are the source of his knowledge as to the fact of murder through poison by the appellant which was not known to him at the time of inquest on 19.04.2013.

42. In the context of above facts proved by evidence on record the question is why not instantly on or after 19.04.2013 when the inquest was done the surrounding circumstances and facts as to the incident of triple death and apparent cause of their death were not gathered by the investigating officer with all reasonable and practicably possible promptness. They did not take statements of neighbouring people, informant Sunil Kumar Mali and Ram Gopal Verma. Even the site map was not sketched to show the entrance and exit in house locating spots where the dead bodies of three victims were lying on the floor instantly which was of utmost importance for the purpose of investigation to reach up to the culprit. No last seen evidence of any person with the deceased in their house was gathered. Even the relation of victims inter-se as well as with other persons of locality and also with the appellant and any other member of the family was gathered. Character of accused and his relation with wife (deceased) was also material but that too was not gathered promptly so as to avoid any future embellishment, undue improvement or exaggeration of related facts.

43. It was only when the Ram Gopal Verma lodged a complaint Ex. Ka-1 arraigning the appellant for the murder of his mother, wife and son setting therefor a specific motive, the illicit relation of appellant with another married women, was moved on 06.05.2013, the PW-8 (SHO) took over the investigation himself. Meanwhile since 19.04.2013 upto 06.05.2013 PW-8 or PW-7 did nothing to discover necessary facts. Thus, they given a specific direction to the investigation.

44. PW-8 in his statement before the Court while examined in chief stated on 30.08.2016 that he took over the investigation of Crime Case No.61/2013 under Section 302/120B IPC on 06.05.2013. He further stated that the statement of complainant Ram Gopal Verma was taken by him on 06.05.2013. At this juncture, it is important that the incident occurred on 19.04.2013. PW-8 further stated that he made inspection of the spot of incident on pointing out of the complainant on 06.05.2013 and recorded his statement under Section 161 Cr.P.C. It is remarkable that incident was occurred on 19.04.2013 information of which was noted by PW-6 in G.D. of Police Station on the same day at 06:45 A.M. PW-7 went on spot for inquiry under Section 174 Cr.P.C. on the same day, completed the proceeding of inquest of dead bodies. Throughout the inquiry and inquest proceeding, Ram Gopal Verma (the complainant) was on spot but his statement was not recorded by the police. Site map was also not sketched to show

the state of things on spot. Even the statement of Sunil Kumar Mali, the first informant of the incident was not recorded instantly who was present there. PW-8 did all the above function after registering the FIR of the incident on 06.05.2013 with extraordinary delay. The delay both in registering FIR and taking the statement of concerned witnesses are not explained by PW-8 in his examination. He admitted in his cross-examination that he took statements of PW-2 to PW-5, the family members of complainant Ram Gopal Verma, posing them as witness on spot of incident with a considerable delay of more than 17 days from the date of incident 18/19.04.2013 on 07.05.2013 and 18.05.2013. He further stated about recording of statements of other witnesses under Section 161 Cr.P.C. on 06.07.2013 and 31.07.2013. Except PW-1 to PW-5, no other witnesses of facts or circumstances are produced before the Court for examination. Delay in recording statements casts a serious doubt about their being witnesses on spot or witnesses of circumstances. It leads to inference that the Investigating Officer was deliberately marking time with a view to decide about shape to be given to the case and witnesses to be introduced. The extraordinary delay in recording statement of witnesses of circumstances around the incident are sufficient to cause embellishment exaggeration and improvement in prosecution case, casting a serious doubt as to it's genuinity.

45. In the aforementioned facts coming forth from evidence of PW-8 on record, it would be relevant to give reference of decision of Hon'ble Apex Court in ***Ganesh Bhavan Patel Vs. State of Maharashtra***17 where in para 15 it is held (relevant extract is quoted hereunder):-

15. ".....Delay of a few hour is simplicity in recording the statement of eye witnesses may not, be itself, amount to serious infirmity in the prosecution case. But it may assume such a character if these are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced."

46. In the instant case also, there exists circumstances in plurality which lead such significance to the delay in not registering the FIR of incident dated 19.04.2013 before 06.05.2013, unless the complainant of complaint dated 06.05.2013 is transposed in place of first informant of incident dated 19.04.2013 and in not recording of statements of witnesses instantly on 19.04.2013 or after a reasonable pause of time and in totality are sufficient to hold the investigation defective. Thus, the first point of determination is answered by us.

9. How the appellant is arraigned in the matter of murder of his own mother, wife and son by administering them poison

47. We noticed three proven facts coming forth from the evidence on record particularly the evidence of PW-1 (the complainant Ram Gopal Verma), PW-6, 7 and 8 which show that it is not the facts discovered through investigation after 19.04.2013 when the incident in question was informed to the local police station and reduced into writing in General Diary, as none of the witnesses of fact circumstances and surrounding factor as to the cause of occurrence was examined before 06.05.2013. They are as under :-

48 (i) The Ram Gopal Verma is the person who on 06.05.2013 reported to the PW-6 through a complaint Ex. Ka 1 the complicity of appellant in the incident. He implicated the appellant to have committed murder of his own mother, wife and son, because he had pre-marriage illicit relation with another married woman (to whom he named in the complaint) in which he was continuing even after the marriage with deceased (Kanchan) and wanted to keep the same unobstructed. PW-6 admits in his deposition before the Court, the complaint was made basis of first information report by him that lead the investigation of offence alleged to have been committed by the appellant.

48 (ii) PW-8 with registration of the FIR took instantly the investigation on 06.05.2013 in his charge and taken the statement of the complainant on the same day. PW-6 stated in his examination that on 06.05.2013 at 10:00 PM in night, the appellant was arrested. PW-8 himself in his examination-in-chief stated that he took statement of two witnesses of hearsay evidence and evidence of complainant's wife Chhaya Verma and daughter Deeksha Verma (PW-5 and PW-3) as the witnesses of spot of incident and on their evidence got in investigation, he made arrest of the accused Ram Gopal Saini in the night at 10:00 P.M.

48 (iii) PW-8 in his statement in chief has further stated that he extracted confession from accused in custody that he committed murder of his wife, son and mother by administering them poison. Lastly, pursuant to the confession, it comes out from his statement in chief, he taken statement of some other witnesses and on the basis of those statements and site map prepared by him on 06.05.2013 only, he submitted the charge sheet against the accused/appellant on 31.07.2013 before the concerned Magistrate.

49. The appellant "Ram Gopal Saini" after the incident was present at the time of post mortem at 03:00 P.M. in the post mortem house on 19.04.2013, it is admitted by PW-1 (complainant) and the concerned police officers (PW-6, PW-7 and PW-8). He was pursuing the action on the information regarding the suspicious death of his mother, wife and son right from 19.04.2013 by adopting the course under Section 154 (3) and 156 (3) Cr.P.C., (as it comes out from the cross-examination of PW-8). Thirdly, the report from Forensic Science Lab could not be received to the police as to the use of poison in causing the death of the victims died in the incident before 22.11.2013. The question arises in the context of above stated facts which came forth on evidence of prosecution itself that how Ram Gopal Verma (PW-1) who did not disclosed any such fact as to the use of poison and also as to the culprit on 19.04.2013, suddenly came to know personally about the application of poison in causing death and that too, by the appellant. Neither in the statement of PW-1 (complainant) nor in the statement of PW-8 (investigator) the specific name of person as source of information who witnessed the above facts is disclosed. For want of any such disclosure in the evidence of both the prosecution witnesses the statements as to the use of poison by the appellant is simply a speculation and the alleged confession by the appellant as to the guilt which have been extracted in Police custody by the PW-8. The PW-8 thus appeared to have

culminated the investigation into charge sheet under Sections 302/120B I.P.C. only on the basis of hearsay and speculation. Such a serious lapse and omissions in submitting charge sheet against the appellant also cast a serious doubt as to the investigative intent.

50. The legal position as to what should be the contents of charge sheet or final report under Section 173 (2) or 173 (8) of the Criminal Procedure Code, 1973 has been expounded by the Apex Court in the case of ***K. Veeraswami Vs. Union of India and others***18. It would be relevant to refer hereunder para 76 of the said judgment:-

76. "The charge-sheet is nothing but a final report of police officer under Section 173(2) of the CrPC. The Section 173(2) provides that on completion of the investigation the police officer investigating into a cognizable offence shall submit a report. The report must be in the form prescribed by the State Government and stating therein (a) the names of the parties; (b) the nature of the information; (c) the names of the persons who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed and, if so, by whom (e) whether the accused has been arrested; (f) whether he had been released on his bond and, if so, whether with or without sureties; and (g) whether he has been forwarded in custody under Section 170. As observed by this Court in Satya Narain Musadi v. State of Bihar [(1980) 3 SCC 152, 157 : 1980 SCC (Cri) 660] that the statutory requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the Investigating Officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. In fact, the report under Section 173(2) purports to be an opinion of the Investigating Officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence."

51. Thus the charge sheet under Section 173 (2) is an opinion of the Investigating Officer intimated to the Magistrate, so as to apprise him of the fact that investigation into a cognizable offence have been under taken, further that by investigation 'sufficient materials' has been procured for the trial of the named accused. Beside this, the investigating officer intimates that the evidence stated in the chargesheet are sufficient to take cognizance of the offence by the Court. But peculiarly enough, in the instant case, Investigating Officer in his evidence or PW-8, admits to submit charge sheet against the appellant on the basis of evidence collected by him through investigation

but in his cross-examination states that the witnesses in the case are only the complainant Ram Gopal Verma, his wife, sons and daughter and none else. He further replied on the query made to him by cross-examiner, no direct evidence of the incident was available and even the circumstantial evidences too were not sufficient to submit charge sheet against the accused. The above fact renders the chargesheet illegal, in view of the judgment of Hon'ble Apex Court in ***K. Veeraswami Vs. Union of India (Supra).***

52. The trial judge has not taken into consideration the facts noted by us as discussed hereinabove, evincing the defective investigation and illegality of chargesheet in considering the strength of prosecution case, especially in a case like the instant one, which absolutely depends on circumstantial evidence. Thus, we answered the second point of determination in appeal framed by us.

10. "Ram Gopal Verma the Complainant"

53. We, when traversed through evidence, noted several facts about Ram Gopal Verma, the complainant of the case which make him interestingly a man of enigmatic personality and mysterious in his actions. He is the propagator and helmsman of the prosecution case and is also examined as PW-1 in the trial. From his statement recorded by the trial judge during examination-in-chief on 05.11.2014 and that recorded in cross-examination on 05.12.2014 it comes out that (Ram Gopal Verma) a grocery shop owner and resident of same locality namely 'Hayatganj', P.S. Tanda Kotwali in District Ambedkar Nagar in which the house of appellant Ram Gopal Saini situated, where the incident in question occurred on 18/19.04.2013. The distance between the two houses (of appellant and the complainant) was approximately 800 to 1000 meters. The daughter of the complainant named Kanchan had love affair with the appellant. She eloped with the appellant Ram Gopal Saini and entered into marriage with him without knowledge and consent of the complainant. After the marriage, both of them started living in cohabitation as husband and wife in the house of appellant, where appellant's mother Kama Devi (deceased) also used to reside. Annoyed of the elopement of his daughter and marriage with the appellant with her against his wish, the Ram Gopal Verma lodged a criminal case against the appellant, his mother and sister under Section 363, 366 and 342 of the IPC in PS. Tanda Kotwali bearing crime case no.838 of 2008. Ram Gopal Verma as PW-1 has admitted in his deposition before the Court during his examination that his daughter Kanchan (deceased) had filed a writ petition in the High Court for the relief of quashment of the proceeding of aforesaid criminal prosecution, wherein the arrest of the accused (the appellant and his mother Kama Devi) was stayed.

54. So far as the criminal prosecution launched by the complainant against the appellant and his mother Kama Devi (deceased) is concerned, the evidence do not disclose the termination of that either by compromise or on merit. But in his own evidence the complainant himself admit the marriage between the appellant and complainant's daughter (Kanchan the deceased) consequent upon love affair between them. Therefore parties to the marriage consensuously

entered into marriage. The other witnesses PW-2 to PW-5 (the sons, wife and daughter of complainant) what stated about their age in comparison to the Kanchan (deceased) disclose that she had attained the age of majority when entered in marriage with appellant in the year 2008. Then also the lodging and continuance of criminal prosecution against the appellant, his mother and sister is suggestive of complainant's malice and enmity towards them.

55. After the arrest of the appellant on 06.05.2013 pursuant to the complaint of Ram Gopal Verma on the same date and submission of charge sheet against him on 31.07.2013, the subsequent action taken by the complainant with regard to the property of the appellant is noticeable. He as PW-1 in his cross-examination dated 05.12.2014 admitted that he had filed a suit against the near relatives of appellant Ram Gopal Saini, bearing no.185/2013 for the custody of his immovable property, a residential plot abutting to the boundary of Roadway Station of Tanda having Gata No.231. He denied the suggestion that the suit was filed with intention to coerce the appellant and the complaint dated 06.05.2013 and the criminal case thereupon was lodged by him falsely with the same purpose but on the other hand, after the death of his daughter Kanchan (appellant's wife) and grand son Dhairya, though had no concern with the appellant's property, even then he filed a suit for the custody of said property, make him a person interested in seeing him behind the bars.

56. On the basis of above proven facts on evidence, the complainant Ram Gopal Verma appears to be inimical with the appellant and even with his mother Kama Devi (deceased) for the reason of her daughter's (Kanchan-deceased) elopement with him and getting married without his consent. Moreover, after the incident losing his daughter he turned not only hostile with appellant but also interested in his incarceration so as to derive benefit from his property. PW-1 is thus an inimical and interested witness against the appellant. Therefore, his testimony should have been cautiously considered by the trial judge before relying the same wholly or partly. In this regard, we think to refer following judgment of the Hon'ble Apex Court which would be relevant-

In ***State of Rajasthan Vs. Kalki***19 it is held,

para 7. ".....A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished..…"

In ***Raju Vs. State of T.N.***20 it is held,

para 20. The first contention relates to the credibility of PW 5 Srinivasan. It was said in this regard that he was a related witness being the elder brother of Veerappan and the son of Marudayi, both of whom were victims of the homicidal attack. It was also said that he was an interested witness since Veerappan (and therefore PW 5 Srinivasan) had some enmity with the appellants. It was said that for both reasons, his testimony lacks credibility.

In ***Vijendra Singh Vs. State of U.P.***21 it is held,

para 31. "In this regard reference to a passage from Hari Obula Reddy v. State of A.P. [Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675 : 1981 SCC (Cri) 795] would be fruitful. In the said case, a three-Judge Bench has ruled that: (SCC pp. 683-84, para 13)

"[it cannot] 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 the 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."

It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Court in Kartik Malhar v. State of Bihar [Kartik Malhar v. State of Bihar, (1996) 1 SCC 614 : 1996 SCC (Cri) 188] has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason."

57. Again in ***Ramashish Rai Vs. Jagdish Singh***22, it is held,

Para 7. ".....The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence. In the present case the High Court has rejected the otherwise creditworthy testimony of eyewitness account merely on the ground that there was enmity between the prosecution party and the accused party.

58. The Trial Court, in our considered opinion has not appreciated the evidence on record as to the character of the complainant as PW-1 in giving credibility to his evidence while weighing the strength of prosecution case.

11. Conduct of the witness PW-1

59. We further noticed from the evidence on record some unusual conduct and behavior of the complainant Ram Gopal Verma throughout the proceeding from the stage of investigation upto that of Trial. In evidence of PW-7, the Sub-Inspector who performed inquest proceeding, it comes out that being father of the deceased Kanchan the complainant did not complain anything on 19.04.2013 when the inquest was being done as to the suspicious death of the victims. PW-8, also has stated in his evidence that though PW-1 was present throughout the inquest proceeding and has been a signatory of the inquest report as witness and also of the memos prepared on seizure of materials therefrom, but he did not move

any complaint as to the cause of death and the culprit. The statements of PW-6, PW-7 and PW-8 consistently affirm, he moved the complaint on 06.05.2013 with regard to the incident dated 19.04.2013. The complainant exhibit Ka-1 itself shows, he did not disclose therein, how he came to know with such precision the details as to the commission of murder of victims and also as to the complicity of the accused. PW-8 in his statement made it clear that PW-1 did not disclose the fact of filing a criminal case under Section 363, 366 and 342 I.P.C. against the appellant and his mother Kama Devi (deceased) and further the filing of writ petition by his daughter Kanchan (deceased) against him in the High Court. The complainant was when examined on 05.11.2014 as PW-1 supported the prosecution case arraigning the appellant but afterward he turned hostile on 22.06.2015 when he was subjected to cross examination. Subsequent development is also notable i.e. filing a suit for custody of appellant's property by him against the appellant's family members as detailed in the preceding para. It is rather surprising as to how and in what manner the complainant as an omnipresent witness came to know who committed the offence, when that was committed and how the poison was administered to cause death only on 06.05.2013. He did not refer any source of knowledge or offered to produce any witness of such facts. Keeping into consideration the unusual conduct and behaviors of the witness PW-1, we are constrained to hold that the same shakes not only the prosecution case but the sanctity of trial also.

12. Ram Gopal Verma (PW-1) and other witnesses of fact (PW-2 to PW-5)

60. The prosecution witnesses PW-2 and PW-4 are sons of PW-1 whereas PW-3 and PW-5 are respectively his daughter and wife. No doubt they are witnesses related with the deceased Kanchan and as such are natural witnesses also. Though, simply for the reason of their interestedness in seeking the culprit punished, being relative would not be a ground for their untrustworthiness, but like other witnesses they should have qualify the test of reliability, credibility and trustworthiness. Out of the witnesses PW-1, PW-2, PW-3, PW-4 and PW-5, we have already discussed the evidence on record which tend to show the PW-1 an inimical and interested witness in prosecution against the appellant. To justify the suitability, reliability and trustworthiness of a witness, it should be kept in mind, which fact he deposed in the Court. In the instant case the prosecution tried to prove two facts by examining it's aforesaid witnesses. First, the accused had committed murder of his mother Kama Devi, wife Kanchan and the minor child 'Dhairya' by administering them poison and second the motive of the appellant behind the commission of murder. Both the facts require personal knowledge of the witnesses, their spontaneity in narration, the probability of their observing the fact which they are proposed to prove.

61. The first version of the incident as reported by the Sunil Kumar Mali on 19.04.2013 at 06:45 and entered by PW-6 in G.D. on same date instantly did not see the light of the day. The version of Ram Gopal Verma as to the incident dated 19.04.2013 reported vide complaint dated 06.05.2013 is the very geneses of the prosecution story. As PW-1, Ram Gopal Verma when examined in the Court,

reiterated the contents of his complaint in his examination-in-chief. Since we have given a detailed account of the contents of complaint moved by Ram Gopal on 06.05.2013, therefore, just to avoid repetition, we come to discuss the relevant portion of his statement before the Court. He states on 18.05.2013, his daughter Kanchan, her son Dhairya and Ram Gopal's (appellant's) mother Kama Devi were alongwith the appellant, in their house at the time of incident. Ram Gopal Saini in a conspiracy to remove all the three victims from his way, murdered them by administering poison and moved to Delhi. Neither the complaint nor the statement recorded before the Court discloses the source of knowledge of aforesaid fact as to the presence of appellant in the house or manner adopted by him in alleged murder. This is important to note here that as admitted by PW-1 himself the distance between the house of appellant and the PW-1 is about 800 to 1000 meters, therefore, without going to the house of the appellant and remaining there throughout the commission of incident, he could not have opportunity to observe and have personal knowledge of the incident. Moreover, if anyone else has told him about the incident, then such person not named in the complaint (Exhibit 1) or in his statement before the Court. On specific query made to him in Cross-examination, whether the said fact, he wrote in the complaint on his own or as informed by some one else, he replied on 28.01.2016, I wrote down the complaint as I wanted and not as informed by any one else. When the PW-1 was not informed of the incident by any eye witness and even he did not go to the house of appellant on 18.04.2013 and remain there, he had no occassion to have personally observe the incident. Even he had no knowledge as to the time, the appellant was lastly seen with the victims in his house and when he left the house. But posing himself as an omnipresent witness, he deposed before the court accounting the hypothetical graphics of the incident with minute details and thus established himself a liar and untruthful witness not worthy of credence.

13. Motive

62. Prosecution in the instant case sought to prove motive by PW-1 as he is the first person to blame the appellant a misdemeanant and set a motive for commission of murder of his own wife, mother and son, administering them poison. The motive he wrote in the complaint (Ex. KA-1) and stated in his examination before the Court is his extramarital and illicit relation with another married woman. He further stated that even after the marriage, the appellant remained in that illicit relation, therefore, he planned to murder the victims to keep smooth his illicit relation.

63. The extra marital illicit relation between two married persons, in the instant case allegedly between the appellant and Smt. Sunita Gupta, is a matter with regard to which there is no evidence on record. Evidence do not show any complaint on the part of husband of Smt. Sunita or by the deceased Kanchan against the appellant. On query made to the witness PW-1 in cross examination he accepted the lack of any such complaint. There is no independent witness having information or knowledge of intimacy between the appellant and said Sunita Gupta, is produced and examined before the Court.

In the absence of any such evidence and witness, the alleged illicit relation between the appellant and Sunita Gupta remains a speculation without any substance. The PW-1 states that he was told about the illicit relationship of appellant with said Sunita Gupta by his daughter Kanchan (deceased) as she use to visit him in his house. The said statement seems not convincible and truthful, in view of the proved fact of criminal prosecution maintained by PW-1 against the appellant annoyed from the elopement of his daughter and marriage with him as well as writ petition by the daughter (deceased Kanchan) against PW-1 for personal protection and stay of prosecution. His inimical relation with his daughter and son in law does not make it believable that his daughter (Kanchan the deceased) had ever visited him after her marriage and converse any such fact to him. His statement as to the illicit relationship of appellant is not supported by other witnesses of fact produced by the prosecution namely his sons, daughter and wife (PW-2 to PW-5) in their statements. Even the PW-8 (the I.O.) in his statement has firmly negatived from the allegations leveled by the PW-1 against the appellant of having illicit relationship with Smt. Sunita Gupta. He stated the said allegations was found baseless with all respect in the investigation.

64. Dhairya (deceased) a male child was begotten out of wedlock of appellant and kanchan (deceased) after their marriage in 2008 who was four years old at the relevant date of incident. There is no complaint lodged with the police by the deceased Kanchan at any point of time before her death that she was being subjected to physical or mental cruelty consequent upon the alleged illicit relationship of the appellant. The prosecution remained fail even to establish the motive of the appellant consistent with his alleged guilt.

65. Other prosecution witnesses PW-2 to PW-5 have not even remotedly indicated any trace of discordant relations between the appellant and his wife Kanchan (deceased) or acrimony between them or a threat perception to the life of the deceased wife. In some how similar facts Hon'ble the Apex Court in the case of ***Gargi Vs. State of Haryana(Supra)*** held as under:-

"In the given circumstances, it is difficult to accept that prosecution was able to establish by cogent and reliable evidence that appellant was involved in illicit relations or was pressurising deceased to transfer property in her name and that there had been strong acrimony between deceased and appellant-It is also difficult to accept, for want of cogent corroborative evidence, if deceased had made any alleged statements about discord with his wife and threat perceptions to PW-7 and PW-8 - In the given circumstances, possibility of levelling of imputations on appellant for intentions other than bringing real culprit(s) to book, is not ruled out altogether."

66. The effect of failure of prosecution in proving the motive in a case based on circumstantial evidence is discussed by Hon'ble the Apex Court in a catena of judgment. It would be relevant to refer one of such judgment in the case of ***Kirti Pal Vs. State of West Bengal with Durga Sutradhar Vs. State of West Bengal & ors***23. In para 26, it is held :-

26. "It is true that motive is an important factor in cases where the conviction is based on circumstantial evidence but that does not mean in all cases of circumstantial evidence if the prosecution is unable to prove the motive satisfactorily, the prosecution must fail. In this case, of course, the prosecution has not adduced evidence as to what was the motive for committing murder of Anjali. But it is a matter of common knowledge that murders have been committed without any pre-eminent motive. It is well established that the mere fact that the prosecution has failed to translate the mental disposition of the accused into evidence, that does not mean that no such mental condition existed in the mind of the accused. The same view was reiterated in Vivek Kalra v. State of Rajasthan [Vivek Kalra v. State of Rajasthan, (2014) 12 SCC 439 : (2014) 6 SCC (Cri) 782] ; it was observed thus: (SCC p. 442, para 6)

"6. ... where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Evidence Act, 1872 but where the chain of other circumstances establishes beyond reasonable doubt that it is the accused and the accused alone who has committed the offence, and this is one such case, the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence. In Ujjagar Singh v. State of Punjab [Ujjagar Singh v. State of Punjab, (2007) 13 SCC 90 : (2009) 1 SCC (Cri) 272] , this Court observed: (SCC p. 99, para 17)

''17. ... It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy.'"

We thus hold, the prosecution remained fail to prove motive in the present case which is based on circumstantial evidence. Now we have to see whether other circumstances necessary to establish the accused committed the offence exclusively are proved by the evidence.

67. The instant case as alleged by the prosecution is a case of culpable homicide amounting murder by administrating poison to the victims. Since we have already observed that there is no evidence on record as to the strained relation between victims and the appellant or any other situation of discord between them interse, therefore we do not find any compelling circumstances to infer suicidal death of the victims. The prosecution since charged the accused for causing homicidal death of victims by administering them poison. The genesis of the allegation as to murder by the appellant is the complaint moved by PW-1 (Ram Gopal Verma) on 06.05.2013 and the self incriminating confession extracted by the investigating officer on 06.05.2013 in terms of the said complaint. The prosecution has no direct evidence to prove the charge of murder of the victims by poisoning against the appellant. To prove it's case apart from the PW-1 (Ram Gopal Verma), prosecution has produced five more witnesses allegedly of fact, PW-2 to PW-5. They are sons, daughter and wife of the PW-1. PW-8, the

Investigating Officer in his cross-examination before the Court has deposed that no independent witness of the incident was available throughout the investigation. He further stated that in the instant case the witnesses are the sons, daughter and wife of the complainant. PW-1 also has admitted on 22.06.2015 the fact of his being the only witness in the case with his own family members and no one else is independent witness in the case. Interestingly, the PW-8 states in his examination-in-chief dated 30.08.2016 that he took evidence of 'Sakshi Mauka' (eye witness or witnesses on spot) the wife of complainant Smt. Chhaya Verma (PW-5) and son Dhananjay Verma (PW-4) on 07.05.2013 but this statement of PW-8 as to the status of aforesaid witness in itself is false, as neither of witness amongst the PW-1 to PW-5 can be presumed to remain present on the spot of incident at relevant time and date of incident (18/19.04.2013) because they ordinarily reside in their own house situated at 800 to 1000 meters away from the house of appellant (the spot of incident). They admittedly did not go on or before 18.04.2013 to the house of appellant. So far as the allegation as to the illicit relation of the appellant is concerned, none of the witness PW-2 to PW-5 have claimed in their statement that Kanchan (deceased) have ever visited their house and told them any such fact after her marriage with the appellant. As such the statement of PW-1 with this regard has not been corroborated by the evidence of other witnesses PW-2 to PW-5 and that of PW-8. For the sake of argument, if Kanchan (the deceased) had told any such fact of illicit relation of her husband (appellant) to her father (PW-1), he had not stated about his daughter having any threat perception of her life by reason of the said illicit relation. Therefore, the allegation as to illicit relation being simply hearsay can not be proved in the Court by PW-1. Further it can not be given weight for not being a circumstance leading to the cause of death of Kanchan and other victims of the incident.

14. Death by poison

68. The appellant was charge sheeted by PW-8 on 31.07.2008 arraigning him to cause death of his mother, wife and the four years' old son by administrating them poison. At this juncture, we think, it would be relevant to keep into consideration several facts in their chronological order.

a) On 19.04.2013 as the PW-7 the Investigating Officer performing inquest proceeding of the dead bodies stated, PW-1-Complainant did not opined as to the suspected cause of death of victims and became signatory of the inquest report with regard cause of death not clear.

b) The viscera were extracted from the dead bodies and sent to forensic science lab for examination and report on 19.04.2013 by the doctor who did autopsy on dead bodies.

c) On 23.11.2013, the F.S.L. furnished report on examination of viscera (forensic report code no.1482, 1483, 1484, 1485 of 2013 dated 22.11.2013 on record with specific finding as to the administration of Aluminum Phosphate (ALP) a pesticide commonly known as sulphas or Rice Tablet.

d) Before the above finding of F.S.L., the complainant moved his complaint dated 06.05.2013 with specific

allegation as to the murder of all the three victims on 18/19.04.2013 by the appellant. Since on 19.04.2013 when during inquest the Investigating Officer, PW-7 was collecting information, during his inquiry as to the cause of death, he did not disclose the fact of poisoning.

The above three proved facts which came forth from the evidence on record tend to show in the absence of any disclosure as to the source of knowledge to the complainant either on his own or received from anyone else, the complaint would be treated moved with knowledge of murder by poisoning. The Investigating Officer, PW-8 had burden to collect the fact and circumstances in evidence to connect the accused with the incident of murder of the three victims on the relevant date or time of occurrence. But the PW-8 immediately while acting on the complaint dated 06.05.2013 with regard to incident dated 19.04.2013 arrested the appellant on the same date (06.05.2013) at 10:00 P.M., on the statement of complainant. Thereafter PW-8 extracted appellant's self incriminating confession of guilt of committing murder of his mother, wife and son by administrating them poison. The confession on having been extracted from the accused in police custody was unable to be proved in Court under Section 25 of the Evidence Act, 1872. Therefore, we perused the evidence on record to gather evidence if any sufficient for the trial judge to link the accused appellant from the guilt he is charged with. In this regard, the inquest reports proved in the Court are materially important which shows the physical state and symptom of poisoning on the dead body, much have been discussed by us in preceding paras in this regard.

15. Post mortem report and viscera test report

69. Since apparently there were no exterior marks of injuries on the dead bodies sufficient to cause death, therefore, the doctors who did autopsy on the dead bodies extracted the viscera and sent to Forensic Science Lab for examination as to the contents which might have caused death. The relevant parts of post mortem report, for the purpose of easy reference as to the physical states of dead bodies and opinion of doctor is being quoted hereunder.

Post Mortem report of Kama Devi (Exhibit Ka-23)

Smt. Kama Devi

External Examination
Average body build.
Average Muscularity.
Rigor Mortis passed
from the neck and present
in upper & lower extremities
froath from mouth illegible
stool from Anus present
Teeth 06/08 right eye semi open
left eye closed Mouth Semi open

Antemortem injuries
(1) Abrasion of Size 2 cm. x 1 cm. Present
upper posterior part of Right
forearm 1 cm. from the right elbow
joint.

Internal examination
Skull NAD Brain Congested

(Heart findings and Wt.) All chamber of Heart

Stomach (wall condition, contents and smell) Stomach wall congested about 200 ml. of

Semi- solid contents present

(Large Intestines and mesenterc Vessels) Congested

G.B. Half field

(Immediate Cause) Could not be certainly

Vicera sends for Physical & Chemical

analysis for Expert Opinion

Post Mortem report of Kanchan (Exhibit Ka-27)

Smt. Kanchan Devi

External Examination
Average body build.
Average Muscularity eye close.
Mouth close froth from the mouth
from left angel of illegible
Rigor Mortis pass from the neck
& present in upper & lower
extremities.
Teeth 16/16 illegible
& lower jaw

Antemortem injuries

No External mark of injury present
at all over the body

(External General Appearance) Cynosis of nail present

Internal examination

Skull Membranes Intact

(Orbital, Nasal, and Aural Cavities - Findings) Congested

Lung findings Congested

(Heart findings and Wt.) filled with blood

Stomach (wall condition, contents and smell) Mucosa congested

(Small intestine including appendix) about 50 ml. semi solid contents pre

(Large Intestines and mesenterc Vessels) Congested, Gallbladder full

(Kidneys finding) Congested

(Urinary Bladder and Urethra) Partially field

(Genital Organs) Vaginal Swab present

(Immediate Cause) Could not be certained

Vicera preserves for forensic analysis

Post Mortem report of Dhairya (Exhibit Ka-31)

Dhairya

External Examination

Average body build.
Average Muscularity.
eye semi open
Mouth semi open
Teeth U/L 8/8
R/M passed from neck & Lower
extremities, Nail cynosed
Lip Cynose..…

Antemortem injuries

No external mark of injury present

Internal examination
Brain Congested
(Lungs Findings) Congested
(Heart findings and Wt.) full with Blood (all chamber)
Stomach (wall condition, contents and smell) Mucosa congested
(Small Intestine including appendix) about 50 ml. semi solid food material.
Pastry food & Gas.
(Large Intestine and mesenterc vessels) illegible & Gas.
G.B. full.
Liver congested
(Kidneys finding) Congested
(Urinary Bladder and Urethra) Partially field
(Immediate cause) Be a certained
vicera preserves & sent to forensic Lab. for chemical and physical analysis.

70. The report of Forensic Science Lab were received on 22.11.2013 of which, the three FSL reports code nos.1482/13, 1483/13 and 1484/13 are with regard to finding as to the existence of poison Aluminum Phosphide (ALP) in the stomach of victims namely mother-Kama Devi, wife- Kanchan and son-Dhairya. The fourth report of FSL code no.1485/13 is with regard to the existence of ALP found in the vomiting on the bed sheet seized from the spot of incident and not upon metallic glass found from the spot of incident (material exhibit 6 & 7).

Forensic Report Code No.1482/2013

"विसरा के भागों (1–5) में अल्युमिनियम फॉस्फाइड विष पाया गया, किन्तु यह वस्तु (06) में नहीं था। रासायनिक विधियॉ प्रयोग की गई। अन्य रासायनिक विष के प्रयोग नकारात्मक रहे। प्रयोग के समय समस्त सावधानियॉ ध्यान में रखी गई।"

Forensic Report Code No.1483/2013

"विसरा के भागों (1–5) में अल्युमिनियम फॉस्फाइड विष पाया गया, किन्तु यह वस्तु (07) में नहीं था। रासायनिक विधियॉ प्रयोग की गई। अन्य रासायनिक विष के प्रयोग नकारात्मक रहे। प्रयोग के समय समस्त सावधानियॉ ध्यान में रखी गई।"

Forensic Report Code No.1484/2013

"विसरा के भागों (1–5) में अल्युमिनियम फॉस्फाइड विष पाया गया, किन्तु यह वस्तु (06) में नहीं था। रासायनिक विधियॉ प्रयोग की गई। अन्य रासायनिक विष के प्रयोग नकारात्मक रहे। प्रयोग के समय समस्त सावधानियॉ ध्यान में रखी गई।"

Forensic Report Code No.1485/2013

" वस्तु (1) से (4) में अल्युमिनियम फॉस्फाइड विष पाया गया, रासायनिक विधियॉ प्रयोग की गई। अन्य रासायनिक विष के प्रयोग नकारात्मक रहे। प्रयोग के समय समस्त सावधानियां ध्यान में रखी गयी।"

16. Nature and general use of ALP

71. The learned Government Advocate, Sri Vimal Prakash placed before us for perusal a downloaded copy of an article titled as, ***"Treatment of Aluminum Phosphide Poisoning with a combination of Intravenous Glucaon, Digoxin and Antioxidant Agents" by 'Zohreh Oghabian' and 'Omid***

Mehrpour'24. It is helpful in understanding the nature, application and fatal effect of pesticide poison named Aluminum Phosphide, reported by the F.S.L., found in the 'viscera' extracted from the dead bodies of victims and not found in and upon the material exhibits 6 & 7 placed before the Court. With courtesy to the authors of the said article we cite the relevant portions extracted therefrom as under:-

Abstract

"Aluminum phosphide (ALP) is a very effective outdoor and indoor pesticide used for protecting stored grains from rodents and other pests.1 In Iran, AlP tablets are widely used for protecting rice against pests and so are traditionally called "rice tablets".2 Phosphine gas (PH3) is rapidly formed and released when AlP comes into contact with water or dilute acids, such as those found in the stomach, and is the fatal active form of the pesticide.3 The two main routes of acute toxicity due to AlP are the ingestion of AlP tablets and inhalation of released PH3. Although the exact mechanism of action of AlP is not clearly understood, PH3 is thought to induce toxicity by blocking the cytochrome c oxidase enzyme and inhibiting oxidative phosphorylation which eventually leads to myocyte death.1,2 AlP poisoning has a very high mortality rate (30-100%) and survival is unlikely if more than 1,500 mg is ingested; the lethal dose for an individual weighing 70 kg is 150-500 mg.1 Exposure to AlP is rarely accidental and the majority of cases of severe AlP poisoning are reportedly due to the deliberate ingestion of AlP tablets with suicidal intentions.2,3 Although there are reports of accidental inhalation of PH3 gas, especially among workers, AlP is known as a suicide poison with no effective antidote that can be easily bought.2

Presenting features of AlP intoxication include the rapid onset of shock, vomiting, nausea, retrosternal and epigastric pain, dyspnoea, anxiety, agitation and garlic-odour breath.3 An early sign of AlP poisoning is severe metabolic acidosis and hypotension, which leads to shock and tissue perfusion failure in the first couple of hours after ingestion due to cardiogenic shock and peripheral circulatory failure.1-4 Other cardiovascular complications include cardiac arrhythmias and acute myocardial infarctions.1 Profound circulatory collapse is commonly associated with AlP poisoning; this is believed to be due to the direct effect of PH3 on the heart cells.5 Cardiogenic shock is one of the main causes of death.5,6 There is currently no known antidote for this poison and most treatment modalities are not successful; however, the effective treatment of AlP poisoning using an intra-aortic balloon pump (IABP) and digoxin has previously been reported.5,6 In addition, other researchers have reported that glucagon, digoxin or antioxidants administered individually to poisoned patients have had a beneficial effect.3,5 This report is the first to present the combined administration of glucagon, digoxin and antioxidants in the management of a patient with AlP poisoning."

ALP Forms

It is available as tablets (3 g, trade names: Phostoxin, Bhostoxin, Quickphos Phosphume Phostek) releasing 1 g PH3 or as pellets (0.6 g,

Quickphos, Alphos, Cellphos). The tablets are green, brown or gray, and each tablet contains 56% AlP and 44% aluminum carbonate.

Mechanism of action

In the case of oral intake, the phosphine gas released is absorbed by the gastrointestinal tract with simple diffusion and is mainly excreted by the kidneys and lungs. Phosphine, like cyanide, inhibits mitochondrial cytochrome oxidase and cellular oxygen utilization [13-15].

Toxicity

The fatal dose for a 70 kg adult is 150-500 mg [6,8]. Permissible exposure limit (PET) is 0.3 ppm over an 8 h shift (for factory stuffs). The range of short term exposure limit (STEL) is 1 ppm and immediate danger to life and health would be 200 ppm. For lethal dose in 30 min, the range of 400-600 ppm (10 mg/Kg AlP) has been determined. It has been reported that its LD50 in mice (inhalation of fumes) is 0.68 g/m3 during 65-75 min of exposure and for rats is 1.47 g/m3 during 35-50 min of exposure. LD50 for cats is 25 ppm (2-4 h daily during 3 days).

Etiology

AlP is the most common agent of poisoning in rural or sub-urban zones of some countries such as India, where it is usually ingested for suicide [5]. It is also uses as a suicide agent in Iran [24] but its poisoning in other countries may be due to occupational exposure [16]. AlP can induce rarely complications including hepatitis, acute tubular necrosis, gastroduodentitis, bleeding diathesis, corrosive like esophageal stricture and intravascular hemolysis.

72. In view of the nature, form and availability in general use as pesticide (rice tablets) and as it's etiology discloses, it's use mostly found in suicidal cases. The prosecution when sets it's use in causing homicidal death of the victims on 18/19.04.2013, is heavily burdened to connect from such use to the accused exclusively, beyond all reasonable doubts. What the prosecution was required in such a case is discussed by Hon'ble the Supreme Court in the case of '***Sharad Birdhichand Sarda Vs. State of Maharashra(Supra)***, Hon'ble S. Murtza Fazal Ali, J. discussed in para 164 and 165:-

164. "We now come to the mode and manner of proof of cases of murder by administration of poison. In Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] this Court held thus: (SCC p. 629, para 15)

"Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question? (secondly), had the accused the poison in question in his possession? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death."

165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased."

73. In view of the requirement of proving the facts enumerated in the judgment quoted here above, in the case before us two facts stand proved (i) the death of all the victims of incident from pesticide poison Aluminum Phosphide (ALP) and (ii) because of the proved fact that appellant ordinarily used to reside in his dwelling house (the spot of incident) alongwith his family members the victims, his mother Kama Devi (deceased), his wife Kanchan (deceased) and four years' old son Dhairya (deceased), he might have opportunity to administer them poison. But out of the four rest of the two facts namely (1) the motive to administer poison to the deceased, prosecution failed to prove what induced the accused to do such offence and that (iii) the accused procured and had the poison in his possession. The prosecution right from the stage of investigation and even up to the stage of trial neither has collected evidence so as to prove the essentially required facts stated hereabove, with regard to procurement and possession of the poison specifically named as Aluminum Phosphide (ALP) commonly used as pesticide and known as Rice Tablets or celphos. The investigating officer has not collected evidence as to storage of food grain in house of incident by the family and use of pesticide for their preservation in storage. The evidences show the appellant to be in employment as a fourth class employee, a peon in TNPG Degree College, Tanda. He is not proved by evidence to be in occupation of grocery business in connection of which he may be presumed to have the pesticide poison 'ALP' in his possession, to the contrary the complainant is established and proved by his own evidence also to be in occupation of grocery shop in the same locality at a distance of 800 to 1000 meters from the house of appellant and naturally can be presumed to be in possession of pesticide like ALP in ordinary course of his established business. The prosecutor thus failed to prove the appellant to be in possession of pesticide known as ALP at the relevant date, time and place of incident. The evidences on record also lack any positive evidence as to his procuring pesticide (ALP) from any shop on or before the date of incident. In the absence of any such evidence as to the procurement and possession by the appellant of the poison specifically named the pesticide 'ALP', the case of prosecution as to the use and administration of that poison by the accused becomes legless and thus not proved.

17. The time of death

74. The victims namely, mother of the appellant Kama Devi (60 yrs.), wife Kanchan (35 yrs.) and son Dhairya (4 yrs.) when died is not known. Even the charge is framed as to the commission of murder on date and time 'Not known'. The first information received in the local police station on 19.04.2013 at 06:45 A.M. is entered in the G.D. of the same date. In any case, it can be said, they were found dead by the first informant Sunil Kumar Mali in the morning of 19.04.2013. The complainant informed about incident on 1.04.2013 by moving a

written complaint on 06.05.2013 in the same police station without specifically stating the date and time that the appellant has murdered the victims. The question important for holding the liability of triple murder as complained by the PW-1 on 06.05.2013 is that particularly and specifically when the murder was committed. Since the death of the victims is proved to have been caused by administration of poison then the material fact is when the poison was administered to the victim and by whom. We kept in our mind the fatal effect of the pesticide (ALP) and it's proximate time for coming into fatal action after oral ingestion. We have gathered information as to the above from the extract of 'article' cited in one of the preceding paras. It comes into market in form of tablets of 3 grams. The toxic effect of ALP is due to deadly phosphine gas liberated when it reacts with water or hydro chloric acid in the stomach an early sign of ALP poisoning in severe metabolic acidosis and hypotension, which lead to shock and tissue perfusion failure in the first couple of hours of the ingestion.

75. The doctor who did autopsy on the dead body of Smt. Kama Devi and Kanchan is produced for examination before the trial judge as PW-9. In his statement Dr. Lal Chand Jain, who was posted as C.M.O. in District Hospital, Ambedkar Nagar on 19.04.2013 has stated that he did the postmortem examination of deceased Kama Devi (of 60 yrs.), Kanchan (30 yrs.) and Dhairya (4 yrs.) with the assistance of Dr. S.P. Mishra and Dr. Vijay Bahadur Gautam. He stated that autopsy was started at about 03:00 P.M. on 19.04.2013. On having been asked about the proximate time of death, he relied on the principles as to the determination of time of death on the basis of stages of rigor mortis seen over the dead body at the time of autopsy i.e. in the instant case at 03:00 P.M. on 19.04.2013. Before discussing on the basis of Modi's Medical Jurisprudence, we think it would be relevant to see the observation of Doctor (PW-9) who did the autopsy on dead bodies as to the stage of 'Rigor Mortis' at 03:00 P.M. on 19.04.2013. PW-9 stated in his cross-examination that there was no symptoms of decomposition on dead bodies. Further, he stated about the presence of rigor mortis on upper and lower limb before the neck of the dead body of deceased-Kanchan, same stage of rigor mortis was on the dead body of Kama Devi (60 yrs.). He finished the autopsy on dead bodies by 03:45 P.M. to 04:00 P.M. on the basis of rigor mortis, he estimated the time of death at any time to a maximum twelve hours ago from the time of post mortem but less than the period of a day. As such in his opinion the victims would have died at any time before 03:00 A.M. on 19.04.2013 in the night of 18/19.04.2013.

76. Scrutinizing the time of death on the basis of stages of rigor mortis visible on dead body is not a mathematical calculation to get actual time of death because according to Modi's Medical Jurisprudence Hon'ble the Apex Court in the case of ***Virendra @ Buddhu and ors. Vs. State of U.P.***25 has held on the point, rigor mortis how aid in determining time of death and up to what extent:-

"25. It is mentioned at p. 125 of Modi's Medical Jurisprudence and Toxicology, Edn. 1977 that in general rigor mortis sets in 1 to 2 hours after death, is well developed from head to foot in about 12 hours, is maintained for

about 12 hours and passes off in about 12 hours. In the instant case rigor mortis was present in lower extremities at the time autopsy was conducted on the dead body after 30 hours. As according to ocular testimony the deceased was murdered on 5-10-1979 at about 10.00 a.m. and the doctor conducted autopsy on the dead body on the next day at about 4.30 p.m. after 30 hours of death but rigor mortis was found present in lower extremities. Had he died on 4-10-1979 at about 10.00 p.m. or so rigor mortis would have passed off from the dead body completely at the time of autopsy. Thus the ocular testimony that he was murdered on 5-10-1979 at about 10.00 a.m. stands corroborated from the medical evidence pinpointing that rigor mortis was present in lower extremities at the time when the autopsy was conducted on the dead body after 30 hours."

77. In the instant case the autopsy on dead bodies were done after atleast 8 to 9 hours of the information to the police station at 06:45 A.M. as to the dead bodies of victims lying in the house of appellant, the spot of incident situated at District Ambdekar Nagar in plains of the State of Uttar Pradesh. The incident occurred in the month of April which is beginning of summer in that region. As such approximate time of appearance of rigor mortis and staying up to 12 hours and thus passing of the same after 12 hours is seen not complete in the same succession and was found passed off up to neck only, the death can be estimated to have been occurred from 12 to 18 hours ago from time of post mortem (from 03:00 to 04:00 P.M. on 19.04.2013). The victims of the incident would have died some times in between 02:00 A.M. to 03:00 A.M. in the night hours of 18/19.04.2013. The poison would have been taken/administered some times in between 10:00 P.M. to 12:00 P.M. hours in night.

18. Who administered the poison?

78. In the instant case the victims of the incident dated 19.04.2013 are proved to have died as a result of poisoning therefore, the question is who administered the poison. There is no direct evidence as to the poisoning by any person, however, the complainant Ram Gopal Verma in his complained alleged murder of victims committed by the appellant. He did not disclose the manner in his complaint (exhibit 1) in which murder is committed. In the evidence of PW-8 (Investigating Officer) the manner in which the appellant allegedly committed the murder is disclosed by his confession extracted by PW-8 in the police custody that he committed the murder of the victims by administrating them poison. For the first time, the complainant as PW-1 deposed before the trial judge that appellant in a conspiracy, given poison to his mother, wife and son. He did not disclose how he came to know this fact, in his examination in chief, he stated that he was informed of the fact of murder by poisoning to the victims from the neighbouring and other people of the area. But who were those people who informed him of the said fact were neither named nor produced before the court. The law of evidence does not permit any person who is informed of a fact from some other person or persons to be a witness to prove that information, if the person who informed is alive, available to depose before the court and is not suffering from any infirmity to attend the

court. In the instant case the PW-1 has kept the persons 'anonymous' who informed him the fact, the appellant murdered the three victims of the incident by administering them poison.

19. Circumstantial evidences

79. No direct evidence as to the administration of poison by the accused could be adduced by the prosecution. Therefore, the contextual facts constituting the circumstantial evidence in the case which tend to prove the guilt of the accused need to be considered. In the case of ***Sharad Birdhichand Sarda (Supra)*** as per Hon'ble S. Murtza Fazal Ali, J. the following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence.

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

20. Last seen evidence

80. In the context of the fact that the appellant ordinarily used to reside in his dwelling house alongwith the deceased victims namely his mother, wife and son and that in his absence they were found dead by poisoning. In the absence of direct evidences as he administered them poison, the last seen evidence would be of most importance with regard to inference of guilt of the accused in absence of any explanation.

81. We have gone through the evidence adduced by prosecution, available on the record of trial so as to gather the evidence as to when the accused was last seen alongwith the victims in his dwelling house. The victims (deceased) as per evidence of

medical expert PW-9, on the basis of rigor mortis apparent over their dead bodies can be presumed to have died any time between 12 O' Clock to 02:00 A.M. in the intervening night of 18/19 April 2013. Further, as we have discussed earlier about the fatal activity of the pesticide ALP (Sulphas) would have taken effect maximum within a couple of hours from ingestion, the same might have been administered to/taken by the victims within 10:00 P.M. to 12 O' Clock in the same night. In ***Sharad Birdhichand Sarda (Supra)***, Hon'ble S. Murtza Fazal Ali, J. says, the circumstances that the appellant was last seen with the deceased before her death, if proved, would be a conclusive evidence against the appellant. But for examining the circumstance a computerized and mathematical approach to the problem in fixing the exact time of the various events can not be correct when from the evidences such precision in time does not appear to be possible one should always give some room for a difference of a few minutes in the time that a lay man would say.

82. The complainant Ram Gopal Verma, who is the first man who levelled allegation over the appellant of committing murder of his mother, wife and son by administering poison has submitted himself for examination before the Court on 05.11.2014. Though in his complaint dated 06.05.2013, he has not alleged 'administration of poison' to the victims for their murder by the appellant, has improved his allegations in his statement under examination in chief. He stated, " Ram Gopal Saini, in conspiracy to remove the victim trio from his way, administered poison to them to kill and thereafter went to his sister's house at Delhi". The nature of above statement appears to be statement of an eye witness present on spot of incident who observed personally the incident. He, in the same continuation stated that after the occurrence, he (the appellant) disappeared on the pretext of going to Delhi. In view of the above statement on oath before the Court he was burdened to disclose at what time the appellant administered the poison and secondly when he left the house after occurrence.

83. The helmsman of the prosecution case, PW-1 (Ram Gopal Verma) deposed in the Court in the course of his cross examination by Defence Counsel on 05.12.2014, "I never met the accused Ram Gopal Saini till the date of lodging the First Information Report of the incident. After the FIR was registered, I met with the accused in Police Station, Tanda Kotwali on 08.05.2013." The statement of PW-1 thus discloses that before 08.05.2013, he never met Ram Gopal Saini (appellant). In cross-examination on 22.06.2015 by learned counsel for the defence, PW-1 refined his answer as to when he lastly met the accused. He stated, after the incident I met for the first time with the accused on 08.05.2013. I never met with Ram Gopal Saini (appellant) in between 18.04.2013 to 08.05.2013." In the context of above statement of PW-1 and the 'time of incident', as estimated on the basis of medical evidence of PW-9, in the intervening night of 18/19 April 2013, it comes forth that the PW-1 is not a last seen witness, because of, firstly he is not stating about when he seen lastly the appellant with the deceased in the dwelling house (the spot of incident) and secondly there is a considerable large gap between he met appellant before 18.04.2013 and time of incident in the intervening night of 18/19 April 2013.

84. It would be relevant here to refer the view expressed by Hon'ble the Supreme Court with regard to application of 'Last seen principle' in the case of ***Bodhraj @ Bodha and ors. Vs. State of Jammu & Kashmir***26.

31. "The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2."

85. Not only PW-1 but other witnesses of fact PW-2 to PW-5, the near relatives of Deceased Kanchan namely her brothers, sister and mother also denied to have last seen the appellant before the incident. The simple reason commonly stated by them is that they were not in terms of visiting the appellant and deceased Kanchan other at their houses and meet together, after the incident of elopement of Kanchan to marry with appellant in 2008. The reason behind such acrimony is stated their intercast marriage and criminal prosecution filed by the PW-1 against appellant, his mother and sister. So far as PW-8 and other Police witnesses PW-6 and PW-7 are concerned, they are not witness of fact. Their information collected during investigation can only be read in evidence when the person who informed is produced as witness to prove the same before the Court. PW-8 in his cross-examination dated 30.08.2016 stated that he came to know during investigation that since one day prior to the date of incident (18/19 April, 2013) the accused was not in 'Tanda'. He further clarified that from investigation, it came into knowledge that he (appellant) had gone Delhi to join a feast in the house of his sister. PW-4, Dhananjay Verma, the brother of deceased-Kanchan in his cross-examination dated 08.02.2016 confirms that the sister of appellant named 'Maya' has her house in Delhi. He has also stated that it is wrong to say, accused masqueraded after the incident to go Delhi. The prosecution evidence further prove (PW-1, PW-6, PW-8 and PW-4) that appellant was present at the time of post mortem on 19.04.2013 (after 03:00 P.M.) and he performed the funeral rites of the dead bodies. The prosecution evidence thus itself sufficient to show that the appellant went to Delhi some times on 17.04.2013 (on day before the date of incident i.e. 18/19 April 2013) to join the feast on the occasion of house warming (Grih Pravesh) ceremony of his sister's house, and also that he again appeared in 'Tanda' only on 19.04.2013 after 03:00 P.M. when the post mortem of dead bodies was being done in post mortem house, District

Hospital, District Ambedkar Nagar. It simply means that meanwhile the accused was not present in 'Tanda'.

21. Evidentiary value of witness who turned hostile

86. Though the prosecution's witnesses posed to be witness of fact respectively PW-1 to PW-5 all went hostile on and after 22.06.2015. This would be important to state that on 05.11.2014 when PW-1 was produced as witness of prosecution, during his examination-in-chief and thereafter in his cross-examination by learned defence counsel on 05.12.2014, he was supporting the prosecution case but thereafter cross-examination kept continued and again resumed after a considerable long lapse of time on 22.06.2015, he turned hostile to the prosecution case. The question arises how the evidence of these hostile witnesses will be weighed, and deposition of PW-1 to what extent lends support to the prosecution case. The PW-1 is the first man who complained on 06.05.2013 that the appellant and none else has committed murder of the victims on 18/19 April 2013. Further, he developed the hypothesis of guilt on the part of appellant by stating in his examination-in-chief as PW-1 that he administered poison to the victims and thus murdered them. He does not disclose either in the complaint nor in his deposition before the Court as to how he came to know the above material information relevant to the fact in issue or who informed him the said fact. He does not claim himself eye witness of the fact. In cross-examination made by Learned Defence Counsel when he turned hostile, he stated the said fact came to his knowledge from the people of the nearby locality. Our Courts have held that outright rejection of the evidence of such witnesses is not permissible. The parties entitled to rely on such part of their evidence which assist their case. We would refer the following para from the judgment of Hon'ble the Supreme Court in ***T. Shankar Prasad Vs. State of A.P.***27, being relevant on the point:-

24. "The fact that PW 1 did not stick to his statement made during investigation does not totally obliterate his evidence. Even in criminal prosecution when a witness is cross-examined and contradicted with the leave of court by the party calling him, his evidence cannot as a matter of law be treated as washed off record altogether. It is for the judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the judge finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the said witness, accept in the light of the other evidence on record that part of his testimony which he found to be creditworthy and act upon it.....…"

In ***State of U.P. Vs. Ramesh Prasad Misra & Anr.***28, Hon'ble the Apex Court held that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of prosecution or defence may be accepted.

In ***Himanshu @ Chintu Vs. State (NCT of Delhi)***29, it is held :-

30. In Prithi v. State of Haryana [(2010) 8 SCC 536 : (2010) 3 SCC (Cri) 960] decided recently, one of us (R.M. Lodha, J.) noticed the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872 and few decisions of this Court as under: (SCC pp. 544-45, paras 25-27)

"25. Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In Khujji v. State of M.P. [(1991) 3 SCC 627 : 1991 SCC (Cri) 916] , a three-Judge Bench of this Court relying upon earlier decisions of this Court in Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389 : 1976 SCC (Cri) 7] , Rabindra Kumar Dey v. State of Orissa [(1976) 4 SCC 233 : 1976 SCC (Cri) 566] and Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] reiterated the legal position that: (Khujji case [(1991) 3 SCC 627 : 1991 SCC (Cri) 916] , SCC p. 635, para 6)

''6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.'

26. In Koli Lakhmanbhai Chanabhai v. State of Gujarat [(1999) 8 SCC 624 : 2000 SCC (Cri) 13] this Court again reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. It is worth noticing that in Bhagwan Singh [(1976) 1 SCC 389 : 1976 SCC (Cri) 7] this Court held that when a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

27. The submission of the learned Senior Counsel for the appellant that the testimony of PW 6 should be either accepted as it is or rejected in its entirety, thus, cannot be accepted in view of the settled legal position as noticed above."

87. The crux of the prosecution case is appellant has administered poison to the victims namely Kama Devi (his mother), Kanchan (wife) and Dhairya (his 4 years' son) and thus committed their murder. In light of the law laid down by Hon'ble the Apex Court in various cases when the prosecution witness turned hostile with regard to evidentiary value of the deposition made before the Court. In the instant case, the prosecution has not produced any such person of nearby locality who had personal knowledge of the said fact either directly or by observing surrounding circumstances leading to an inference as to the guilt of the appellant. The other witnesses of the fact PW-2 to PW-5 are the members of the PW-1's family, they from the very inception of their deposition before the

Court have stated about Kanchan (deceased) had no visiting terms with them after the incident of her elopement and marriage with appellant and also about their want of knowledge as to appellant whether was present in Tanda on the date and time of incident or not. Therefore, we did not find any part of evidence of the PW-1 having corroboration from the deposition of other prosecution witness or finding support from their evidence with regard to the fact in issue. Even they had not corroborated the statement of PW-1 with regard to the illicit relations of the appellant with another woman as alleged by the PW-1.

88. To the contrary, the PW-1 in his cross-examination before the trial Court stated, "in the instant case he (PW-1), his wife, sons and daughter are witnesses and none else is independent witness. He did not have knowledge prior to the incident as to the fact of appellant whether will be in home on the relevant day, date and time of incident. In continuation of the cross-examination on 28.01.2016, he deposed that he (PW-1) and his family members had no usual visiting terms with Kanchan (deceased) at her home. Since before a day from the date of incident i.e. 18.04.2013, the appellant was in his sister's house at Delhi. He further stated about appellant that he had no illicit relation with any other woman and his daughter Kanchan was happily cohabiting with appellant without any complaint. He firmly stated that he came to know about the incident on 19.04.2013. On having been cross-examined with the leave of the Court by the public prosecutor, he assertively stated that on the date of incident, the appellant was in Delhi and his statement contrary to this, written in his examination-in-chief is wrong. He stated, I never seen the appellant personally on the date of incident and saw him only after the incident in post mortem house. All the PWs from PW-1 to PW-5 have stated that they did not attend the funeral and last rites of the deceased which was done by the appellant. Thus, the evidence of PW-1 deposed in his cross-examination as to the appellant's absence on the date of incident in Tanda, his being in Delhi. at his sister's house and presence in 'Tanda' only on 19.04.2013 finds support and corroboration with the deposition on the same fact by PW-8, the investigating officer and also from the evidence of PW-2 to PW-5. The part of his evidence as observed above by us deserve to be read in evidence and to be taken into consideration while deciding the fact in issue, as to the "administering poison" and whether the appellant committed murder of the victims by administering them poison.

22. Conviction based on circumstantial evidence

89. As in the instant case, learned trial court has recorded conviction of the appellant purportedly on the basis of circumstantial evidence, therefore we have to find out the circumstances carved out by the learned trial judge from the evidences on record which if taken in their totality lead to the inference exclusively suggesting the guilt of the accused and none else. In a catena of judgments Hon'ble the Apex Court has elaborately reiterated the principles governing the appreciation of circumstantial evidence and when it can be made basis of the conviction. Before proceeding further with discussion over this aspect in the instant case, we think it

would be relevant to quote one of such judgment of Hon'ble the Apex Court in ***R. Shaji Vs. State of Kerala***30. Para 40 of the judgment is quoted hereunder:-

40. "It is a settled legal proposition that the conviction of a person accused of committing an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances, such conviction may also be based solely on circumstantial evidence. For this to happen, the prosecution must establish its case beyond reasonable doubt, and cannot derive any strength from the weaknesses in the defence put up by the accused. However, a false defence may be brought to notice only to lend assurance to the court as regards the various links in the chain of circumstantial evidence, which are in themselves complete. The circumstances on the basis of which the conclusion of guilt is to be drawn, must be fully established. The same must be of a conclusive nature, and must exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused, and the chain of evidence must be complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must further show, that in all probability the said offence must have been committed by the accused. (Vide Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] and Paramjeet Singh v. State of Uttarakhand [(2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98] .)"

90. The prosecution in the context of the charge of 'murder by poisoning' had to prove certain facts relevant to the fact in issue and surrounding circumstances thereto, which can be enumerated in the instant case as under:-

(i) The accused/appellant had a clear motive to commit murder of his mother, wife and the four years' son.

(ii) That the appellant was in extramarital illicit relation with one Sunita Gupta wife of Ved Prakash Gupta.

(iii) The wife or/and the mother had tense relation with the accused/appellant due to any dispute and in connection thereto there persisted strong acrimony between them.

(iv) The mother and/or wife had complained to their relatives or law enforcing authorities with regard to their threat perception as to life at the end of accused appellant.

(v) The victims of the incident used to reside in same dwelling house alongwith the appellant without intervention of sharing of anyone else.

(vi) Victims died due to poisoning.

(vii) The accused appellant procured the pesticide named 'Aluminum Phosphide' which is a scheduled pesticide poison from any shop or otherwise and he was in possession of the poison at the relevant date and time of the incident.

(viii) The accused appellant had reason to ordinarily possess the pesticide ALP in connection with any business and therefore he may be supposed to possess in home such poison on the date and time of the incident.

(ix) That on or soon before the relevant date and time of the incident, any altercation took place between the victims of the incident and the appellant.

(x) The appellant was seen by any one in his house alongwith the victims on the relevant date and time, more exactly to say in the night of 18/19 April, 2013.

(xi) The appellant was seen by any one leaving his house in the night of 18/19 April 2013.

(xii) The appellant was seen in perturbed and perplexed physical and mental condition in or out of his house in the night of 18/19 April 2013.

(xiii) That after the incident the appellant was absconding and hiding himself from police and other persons of the locality.

(xiv) That none else except the appellant has opportunity or chance to access to the victims in house (spot of incident).

(xv) That no one else met the victim in their house since 17th April till any time in the night of 18/19 April 2013 when the incident took place.

91. Out from the circumstances enumerated here in above, the prosecution by it's positive evidence has succeeded in providing circumstances mentioned at serial no. (v) and (vi) only, that is to say, the victims ordinarily used to reside in the same dwelling house with the appellant where the incident was committed and that the victims died by reason of administration of pesticide poison (Aluminum Phosphide). No positive and direct evidences were adduced by the prosecution before the trial court to prove other circumstances enumerated in the preceding para, though the same were quite possible to be proved and evidences thereto were within reach of the prosecution. The first informant Sunil Kumar Mali who reported the incident on 19.04.2013 instantly in the morning at 06:45 A.M. was not produced for examination before the trial Court. He being a near relative of the victims and appellant was the best person to state about the cause of death, mutual relations between the victims interse as well as with the appellant. He would have been a material witness as to when and how he came to know about the incident. This probable witness was signatory as witness of inquest and also a witness whose pre-trial statement under Section 161 Cr.P.C. the PW-8 (I.O.) had recorded during investigation.

92. We have noticed and carved out in earlier part of this judgment, several material omissions, defects and skipping in procedure during investigation which has emerged from evidence on record, which have adversely affected the case of prosecution. The defective investigation has created vast gaps in prosecution story. The lack of evidence as to tense relations between appellant and his deceased wife and / or also with his mother (deceased), the lack of evidence as to conversation / communication with any relative by the deceased Kanchan (Appellant's wife) as to any acrimony or threat perception of life from appellant, the lack of evidence as to the extra marital illicit relationship of appellant with another woman and the appellant causing usual altercation with his deceased wife, all have caused failure of prosecution in proving a clear motive on the part of appellant to kill not only his wife but also his mother and a four years' old innocent son. Likewise, no positive evidence as to the procurement and possession of poison with appellant is adduced by the prosecution so as to link him with the incident of poisoning. Moreover, prosecution seems uninterested in producing last seen evidence so as to

prove the relevant fact as to the appellant, lastly seen alongwith the victims in his house on 18 April, 2013 before the incident or of his leaving the house at any time thereafter. The prosecution evidence tend to establish the appellant being out from his house since 17 April, 2013 and he was seen thereafter on 19.04.2013 at post mortem house at 03:00 P.M. In this large gap of time, no evidence to over rule the possibility of access to the victims by any one else, was adduced, rather there is admission of the PW-1 himself that he was in usual visiting term with his deceased daughter though we have held the same unbelievable in the circumstances of the case. The evidence of neighbouring people would have been helpful in proving the said fact.

93. We have also noticed that the aforesaid circumstances and fact which, if would have been proved by evidence of prosecution, certainly they on being taken in totality would have formed a complete unbreakable sequence of circumstances leading to suggest the guilt of accused exclusively.

94. The learned Government Advocate harangued justifying the impugned judgment of learned Trial Court recording conviction on the basis of circumstantial evidence and the adverse inference drawn against the accused. According to him, there were sufficient evidence to prove the aforesaid circumstances forming chain of circumstances so as to suggest guilt of the accused, as on case diary the investigator (PW-8) has recorded Pre-trial evidence of witnesses under Section 161 Cr.P.C. which tend to prove the last seen evidence and appellant's leaving the house after incident in perplexed condition etc. We again noticed that no witness of pre-trial statements under Section 161 Cr.P.C. is produced before the trial Court to prove such fact. The statements recorded under Section 161 Cr.P.C. are not substantial evidence to be taken into reliance unless they are deposed by the maker their of in trial before the judge so as to testify and subjected to cross-examination for judging the veracity. Hon'ble the Supreme Court in ***R. Shaji Vs. State of Kerala(Supra)*** has held about the evidentiary value of such statements:-

26. "Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case."

In view of the above we do not have any reason to look into the Pre-trial recorded evidence of witnesses who are not produced before the trial court for examination on oath in evidence.

95. In a case of defective investigation before Hon'ble the Supreme Court, namely ***Suresh Vs. State of***

Haryana31 where the circumstantial evidence which was led had gaps in between, it was held :-

54. "From the aforesaid circumstances, we may note that the hypothesis canvassed by the prosecution cannot be said to have been proved beyond reasonable doubt as there exist apparent gaps in the prosecution story, which are left incomplete or insufficiently proved. In Latesh v. State of Maharashtra [Latesh v. State of Maharashtra, (2018) 3 SCC 66 : (2018) 2 SCC (Cri) 235 : AIR 2018 SC 659] , this Court had observed that: (SCC p. 83, para 46)

"46. ... When you consider the facts, you have a reasonable doubt as to whether the matter is proved or whether it is not a reasonable doubt in this sense. The reasonableness of a doubt must be a practical one and not on an abstract theoretical hypothesis. Reasonableness is a virtue that forms as a mean between excessive caution and excessive indifference to a doubt."

56. We may note that every acquittal in a criminal case has to be taken with some seriousness by the investigating and prosecuting authorities, when a case of this nature is concerned. We are aware of the fact that there has been a death of a person in this incident and there is no finality to the aforesaid episode as it ends with various unanswered questions, which point fingers at the lack of disciplined investigation and prosecution. Although courts cannot give benefit of doubt to the accused for small errors committed during the investigation, we cannot however, turn a blind eye towards the investigative deficiencies which goes to the root of the matter."

96. We considered the reasoning given by learned trial judge for holding the accused-appellant guilty of committing murder on the basis of medical evidence, the testimonies of the complainant alongwith other prosecution witnesses and the adverse inference drawn from the absence of accused after the incident, not acceptable. The case is totally of circumstantial evidence but is foisted by the learned trial court as if a case of direct evidence, giving too much reliance on the evidence of PW-1, the complainant to whom we have held, 'not credible', in our earlier part of the judgment. It would be relevant to refer the golden rules of evidence that 'men may tell a lie, but the circumstances may not' which is squarely applicable in the instant case, therefore, we are unable to accept the narrative of the prosecution which stands on the complaint of Ram Gopal Verma as a gospel fruit. Thus the question no. (iii) & (iv) framed by us as point of determination in the appeal stand answered from the above discussion. Prosecution failed to prove it's case by producing best evidences without any justification. Further, the trial judge has misread the evidence on record and even omitted to read the evidence available on record. The impugned judgment is therefore suffering from material errors.

23. Examination of accused under Section 313 Cr.P.C., the Defence taken by the accused and explanation.

97. After recording the statements of prosecution witness the learned trial judge, in due discharge of it's mandatory duty, called the accused in person on 24.10.2016 under Section 313 (1) (b) of the Cr.P.C. to put before him every such pieces of evidence, which appears

incriminatory and to seek his reply. The examination under this provision of the Cr.P.C. is a facultative examination which is done only after the cross-examination of witness is over. The outcome of the examination-in-chief and cross-examination of the prosecution witness with regard to a fact in issue or facts relevant thereto or as to surrounding circumstances relevant to the fact in issue are helpful not only for prosecution in proof of it's case as substantive evidence, but also for the accused, when any piece of such evidence lends support to his defence.

98. The appellant when was put the questions as to the evidence led in the trial with regard to his committing by administering poison, murder of his wife, son and mother for his alleged illicit relations with another woman, replied the same to be false implication made against him due to enimity. Likewise, he pleaded want of knowledge, when was asked about the evidence as to the death of the victims by poison and with regard to postmortem and viscera report. He answered to the questions relating to the FIR lodged by PW-1 registered by PW-6, investigation by PW-8, by saying that all are fictitious and fabricated for false implication. Lastly, when asked whether he want to say anything more, he replied 'yes' and stated in defence that he is falsely implicated by his father in law due to enimity. He further stated that on the relevant time of incident, he was in Delhi at the residence of his sister.

99. So far as the plea of the accused to be in Delhi at the time of incident is concerned it amounts 'plea of alibi'. The defence of false implication on the ground of enimity hatched by the complainant Ram Gopal Verma, as we have discussed earlier is proved by prosecution evidence itself. The evidence of PW-8 and PW-1 both tend to show that since a day back from the date of incident the appellant was not in 'Tanda' as he gone to Delhi. Therefore, both the defences taken by the accused has sufficiently been established from the prosecution evidence on record. The prosecution was heavily burdened to prove that the appellant was present in Tanda particularly in his house at the relevant date and time of the incident, which it could not prove by it's witnesses. This is a fact inconsistent with the fact in issue i.e. murder of victims by the accused committed in his house by giving them poison.

100. In the case of ***Binay Kumar Singh Vs. State of Bihar***32, Hon'ble the Supreme Court observed with regard to plea of alibi as under:-

22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context:

"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."

23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would

have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide Dudh Nath Pandey v.State of U.P. [(1981) 2 SCC 166 : 1981 SCC (Cri) 379] ; State of Maharashtrav. Narsingrao Gangaram Pimple [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63] .

101. In ***Jumni and others Vs. State of Haryana***33, Hon'ble the Supreme Court held that it is not as if the accused person is required to prove his innocence, in fact, it is for the prosecution to prove his guilt. It was further held in this case that:-

20. "It is no doubt true that when an alibi is set up, the burden is on the accused to lend credence to the defence put up by him or her. However, the approach of the court should not be such as to pick holes in the case of the accused person. The defence evidence has to be tested like any other testimony, always keeping in mind that a person is presumed innocent until he or she is found guilty."

102. In ***State of Kerala Vs. Anilachandran @ Madhu & Ors.(Supra)***, Hon'ble the Supreme Court held that:-

15. "The High Court has noticed that the crime was not committed in the manner as suggested by the prosecution and the genesis of the incident is not established. Even if a plea of alibi is set up by the accused and is discarded, that does not take away the duty of the prosecution to prove beyond reasonable doubt that the accused persons were guilty. It is certainly the duty of the persons who plead an alibi to prove it beyond reasonable doubt. Merely because the accused was not able to prove his defence, it cannot be presumed that the prosecution case is proved against him."

The learned trial Court has recorded it's observation in the judgment as to the failure of accused to prove that he was in Delhi at the relevant time of incident. On the basis of discussions made hereinabove, we hold the said observation in the light of evidences on record and facts of the case absolutely wrong and absurd, because it was the prosecution who had strict burden to prove the presence of accused in the house of incident on the relevant date and time of incident. The prosecution failed to discharge it's primary burden of proof under Section 101 of the Evidence Act, 1872.

103. The learned trial judge in the context of two proved facts, namely the death of the victims in dwelling house and cause of death being the administration of poison, has put the burden of explanation as to how the incident took place, on the appellant, by applying Section 106 of the Evidence Act, 1872. In doing so, learned trial judge failed to appreciate the evidence led by the prosecution that it has not discharged it's primary burden to prove the fact that the appellant was present at the relevant day and time of incident in the house of incident alongwith the deceased when they were alive. The learned trial judge though relied on the judgment delivered by Hon'ble the Apex Court in ***Trimukh Maroti Kirkan Vs. State of Maharashtra (Supra)*** but did not go through the rule of last seen evidence enshrined in it's para (22) which is as under:-

22. "Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. InNika Ramv.State of H.P.[(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. InGaneshlalv.State of Maharashtra[(1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation o give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. InState of U.P.v.Dr. Ravindra Prakash Mittal[(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself

and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. InState of T.N.v.Rajendran[(1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

104. There are three cardinal principles of criminal jurisprudence:-

(I) Right to fair trial as enshrined in Article 21 of Constitution of India.

(II) Presumption of innocence of the accused.

(III) Standard of proof which is beyond reasonable doubt in a criminal case.

Much has been discussed by us in the earlier part of the judgment about the right to fair trial and standard of proof beyond reasonable doubt in a criminal case. The general principle regarding the presumption of innocence of accused is reiterated by Hon'ble the Supreme Court in the case of ***Prem Kumar Gulati Vs. State of Haryana***34, it is held that:-

15. "In Kali Ram v. State of H.P. [(1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : AIR 1973 SC 2773], a three-Judge Bench of this Court elaborately discussed the mode of appreciation of evidence and the general principles regarding presumption of innocence of the accused. The Bench observed: (SCC pp. 820 & 821, paras 25 & 27)

"25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind

which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by report to surmises, conjectures or fanciful considerations. As mentioned by us recently inState of Punjabv.Jagir Singh[(1974) 3 SCC 277 : 1973 SCC (Cri) 886] a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

* * *

27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.

105. On the basis of discussions made above, we are of considered opinion that in the instant case when the prosecution has failed to discharge it's initial burden to prove the fact primarily required to be proved necessarily for the application of Section 106 of the Evidence Act, 1872, the trial judge has erred in seeking explanation with regard to the fact how the victims died in the dwelling house by administration of poison. On the failure of prosecution to prove it's case beyond all reasonable doubt, the trial judge was in error to record conviction only on speculation, inferences and suspicion. At this juncture of discussions, it would be relevant to refer the judgment of Hon'ble the Supreme Court in the case of ***Jose @ Pappachan Vs. Sub Inspector of Police, Koyilandy and another(Supra).*** Where in the trial for murder, the wife was

strangulated to death by husband and then hanged in his house. However, in the absence of any persuasive evidence to hold, that at the relevant time, appellant was present in his house, it is impermissible to cast any burden on him under Section 106 of the Evidence Act. It is held:-

52. "The evidence of the eyewitnesses when considered in conjunction with the testimony of the doctor does not link the appellant directly or indirectly with the actual act leading to the unnatural death of the deceased. In the absence of any persuasive evidence to hold that at the relevant time the appellant was present in the house, it would also be impermissible to cast any burden on him as contemplated under Section 106 of the Evidence Act. The consistent testimony of the appellant and his son to the effect that after alighting from the bus on their return from Potta, the deceased was made to accompany DW 1 back home while the appellant did go in search of labourers for works in his compound on the next day and that thereafter till the time DW 1 had departed for his ancestral house, the appellant did not return home, consolidates the defence plea of innocence of the appellant."

Further, it is held that how so ever strong may be the suspicion it can not take place of proof:-

56. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touchstone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.

58. inalienable interface of presumption of innocence and the burden of proof in a criminal case on the prosecution has been succinctly expounded in the following passage from the treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 445:

"The presumption of innocence states that a person is presumed to be innocent until proven guilty. In one sense this simply restates in different language the rule that the burden of proof in a criminal case is on the prosecution to prove the defendant's guilt. As explained above, the burden of proof rule has a number of functions, one of which is to provide a rule of decision for the factfinder in a situation of uncertainty. Another function is to allocate the risk of misdecision in criminal trials.Because the outcome of wrongful conviction is regarded as a significantly worse harm than wrongful

acquittal the rule is constructed so as to minimise the risk of the former. The burden of overcoming a presumption that the defendant is innocent therefore requires the state to prove the defendant's guilt."

59. The above quote thus seemingly concedes a preference to wrongful acquittal compared to the risk of wrongful conviction. Such is the abiding jurisprudential concern to eschew even the remotest possibility of unmerited conviction.

61. Addressing this aspect, however, is the following extract also from the same treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 483:

"Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, factfinders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.

The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means that someone whom, on the evidence, the factfinder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgements of probability necessarily admit that the factfinder is not "sure".It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction."

63. As recent as in Sujit Biswas v. State of Assam[Sujit Biswasv.State of Assam, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677] , this Court also in the contextual facts constituting circumstantial evidence ruled that in judging the culpability of an accused, the circumstances adduced when collectively considered must lead to the only irresistible conclusion that the accused alone is the perpetrator of a crime in question and the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused.

106. In the backdrop of above discussions we once again revert to the argument of learned Government Advocate justifying the order of conviction despite of the fact the same is passed in utter ignorance of the lapses, skipping of procedure and defective investigation done by the investigating agency in the instant case which created such large vacuums and holes in the prosecution case which become unrepairable. Though in ***Sheo Shankar Singh Vs. State of Jharkhand and anothers***35, it is held:-

54. ".....Deficiencies in investigation by way of omissions and lapses on the part of investigating

agency cannot in themselves justify a total rejection of the prosecution case."

Hon'ble the Supreme Court has again in the case of ***Surajit Sarkar Vs. State of West Bengal***36, has addressed the issue and held that:-

49. "We are not prepared to accept as a broad proposition of law that in no case can defective or shoddy investigations lead to an acquittal. It would eventually depend on the defects pointed out. If the investigation results in the real culprit of an offence not being identified, then acquittal of the accused must follow. It would not be permissible to ignore the defects in an investigation and hold an innocent person guilty of an offence which he has not committed. The investigation must be precise and focused and must lead to the inevitable conclusion that the accused has committed the crime. If the investigating officer leaves glaring loopholes in the investigation, the defence would be fully entitled to exploit the lacunae. In such a situation, it would not be correct for the prosecution to argue that the court should gloss over the gaps and find the accused person guilty. If this were permitted in law, the prosecution could have an innocent person put behind bars on trumped up charges. Clearly, this is impermissible and this is not what this Court has said."

107. The aforesaid view of Hon'ble the Supreme Court has again reflected in the case of ***Suresh Vs. State of Haryana(Supra)***, it is held that:-

54. From the aforesaid circumstances, we may note that the hypothesis canvassed by the prosecution cannot be said to have been proved beyond reasonable doubt as there exist apparent gaps in the prosecution story, which are left incomplete or insufficiently proved. InLateshv.State of Maharashtra[Lateshv.State of Maharashtra, (2018) 3 SCC 66 : (2018) 2 SCC (Cri) 235 : AIR 2018 SC 659] , this Court had observed that: (SCC p. 83, para 46)

"46. ... When you consider the facts, you have a reasonable doubt as to whether the matter is proved or whether it is not a reasonable doubt in this sense. The reasonableness of a doubt must be a practical one and not on an abstract theoretical hypothesis. Reasonableness is a virtue that forms as a mean between excessive caution and excessive indifference to a doubt."

55. In view of this proposition, we accept that there is no direct evidence which led the prosecution to clearly prove that the deceased was shot at Adarsh Nagar in Hisar. Even the circumstantial evidence which is led, has gaps in between. In the narration above, there is a big hiatus between the time the accused left the village and the appellant-accused were seen in the hospital, at Hisar. Neither the intermediate facts are established with certainty, nor is the case as a whole established beyond reasonable doubt.

56. We may note that every acquittal in a criminal case has to be taken with some seriousness by the investigating and prosecuting authorities, when a case of this nature is concerned. We are aware of the fact that there has been a death of a person in this incident and there is no finality to the aforesaid episode as it ends with various unanswered questions, which point fingers at the lack of disciplined investigation and prosecution. Although courts cannot give benefit of doubt to the

accused for small errors committed during the investigation, we cannot however, turn a blind eye towards the investigative deficiencies which goes to the root of the matter.

58. We have considered the reasoning of the court below in this case, which we accept. Although this case was foisted to be a case of direct evidence, there is no credibility in the statements of the appellant-accused as the surrounding circumstances have shown, as already indicated in the earlier parts of the judgment, to be against them. We may note the golden rule of evidence that "men may tell a lie, but the circumstances do not", which is squarely applicable in this case at hand. Therefore, we cannot also accept the narrative of the appellant-accused in the other appeals, as a gospel truth.

108. We would not refrain ourselves from referring the decision of Hon'ble the Supreme Court which provides guidance as to the standard required when circumstantial evidence is made basis of the conviction and the approach required in appreciation of evidence by trial court. In the case of ***R. Shaji Vs. State of Kerala(Supra).*** It is held that:-

40. It is a settled legal proposition that the conviction of a person accused of committing an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances, such conviction may also be based solely on circumstantial evidence. For this to happen, the prosecution must establish its case beyond reasonable doubt, and cannot derive any strength from the weaknesses in the defence put up by the accused. However, a false defence may be brought to notice only to lend assurance to the court as regards the various links in the chain of circumstantial evidence, which are in themselves complete. The circumstances on the basis of which the conclusion of guilt is to be drawn, must be fully established. The same must be of a conclusive nature, and must exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused, and the chain of evidence must be complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must further show, that in all probability the said offence must have been committed by the accused. (VideSharad Birdhichand Sardav.State of Maharashtra[(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] andParamjeet Singhv.State of Uttarakhand[(2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98] .)

61. Be that as it may, when a statement is recorded in court, and the witness speaks under oath, after he understands the sanctity of the oath taken by him either in the name of God or religion, it is then left to the court to appreciate his evidence under Section 3 of the Evidence Act. The Judge must consider whether a prudent man would appreciate such evidence, and not appreciate the same in accordance with his own perception. The basis for appreciating evidence in a civil or criminal case remains the same. However, in view of the fact that in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, courts have created the requirement of a high degree of proof."

109. Again in ***Dharam Deo Yadav Vs. State of Uttar Pradesh***37, Hon'ble the Supreme Court held that:-

15. "We have no eyewitness version in the instant case and the entire case rests upon the circumstantial evidence. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum. InHanumant Govind Nargundkarv.State of M.P.[AIR 1952 SC 343 : 1953 Cri LJ 129] , this Court held as follows: (AIR pp. 345-46, para 10)

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

Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eyewitness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

110. In ***Tanviben Pankajkumar Divetia Vs. State of Gujarat***38, Hon'ble the Supreme Court has held that:-

44. "The Court has drawn adverse inference against the accused for making false statement as recorded under Section 313 of the Code of Criminal Procedure. In view of our findings, it cannot be held that the accused made false statements. Even if it is assumed that the accused had made false statements when examined under Section 313 of the Code of Criminal Procedure, the law is well settled that the falsity of the defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea may be considered as an additional circumstance if other circumstances proved and established point out the guilt of the accused. In this connection, reference may be made to the decision of this Court inShankarlal Gyarasilal Dixitv.State of Maharashtra[(1981) 2 SCC 35 : 1981 SCC (Cri) 315 : AIR 1981 SC 765] .

45. The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be

clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held thatthe Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. (Jaharlal Dasv.State of Orissa[(1991) 3 SCC 27 : 1991 SCC (Cri) 527])

46. We may indicate here that more the suspicious circumstances, more care and caution is required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court."

24. Death Sentence

111. Amazing enough, the learned trial judge in the instant case which is based solely on circumstantial evidence and the prosecution remained unsuccessful in proving it's case beyond all reasonable doubt, instead of recording acquittal, not only recorded conviction on the basis of erroneously drawn adverse inference of guilt has also awarded him sentence of capital punishment "the Death Penalty". Before proceeding with discussion on the issue of justification of 'Death penalty', we would think it relevant to state what we noticed about the authoring of the impugned judgment. The arguments and rival contentions alongwith the reference of the judgments of Hon'ble the Supreme Court are cited, but so far as the conclusion is concerned that is recorded abruptly without recording logical and sound reasons. In ***Main Pal and another Vs. State of Haryana and others***,39 it is held that:-

10. "On a bare perusal of the trial court's judgment one thing is patently noticeable. The trial court has merely referred to the arguments advanced and has then come to abrupt conclusions without even indicating any plausible or relevant reasons therefor. Merely coming to a conclusion without any objective analysis relating to acceptability or otherwise of the rival stands does not serve any useful purpose

in adjudicating a case. The trial court was required to analyse the evidence, consider the submissions and then come to an independent decision after analysing the evidence, the submissions and the materials on record. Since the trial court had not pragmatically analysed the evidence, and had given abrupt conclusions, that itself made the judgment vulnerable. Further, several aspects which the trial court found to be of significance were really arrived at hypothetically and on surmises. Merely because the evidence of PW 2 shows that he acted in an unnatural manner, that per se would not be a determinative factor to throw out the otherwise cogent prosecution evidence. The High Court on the other hand has considered in great detail the evidence of the witnesses. It has come to a positive finding that PW 1 was in a position to identify the accused persons. Some of the pleas now advanced were also not taken up before the courts below, for example, non-examination of the pellets/wads by the Forensic Science Laboratory. On considering the evidence on record, pragmatically one thing is clear that the High Court after analysing the evidence in great detail, was justified in treating the trial court's judgment to be practically unreasoned.

25. Justification of Death Penalty

112. Hon'ble the Supreme Court considering the law laid down in ***Machhi Singh and others Vs. State of Punjab***40 and in ***Bachan Singh Vs. State of Punjab***41 has reiterated in the case of ***Shivaji Vs. State of Maharashtra alias Dadya Shankar Alhat Vs. State of Maharashtra***42. Hon'ble the Supreme Court has discussed the proportionality object and considerations involved in awarding Death sentence in para 25 & 26, which are quoted as under:-

25. "9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of ''order' should meet the challenges confronting the society. Friedman in hisLaw in Changing Societystated that: ''State of criminal law continues to be--as it should be--a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual

and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. InMaheshv.State of M.P.[(1987) 3 SCC 80 : 1987 SCC (Cri) 379 : (1987) 2 SCR 710] , this Court while refusing to reduce the death sentence observed thus: (SCC p. 82, para 6)

''[I]t will be a mockery of justice to permit these appellants [the accused] to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.'

10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court inSevaka Perumalv.State of T.N.[(1991) 3 SCC 471 : 1991 SCC (Cri) 724 : AIR 1991 SC 1463]

11. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

12. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

13. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating

and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated inDennis Councle McGauthav.State of California[402 US 183 : 28 L Ed 2d 711 (1970)] : that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

14. In Jashubha Bharatsinh Gohilv.State of Gujarat[(1994) 4 SCC 353 : 1994 SCC (Cri) 1193] it has been held by this Court that in the matter of death sentence, the courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

16. In Dhananjoy Chatterjeev.State of W.B.[(1994) 2 SCC 220 : 1994 SCC (Cri) 358] this Court has observed that a shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

17. Similar view has also been expressed inRavjiv.State of

Rajasthan[(1996) 2 SCC 175 : 1996 SCC (Cri) 225] . It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should ''respond to the society's cry for justice against the criminal'. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance."

These aspects have been elaborated inState of M.P.v.Munna Choubey[(2005) 2 SCC 710 : 2005 SCC (Cri) 559] , SCC pp. 714-17, paras 9-17.

26. "5. InBachan Singhv.State of Punjab[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] a Constitution Bench of this Court at para 132 summed up the position as follows: (SCC p. 729)

''132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware--as we shall presently show they were--of the existence of death penalty as punishment for murder, under the Penal Code, if the thirty-fifth Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and

other capital offences were before Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19."

6. Similarly, inMachhi Singhv.State of Punjab[(1983) 3 SCC 470 : 1983 SCC (Cri) 681] in para 38 the position was summed up as follows: (SCC p. 489)

''38. In this background the guidelines indicated inBachan Singh case[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge fromBachan Singh case[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] :

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.'

7. The position was again reiterated inDevender Pal Singhv.State of NCT of Delhi[(2002) 5 SCC 234 : 2002 SCC (Cri) 978] : (SCC p. 271, para 58)

''58. FromBachan Singh case[(1980) 2 SCC 684 : 1980 SCC (Cri) 580] andMachhi Singh case[(1983) 3 SCC 470 : 1983 SCC (Cri) 681] the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:

The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or

reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.'

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

8. What is culled out from the decisions noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up." [Ed.: As observed inUnion of Indiav.Devendra Nath Rai, (2006) 2 SCC 243 at pp. 247-49, paras 5-8.]

113. In the backdrop of the discussions made above, we are of considered opinion that the judgment regarding conviction of the accused, impugned in Criminal Appeal No.358 of 2017 is not sustainable in the eye of law and therefore, is liable to be set aside. Consequent thereupon, the sentence of death punishment awarded to the appellant is also liable to be reversed.

114. The prosecution has failed to prove it's case beyond all reasonable doubt, the appellant is entitled to be given benefit of doubt and as such, deserves to be acquitted of the charges leveled against him.

Order

A) The Criminal Appeal No.358 of 2017 is ***allowed***.

B) The judgment of the trial court passed in Sessions Trial No.213 of 2013 arising out of Case Crime No.61 of 2013 under Section 302 I.P.C. registered at Police Station Kotwali Tanda, District Ambedkar Nagar impugned in this Criminal Appeal No.358 of 2017 is set aside. The conviction is reversed. Consequent thereupon the appellant is acquitted of the charges leveled against him and the sentence of Death penalty awarded to him is reversed.

C) We have no occasion to confirm the death punishment as referred in the Capital Sentence reference case no.1 of 2017 because the judgment of conviction has already been ordered by us to be set aside. The move to get

confirmation of Death sentence awarded to the appellant Ram Gopal Saini s/o Ram Naresh Saini r/o Mohalla Hayatganj, Police Station Kotwali Tanda, District Ambedkar Nagar in reference case no.1/2017 (Capital Sentence) is declined.

D) Copy of the order be sent to the Jail Superintendent of District Jail, Ambedkar Nagar for necessary compliance under intimation of the Court.

E) Copy of the order be also sent to the District Judge, Ambedkar Nagar for information and necessary action pursuant to the order passed by this Court in Criminal Appeal No. 358 of 2017 and Capital Punishment reference case No.1 of 2017 for necessary compliance under intimation to the Court.

F) The Deputy Registrar (Criminal) is directed to enter the judgment in compliance register maintained for the purpose in the Court and to intimate the compliance to the Court within a maximum period of 10 days.

(2020)06ILR A1023
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.06.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 15 of 1982

State of U.P. ...Appellant
Versus
Avadh Ram & Ors. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Badri Prasad, B N Rai, Shiv Pal Singh, Subodh Kumar Shukla

Criminal Law-Indian Penal Code, 1860-Section-396- Appeal against conviction.

Test Identification Parade-
The evidence of identification parade is not a substantive evidence, its only corroborative evidence.(Para-38)

Thus if evidence of TIP is shaky and doubtful due to this reason, the evidence of identification before the court cannot be relied upon. This case is based only on TIP evidence. (Para-37)

Criminal Appeal rejected. (E-2)

List of cases cited: -

1. Shaikh Umar & anr. Vs St.of Maha. AIR 1998 SC.

2. Surajpal Singh & ors. Vs St. of Punjab, AIR 1952 SC 52

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

The instant appeal has been filed against the judgment and order dated 06.02.1981, passed by the IInd Additional Sessions Judge, Bahraich, in S.T. No. 417 of 1979 (State vs. Awadh Ram and others), arising out of the Case Crime No. 43 of 1979, under Section-396 IPC, Police Station (in short P.S.) Sonwa, District-Bahraich whereby respondents-accused (hereinafter referred to as 'the respondents,) Awadh Ram, Piarey, Chhotey, Gaya Prasad, Jhabbar, Kallan, Azeem Sain, Bharosey and Hari Ram have been acquitted by the trial Court from the charge for offence under Section 396 IPC.

2. The brief facts, arising out of this appeal, are that Awadh Ram, (Pw-1), informant, resident of village Majhawwa Bujurg, P.S.- Sonwa, District Bahraich, lodged first information report (in short FIR) (Ext. Ka-1), on 03.7.1979 at 6.40 A.M., stating therein that in the intervening night of 2/3 July, 1979, he, his father Samaydin, brother Faren and other family members were sleeping outside his house whereas the ladies were sleeping inside the house. A lantern was emitting light on the Darawaja (outer door of Court-yard) of the house. At about 00.30 A.M., 18-20 dacoits appeared at his house and as they dashed the door, he and other family members, sleeping outside the house, got-up. It is further stated that when the informant (Pw-1) and his other family members asked about the identity of the dacoits , they started to beat them by Lathi- Danda and by removing the *Tatia* (temporary partition made by gross and wood), they, armed with Lathi, Danda, Pistol, Gun, Ballam and Torches, entered into his house . Informant (Pw-1) and his family members raised alarm whereupon Faquirey (Pw-5), Munna (not examined), Pahalwan (not examined), Ashok Kumar (not examined), Ram Adhar (not examined) Daya Ram (not examined), deceased Ram Sumiran , Autar (not examined) and other co-villagers came with Torches, Lathi, Danda and Beroo. Ashok Kumar put fire on *Jhakhar* (heap of Chara) which emitted sufficient light to identify the dacoits. It is further stated in FIR that dacoits started fire with gun and country made pistol which caused injury to Samaydin, Smt. Dulara (wife of informant), and Ram Sumiran and they died on the spot. Since the dacoits were bent upon to kill so many people of the village, the villagers challenged the dacoits and attacked upon them with Lathi, Danda, Beroo , brick and stones; one dacoit was caught and died on the spot, due to injuries caused by the villagers, crying Sardar- Sardar and some dacoits had also got serious injuries in counter attack. It is further stated that dacoits remained at the place of occurrence about half-an-hour and looted the house of Chhotey Lal (not examined), Ram Autar (not examined) and Maya Ram (not examined), besides the house of informant and thereafter they escaped from the place of occurrence towards western side of the village after looting the jewelery and cash. It is further stated in FIR that Faquirey (Pw-5),Munna Lal(not examined) and Sarojini (not examined) also got serious injuries, caused by dacoits and they had been sent to Sadar Hospital, Bahraich for treatment . It is further stated that dacoits had been identified in the light of torches, lantern and light emitted from burning of *Jhakhar*.

3. On the basis of the said information, the Chik report (Ext.-Ka 4) was prepared, a case was registered on report No.9 at 06.40 A.M. on 03.07.2019 (Ext. Ka-5) and investigation of the case was entrusted to Sub Inspector (In short S.I). Sukh Sagar Singh (Pw-7) who rushed to the place of occurrence, inspected the dead body of Samaydin, Smt. Dulara Devi, Ram Sumiran and unknown dacoits, prepared inquest memo of the dead bodies and other relevant papers (Ext. Ka-6 to Ext. Ka-17), required for post-mortem examination,sent the dead bodies to District Hospital Baharich for post-mortum examination, recorded the statement of Awadh Ram (Pw-1), Budh Sagar (Pw-2), Tula Ram (Pw-3), Devesh Kumar (Pw-4), Faquirey (Pw-5)

and other witnesses, inspected the place of occurrence and prepared site plan (Ext.Ka-18), took the sample of blood stained and plane earth, a pair of Sandle, one shoe, empty cartridges, ashes of burnt *Jhakhar* from the place of occurrence , inspected the lantern and torches and prepared memo (Ext. Ka-19 to Ext.Ka-25). Meanwhile the investigation was undertaken by Station Officer Sonwa, S.I. Rana Pratap Singh (Pw-9) on 05.07.1979 who arrested the respondent Awadh Ram and also sent instructions to S.I. T.N. Singh (Pw-8) of Police Station Hardi for arrest of other respondents. S.I. Ram Nagina Singh (Pw-6) arrested respondents Hari Ram, Azeem Sain and Bharosey, S.I. T.N. Singh (Pw-8) arrested respondents Tej Bahadur, Gaya Prasad, Chhotey, S.I. Shyam Nath Singh (Pw-10) arrested respondent Kallan, S.I. Mehndi Hasan (Pw-13) arrested respondent Jhabbar, and Constable(In short Const.) Daya Shanker (Pw-16) arrested respondent Piarey.

4. After arrest of respondents, S.I. Rana Pratap Singh (Pw-9) also sent a report for Test Identification Parade (in short "TIP'). Upon such report, TIP of thirteen person namely Awadh Ram, Piarey , Chhotey, Gaya Prasad, Jhabbar, Kallan, Azeem Sain, Bharosey, Hari Ram Tej Bahadur, Lalji , Jhabbar @ Rafeeq and Kirau , was conducted in District Jail Bahraich on 26.07.1979 before Ram Achhaibar Singh (Pw-14), Extra Magistrate Bahraich, by Awadh Ram (Pw-1), Budh Sagar (Pw-2), Tula Ram (Pw-3), Devesh Kumar (Pw-4), Faquirey (Pw-5), Amerika (not examined), Ramadhar (not examined), Ramavtar (not examined) and Pahalwan (not examined). Awadh Ram (Pw-1) identified six respondents Awadh Ram, Piarey, Gaya Prasad, Jhabbar, Kallan, and Hari Ram and one accused Tej Bahadur (since deceased). Budh Sagar (Pw-2) identified six respondents Awadh Ram, Piarey, Chhotey, Gaya Prasad, Jhabbar, and Kallan. Tula Ram (Pw-3) identified three respondents Chhotey, Jhabbar, Kallan including one accused Tej Bahadur (since deceased). Devesh Kumar (Pw-4) identified all the respondents including one accused Tej Bahadur (since deceased). Faquirey (Pw-5) identified five respondents Awadh Ram, Piarey, Chhotey Lal, Gaya Prasad and Jhabbar and one accused Tej Bahadur (since deceased). Pw-14, on the performance of the witnesses, prepared TIP report (Ext.-34). After investigation, PW-9 submitted a charge sheet (Ext. Ka- 28) only against the respondents Awadh Ram, Piarey, Chhotey Lal, Gaya Prasad, Jhabbar, Kallan, Azeem Sain, Bharosey, Hari Ram including accused Tej Bahadur, Lalji , Jhabbar@ Rafeeq and Kirau before the competent Magistrate, who, since the offence was exclusively triable by the Court of Session, after providing the copies of relevant documents in view of Section 207 of Code of Criminal Procedure 1973 (in short Code), committed the case for trial to the Court of Session Judge, Bahraich.

5. Learned counsel appearing for the State and defence were heard at the stage of framing of charge by the trial Court ; Lalji , Jhabbar @ Rafeeq and Kirau were discharged whereas charge was framed against respondents including one accused Tej Bahadur, who died during trial.

6. In order to prove its case, the prosecution examined Awadh Ram (Pw-1), Budh Sagar (Pw-2), Tula Ram (Pw-3), Devesh Kumar (Pw-4), Faquirey (Pw-5),

S.I. Ram Nagina Singh (Pw-6), Sukh Sagar (Pw-7), S.I. T.N. Singh (Pw-8), S.I. Rana Pratap Singh (Pw-9), S.I. Shyam Nath Singh (Pw-10), Const. Govinda Prasad Awasthi (Pw-11), Const. Brij Mohan Pathak (Pw-12), Const. Mehndi Hasan (Pw-13), Ram Achhaibar Singh (Pw-14), Const. Ashok Kumar Singh (Pw-15) and Const. Dayashankar Singh (Pw-16). Awadh Ram (Pw-1); Budh Sagar (Pw-2); Tula Ram (Pw-3), Devesh Kumar (Pw-4) and Faquirey (Pw-5) are witnesses of fact as well as eye-witnesses whereas rest witnesses are formal witness.

7. After conclusion of prosecution evidence, statement of respondents were recorded under Section 313 of the Code wherein they denied the prosecution story and stated that they had been falsely implicated. They further stated that they were arrested from their houses; their photographs were taken in the police station; prosecution witnesses already knew them and they were shown to the prosecution witnesses prior to TIP. Respondent Awadh Ram further stated that Awadh Ram, Tula Ram, Devesh Kumar, Pahalwan, Budh Sagar (Pw-1 to Pw-5) respectively, already were knowing him prior to alleged incident as his maternal uncle Kandhai Lal (Cw-1) resides in village Manjhawa Bujurg who was neighbour of the informant Awadh Ram (Pw-1) and other prosecution witnesses. He further stated that a second daughter of CW-1 was married with his elder brother and since no one was available to look after the agricultural farming of Kandhai Lal, he used to look after his farming, Awadh Ram (Pw-1) used to quarrel with Khandhai Lal (Cw-1) and falsely implicated him.

8. Respondent-Chhotey further stated that he is relative of respondent Awadh Ram; Kandhai (Cw-1) who is in-laws of respondent Awadh Ram , resides in village Manjhawa Bujurg, is neighbour of the informant (Pw-1). He also used to go to the village of CW-1. Respondents Hari Ram and Bharosey further stated that they were servant for only Rs.30/- of village Pradhan Ikrauli and left his service , hence they were falsely implicated. Respondent Gaya Prasad stated that he was falsely implicated by the police and he was shown to the witnesses at Kotwali and his photo was also taken. Respondent Azeem Sain further stated that Devesh Kumar (Pw-4) had caused an accident by his by-cycle wherein his goat was injured, and due to dispute whereof he was falsely implicated.

9. Kandhai (Cw-1) ,resident of Majhawwa Bujurg, P.S.- Sonwa, District Bahraich, was produced before Trial Court by the respondents, in their defence, who stated that his two daughters namely, Parwati and Kalawati had been married with Kailash and respondent Awadh Ram, who were sons of Ram Lautan and respondent Awadh Ram is his son-in-law. He further stated that respondent Awadh Ram used to come frequently at his house.

10. After conclusion of evidence of both sides and hearing the arguments of learned counsel for both sides the learned trial Court acquitted all the respondents vide impugned judgment and order. Aggrieved by the said judgment and order the State has filed this appeal.

11. During pendency of the appeal, the respondent Chhotey Lal and Gaya Prasad did not appear despite repeated notices, hence the appeal against them was separated vide order dated 05.07.1982, while respondent no.7 Azeem

Sain and respondent no.8 Bharosey had died during pendency of appeal. The appeal filed against them has been abated vide order dated 10.02.2020.

12. Heard Sri Badrul Hasan learned A.G.A. appearing for appellant-State, Mr. Subodh Kumar Shukla learned counsel for remaining respondents Awadh Ram, Piarey, Jhabbar, Kallan, and Hari Ram, and perused the record.

13. Learned A.G.A. has submitted that respondents had been properly identified by the prosecution witnesses at the time of occurrence in the TIP and also before the trial Court during their examination. Learned A.G.A. further submitted that there was sufficient light of torches, *Jhakhar*, burnt at the place of occurrence, and lantern wherein the respondents were identified. Learned A.G.A. further submitted that trial Court did not properly appreciated the evidence. Learned A.G.A. further submitted that judgment of trial Court, based on the premises that respondents were shown to the witnesses in Police Station before TIP, is baseless because no such plea was taken by the respondents before the trial Court. Learned A.G.A. further submitted that the impugned judgment and order is against the settled principle of law, liable to be set aside and appeal be allowed.

14. Per-contra learned counsel appearing for the respondents submitted that prosecution has miserably failed to prove its case beyond reasonable doubt. The finding of trial Court that respondent Awadh Ram is son-in-law as well as nephew (Bhanja) of Kandhai (Cw-1) who is neighbour of Awadh Ram (Pw-1) is not disputed. Learned counsel further submitted that the prosecution story regarding the source of light at the place of occurrence is also doubtful . Learned counsel further submitted that Budh Sagar (Pw-2) has not supported the prosecution case whereas the presence of Tula Ram (Pw-3) and Devesh Kumar (Pw-4) at the place of occurrence is also doubtful. Learned counsel further submitted that the witnesses (Pw-2, Pw-3 and Pw-4), produced by the prosecution, are also not named in the FIR and the prosecution has not put any explanation as to why the prosecution witnesses ,except Faquirey (Pw-5), named in the FIR, were not produced before the trial Court. Learned counsel further submitted that sole evidence of identification is not reliable because the respondents were already known to the prosecution witnesses prior to the occurrence, they had also been shown to witnesses and their photographs had also been taken by police prior to TIP proceeding. .Learned counsel further submitted that the respondents are innocent, they have been falsely implicated and the judgment and order passed by the learned trial Court is well discussed and according to the settled principle of law and there is no requirement of interference in this appeal by this Court and the appeal is liable to be dismissed.

15. We have considered the arguments led by learned counsel for both the parties and perused the record.

16. The occurrence in question, that dacoity was caused in the intervening night of 2/3.7.1979 at about 00.30 A.M. in the village Majjhawa Bujurg P.S.-Sonwa, District Bahraich wherein three persons namely, Samaydin, Ram Sumiran and Dulara were killed including one dacoit was killed on the spot and

Munnalal, Faquirey (Pw-5) and Sarojni were injured, is not disputed.

17. Ram Awadh (Pw1), informant and star witness of the prosecution, while supporting the prosecution case, as stated in the FIR lodged by him, has admitted in cross-examination that injured Munnalal, Sarojni and Faquirey (Pw-5) and deceased Samaydin, Dulara and Sumiran had not received injury in his presence as he had gone in village to raise alarm for witnesses. So far as the light of lantern is concerned he stated that it was very dimmer when he went to sleep. However, he further stated that all the dacoits were without any precaution to conceal their identity but he did not mention any distinction or particular of identity of any dacoits. He further admitted that he had come to Bahraich with other witnesses after 13-14 days of the occurrence. He further admitted that respondent Jhhabbar is dark black and also admitted that house of Kandhai (Cw-1) is in the south of his house but he did not know that his one daughter had been married to the respondent Awadh Ram and another to his brother.

18. Budh Sagar (Pw-2) supported the prosecution story in examination in chief but in the cross-examination he did not support the prosecution story and admitted that in the intervening night when the occurrence took place he was not present at the place of occurrence as he had gone to village Bibipur to participate Gauna ceremony of his brother Anirudh Kumar and returned in the morning of 03.07.1979. He further admitted that he had given statement in examination in chief , due to fear of police.

19. Tula Ram (Pw-3) is another eye witness who has admitted that at the time of occurrence he was teacher Salon Risia situated at a distance of 4 miles from the place of occurrence. He further admitted that he had not seen that Munna, Faquirey (Pw-5) and Sarojni were injured. He also admitted that he had not seen fire arm injury at Simiran. He also admitted that he had not seen fire on deceased Simiran, Dulara, and Samaydin and when he saw them, they were already dead.

20. Devesh Kumar (Pw-4) was student at the time of occurrence. He admitted that dacoits were 18-20 in number and he had seen all the dacoits by face but he was not carrying a torch at that time. He further admitted that he had not informed any description or identification marks of dacoits to Investigating Officer.

21. Faquirey (Pw-5) has stated that he had informed the description and identification marks of dacoits to Investigating Officer but he could not give an explanation as to why the investigating officer had not noted that fact in his statement. S.I. Sukh Sagar Singh (Pw-7), I investigating officer, who had recorded the statement of witnesses during investigation, has admitted that Faquirey (Pw-5), in his statement, had not stated any description or identification mark of any dacoits.

22. S.I. Rana Pratap Singh (Pw-9), II investigating officer, arrested the respondent Awadh Ram and filed charge sheet (Ext.Ka-28),after the investigation.

23. Ram Achhaibar Singh (Pw-14), extra magistrate, conducted the TIP of the

respondents and prepared TIP report (Ext.Ka-34).

24. S.I. Ram Nagina Singh (Pw-6), S.I. T.N. Singh (Pw-8), S.I. Shyam Nath Singh (Pw-10), Const. Mehndi Hasan (Pw-13), , and Const. Dayashankar Singh (Pw-16) are the arresting police officers of the respondents whereas Const. Govinda Prasad Awasthi (Pw-11),Const. Brij Mohan Pathak (Pw-12) and Const. Ashok Kumar Singh (Pw-15) are the police officers who took away the respondents to District Jail Bahraich ,after their arrest.

25. Trial Court disbelieved the testimony of aforesaid prosecution witnesses on the ground that the respondent Awadh Ram was married to the daughter of Kandhai (Cw-1) who is co-villager of the aforesaid prosecution witnesses and neighbour of informant Awadh Ram (Pw-1). Trial Court also found that Investigating Officer has also shown the house of Kandhai (Cw-1) adjoining the house of Awadh Ram (Pw-1) and Chhotey Lal. Respondent Awadh Ram has not only his Sasural in the house of Kandhai (Cw-1) but sister of Kandhai (Cw-1) was also his mother. On that count the trial Court was of the view that the respondent Awadh Ram had been frequently visiting to the maternal relation as well as his in-laws to the house of Kandhai (Cw-1), adjoining to the place of occurrence and the statement of Awadh Ram (Pw-1) that he did not know the respondent Awadh Ram, according to the trial Court was not reliable. The trial Court also found that Awadh Ram (Pw-1) has admitted in his examination in chief that respondent Hari Ram and respondent Bharosey (since deceased) were real brother who were resident of village Dehwa, sitauted at a distance of 2-3 furlong from the place of occurrence. The trial Court was of the view that identity of respondent Awadh Ram, Hari Ram and Bharosey (since deceased) were presumed to be known to Awadh Ram (Pw-1) and if they were present at the time and place of occurrence their names should have been disclosed in the FIR.

26. In addition to above the trial Court further found that neither any identification marks of dacoits were mentioned in the FIR nor it was stated before the trial Court by witnesses during their examination and the trial Court was of the view that if the prosecution witnesses had seen any dacoits/respondents at the time of occurrence they had noticed the peculiar feature and identity of dacoits/respondents but they failed to do so. The trial Court also found that some respondents have peculiar feature of identity in view of their clear chiken-pox's mark and colour but none of the witness has stated any peculiar identity of any respondent. In view of the above inconsistency, irregularity, short coming and contradiction in the testimony of witnesses the trial Court disbelieved the prosecution story and acquitted all the respondents.

27. Admittedly the alleged occurrence was happened in the intervening night of 2/3.07.1979. Awadh Ram (Pw-1) has stated that dacoits were 18-20 in number. He specifically stated that at the time of occurrence he, Chhotey Lal, Samaydin (deceased) Feran, Sanehi and Ram Bilas were sleeping at his house and suddenly dacoits appeared and started to beat them whereupon they (including him) run away from his house and raised

alarm in the village. He further stated that some dacoits entered into his house from the back side and opened the main door and thereafter the dacoits who were present at the main gate also entered into the house. He further stated that on his alarm Faquirey (Pw-5), Munnalal, Ashok Kumar, Amerika, Pahalwan, Tula Ram, Ram Adhar and other co-villagers appeared with Danda, Berroo and torches. He further stated that Ashok Kumar burnt the *Jhakhar*, placed near the house of one Bhagwandin. In F.I.R. (Ext.Ka-1) it is mentioned that upon alarm raised by Awadh Ram (Pw-1) and his family members, Faquirey , Munna, Pahalwan , Ashok Kumar, Ram Adhar, Daya Ram, Ram Sumiran and Awatar appeared with Lathi, Danda, Berroo and torches. Thus the presence of Budh Sagar (Pw-2), Tula Ram (Pw-3) and Devesh Kumar (Pw-4) have been shown neither in the FIR nor stated by Pw-1 during his examination. Faquirey (Pw-5) has also not stated about the presence of Budh Sagar (Pw-2) and Devesh Kumar (Pw-4) at the time of occurrence. The prosecution has not given any explanation that if these witnesses were present at the time and place of occurrence why their presence were not shown in the FIR and also not stated by Awadh Ram (Pw-1) in his statement. Thus, the trial Court was of the view that these witnesses were not present at the time and place of occurrence. For the reasons mentioned in the impugned judgment and order we are also of the view that the findings of trial Court requires no interference in the light of aforesaid grounds also.

28. Learned trial Court has specifically doubted the presence of Tula Ram (Pw-3) and Devesh Kumar (Pw-4) on the ground that at the time of occurrence, Tula Ram (Pw-3) was teacher in Sitai Salon at Risiya situated 4 miles away from the place of occurrence and he has not seen the major part of dacoity. Similarly Devesh Kumar (Pw-4) was a student and studying in Bahraich in those days. Further, Budh Sagar (Pw-2) did not support the prosecution story in cross-examination and specifically stated that he had not seen the occurrence as he was not present at the time and place of occurrence . In our opinion, the finding of the trial Court , dis-believing the presence of (Pw-2) Budh Sagar, (Pw-3) Tula Ram, (Pw-4) Devesh Kumar at the place of occurrence, further finds support as their presence has neither been mentioned in the FIR (Ext. Ka-1) nor stated by Awadh Ram (Pw-1).

29. Admittedly the alleged dacoity was caused in the dark night at about 00.30 A.M. by unknown persons. Awadh Ram (Pw-1), in his examination in chief, has specifically admitted that he did not know any dacoit either by his name or by face earlier to the occurrence. He had, for the first time, seen them in the light of burning *Jhakhar* and 5(five) torches. He further admitted that he was also carrying torch at the time of occurrence. Record shows that during trial no torch was produced before the trial Court either during the examination of eye-witnesses or during examination of Investigating Officer S.I. Sukh Sagar Singh (Pw-7) and S.I. Rana Pratap Singh (Pw-9) because S.I. Sukh Sagar Singh (Pw-7) has proved only the recovery memos of torches, lantern, Sandles, empty cartriages, plain and blood stained earth as Ext. Ka-19 to Ext. Ka-25. Now question arises as to whether there was sufficient light at the place of occurrence wherein the respondents-dacoits could have been

identified by the prosecution witnesses. Non-production of torches and lantern before the trial Court without any justification creates further doubt in the prosecution story that respondents were seen and identified by the prosecution witnesses in the light of torches because the trial Court had no occasion to verify the existence of torches at the time of occurrence as well as its' working condition. This doubt further strengthened due to non-production of Munna, Pahalwan, Ashok Kumar, Ram Adhar, Daya Ram and Ram Autar who, as per FIR, appeared at the place of occurrence with torches.

30. In addition to above, according to the prosecution, the respondents were also seen and identified in the light of *Jhakhar* of Bhagwandin, burnt by one Ashok Kumar. In site-plan (Ext. Ka-18), said Jhakhar was situated behind the western side of the *Ghari* (animal yard) of Bhagwandin whereas the alleged occurrence was happened in the house of Awadh Ram (Pw-1) and marked as "X-1" which is situated towards south-east to the said *Jhakhar* and between the place of occurrence and said *Jhakhar*, houses of Avatar Kahar, Gokul Kahar, Bhagwandin are situated and one *Babul* tree was also situated nearby the said *Jhakhar*. Awadh Ram (Pw-1), in his cross-examination, has specifically admitted that it was a rainy season at the time of occurrence, although it was not rained for so many days. He further admitted that the said *Jhakhar* was containing 10-15 bundles *(Bojha)* and by the burning of *Jhakhar* the *Babul* tree was not scorched. Admittedly, dacoits were 18-20 in numbers. According to Awadh Ram (Pw-1) the dacoits had been remained at the place of occurrence only for half-an-hour. It can not be supposed that they were standing at any particular place. Since it was rainy season, the *Babul* tree, standing nearby the said *Jhakhar*, was not scorched and said *Jhakhar* was situated towards western side of the house of Bhawandin and it was situated at considerable distance from the place of occurrence, the prosecution version that the said *Jhakhar* had emitted sufficient light wherein the dacoits were identified by the prosecution witnesses is doubtful. This conclusion further gets strengthen as the prosecution has failed to produce Ashok Kumar who had burnt the said *Jhakhar* and Bhagwandin, owner of the said *Jhakhar*, *who* could state whether or not the said *Jhakhar* was burnt at the time of dacoity to identify the the dacoits.

31. So for as the submission of learned AGA that finding of trial Court that the respondents were shown to the prosecution witnesses prior to TIP, is not just because no such plea was taken by respondents before trial Court, is concerned, record shows specific suggestion had been put by counsel of respondents during trial to prosecution witnesses that respondents were shown to them by police and their photographs were also taken in police station. In addition to above respondents, in their statement u/s 313 of the Code while denying the prosecution evidence, had also taken the aforesaid plea. Thus the aforesaid submission of Ld. AGA has no force.

32. It is also pertinent to point out at this juncture that according to prosecution, in this occurrence dacoity was committed in three houses wherein huge money and ornaments were looted by dacoits, armed with deadly weapons,

for which thirteen person including respondents were arrested within 10 days of the occurrence and made accused in police report u/s 173(2) of the Code but neither any weapon ,used in committing the said dacoity nor any looted property was recovered from possession of any respondents. Prosecution case is silent on the point of any effort made by police for recovery of such weapons and looted property. Silence of prosecution on such vital piece of evidence is also fatal to the prosecution.

33. As discussed herein above, most of the witnesses named in the FIR i.e. Munna, Pahalwan, Ashok Kumar, Ram Adhar, and Daya Ram carrying torches at the time of occurrence and the witnesses Autar, Maya Ram and Chhote Lal, whose houses were also looted, have not been produced by the prosecution whereas Budh Sagar (Pw-2), Tula Ram (Pw-3) and Devesh Kumar (Pw-4) whose presence have been found as doubtful as discussed herein above, have been produced by the prosecution. TIP of respondents were held in District Jail Bahraich. Nine person namely Awadh Ram (Pw-1) Amerika, Pahalwan, Budh Sagar (Pw-2), Ram Adhar, Ram Avatar, Tula Ram(Pw-3) Devesh (Pw-4) and Faquirey (Pw-5) were produced during investigation to identify the respondents-accused wherein Budh Sagar (Pw-2) did not support the prosecution story. Prosecution has neither produced Amerika, Munna, Ashok Kumar, Pahalwan, Ram Adhar and Ram Avatar, before the trial Court nor put any explanation for their non production. It is very amazing fact that Devesh Kumar (Pw-4) whose presence was found suspicious and was not carrying any torch with him at the time of occurrence, had identified all the ten person including respondents who were arrested during investigation as accused of this occurrence. Trial Court disbelieved the 100% identification of this witness (Pw-4). In addition to above, admission of Awadh Ram (Pw-1) , that he had come to Bahraich with other witnesses after 13-14 days of the occurrence, had further created doubt in the reliability of evidence of identification and the trial Court found force in the argument of defence counsel that the respondents had been shown to the witnesses prior to TIP and held TIP as shaky and suspicious. In the fact and circumstances as discussed herein above we are also of the view that TIP of respondents is not reliable and finding of the trial Court does not require interference.

34. There is another reason which makes the prosecution case highly doubtful. The prosecution case is based only on the evidence of identification. In FIR no identification marks of any dacoits has been mentioned. Neither Awadh Ram (Pw-1) nor other witnesses have stated that they had seen any particular identification marks on the face of respondents. Awadh Ram (Pw-1), before the trial Court, had identified the respondents Kallan, Piarey , Awadh Ram, Jhabbar, Gaya Prasad and Hari Ram and one accused Tej Bahadur (since deceased). He has further admitted that respondent Jhabbar is black having read bond (Dhaga) on his neck but he had not noticed any bond (Dhaga) on his neck at the time of occurrence. He further admitted that some of dummies standing with respondent Jhabbar at the time of TIP, were white, and some were matching and some were more black than him but he had not noticed even at the time of TIP whether respondent Jhabbar had weared

bond (Dhaga) on his neck or not. This witness (Pw-1) further admitted that Kandhai Pasi (Cw-1) is his co-villager who is elder than him. He further admitted that he could not disclose the description of dress, weared by dacoits and weapons carried by them. This witness (Pw-1) has also admitted that respondent Kallan having small moustache had no beard whereas some of dummies had moustache , some were without moustache or beard, some were white in colour and some were in colour similar to respondent Kallan standing in TIP. Faquirey (Pw-5) in cross-examination admitted that respondent Chhotey is pox-pitted. TIP report (Ext. Ka-34) further shows that some respondents were pox-pitted and each respondents had considerable numbers (5 to 8) specific identification marks including black mole and pox- pit on their face as well as on both sides of their tamples but Achhayver Singh (Pw-14), has not stated that any pox-pitted under trial was mixed in the parade of respondent who was pox-pitted. Ram Achhavar Singh (Pw-14) had only stated that under trial prisoners ,who were lined up with respondents in TIP, were similar in hight, colour and in appearance. Thus it is clear that dummies, lined up with respondents at the time of TIP, were not similar in colour, hight and facial appearance to the respondents. In such fact and circumstances, we are of the view that trial Court rightly dis-believed the prosecution evidence.

35. It is settled principle of criminal jurisprudence that identification of accused by the witnesses before the Court is substantive piece of evidence whereas evidence of TIP is very weak evidence,it has only the corroboratory value and where the offenders were unknown to the witnesses and the prosecution case is based only on the evidence of identification, prosecution has to prove that prosecution witnesses had proper and sufficient opportunity to see and identify the respondents and they had properly seen and identified them . It was dark midnight at the time of occurrence. Evidence, produced by the prosecution, regarding sufficiency of light at the place of occurrence, has been found shaky and doubtful. As discussed herein above, prosecution witnesses had admitted that they had neither noted the description or special characteristic of any dacoits nor disclosed it in their statement given to investigating officer. They had further admitted that they neither noted the colour of the dacoits nor noted the colour of their clothes. Every person has his specific appearance, characteristic and bodily strength. During examination prosecution witnesses seeing the respondents admitted that some of respondents especially Jhabbar, Chhotey and Kallan had special appearance, identification marks and characteristic. Prosecution has not placed a single justification that if the respondents had special appearance identification marks why the prosecution witnesses had not noted and disclosed it to investigating officer . Neither mentioning specific feature or identification marks or appearance of any dacoits in FIR nor disclosing to investigating officer had further made the evidence of identification shaky and doubtful.

36. In the case of Wakil Singh vs. State of Bihar, AIR. 1981 S.C.1392, where judgment and order of acquittal, passed by trial Court as the evidence of identification was doubtful, was reversed

in appeal by the High Court in appeal , Hon'ble Supreme Court, setting aside the judgment of the High Court ,has held as under:

"2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or of black colour. *In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification could not be excluded. For these reasons, therefore, the trial Court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial Court. The High Court, however has chosen to rely on the evidence of a single witness, completely over-looking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3 1/2 months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness."* (Emphasis supplied)

37. The object of TIP is to find out whether the suspected offender arrested by police during investigation is real culprit or not. Evidence of TIP can be held as reliable and trustworthy only where the the suspects were neither shown to the witnesses nor the witnesses had an opportunity to see them prior to TIP and the proceeding of TIP is not irregular. Thus if evidence of TIP is shaky and doubt due to aforesaid reason, the evidence of identification before the court can not be relied upon.

38. In ***Shaikh Umar Shaikh and another v. State of Maharashtra AIR 1998 SC,*** wherein the trial Court ,after rejecting the evidence of identification parade on the ground that suspects were shown the witnesses prior to identification parade, relied on the evidence of identification before it and convicted the appellant, Hon'ble Supreme Court while allowing the appeal has held as under:

"The Designated Court after having rejected the evidence of identification parade on the ground that the suspects were possible shown to the witnesses, relied upon the evidence of identification of the accused in the Court by the two witnesses and on that evidence recorded conviction against the appellants. ***No doubt, the evidence of identification parade is not a substantive evidence, but its utility is for purpose of corroboration. In other words, it is utilised for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. The real and substantive evidence of the identity of the accused comes when witnesses give statement in the Court, identifying the accused.*** *It is true that in the present case, PW-2 and PW-11 identified the two accused who are*

the appellants before us in the Court. ***But, the question arises; what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made basis for recording conviction against the accused.*** *The reliance of evidence of identification of the accused in the Court by PW-2 and PW-11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eye-witnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside."* (Emphasis supplied)

39. It is settled principle of law that the accused will be presumed as innocent unless and until the prosecution has succeeded to prove its case beyond reasonable doubt and the presumption of innocence of accused is further strengthened if he is acquitted by the Trial Court after considering the material evidence available on record. In appeal against acquittal the prosecution has to show that gross mistake has been committed by the Trial Court in appreciating the evidence on record or application of settled principle of law.

40. Hon'ble the Apex Court in ***Surajpal Singh and others Vs. State of Punjab, AIR 1952 SC 52*** held as under :-

"It is well-established that in an appeal under section 417 of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, ***but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."***

(Emphasis supplied).

41. Coming to the facts of this case , in the light of above discussions, we are of the view that the impugned judgment and order passed by trial Court is well reasoned, well discussed and requires no interference. The prosecution has miserably failed to prove its case beyond reasonable doubt and there is no illegality or infirmity in the impugned judgment and order passed by Trial Court in Sessions Trial No.417 of 1979, whereby the respondents-accused were acquitted. The appeal is liable to be **dismissed**.

42. The judgment and order dated 06.02.1981 passed by trial Court in Sessions Trial No. 417 of 1979 is affirmed. The appeal lacks merit and is dismissed.

43. Copy of this judgment be sent to District Sessions Judge, Bahraich with Lower Court Record for information and compliance.

(2020)06ILR A1036
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.05.2020

BEFORE

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

Criminal Appeal No. 346 of 2001
connected with
Criminal Appeal 295 of 2001

Gauri Shankar @ Bacchan & Anr. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:
Sri Ravindra Nath Rai, Sri Indra Kumar Chaturvedi

Counsel for the Respondent:
A.G.A., Sri Sudist, Sri Shiv Narayan Singh, Sri Santosh Tripathi

Criminal Law-Indian Penal Code, 1860- Sections 147, 148, 302/34 - Appeal against conviction.

Medical Evidence and Ocular Evidence:-
The medical evidence makes the ocular testimony improbable, it create doubts the prosecution version. (Para-16)

Benefit of doubt-
Prosecution concealing fact and presence of alleged eye witnesses doubtful- accused are entitled for benefit of doubt. (Para-65)
Prosecution has miserably failed to prove the charge against the appellant accused. (Para-67)

Criminal Appeal allowed. (E-2)

List of cases cited: -

1. Lakshmi Singh Vs St.of Bihar[1976] 1 SCC (Cri) 671, (Para 11, 16).

2. Bhagwan Sahai & anr. Vs St. of Raj. [2016] 13 SCC 171 (Para 8).

3. Govindaraju @ Govind Vs St. by Sriramapuram P.S. [2012] 2 SCC (Cri) 533 (Para 39).

4. Balaka Singh & ors. Vs The St. of Punjab1975 SCC (Cri) 601, (Para 9).

5. St. of U.P. Vs Wasif Haider etc.[2019] 1 SCC (Cri) 701, (Para 24, 25).

6. Balaka Singh & ors. Vs The St. of Punjab 1975 SCC (Cri) 601, (Para 7).

7. Badam Singh Vs St.of M.P. 2004 (2) JLJ 67 (SC), (Para 15, 23).

8. Balaka Singh & ors. Vs The St. of Punjab 1975 SCC (Cri) 601.

9. Md. Alimuddin & others Vs The St. of Assam 1992 2 Crimes(HC) 506; 1992 0 CrLJ 3287

10. Dahyabhai Chhaganbhai Thakkar Vs St. of Gujarat, 1964 0 Supreme(SC)

11. KM Nanavati Vs St.of Maharashtra 1961 Supreme(SC) 374,

12. Digamber Vaishnav & anr. Vs St. of Chandigarh (2019) 4 SCC 522.

13. Gurwinder Singh alias Sonu & anr. Vs St. of Pun. & anr. (2018) 16 SCC 525.

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

1. Heard Sri I.K.Chaturvedi, learned Senior Counsel assisted by Sri Ravindra Nath Rai, Sri Vinay Saran, learned Senior Counsel assisted by Sri Pradeep Kumar Mishra & Sri Indu Shekhar Tripathi, learned counsel for the appellants, Ms. Mandvi Tripathi and Sri Shiv Narayan Singh, learned counsel for the complainant/victim, Sri M.C.Joshi, learned A.G.A. for the State, considered the written submission filed by Sri

Pradeep Kumar Mishra and perused the record carefully.

2. These appeals are directed against the judgment and order dated 05.2.2001 passed in S.T.No 104/1987, State vs Gauri Shankar and others,whereby learned VIth Additional Sessions Judge, Ballia has convicted the appellants Gauri Shankar @ Bachchan Yadav, Ram Ashish Yadav and Rama Kant u/s 147, 302/34 IPC and sentenced each of them to undergo one year rigorous imprisonment and life imprisonment, respectively, fine Rs. 1000/ has been also imposed upon them with default stipulation.

3. Accused Vishwanath has been acquitted u/s 148 and 302 IPC by giving him benefit of doubt.

4. At the very outset it may be noted that accused Shiv Shankar and Munna Lal @ Sachchidanand have died during the trial and case has been abated against them.

5. In brief, prosecution case is that there is a Math and its Dhaba in village Karo. Ramakant Singh son of Sri Tulsi Singh, younger brother of informant, Govind Singh was living in the dhaba. On 24.02.1987, Akhand Manas Path was going on in the Math and Ramakant Singh was present in the Dhaba. At about 9.00 a.m. due to old enmity, Gauri Shankar @ Bachchan Yadav and Shiv Shankar both sons of Rekha Yadav, Vishwanath Upadhyay son of Raj Narayan Upadhyay, Munna Lal @ Sachchidanand son of Yaduvansh Lal, Ram Ashish Yadav s/o Gauri Shankar Yadav and Ramakant Yadav s/o Basdev Yadav, all resident of village Karo, police station Chitbada Gaon, Ballia in furtherance of their common intention armed with lathi and bhala (spear) coming to the Dhaba exhorted Ramakant Singh to come out, on which by jumping back over boundary wall he fled towards East side. Assailants chased him with intention to kill and till reaching moonj (Sarpat) bushes of betel bhita (mound) of Vishwanath Barai surrounding him they assaulted with lathi and bhala, on account of which he died. On hearing noise informant, Satya Narayan Singh s/o Havaldar Singh r/o village Sujayat, Vijai Lal s/o Vishnu Lal r/o Basdev, Ram Baran Chaudhary s/o Jagdish Chaudhary r/o village Vishunpura police station Chitbada Gaon Ballia and several persons who were present in the Manas Path followed up to the spot to save the deceased and witnessed the incident.

6. On the basis of written report Ext.Ka-1, Case Crime No.55/1987, under Sections 147, 148, 149, 302 I.P.C. against accused under chik F.I.R. Ext. Ka-2 was registered at 12:30 p.m. on 24.02.1987 and its entry was recorded on G.D. No.16 (Ext. Ka-3). The investigation of the case was handed over to S.H.O. Sri T.N. Mishra. Investigating Officer after recording the statement of informant Sri Govind Singh, reached the spot. He prepared inquest memo Ext. Ka-5 and relevant documents like letter to C.M.O. (Ext. Ka-6), specimen seal (Ext. Ka-7), photo lash (Ext. Ka-8), police Form no.13 (Ext. Ka-9) and dispatched the dead body along with constable Uma Shankar Rai (PW-6) and Krishna Kumar Pandey for postmortem.

7. Dr. G.C. Upadhyay conducted postmortem of the dead body on 25.02.1987 at 2:00 p.m. and prepared his report Ext Ka-4, according to which

following injuries were found on the dead body:

(i). Abrasion 2 c.m. x 1.2 c.m. on the right arm 6 c.m. above elbow.

(ii). Abrasion 4 c.m. x 1 c.m. on right ankle joint on the anterior part.

(iii). Abrasion 1 c.m. x 10 c.m. On the back of thigh middle of right thigh.

(iv). Abrasion 2 c.m. x 2 c.m. on the right side face just below the right eye.

(v). Lacerated wound 2 c.m. x .05 c.m. x scalp and oblique at 9 O'clock position just lateral and above the lateral end of right eye.

(vi). Lacerated wound 2 c.m. x 0.5 c.m. scalp deep 1 c.m. above injury no.5 oblique 2 O'clock position.

In internal examination right parietal bone was found fractured. Right membrane of the brain was congested and 200 gram blood was clotted. According to his opinion cause of death was shock and haemorrhage as a result of ante-postmortem injuries and injuries were possible on 24.02.1987 at 9:00 a.m. Ordinarily, the injuries were sufficient for causing death and instantaneous death was possible due to the injuries.

8. Investigating Officer took into his possession five (four live and one empty) cartridges, blood stained and plain earth and two lathis from the place of incident and prepared its memo Ext. Ka-10 to Ext. Ka-12 respectively. He also prepared spot map Ext. Ka-13. After completing investigation submitted charge sheet Ext. Ka-14, under Sections 147, 148, 149, 302, 34 I.P.C. against the accused persons.

9. Since the offence under Section 302 I.P.C. is triable by Court of Sessions only, therefore, learned Chief Judicial Magistrate committed accused to the court of Sessions where Case Crime No.55 of 1987, under Sections 147, 148, 149, 302 I.P.C. was registered as S.T. No. 104 of 1987. Learned Sessions Judge transferred the trial to the court of IInd Additional Sessions Judge, Ballia, who framed charge under Sections 147 and 302 I.P.C. against accused Ramakant, Ram Ashish, Gauri Shankar and Shiv Shankar, under section 148, 302 I.P.C. against accused Vishwanath and Munna Lal. In due course of trial it was again transferred to the court of VIth Additional Sessions Judge, Ballia.

10. Prosecution to prove the charge against the accused persons produced 08 witnesses. P.W.1 Govind Singh informant, P.W.2 Vijay Shankar Lal, P.W.4 Satya Narayan and P.W.5 Km Rekha Singh are witnesses of fact, while P.W.3 Shivanand Pandey scribe of the chik F.I.R. and G.D., P.W.6 constable Uma Shankar Rai carrier of dead body for post mortem. P.W.7 Dr. G.C. Upadhyay conducted post mortem and P.W.8 S.I.T.N.Mishra, Investigating Officer, are the formal witnesses.

11. After examination of the prosecution witnesses statement of accused were recorded under Section 313 Cr.P.C. in which Gauri Shankar @ Bachchan Yadav has stated that Ramakant had asked him to collect contribution, he refused to do so then he beat him. Few people rescued him then he went to the police station. Ramakant has stated that case proceeded against him due to enmity. Vishwanath Upadhyay has stated that his partner Laliya is retired daroga, who implicated him in collusion with the informant. Ram Ashish has

stated that he has no knowledge why he has been implicated.

12. In defence D.W.1 R.N. Singh, X-Ray Technician has been produced, who has proved injury of accused Gauri Shankar as Ext. Kha.

13. Learned VIth Additional Sessions Judge, Ballia after hearing the parties and perusal of the record passed the impugned judgment and order as disclosed in para 2 of the judgment. Hence, this appeal.

14. Learned counsel for the appellants submits that witnesses are not resident of the same village Karo, their presence is doubtful, that is why story of Manas Path has been introduced.

15. He further submits that no one was armed with fire arm but as per recovery memo Ext Ka-10 live and empty cartridges were recovered from the spot. It is defence case that deceased Ramakant Singh had asked accused Gauri Shankar to collect contribution, he refused to do so then Ramakant beat him. In this regard accused Gauri Shankar had lodged NCR No 14 u/s 325 (wrongly mentioned in place of 323), 504 IPC against deceased Ramakant and two others which has been proved by PW-3 Shivanand Pandey also. Injury report Ext. Kha of the accused Gauri Shankar has been proved by DW-1 R N Singh. These facts show that prosecution has deliberately suppressed the genesis and origin of the occurrence and has not presented true version which is fatal to the prosecution. In support of his contention learned counsel has relied on **Lakshmi Singh vs. State of Bihar[1976] 1 SCC (Cri) 671, (Para 11, 16) and Bhagwan Sahai and Another vs. State of Rajasthan [2016] 13 SCC 171 (Para 8).**

16. Next submission is that prosecution evidence is, lathi and bhala were used in causing the injuries but as per medical evidence no injury is possible by bhala, thus ocular evidence is also not supported by the medical evidence. Even the injuries alleged to have been caused and found on the body of the deceased, the story put forward by the prosecution is not only improbable but is impossible of being true. In support of the contention learned counsel has relied on **Govindaraju @ Govind vs. State by Sriramapuram P.S. [2012] 2 SCC (Cri) 533 (Para 39) and Balaka Singh and others vs. The State of Punjab1975 SCC (Cri) 601, (Para 9).**

17. It is also submitted that in site plan position of witnesses from where they saw the incident has not been shown which is fault on the part of investigating officer and benefit of doubt arising out of a faulty investigation also accrues in favour of the accused. In support of his contention he has relied on **State of Uttar Pradesh vs. Wasif Haider etc.[2019] 1 SCC (Cri) 701, (Para 24, 25).**

18. He further submits that as per prosecution FIR was lodged on 24.2.1987 at 10:30 a.m. but in inquest memo time of information at police station is mentioned as 9:00 a.m. In the inquest memo it is mentioned that papers including FIR were sent for postmortem but according to PW-8 investigating officer dead body was received on 24.2.1987 at 9:00 p.m. and papers were received on 25.2.1987 at 9:25 a.m. Since FIR was not in existence at the time of preparation of inquest memo that is why in the inquest memo time of

information at the police station has been mentioned 9:00 a.m. and at the time of receiving dead body papers were not handed over to the doctor. Special report was also received to concerned magistrate on 07.3.1987 and prosecution has failed to explain the undue delay in receipt of the special report by the concerned Magistrate. All these facts indicate that FIR was not lodged at the time alleged and it has no authenticity. In this regard he relies on **Balaka Singh and others vs. The State of Punjab 1975 SCC (Cri) 601, (Para 7) and Badam Singh vs. State of M.P. 2004 (2) JLJ 67 (SC), (Para 15, 23)**

19. Learned counsel has referred para 8 of the case of **Balaka Singh and others vs. The State of Punjab 1975 SCC (Cri) 601**, in which it has been held that the prosecution witnesses who can implicate appellants and the four accused equally with regard to assault on the deceased, it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the appellants. If all the witnesses in one breath implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to the appellants may have been conveniently made to suit the needs of the prosecution case. If the case against the four accused fails, then the entire prosecution case will have to be discarded. He submits that similar is the instant case in which four accused have been alleged having lathi and two accused having bhala. One accused alleged having bhala has been acquitted by the trial court and the other accused has died. Accused alleged having lathi on the basis of suspicion have been convicted.

20. Lastly, he submits that prosecution has to stand on its own leg to prove the charge against the accused-appellants, from the prosecution evidence charge is not proved and on basis of NCR lodged by accused-appellant Gauri Shankar appellants have been convicted, impugned judgment and order is not sustainable and it is liable to be set aside.

21. Per contra learned A.G.A. submits that it is a case of direct evidence, therefore, motive of the incident is not important. P.W.1 Govind Singh, P.W.2 Vijay Shankar Lal, P.W.4 Satya Narain Singh and P.W.5 Rekha Singh have proved that there was Manas Path. In statement under Section 313 Cr.P.C. accused Gauri Shankar has also stated that Manas Path was going on, thus the fact that at the time of incident Manas Path was going on, is established. In his statement u/s 313 Cr.P.C Gauri Shankar has admitted that he had lodged NCR No 14 u/s 325 (wrongly mentioned in place of 323), 504 IPC on the same day, i.e., on 24.2.87. According to PW-3 Shivanand Pandey NCR No. 14 was registered at 10.15 a.m. In original record NCR is available in which time of incident has been mentioned as 9.00 a.m. In the present case also time of incident is alleged 9.00 a.m. Thus, according to, prosecution and defence, both, incident had occurred on 24.2.87 at 9.00 a.m. He further submits that P.W.1 Govind Singh, P.W.2 Vijay Shankar Lal, P.W.4 Satya Narain Singh and P.W.5 Rekha Singh have proved the incident and presence of the accused at the site. In the inquest

memo crime number 55/87 u/s 147, 148, 149, 302 IPC is mentioned, however, in column of date and time of report at the Police Station, starting inquiry and place where the Investigating Officer has gone, time of report at the Police Station is wrongly mentioned as 9.00 a.m. For postmortem dead body was received on 24.2.1987 at 9.00 p.m. and papers were received on 25.2.1987 at 9:25 a.m. First, inquest memo is prepared then it is signed by the witnesses and in the inquest memo it is mentioned that including FIR nine papers were sent. Since crime number is mentioned in inquest memo, therefore, on the basis of wrong entry recorded in the inquest memo regarding reporting time to the police station, receiving dead body for postmortem at 9.00 p.m. on 24.2.1987 and receiving of relevant papers next day, FIR cannot be said to be ante timed. Special report has been received to the magistrate on 07.03.1987 but no question in this regard has been put to P.W.3 Shivanand Pandey, the Head Moharrir and ultimately it cannot be ground for acquittal. Prosecution witnesses have stated that Vishwanath Upadhyaya and Munna Lal had bhala in their hand and they had also assaulted with the bhala but they have not stated that the assault made by the bhala hit the deceased. Munna Lal has died during trial and Vishwantah Upadhyaya has been acquitted. Therefore, on the basis of no injury of bhala was found, prosecution case cannot be doubted. Lathi injury is supported by medical evidence and doctor has opined that injuries are possible on 24.02.1987 at 9.00 a.m. and injuries were sufficient to cause death. Thus, oral evidence is consistent with the medical evidence also. P.W.1 Govind Singh has stated that height of the boundary wall was 5-6 feet whereas Investigating Officer has stated that it was 15 feet but these calculations are hypothetical and cannot affect the prosecution case. So for as submission is concerned that live and empty cartridges were recovered from the spot whereas no accused was armed with fire arm it may be there with a view to mislead the prosecution case. From the prosecution evidence coupled with NCR lodged by accused, incident is proved. Learned trial court has rightly convicted and sentenced the appellants. Therefore, no interference is required by this Court. Sri Shiv Narain Singh, learned counsel for Sri Nikhil Singh son of the deceased submits that PW-5 Rekha is the eye-witness of the incident, investigating officer has contradicted his presence but his statement is wrong. There was a dispute between deceased and accused with regard to fishing lease, that is why he was murdered. Ms. Mandavi Tripathi learned counsel on behalf of Rekha Singh, daughter of the deceased submits that betel mound was next to mustard field and deceased ran from the side of the betel mound, not through the betel mound. There was a dispute with regard to fishing lease. PW-2 Vijai Shankar Lal has stated that deceased was stabbed with the spear. Three blows from the spear were made and spear blows were inflicted from the side and the spear blow hit the thigh. He has further stated that he had also seen the injuries on teeth and eyes.

22. Since learned AGA has submitted that from the prosecution evidence coupled with NCR lodged by the accused Gauri Shankar incident is proved and learned counsel for appellants has submitted that prosecution has to stand on its own leg, therefore, the issue of liability of burden of proof is taken first. To decide the issue it will be

apposite to refer the law laid down by the High Court and Supreme Court in this regard.

23. In para 24 of the judgment in case of **Md. Alimuddin & others versus The State of Assam 1992 2 Crimes(HC) 506; 1992 0 CrLJ 3287** Hon'ble Gauhati High Court has held as under:

"24. It is one of the fundamental tenets of criminal jurisprudence that the burden of proving the prosecution case squarely lies on the prosecution. This general burden never shifts. Defence is not bound to open its mouth so long as prosecution does not discharge its general burden of proving its case beyond reasonable doubt. Defence version may even be false, because a falsely instituted prosecution may compel the accused to adopt a false defence. So, prosecution can not derive any advantage from the falsely or other infirmities of the defence version, so long as it does not discharge its initial burden of proving its case beyond all reasonable doubt."

24. In para 6 of the judgment in case of **Dahyabhai Chhaganbhai Thakkar VS State Of Gujarat, 1964 0 Supreme(SC) 91**, the Hon'ble Supreme Court has held as under:

"It is fundamental principle of criminal jurisprudence that an accused in presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in S. 299 of the Indian Penal Code. This general burden never shifts and it always rests on the prosecution. But, S. 84 of the Indian Penal Code provides that nothing is an offence if the accused at the time of doing that Act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception, under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the court shall presume the absence of such circumstances. Under S. 105 of the Evidence Act, read with the definition of "shall presume in S. 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent; man would act upon them. The accused has to satisfy the standard of a "prudent man . If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under S. 105 of the evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself.

It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in S. 299 of the Indian Penal Code. If the judge has such reasonable doubt, he has to acquit the accused, for in that even the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

25. In case of **KM Nanavati vs State of Maharashtra 1961 Supreme(SC) 374**, relevant part as held by Hon'ble Supreme Court in para 18 of the judgment is quoted as under:

"In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence : indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

26. In para 14 of its judgment Hon'ble Supreme court in case of **Digamber Vaishnav and another vs State of Chandigarh (2019) 4 SCC 522**, 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 addition circumstance if other circumstances unfailingly point to the guilt."

27. Thus , from the law laid down in the above referred cases, it is well settled, that in criminal case the general burden of proof unless there is a specific statute to the contrary, squarely rests on the prosecution to prove its case against accused beyond reasonable doubt which never shifts and special burden to prove the circumstances coming under exception rests upon the accused. In proving the case beyond reasonable doubt, prosecution can not take advantage of falsely instituted case or false plea taken by the defence or infirmity in defence. Suspicion, however strong can not take the place of legal proof.

28. In view of the above, the contention of learned AGA is not tenable that from prosecution evidence coupled with NCR lodged by accused Gauri Shankar incident is proved. In proving the charge against the accused, prosecution can not take advantage of NCR lodged by accused Gauri Shankar. Accordingly,

prosecution has to prove the charge u/s 147 and 302/34 IPC against the appellants beyond reasonable doubt by its own evidence.

29. Prosecution has produced four witnesses of fact i.e PW-1 Govind Singh resident of village Vishunpura, PW-2 Vijay Shankar Lal resident of village Basdeva, P.W.4- Satya Narain is resident of village Ujayat and P.W-.5 Km Rekha Singh resident of village Vishunpura. None of the witness is resident of village Karo. As per Ext Ka-1 at the time of incident Manas Path was going on and PW-1 Govind Singh in his oral testimony has stated that before two days of the incident Manas Path was going on and from his cross examination nothing has been extracted so that any adverse inference can be drawn. PW-2 Vijai Shankar Lal and PW-4 Satya Narain too have stated that at the time of incident i.e. on 24.2.1987 at 9.00a.m. Manas Path was going on and from their cross examination also nothing has been elicited by defence so that any adverse inference can be drawn. Thus prosecution evidence regarding Manas Path at the time of incident is intact and consistent. This fact is also supported by statement of accused Gauri Shankar made u/s 313 Cr PC in which he has stated that from two days before the incident Manas Path was going but persons mentioned were not present in the Manas Path. In view of the above, it is established that on 24.2.1987 at 9.00 a.m., Manas Path was going on, therefore, contention of learned counsel for the appellants bears no force that none of witness is resident of village Karo that is why story of Manas Path has been introduced.

30. As per Ext Ka-1 as well evidence adduced by prosecution, none of the accused was armed with fire arm but as per Ext Ka-10 proved by PW-8 Sri T N Mishra the investigating officer, four live and one empty, cartridges were recovered from the place of incidence. Since prosecution has not alleged that accused were armed with fire arm, therefore merely on the basis of recovery of live and empty cartridges, prosecution case can not be doubted.

31. Learned counsel for appellants regarding suppression of genesis and origin of the occurrence has referred para 11 of judgment in case of **Lakshmi Singh vs. State of Bihar** (supra) in which Hon'ble Supreme Court has held as under:

"According to the doctor injury No.1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounded duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence."

32. In other referred case of **Bhagwan Sahai and Another vs. State of Rajasthan** (supra), in para 8 of the judgment referred by learned counsel for the appellant Hon'ble Supreme Court has held as under:

"8. The aforesaid view of the High Court is devoid of legal merits. Once the Court came to a finding that the prosecution has suppressed the genesis

and origin of the occurrence and also failed to explain the injuries on the person of the accused including death of father of the appellants, the only possible and probable course left open was to grant benefit of doubt to the appellants. The appellants can legitimately claim right to use force once they saw their parents being assaulted and when actually it has been shown that due to such assault and injury their father subsequently died. In the given facts, adverse inference must be drawn against the prosecution for not offering any explanation much less a plausible one. Drawing of such adverse inference is given a go-bye in the case of free fight mainly because the occurrence in that case may take place at different spots and in such a manner that a witness may not reasonably be expected to see and therefore explain the injuries sustained by the defence party. This is not the factual situation in the present case. "

33. In the instant case PW-3 Shivanand Pandey scribe of chik FIR Ext Ka-2 has admitted in his statement that on the basis of oral information of informant Gauri Shankar HCP No 14 had registered a case on the same day at 10.15 a.m. against Ramakant, Jai Singh and Dharmakshad Singh u/s 325, 504 IPC. PW-8. Sri T N Mishra, investigating officer has also stated that on 24.2.87 at 10.15 a.m. NCR No 24/87 was registered by Gauri Shankar against Ramakant and two others. As per copy of NCR available on record on 24.2.87 at 9.00 a.m. Gauri Shankar had gone to worship in the Math at that time Jaisheel and Dhareekshad Singh caught hold of him and Ramakant beat him with lathi from which he had received injury on his head. As per injury report Ext.Kha of Gauri Shankar dated 24.02.1987 one lacerated and three contused injuries have been found as under:

(i). Lacerated wound 1.5 cm. x 0.5 cm. skin deep on head.

(ii). Contusion 30 cm. x 1cm. on upper part back of chest.

(iii). Contusion 11 cm. x 1cm. on the Rt side back of chest 6.5 cm. below the injury no. 2.

(iv). Contusion 1.5 cm. x 0.5 cm. on the Lt side-back of chest of Scapula.

All injuries were simple in nature caused by some blunt object duration fresh. Thus from the injury report of the accused Gauri Shankar it is clear that his injuries were simple in nature.

34. In para 10 of its judgment in the case of **Gurwinder Singh alias Sonu and another vs State of Punjab and another (2018) 16 SCC 525**, Hon'ble Supreme Court has held as under:

"It cannot be held as an invariable proposition that as soon as the accused received the injuries in the same transaction, the complainant party were the aggressors -it cannot be held as a rule that the prosecution is obliged to explain the injuries and on failure of the same, the prosecution case should be disbelieved. It is well settled that before placing the burden on the prosecution to explain the injuries on the person of the accused, two conditions are to be satisfied:-(i) the injuries were sustained by the accused in the same transaction; and (ii) the injuries sustained by the accused are serious in nature."

35. It is not the defence case that accused Gauri Shankar had received injury in the same transaction of the incident as alleged by the prosecution. Therefore, in view of the law laid down by Hon'ble Supreme Court in the above referred case of **Gurwinder Singh alias Sonu and another vs State of Punjab and another supra**, prosecution is not obliged to explain the injury of the accused Gauri Shankar.

36. Otherwise, also, in the instant case injuries of accused are simple in nature. In the case of **Laxmi Singh vs State of Bihar** (supra) referred by learned counsel for the appellant injury no. 1 of accused Dasrath Singh was found grievous in nature and in **Bhagwan Sahai and another vs State of Rajasthan** (supra) prosecution had not explained the injuries on the person of the accused including death of the father of appellants from which it is clear that the injuries received in the referred cases were grievous in nature. Therefore in the referred cases prosecution was obliged to explain the injuries received to the accused side. In the instant case appellant Gauri Shankar has received simple injuries. Since facts and circumstances of the referred cases differ from the instant case, therefore, the finding of the referred cases are not applicable in the instant case.

37. It is admitted fact that accused Gauri Shankar had lodged NCR against the deceased and two others on the same day disclosing time of occurrence 9.00 a.m. which is the time of occurrence in the instant case also but there is no opportunity to test the veracity of its content because it was not investigated as stated by PW-8 T. N. Mishra in cross examination that he did not investigate the NCR registered by the accused taking permission from the court.

38. Since, accused Gauri Shankar did not receive the injuries in the same transaction of the incident as alleged by the prosecution as well as injuries of the accused being simple in nature and there was no opportunity to test veracity of the contents of NCR lodged by the accused, therefore, on the basis of injuries of accused Gauri Shankar and NCR lodged by him, it cannot be held that prosecution has suppressed the genesis of the case. Accordingly, contention of the learned counsel for the appellants is not tenable that prosecution has suppressed the genesis and origin of the occurrence.

39. To test veracity of the witness learned counsel for the appellants has referred para 39 of the judgment in the case of **Govindaraju @ Govind vs. State by Sriramapuram P.S.,** (supra) in which Hon'ble Supreme Court has held as under:

"39. The injuries were piercing injuries between the intercasal space and the stab injuries damaged both the heart and the lungs. It has been noticed by the High Court that according to PW-1, the victim was not able to talk. The post mortem report clearly establishes injuries by knife. But the vital question is who caused these injuries. It takes some time to cause so many injuries, that too, on the one portion of the body i.e. the chest. If the statement of PW1 is to be taken to its logical conclusion, then it must follow that when the said witness saw the incident, the accused Govindaraju was not stabbing the deceased but, was watching the police coming towards them

and had called upon one of the other accused, Goverdhan, to run away as the police was coming. Obviously, it must have also taken some time for the accused to inflict so many injuries upon the chest of the deceased. Thus, this would have provided sufficient time to PW1 to reach the spot, particularly when, according to the said witness he was only at a distance of 30 yards and was on a motorcycle. At this point of time, stabbing had not commenced as the accused were alleged to be chasing the victims. Despite of all this, PW-1 was not able to stop the further stabbing and/or running away of the accused, though he was on a motor cycle, equipped with a weapon and in a place where there were shops such as the VNR Bar and also nearby the conservancy area, which pre-supposes a thickly populated area. Thus, the statement of PW-1 does not even find corroboration from the medical evidence on record. The High Court in its judgment has correctly noticed that the place of incident in front of VNR Bar of Sriramapuram was not really in dispute and having regard to the time and place, it was quite possible, at least for the persons working in the Bar, to know what exactly had happened. With this object, PW-7 was produced who, unfortunately, did not support the case of the prosecution. Having noticed this, we are unable to appreciate the reasons for the High Court to disturb the finding of acquittal recorded by the learned trial Court."

40. Learned counsel in this regard has referred the other case of **Balaka Singh and others vs. The State of Punjab**, (supra) in referred para 9 of its judgment Hon'ble Supreme Court has held as under:

"9. In order to test the veracity of the prosecution witnesses we find that one of the eye witnesses, namely, Waryam Singh has deposed that Gurmej Kaur, the wife of the deceased, who was drawing water, from the hand pump when the accused came, ran towards Dharam Singh and fell upon his body in order to protect him from receiving further injuries. At this the appellant Balaka Singh is alleged to have given her a barchha blow on her right hand and the appellant Joginder Singh gave a barchha blow on the left buttock of Gurmej Kaur. According to the evidence of this witness the two appellants Balaka Singh and Joginder Singh appear to have assaulted Gurmej Kaur with a sharp-cutting instrument, namely, barchha and spear. This version is completely falsified by the medical evidence of Dr. Mohinder Singh who examined Gurmej Kaur and who stated in his evidence that all the injuries on Gurmej Kaur were caused by blunt weapon. Moreover out of the six injuries which Gurmej Kaur received on her body not a single one could be caused by a sharp- cutting instrument because there was no penetrating or incised wounds. The injuries were either contusions, abrasions or lacerated wounds. While the witness Waryam G- Singh says that the accused Joginder Singh had given a barchha blow on the left buttock of Gurmej Kaur, according to the medical evidence, it was a lacerated wound deep on the upper and outer part of the leftbuttock. This, therefore, clearly demonstrates the extent to which the witnesses could have gone in order to implicate all the accused."

41. Before adverting to evidence for purpose of testing veracity of the witness, it would be proper to refer to Modi

Medical Jurisprudence and Toxicology, 23rd Edition Reprint 2011, according to which for occurrence an abrasion, there must be pressure of an object and it should move on the skin to form an abrasion. Bruise or contusions are injuries which are caused by a blow from a blunt weapon, such as a club, lathi, whip, iron bar, stone, ball, fingers, fist, boots or by a fall, or by crushing or compression. These are accompanied by a painful swelling and crushing or tearing of the subcutaneous tissues without solution of continuity of the skin.

42. As per Ext. Ka-1 accused Gauri Shankar alias Bachchan Yadav, Shivshankar Yadav, Vishwanath Upadhay, Munna Lal @ Sachidanand Lal, Ramashish Yadav and Ramakant Yadav armed with lathi and bhala assaulted deceased Ramakant on account of which he died. The incident was witnessed by informant PW-1 Govind Singh, PW-2 Vijai Lal, PW-4 Satya Narayan Singh, Rambaran Chaudhary and many others. Informant PW-1 Govind Singh in his oral testimony has stated that accused Gauri Shankar @ Bachchan Yadav, Ramashish, Ramakant, Shivshankar had lathi and Sachidanand Lal and Vishwanath Upadhay had bhala in their hand and surrounding the deceased near moonj of Sarpat crossing the bhita of Vishwanath Barai accused assaulted him with lathi and bhala. Receiving the injury his brother fell down, after fleeing away of accused persons they saw that Ramakant has died. In cross-examination he has stated that he had seen the injuries on head, neck and arms on the body of the deceased Ramakant Singh. There was a mark of cut on the neck, he did not measure how much the neck was cut but it was bleeding. He did not see from which arm it was cut. He has further stated that in the assault bhala was used he did not see any stab wound, he cannot tell about the cut marks were of lathi or bhala. He has specifically stated that in the assault lathi and bhala were used and he had also seen a mark of cut on the neck which was bleeding also but as per medical report Ext. Ka-4 proved by PW-7 Dr. G.C. Updhayay no cut mark injury either on neck or on any other part of the body has been found, it is also considerable that on assaulting by six person from lathi and bhala only two lacerated wound will not occur and abrasion injuries are not possible on assault by lathi and bhala, thus, the oral evidence is not supported with the medical evidence, the injuries found in the medical report are not probable in the alleged manner of assault, demonstrate that actually the witness did not see the incident that is why he has made such a statement. Accordingly, his evidence does not inspire confidence that he was an eye-witness of the incident.

43. Prosecution has examined the other named witness in the FIR PW-2 Vijay Shankar Lal who has stated that at the time of incident Ramakant Singh was living in a dhaba of Mathia and his daughter Rekha was also with him. He heard a noise when he was sitting in the Manas Path, on which he along with Govind Singh, Satya Narayan Singh, Rambaran Chaudhary rushed to the dhaba and saw that accused Gauri Shankar @ Ram Bachan, Vishwanath Upadhayay, Munnalal @ Sachidanand Lal, Shiv shankar, Ramakant and Ramashish were trying to break open the door of Ramakant, they were abusing and exhorting him to come out. Munna Lal and Vishwanath had bhala and remaining

had lathi in their hand when the door was not opened then at once they rushed towards East side turning from South side of the dhaba, witness Vijai Shankar Lal, Govind Singh, Satya Narayan Singh, Rambaran Chaudhary also ran behind the accused. Ramakant was running towards East turning from South side house of Sitaram and when deceased Ramakant reached North-East corner near the bhita of Vishwanath Barai, the accused started assaulting him with lathi and bhala. In cross-examination he has stated that on falling the deceased, he had seen assaulting with bhala. He has specifically stated that 2-3 bhala blows were inflicted and he had seen hitting 2-3 bhala blows. He has further stated that from left side bhala blows were given and all the bhala blows hit the thigh. He has also stated that he had seen the injuries on teeth and eyes. As per medical evidence no bhala injuries on the thigh has been found. On teeth and eye also no injury has been found. Thus, oral evidence of this witness also is not corroborated with the medical evidence. Oral evidence not finding corroboration with the medical evidence, demonstrate that this witness also actually did not see the incident that is why he has made such a statement. Further in examination-in-chief he has stated that on 24.2.1987 at 9:00 a.m. Manas Path was going on and along with him 5-6 persons, were also present but in cross-examination he has stated that at 8:30 a.m. he left the Math, if it was so then at 9:00 a.m., i.e. at the time of incident he would not have been present there, therefore, at the same stage his statement regarding his presence becomes contradictory which also indicates his presence doubtful at the time of incident. It is also considerable that as stated by this witness, the injuries found in the medical report are not compatible with the assault made by the accused. In view of the above discussion, evidence of this witness also does not inspire confidence regarding him to be an eye witness.

44. Prosecution has examined PW-4 Satya Narayan Singh also as an eye-witness of the incident who on repeated asking about who came at 9:00 a.m. and what happened he kept mum and on asking which accused came then he replied Bachan @ Gauri Shankar, Shivhankar, Ramakant, Vishwanath and Munna Lal, came. He did not name accused Ramashish and on asking which arms were in whose hand he replied that they had lakda (wooden piece). He further stated that Shivshankar and Rambachan had lakda and Munna Lal had bhala. On asking by government counsel he has stated that Vishvanath had bhala in his hand. On further asking about what happened after they came on the door and struck the door, he replied that all persons ran away crossing the boundary. Again on asking about who assaulted whom he has stated that Bachan, Vishwanath, Munna Lal and after a minute stated Ramakant assaulted. The whole statement made by this witness in examination in chief itself creates a shadow of doubt about him to be witness of the incident. This witness has set-up a new case of Lakda being in the hands of accused in place of lathi. He has also not taken the name of accused Ramashish and about assault he has taken the name of four accused only. He has also stated that all the persons ran away crossing the boundary while according to FIR and other witnesses the accused turning from the south side *dhaba* rushed towards east side. Thus his statement is neither consistent with the FIR nor consistent with the evidence of PW-1

Govind Singh and PW-2 Vijay Shankar Lal. In view of the above, the evidence of this witness also does not inspire confidence to be eye witness of the incidence.

45. Prosecution has examined PW-5 Km. Rekha Singh, fourth witness, also as eye-witness of the incident who has stated that on 24.02.1987 she had gone to the dhaba of Mathiya for delivering milk to her father at about 8:30 a.m. she heard sound for beating Ramakant then she locked the door. Her father jumping East-side boundary wall fled, the accused Gauri Shankar, Shivshankar, Ramashish, Ramakant, Munna Lal and Vishwanath Upadhayay started beating the door with lathi and on not opening the door all the accused turning from South chased her father running towards East, then she came out opening the door and saw that the accused were chasing her father and to rescue her father Govind Singh her elder father (i.e. uncle), Vijay Shankar, Satya Narayan Singh and Bachhan Chaudhary were following the accused persons, she also followed them. Munna Lal, Vishwanath had bhala, Gauri Shankar, Vijay Shankar, Ramashish and Ramakant had lathi in their hand, reaching to moonj of Sarpat towards East-North bhita of Vishwanath Barai, Ramashish gave a lathi blow on the leg of her father again he gave another blow on her father's head on which he fell down then all the accused started beating him with their lathis. When accused were beating her father, apart from her, the incident was witnessed by her elder father Govind Singh, Vijay Shankar, Satya Narayan Singh and Bachhan Chaudhary. This witness has stated that Munna Lal and Vishwanath had bhala in their hand but while assaulting her father, in chief examination itself she has stated that Ramashish gave first blow of lathi on leg then other blow on head and when he fell down all the accused assaulted by lathi while accused Munna Lal and Vishwanath had bhala in their hand. If accused Munna Lal and Vishvanath had bhala in their hand and they had gone with an intention to kill, then they would have used the weapon in their hand in natural fashion of its use. On the other hand P.W.1 Govind Singh and P.W.2 Vijai Shankar Lal have stated that the accused had given bhala blow. Thus, her statement does not appear natural one. Her statement is also not consistent with the evidence of PW-1 Govind Singh and PW-2 Vijai Shankar Lal with regard to bhala and lathi blow. As per medical report, abrasion on the right arm, abrasion on right ankle joint, abrasion on the back of thigh and abrasion on right side face below the right eye have been found but in view of Modi Medical Jurisprudence referred above, on giving lathi blow only abrasion injury will not occur. Thus, the injuries found in medical report as stated by her, are not compatible with the assault made by the accused persons. In cross examination she has stated that she could not see who was assaulting by bhala and who was assaulting with lathi which further creates doubt as to whether she had witnessed the incident. It appears that when no injury of bhala was found in medical report then the version has been changed by the witness regarding giving lathi blow by all the accused. In cross-examination she has stated that she had told the investigating officer that Ramashish had given lathi blow on the leg if this statement is not recorded by the investigating officer, then she cannot tell any reason, which indicates that she has given such statement first time in court

that Ramashish gave lathi blow in the leg of her father. Similarly she has also stated that she had not told the investigating officer that Munna Lal had assaulted by lathi but she had told that Munna Lal had no lathi, he had bhala which indicates that this witness has again stated first time in court that Munna Lal had bhala in his hand. Km Rekha has specified that first and second lathi blow was given by Ramashish to the deceased. According to her statement, her elder father and other witnesses were following the accused ahead of her, but they do not specify the role of assault by the accused persons. The statement of the witness as discussed above demonstrate that this witness also did not see the incident that is why she has given such a statement. Evidence of this witness is also not consistent with the evidence of PW-1 Govind Singh and PW-2 Vijai Shankar Lal. Apart from it, PW-1 Govind Singh in cross-examination at page 23 of the paper book has stated that the incident was witnessed by Vijay Lal, Satya Narayan Singh and Bachhan, they saw that his brother had died at that time his brother's daughter Rekha and his nephew Akshay also arrived which too indicates that witness Rekha did not see the incident. In view of the above, the evidence of this witness also does not inspire confidence.

46. In the instant case it is notable that as per medical report Ext Ka-4 deceased Ramakant had received four abrasion injuries and two lacerated wounds. In view of the above referred Modi Medical Jurisprudence and Toxicology if all the six accused had assaulted the deceased with bhala and lathi as stated by witnesses, then only two lacerated wounds are not probable and on giving blow by bhala and lathi abrasion injuries will not occur. From bhala blow piercing or incise injury will occur. In the instant case piercing or incised injury has not been found which demonstrate that the manner of occurrence which has been brought forth by the prosecution is not tenable.

47. Thus, considering the evidence available on record as discussed above, ocular evidence is not consistent with the medical evidence, evidence of prosecution witnesses do not inspire confidence, keeping in view the opinion of Hon'ble Supreme Court in the case of **Balaka Singh and others vs. The State of Punjab**, (supra) the injuries found on the body of the deceased demonstrate that the manner of the incident as alleged by the prosecution does not appear probable one which creates doubt regarding the witnesses to be the eye-witness of the incident.

48. The learned counsel for the appellant has referred the case of **State of Uttar Pradesh vs. Wasif Haider** etc., (supra) with regard to benefit accruing due to faulty investigation.

49. In the referred case four accused were specifically identified from a group of 200-300 rioters with 100% perfection without mention of any distinction marks, test identification parade was also conducted after a delay of 55 days and explanation for delay was also not offered. Identity of accused was also not concealed, F.S.L report was not compatible with each other and place of occurrence was also not ascertained with precision, therefore, Hon'ble Supreme Court held that investigative lapse has fortified the presumption of innocence and accused were held entitled for benefit of doubt.

50. In referred para 24 and 25 Hon'ble Supreme Court has held as under:

"24. In the present case, the cumulative effect of the aforesaid investigative lapses has fortified the presumption of innocence in favor of the accused-respondents. In such cases, the benefit of doubt arising out of a faulty investigation accrues in favor of the accused.

25. Although we acknowledge the gravity of the offence alleged against the accused-respondents and the unfortunate fact of a senior official losing his life in furtherance of his duty we cannot overlook the fact that the lapses in the investigation have disabled the prosecution to prove the culpability of the accused. The accused cannot be expected to relinquish his innocence at the hands of an inefficacious prosecution, which is ridden with investigative deficiencies. The benefit of doubt arising out of such inefficient investigation, must be bestowed upon the accused."

51. In the instant case, as per spot map Ext. Ka-13 proved by PW-8 Sri TN Mishra, Investigating Officer, place A has been shown, the place of incident, place C has been shown, dhaba of the Math and by round mark running of deceased and by dash mark chasing by accused has been shown. Mark B has been shown from where the deceased ran away jumping the boundary wall, in the spot map position of witnesses has not been indicated. The spot map has been prepared on the date of incident itself, i.e on 24.02.1987. If the witnesses had seen the incident then the place from where they had seen the incident should have been marked, which is a lapse on the part of investigating officer.

52. In the instant case, it is also notable that in the spot map Ext Ka-13 from the main door of the dhaba accused have been shown running and running from Southern wall of house of Sitabhar towards North up to end of the Northern wall, then they turned towards South and deceased also ran from the Northern wall side of house of Sitabhar towards South, thereafter both ran towards East side and turning after some distance towards North and again turning towards East reached the place of incident. If it actually happened so, then at the corner of North-East wall of Sitabhar from where, both, deceased and accused were running parallel towards South accused would have caught the deceased at the corner or at some distance from there and if deceased had already left the Northern corner place situated adjacent to the house of Sitabhar, then there was no reason for the accused to turn from Southern side to North side up to almost end of the Northern wall of Sitabhar, which also creates doubt about its authenticity, being inherently improbable.

53. In view of above discussion,keeping in mind the opinion of the referred case of **State of U.P. vs. Wasif Haider** etc., (supra) inherent improbability in the map and lapse in the investigation also casts a doubt on the prosecution case and on account of above a benefit accrues in favour of accused.

54. Learned counsel for the appellants has referred the case of **Balaka Singh and others vs. The State of Punjab**, (supra) in support of his contention that FIR was not registered at the alleged time. In referred para 7 of the judgment Hon'ble Supreme Court has held as under:

"7. Another finding which demolishes the entire edifice and fabric of the prosecution case is that the F. I. R. itself was not written at 10 P. M. as alleged by the informant Banta Singh but it was written out after the inquest report was prepared by the A. S. I. and after the names of the four accused acquitted by the High Court were inserted in the inquest report. If this is true then the entire case of the prosecution becomes extremely doubtful. The High Court has also derived support from another important circumstance to come to the conclusion that the F.I.R. was not written at 10 P. M. as alleged by the prosecution but after the preparation of the inquest report at about 2-30 A.M. The High Court points out that according to the prosecution the special report reached the Ilaqa Magistrate at 11 A. M. on September 2, i. e. more than 12 hours after the F. I. R. was lodged at the police station whereas it should have been delivered to the Ilaqa Magistrate during the night or at least in the early morning. Counsel appearing for the appellants submitted that under the High Court Circulars and the Police Rules it was incumbent upon the Inspector who recorded the F. I. R. to send a copy of the F. I. B. to the Ilaqa Magistrate immediately without any loss of time and the delay in sending the F. I. R. has not been properly explained by the prosecution as rightly held by the High Court. It is, therefore, clear that the F. I. R. itself was a belated document and came into existence during the small hours of September 2, 1966. Indeed if this was so, then there was sufficient time for the prosecution party who are undoubtedly inimical to the accused to deliberate and prepare a false case not only against the four accused who have been acquitted, but against the other five appellants also. The High Court also found that the best person to explain the delay in sending the special report to the Ilaqa Magistrate was the Police Constable who had carried the F. I. R. to the Ilaqa Magistrate but the Constable has not been examined, by the prosecution. On this point the High Court observed as follows :

"The delay with which the special report was made available to the Ilaqa Magistrate is indicative of the fact that the first information report did not come into existence probably till about sunrise by when the dead body had already been dispatched for the purpose of post-mortem examination to Patiala along with the inquest report, so that the Investigating Officer was no longer in a position to make alterations in the body of that report and all that he could do was to add later on the names of the said four appellants to its heading."

"This finding of the High Court is based on cogent materials and convincing reasons, but unfortunately the High Court has not considered the effect of this finding on the truth of the prosecution case with regard to the participation of the appellants. In our opinion, in view of the finding given by the High Court it has been dearly established that the F. I. R. was lodged not at 10 P. M. as alleged by the prosecution but some time in the early morning of September 2, 1966. If this was so, then the F. I. R. lost its authenticity. If the prosecution could go to the extent of implicating four innocent persons by inserting their names in the inquest report and in the F. I. R. which was written subsequent to the inquest report they could very well have put in the names of the other five appellants also because

they were equally inimical to the prosecution party, and there could be no difficulty in doing so because it is found by the High Court that all the prosecution witnesses belonged to one party who are on inimical terms with the accused."

55. Learned counsel with regard to FIR was not registered at the alleged time, has referred another case of **Badam Singh vs. State of M.P.**, (supra). In referred para 15 and 23 Hon'ble Supreme Court has held as under:

"15. One other fact which is worth noticing at this stage is the despatch of the special report from the police station, and its receipt by the Ilaqa Magistrate. As noticed earlier, the occurrence took place at about 5.30 p.m. and the matter was reported to the police at 11.15 p.m. The evidence produced shows that the special report was despatched on 27.9.1986 (Ex. P-17) to the Judicial Magistrate, Class I at Pichhor. The same was received by the Magistrate on 6.10.1986 as per Ex. P-18. The Investigating Officer was questioned on this aspect of the matter but he stated that he had given the special report to the Head Constable Moharrir to send it to the concerned Magistrate, and he had entrusted him with the responsibility of taking the report to the concerned Magistrate. When questioned, he categorically replied that he could not tell why copy of the said report Ex. P-18 reached the Magistrate on 6.10.1986. He denied the suggestion that a fake entry about despatch of the report to the Magistrate was made. From the evidence on record it cannot be denied that the report was received by the concerned Magistrate 10 days after it was allegedly despatched."

"23. The prosecution, as we have noticed earlier, has also failed to explain the delay in receipt of the special report by the concerned Magistrate. As is apparent from the evidence on record the special report despatched on the night intervening the 27th and 28th September, 1986 reached the concerned Magistrate on 8.10.1986. The Investigating Officer categorically stated that he was in a position to give any explanation for it."

56. As per FIR Ext. Ka-2 incident had occurred on 24.02.1987 at 9:00 a.m. and information at the police station was given on the same day at 10:30 a.m. According to inquest memo Ext. Ka-5 report at the police station was given at 9:00 a.m. on 24.02.1987, inquest was started at 11:30 a.m. and ended at 14:30 p.m. In inquest memo Ext. Ka-5 it is also mentioned that dead body was dispatched for postmortem report along with 11 papers including FIR. As per police Form-13 Ext. Ka-9 dead body was received on 24.02.1987 at 9:00 p.m. and papers were received on 25.02.1987 at 09:25 a.m. Postmortem was conducted on 25.02.1987 at 02:00 p.m. PW-8 T N Mishra investigating officer has stated that papers were received by doctor on 25.02.1987 at 09:25 a.m. and in police Form-13 date of reaching dead body is mentioned, in date of 24.02.1987 there appears some overwriting or dispersion on 4. He has also stated that he did not record the statement of the police who carried the dead body for postmortem. The police who carried the dead body for post-mortem was the best person to explain why the dead body was received on 24.02.1987 at 09:00 p.m. and papers were received at 09:25 a.m. On 25.02.1987, but prosecution has withheld him, which is also a lapse on the part of

investigating officer and it creates a doubt as to sending the papers along with the dead body for postmortem.

57. According to Investigating Officer after registration of the case he recorded statement of informant Govind Singh thereafter along with force and informant reached the place of incident and prepared inquest memo of the deceased Ramakant. Generally, inquest memo is prepared by appointing panches among the persons present on the spot and it also finds mention in the inquest memo but in the instant case on going through the inquest memo Ext Ka-5 it would be clear that there is no mention how the panches have been appointed. As per inquest memo Ext. Ka-5 Kamlesh Singh, Sunil Kumar Upadhyay, Satyanarain Singh, Vijay Shankar Lal and Ramanand Singh were appointed panch for preparing inquest memo. Informant Govind Singh was also present at the time of inquest memo but he was not appointed panch which also creates a doubt regarding his presence at the time of preparation of inquest memo.

58. In the inquest memo there is mention that in opinion of panches death of the deceased was caused by causing injury with bhala and lathi while one of the panch PW-2 Vijai Shankar Lal has stated in his cross-examination that he made signature on the inquest memo at 11-12 a.m., at that time inquest memo was kept filled and on asking of investigating officer he put his signature on it. He has further stated that inquest memo was not prepared before him. When he put his signature dead body was sealed which demonstrate that his opinion was not taken about the cause of death of the deceased. This fact speaks in volume about veracity of inquest memo.

59. It is also noticed that as per inquest memo 12 injuries were found on the dead body as under:

(i). Four blooded injuries on shin of right leg.

(ii). Sic.

(iii). Blooded injury on right arm.

(iv). Contusion interior side of left arm.

(v). Blooded injury in right eye.

(vi). Blooded injury on neck below right cheek.

(vii). Blooded injury above right eye.

(viii). Blooded injury on head above right ear.

(ix). Blooded injury on face and nose.

(x). Injury sic.

(xi). Pressed mark on front neck.

(xii). On right thigh inner side blooded injury.

60. As per postmortem report Ext Ka-4 only six injuries have been found and no injury on right leg shin, nose, right eye and neck have been found. In this regard on asking by defence about getting explanation from the doctor for finding only six injuries, investigating officer has stated that he forgot it. Thus inquest memo contradicts postmortem report and the contradiction also creates a suspicion on proper preparation of inquest memo.

61. PW-3 Shivanand Pandey in cross-examination has admitted that he did not obtain signature of informant on chik FIR Ext. Ka-2. He has also stated that in the note column of FIR it is written that signature or thumb impression should be obtained of the informant at the end

but signature of informant has not been obtained in chik FIR.

62. In view of the above, when we bestow our consideration cumulatively in the matter, i.e., mentioning of reporting time in the inquest memo 09:00 a.m., not obtaining signature of the informant on the chik FIR after registration of the case, not appointing informant panch for inquest memo, as per inquest memo Ext Ka-5, investigating officer found 12 injuries but as per postmortem report Ext Ka-4 only six injuries were found, preparation of inquest memo without presence of PW-2 Vijai Shankar Lal and obtaining his signature after sealing the dead body, dead body was received to the doctor on 24.02.1987 at 09:00 p.m. but papers were handed over to him at 09:25 a.m., all these facts demonstrate that although after information to the police station, inquest was conducted and dead body was dispatched for postmortem but FIR was not in existence and investigating officer was marking time with a view to decide about the shape to be given to the case and eye witness to be introduced that is why in the inquest memo it has been mentioned that including FIR 11 papers were sent for postmortem but it were not handed over to the doctor at the time of receiving dead body by the doctor. Accordingly, we do not find force in the contention of learned AGA that reporting time in the inquest memo was wrongly recorded.

63. As per chik FIR incident occurred on 24.02.1987 at 09:00 a.m. its information was given at police station on the same day and it has been received by concerned magistrate on 27.03.1987. PW-8 Investigating Officer on asking when FIR was sent to head quarter or magistrate from the police station, he has replied that it is sent by head moharrir he cannot tell of which responsibility is not on police station officer. He has further stated that he had sent special report but without looking GD he cannot tell, then he was directed to tell the number in the afternoon by bringing the GD but on going through his whole testimony it is borne out that no such number has been told by him regarding sending special report. Thus the delay in sending special report to the concerned magistrate is not explained.

64. In the instant case according to chik FIR Ext. Ka-2 all the accused assaulted deceased with lathi and bhala having in their hand. In oral testimony PW-1 Govind Singh as well as PW-2 Vijay Shankar Lal, PW-5 Kumari Rekha Singh have specified that accused Gauri Shankar @ Bachchan Yadav, Ramashish, Ramakant, Shivshankar had lathi and Sachidanand Lal @ Munna Lal and Vishwanath Upadhyay had bhala in their hand. As per postmortem report no bhala injury has been found, two lacerated wound caused by blunt object have been found. On going through the whole evidence on record it is not distinguishable, who is author of those two lacerated wound except one lacerated wound as per P.W.5 Km. Rekha, might have been caused by accused Ramashish. The alleged eye-witnesses in above discussion have not been found eye-witnesses of the incident. Accused Vishwanath assigned role of *bhala* has been acquitted. In view of the law laid down by Hon'ble Supreme Court in **Balaka Singh and others vs. The State of Punjab** (supra) referred by the learned counsel for the appellants, we find that the witnesses who can implicate the

appellants and two other accused with regard to assault on the deceased it is not possible to reject the prosecution case with respect to two accused and accept it with respect to the appellants.

65. It is not disputed that accused Gauri Shankar had lodged NCR no. 14/87, u/s 323, 504 (wrongly mentioned 325). It is evident from the statement of PW-3 Shivanand Pandey, PW-8 investigating officer and reply made by accused Gauri Shankar in statement u/s 313 Cr.P.C of question no. 16. Although the NCR lodged by the accused Gauri Shankar against the deceased and two other persons was not investigated and injury caused to him was also not of grievous nature but in the NCR lodged by the accused it is alleged that he had gone at the Math to worship where the incident occurred at 9.00 a.m. and in the instant case also incident has occurred at 9.00 a.m. but at different place, which creates strong suspicion against the accused Gauri Shankar to be involved in causing incident but suspicion however strong may be it can not take the place of proof as held by Hon'ble Supreme Court in **Digamber Vaishnav and another vs State of Chandigarh**, (supra). If for the sake of argument it is assumed that incident occurred at 9.00 a.m. with the accused Gauri Shankar at the Math and in that sequence deceased Ramakant was killed then prosecution should have disclosed it as alleged by the prosecution that witnesses were present in the Math, where, Maanas Path was going on and if it was falsely lodged, investigating officer should have investigated and unearthed the truth of it but he did not investigate the NCR. It is well settled that benefit of doubt always goes in favour of accused, therefore, in both the situations i.e., not coming fairly with the prosecution story or not going to the reality of NCR by investigating officer, benefit will go in favour of accused.

66. PW-1 Govind Singh has stated that his brother Rmakant had taken on lease Gaon Sabha pond for fishing. Accused on pretext of drinking water and bathing their animals were causing damage to the fishes, that is why his brother had forbidden them due to which accused Gauri Shankar @ Bachchan Yadav, Ramashish Yadav, Ramakant Yadav, Vishvanath Upadhyay, Sachchidanand Lal, Munni Lal and Shiv Shankar Yadav were bearing enmity with his brother. He has also stated that he has no knowledge that deceased Ramakant Singh had instituted a case U/S 379 against Sipahi Bhar for stealing fish. State vs Jayram Village Case had also proceeded before this incident and deceased Ramakant Singh was witness in the case. A case u/s 436 IPC was instituted by Vijay Bahadur Singh against Madan Yadav in which property of the deceased was attached and this witness was witness in the case, in which accused were acquitted. He has also stated that deceased Ramakant Singh had a gun which was deposited in the case u/s 307 IPC because there was allegation against boys of the family for keeping illegal carbine. It has been also stated that deceased Ramakant Singh had instituted a case u/s 379 IPC against Ramchandra in which Rambaran was a witness, which was also instituted before this incident which indicates that deceased had litigation of criminal cases from others also, therefore, grievance of other persons against the deceased also cannot be ruled out. In case of enmity with others, there is a possibility of causing the incident by other inimical persons also.

67. In view of the facts and circumstances of the case and evidence available on record as discussed above we find that prosecution evidence is

scattered, witnesses produced by prosecution do not inspire confidence that they are eye-witnesses of the incident, oral testimony is also not consistent with the medical evidence, manner of assault as alleged also does not correspond with the injury of deceased found in medical report, there are lapses on the part of investigating officer also. Prosecution has miserably failed to prove the charge against the appellant-accused. Learned trial court has not passed the judgment and order evaluating the evidence available on record in proper perspective, therefore, it is perverse and not sustainable accordingly, it is liable to set aside.

68. Appeals are allowed, judgment and order recorded by learned trial court under appeal dated 05.2.2001 is set aside. Appellants are acquitted of the charge framed against them. They are on bail, their bail bonds are discharged. Appellants are directed to comply the provision of section 437-A Cr.P.C. to the satisfaction of the court concerned.

69. Registry is directed to send the order and original record to the court below for compliance.

(2020)06ILR A1058
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Criminal Appeal No. 1461 of 1983

Onkar & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Keshav Sahai, Sri A.C. Chaturvedi, Sri K.K. Tripathi, Sri Sheshadri Trivedi, Sri Ajai Kumar Pandey, Sri Satish Trivedi

Counsel for the Respondent:
A.G.A.

Criminal Law-Indian Penal Code, 1860- Section-302- Appeal against conviction.

Minor contradiction –

Do not affect the core of prosecution.

Motive –
Becomes irrelevant in the case of the direct witnesses.

Exception 4 – ingredients of – Principles summarized- Not intention of accused to cause death while committing the act – Attack was not premeditated and preplanned – Act of accused was not cruel and he did not take undue advantage of deceased. Scuffle took place in the heat of passion and all requirements under Section 300 Exception 4, satisfied- Hence, accused entitled to such benefit.(Para-34)

Conviction upheld sentences reduced to the period of imprisonment has already undergone. (Para-39)

The appeal is partly allowed. (Para-40)

List of cases cited: -

1. St. of U.P. Vs Krishna Master & ors., (2010) 12 SCC 324.

2. Surain Singh Vs St. of Punj., (2017) 5 SCC 796

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

1. This Criminal Appeal under Section 374(2) of Criminal Procedure Code has been filed by accused appellants Onkar and Uma Shankar, who have been

convicted under Section 302 I.P.C. and consequently, sentenced to life imprisonment vide judgment and order dated 11.04.1983 passed by VIIIth Additional Sessions Judge, Kanpur in S.T. No. 306 of 1982 (State Vs. Onkar and others) under Section 302 I.P.C., Police Station-Chaubepur, District-Kanpur Dehat.

2. We have heard Mr. Satish Trivedi, Senior Advocate, assisted by Mr. Sheshadri Trivedi, learned counsel for appellants and Mr. Syed Ali Murtaza, learned Additional Government Advocate for State-respondent.

3. Prosecution case in brief as emerging from FIR dated 07.09.1982 as well as the material available on record may be stated as under:

4. An occurrence took place on 07.09.1982 in which Laxmi Narain died. In respect of aforesaid occurrence, a written report dated 07.09.1982 (Ext. Ka-1) was presented at police station Chaubeypur, District Kanpur on 07.09.1982 by First Informant, P.W.2-Darshan Devi, alleging therein that in the afternoon of 07.09.1982, Informant, her mother-in-law Mst. Mathura Kunwari, Informant's son Durga Prasad and Laxmi Narain, elder brother of Informant's husband, were present at their home. Informant's nephews namely Onkar, Uma Shankar and Smt. Geeta Devi wife of Onkar, were also present in the house. At the instance of Mathura Kunwari, mother-in-law of Informant, elder brother of Informant's husband, Laxmi Narain had sold wood of a mango tree, which had fallen down, for a consideration of Rs.900/-. At about 12.30 PM on 7.9.1982, Onkar objected to Laxmi Narain claiming that he too had share in the wood sold by him and demanded money of his share, whereupon Laxmi Narain said that the fallen mango tree belonged to his mother and it was at her instance that, wood of fallen mango tree was sold. This got Onkar infuriated and he threatened that he would teach a lesson. Thereafter Onkar armed with sickle (Hansiya) and Uma Shankar armed with Spud (Khurpi) started assaulting Laxmi Narain; Smt. Geeta Devi also caught hold Laxmi Narain and all the three persons felled Laxmi Narain on the ground and inflicted injuries on his legs, arms and neck with sickle and spud. On account of injuries inflicted Laxmi Narain died instantaneously. Informant and her mother-in-law raised alarm, whereupon villagers Shiv Ram Singh, Raj Bahadur Singh and other persons in the vicinity arrived on the spot and witnessed the incident. Accused Onkar, Uma Shankar and Smt. Geeta, after committing murder of Laxmi Narain fled away from the place of occurrence. On the basis of written report (Ext. Ka-1), P.W.-5 Head Moharrir Ram Prasad Misra made relevant entries in the general diary. He thereafter prepared the Check F.I.R. (Ext. Ka-4).

5. Thereafter investigation of case was undertaken by P.W.-7, Sub-Inspector D.S. Sharma, Station Officer, P.S. Chaubeypur, District Kanpur. He recorded statement of P.W.2 Darshan Devi (Informant), visited the place of occurrence and prepared inquest (Ext. Ka-6). He also prepared Photo LASH and Challan LASH (Ext. Ka-7) and (Ext. Ka-8), respectively. He thereafter dispatched the dead body for postmortem examination after duly sealing the same through constable Jeet Narain Chaubey, P.W.1. He prepared the site plan (Ext.

Ka-10) on the pointing of First Informant. He collected blood stained and plain earth in two separate boxes, sealed them and prepared recovery memo Ext. Ka-11. He marked sealed boxes as Material Ext. 1 and 2. Thereafter he sent both sealed boxes for Serological examination to the Serologist along with towel (Ext. 1), Janeu (Ext.4) Shirt (Ext.5) in a sealed bundle.

6. Autopsy on the dead body of Laxmi Narain was conducted by P.W.8 Dr. S.C. Gupta at 2.30 pm on 8.9.1982. According to him, deceased was aged about 40 years. His body was of average built. His eyes were open, *rigor mortis* was present on both upper and lower limbs. In the opinion of Doctor, about one day had passed since the time of his death. He found following ante mortem injuries on the body of deceased:

1-Incised wound 4 cm x 2 cm x bone deep over right eyebrow. Edges of wounds retracted.

2-Incised wound present parallel and below to lower jaw 6 cm x 1.5 cm x muscle deep on left side of neck.

3-Incised wound present on the left side of neck 2.5 cm above left clavicle size 16 cm x 4 cm x half depth of neck cut with lop haemorrhage. Edges of wound retracted.

4-Incised wound present on the front of right side of chest 7 cm above right nipple size 3 cm x 1.5 cm x muscle deep.

5-Incised would present on the left shoulder 4 cm x 1.5 cm x muscle deep.

6-Incised wound present on the front of left upper arm 10 cm above left elbow joint; size 6.5 cm x 1/2 cm x skin deep.

7-Incised wound present on the front of left upper arm 5 cm above left elbow size 7 cm x 3 cm x muscle deep.

8-Incised wound present 6.5 cm above right knee size 6 cm x2.0 cm x muscle deep over front of right thigh.

9-Incised wound present 6.5 cm below right knee size 6.5 cm x1.5 cm x muscle deep over front of right leg.

10-Incised wound present over right leg 11 cm below right knee size 4 cm x 1 cm x bone deep.

11-Incised wound present on the front middle part of left thigh front side, size 7 cm x 3 cm x muscle deep.

12-Incised wound present on the left thigh 12 cm above left knee size 6 cm x 1.5 cm x muscle deep.

13-Incised wound present on the left thigh front side 10cm above left knee size 3.5 cm x 1/2 cm x muscle deep.

14-Incised wound present over front of left leg 11 cm below left knee size 3 cm x 1.5cm x muscle deep.

15-Incised wound present on the left leg front size 5 cm x 2 cm x bone deep (Tibia bone cut in chips) injury present 10 cm below left knee.

16-Incised wound present on the front of left leg 15 cm below left knee size 4.5 cm x 1/2 cm x bone deep.

17-Incised wound present on the back of neck at level of 6th cervical size 7 cm x 4 cm x vertebral deep (6th cervical vertebral cut).

18-Incised wound present on the right side back of neck size 6 cm x 1.5cm x muscle deep.

19-Incised wound present on the back of left shoulder over border of scapula size 3 cm x 1/2 cm x muscle deep.

20-Incised wound present on the back of left shoulder 5 cm x 2.5cm x muscle deep.

21-Incised wound present on the back of left shoulder 5 cm x 1 cm x muscle deep one cm below injury no.20.

22-Incised wound present on the back of left lge5 cm below left knee size 4 cm x 1.5 cm x muscle deep.

7. On external examination P.W.8 found that 6th cervical vertebral was cut corresponding to injury no.17. Heart was empty and weighed 180 grams. Vessels of left side neck were cut. Stomach was empty; small intestine was empty but filled with gases; large intestine was found half filled with gases.

8. In the opinion of autopsy surgeon, death of deceased was caused due to shock and haemorrhage, as a result of ante mortem injuries.

9. Thereafter on receipt of report of Serologist (Ext. Ka-12) and (Ext. Ka-13), and after conclusion of investigation, P.W.7, S.I., D.S. Sharma Investigating Officer submitted charge sheet dated 4.10.1982 (Ext. Ka-14) in the Court against Onkar, Uma Shankar and Geeta Devi.

10. Upon submission of aforesaid charge-sheet, cognizance was taken by the Chief Judicial Magistrate, Kanpur vide cognizance taking order dated 14.10.1982 under Section 302 IPC. As the case was triable by Court of Sessions, the matter was accordingly committed to Court of Sessions, Kanpur vide committal order dated 20.11.1982, passed by C.J.M. Kanpur. Consequently, Sessions Trial No. 306 of 1982 (State Vs. Onkar and others) under Section 302 I.P.C., P.S. Chaubepur, District-Kanpur came to be registered.

11. Aforesaid Sessions Trial was subsequently transferred to the Court of VIIIth Additional District and Sessions Judge, Kanpur, who framed charges against accused namely Geeta Devi, Onkar and Uma Shankar vide framing of charge orders dated 18.01.1983. Charges against Geeta Devi, Onkar and Uma Shankar, read as under:

Charge framed against Geeta Devi

"I, G.A. Farooqi,VIII Addl. District & Sessions Judge, Kanpur-NMA do hereby charge you Smt. Geeta Devi as follows:

That you on 7.9.82 at about 12.30 noon in village Kharagpur, P.S. Chaubeypur, Distt. Kanpur-Dehat from common intention with Onkar and Uma Shanker to commit the murder of Luxmi Narain and in furtherance of that common intention you alongwith Onkar and Uma Shanker committed murder by intentionally causing the death of Luxmi Narain and thereby committed an offence punishable U/s 302 IPC read with Section 34 I.P.C. and within my cognizance.

And I, hereby direct that you be tried on the aforesaid charge by me."

Charge framed against Onkar and Uma Shanker

"I, G.A. Farooqi,VIII Addl. District & Sessions Judge, Kanpur-NMA do hereby charge you Onkar and Uma Shanker as follows:

That you on 7.9.82 at about 12.30 noon in village Kharagpur, P.S. Chaubeypur, Distt. Kanpur-Dehat committed murder by intentionally causing the death of Luxmi Narain and thereby committed an offence punishable U/s 302 IPC and within my cognizance.

And I, hereby direct that you be tried on the aforesaid charge by me."

12. Accused persons denied the charges so framed and demanded trial. Consequently, burden fell upon prosecution to bring home the charges levelled against accused.

13. Accordingly, prosecution in support of its case, adduced eight witnesses, out of whom, P.W.2 Darshan Devi (Informant), P.W.3 Durga Prasad and P.W.6 Raj Bahadur Singh are witnesses of fact, who have deposed material facts about the occurrence.

14 P.W.1 C.P. No. 3109, Constable Jeet Narain Dubey, was posted at Police Station Chaubeypur, District-Kanpur Dehat on 7.9.1982. This witness took the dead body of deceased for postmortem on 7.9.1982 and got postmortem of body of the deceased conducted on 8.9.1982. This witness was cross-examined with regard to the timing of postmortem as well as the distance between hospital and Police Station. However, defence could not dislodge this witness. As such, his testimony remains intact.

15. P.W.-2 Darshan Devi, wife of Radhe Shyam is a witness of fact. It is this witness who had submitted written report dated 7.9.1982 at Police Station Chaubeypur, District Kanpur Dehat, of the occurrence dated 7.9.1982. This witness has clearly proved the manner of occurrence and also the place of occurrence. She has implicated accused persons namely, Onkar, Uma Shanker, and Geeta Devi in the commission of crime. She has clearly assigned role of causing injury to deceased to Onkar and Uma Shanker. This witness was recalled and also cross-examined but she remained intact.

16. P.W.-3, Durga Prasad is a child witness. This witness has also deposed regarding the manner of occurrence and also place of occurrence. His testimony has been consistent and inspite of lengthy cross-examination, prosecution could not dislodge him.

17. P.W.4 Naresh Chandra, is the area Lekhpal. He has proved Khatauni Ext. Ka-2 in respect of Survey Plot No. 738 area 3 bigha recorded in the name of Mathura Kunwari Kaith, Ram Autar and Jwala Prasad sons of Ramma.

18. P.W.5 is H.C. No. 72 Ram Prasad Mishra. This witness was posted as Head Moharrir at P.S. Chaubeypur, District Kanpur Dehat. This witness entered written report dated 7.9.1982 in the general diary and thereafter, prepared Check F.IR (Ext. Ka-4). He has proved Check F.I.R. (Ex. Ka-4) as well as G.D. entry regarding written report (Ex. Ka-5). This witness was cross-examined with regard to the timing of lodging of F.I.R. and also the person in whose presence F.I.R. was registered. However, defence could not cull out any such statement from him on the basis of which testimony of this witness could be doubted.

19. P.W.-6 Ram Bahadur Singh is a witness of fact and a neighbour of First Informant. This witness has deposed before Court below that he has witnessed the occurrence. He has accordingly described the manner of occurrence as well as the place of occurrence. His testimony, by and large, is similar to P.W.2 Darshan Devi and P.W.3 Durga Prasad. This witness was cross-examined by defence but defence failed to dislodge him.

20. P.W.7 Sri D.S. Sharma is the Investigating Officer, who has proved inquest report Ext. Ka-6, Photo Nash and Challan Nash as Ext. Ka-7 and Ext. Ka-8, specimen seal Ext. Ka-9, Site Plan Ext. Ka-10, Blood Stained and Plain Earth sealed in two separate boxes, Material Exhibits (M. Ext.) 1 and 2, Recovery Memo in respect thereof Ext. Ka-11. He has also proved Towel (M. Ext.3), Janeu (M. Ext.4) and Shirt (M.Ext.5), which were sent to Serologist for analysis. Report received from Serologist Ext. Ka-12 and Ext. Ka-13 and Charge-sheet Ext.Ka-14, have been proved by him.

21. P.W.8 Dr. S.C. Gupta, had conducted autopsy on the dead body of deceased. He has proved Postmortem Report Ext. Ka-15 prepared by him. This witness had described nature of injuries found on the body of deceased as incised wounds and also detailed the status of body. This witness has clearly supported that injuries sustained by deceased could have been caused by weapons of assault namely, sickle (hansiya) and spud (Khurpi). This witness has also suggested the time of death of deceased which is similar to timing of incident stated in the F.I.R. Inspite of detailed cross-examination, prosecution failed to dislodge this witness.

22. Defence in support of its case, adduced three witnesses namely D.W.-1, Krishna Gopal, D.W.-2 Ram Gopal Verma and D.W.-3 Chandrabhan Singh. However, all the three defence witnesses were disbelieved by Court below.

23. After prosecution evidence was over, all the incriminating material and adverse circumstances were disclosed to the accused for their version of occurrence in terms of Section 313 Cr.P.C. The accused persons denied most of the questions by repeatedly saying that it is false or they have no knowledge regarding the same.

24. On behalf of accused, it was urged before Court-below that P.W.6 Raj Bahadur Singh is not an independent witness; he has illicit connection with Smt. Darshan Devi and has been cultivating land on Batai, as such, he is a partisan witness, therefore, his testimony could not be relied upon; non production of neighbouring witnesses makes prosecution case highly doubtful; as per the site plan, witnesses are shown to have arrived at the place of occurrence from western side whereas, P.W.6 Raj Bahadur has deposed that he came from eastern side to the place of occurrence; F.I.R. is ante-time; no food was found in the stomach of deceased, therefore, defence case that deceased Laxmi Narayan was murdered in the night stand supported by the statement of Doctor. It was also urged that P.W. 8 Dr. S.C. Gupta, who conducted autopsy on the body of deceased, has not stated that death was caused due to shock and hemorrhage, due to ante-mortem injuries; as such, it is not proved that Laxmi Narayan has died because of shock and hemorrhage as a result of ante-mortem injuries. Mother of Laxmi Narayan was the best witness to prove the occurrence and her non production makes prosecution case doubtful. Accused Geeta Devi is entitled to get the benefit of doubt as there is no evidence to show that Smt. Geeta Devi has also assaulted Laxmi Narayan with any weapon.

25 The Court below meticulously and exhaustively dealt with each of the

above mentioned submissions urged on behalf of the accused-appellants to dislodge the prosecution case and vice-versa in proof of their innocence. Upon evaluation of the said submissions, in the light of the proposition required to be addressed in a case relating to direct evidence i.e. prosecution witnesses of fact are credible and reliable, none of the submissions urged on behalf of accused-appellants to dislodge the prosecution case were found cogent enough by Court below to believe another hypothesis much-less a reasonable hypothesis than the one pleaded by prosecution. Consequently, Court below by means of judgement and order dated 11.04.1983 convicted accused Onkar and Uma Shanker under Section 302 I.P.C. but acquitted accused Geeta Devi by extending her the benefit of doubt. Hence feeling aggrieved by judgement and order dated 13.09.2012, as detailed above, accused-appellants have now approached this Court by means of present criminal appeal.

26. Learned counsel for appellants urged that Court below has observed in impugned judgement that there is no evidence on record to show that the accused appellants assaulted deceased with a pre-meditated mind, which resulted in the death of Laxmi Narain, the deceased, as such, no conviction under Section 302 I.P.C. was possible. However, Court below has not specifically dealt with this issue.

27. Elaborating his argument, learned Senior Counsel for appellants submits that the case in hand is liable to be considered in the light of the provisions contained in Section 304 part 1 I.P.C. As per prosecution evidence itself there is nothing to show that there was a premeditated mind on the part of the accused-appellants to commit the crime. As such it is urged that the case in hand is one which is required to be judged on the principle of sudden quarrel. Consequently other findings rendered by Court below have been challenged by learned Senior Counsel for appellants.

28. However, this Court being the last Court of fact and also the legal obligation with which a Court of appeal is cloaked, we have to scrutinize the findings recorded by Court-below and also evaluate oral evidence on record to find out whether conviction of the accused-appellants deserves to be maintained, modified or same is liable to be set-aside.

29. This brings us to the issue relating to the appreciation of evidence by appellate Court as held in **State of Uttar Pradesh Vs. Krishna Master and Others, as reported in 2010 (12) SCC 324**. Paragraphs 15, 16, 17, 24 of aforesaid judgement clearly deal with the manner in which the evidence of the eye-witnesses is to be evaluated in a criminal case. Paragraphs 15, 16, 17 and 24 are accordingly reproduced herein below:-

15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and

infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless the reasons are weighty and formidable, it would not be proper for the appellate Court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the Court. Small/trivial omissions would not justify a finding by Court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from the truth. In sifting the evidence, the Court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eye-witnesses examined in this case proves the prosecution case.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the Court must keep in mind all these relevant factors

while appreciating evidence of a rustic witness."

30. Applying aforesaid observations made by Apex Court to the case in hand, we find that Court-below has rightly held that prosecution witnesses of fact are credible and reliable and hence, their testimony is worthy of credit. There is no such contradiction, embellishment or exaggeration in the testimony of prosecution witnesses of fact so as to discard the same. The testimony of prosecution witnesses of fact has been similar in content and consistent throughout. We have ourselves also examined oral testimony of prosecution witnesses of fact in the light of observations made by Apex Court as referred to above and inescapable conclusion is that the testimony of prosecution witnesses of fact have to be relied upon and dealt with accordingly.

31. We have already referred to the proposition which is required to be addressed by a Court while dealing with a case of direct evidence. The veracity of prosecution case is to be judged in the light of the same. P.W.-2, Darshan Devi, P.W.3 Durga Prasad and P.W.-6, Raj Bahadur Singh, are eye witnesses of the occurrence. They have fully proved the occurrence. The defence in cross-examination of these witnesses could not dislodge their testimony nor could it cull out any such thing on the basis whereof it could be even remotely inferred that the aforesaid eye-witnesses of fact are not credible and reliable and hence not worthy of trust. The three prosecution witnesses of fact namely P.W.-2 Darshan Devi, P.W.-3, Durga Prasad and P.W.-6 Raj Bahadur Singh have been consistent throughout regarding description of the manner of occurrence. They have also proved the identity of accused persons, which further stands corroborated from the fact that the accused have been nominated by name in the F.I.R. The defence, in spite of detailed and lengthy cross-examination of these witnesses, could not bring another hypothesis regarding the presence of accused at the time and place of occurrence. Secondly, the prosecution case that deceased died on account of the Ante-Mortem injuries caused upon the deceased by two of the named accused persons, stands corroborated by medical evidence, i.e., the Post-Mortem Report (Ext. Ka. -1) as well as the testimony of P.W.-8, Dr. S. C. Gupta, who conducted autopsy on the body of deceased. He has described ante-mortem injuries found on the body of the deceased as Incised Wounds. He has also discussed ante-mortem injuries found on the body of the deceased as incised wounds, which could have only been caused by the weapons of assault, namely, sickle (Hansiya) and Spud (Khurpi) in the hands of two of the the accused. The opinion of Doctor regarding time of death of deceased also leads to the same inference that occurrence took place around 12.30PM. Thirdly, on the question of motive, it may be noted that in a case of direct evidence motive is irrelevant. But there can be no motiveless malignancy also. All the prosecution witnesses of fact have been consistent in their statements throughout regarding the cause behind the occurrence i.e. the demand of his share of money by Onkar in the consideration received from selling wood of a fallen mango tree. In the description of the manner of occurrence right from the beginning upto death of deceased, all the prosecution witnesses have been consistent and natural. Thus

prosecution was able to prove the same story which it set out to prove. Lastly, the submission urged on behalf of accused-appellants that there was no pre-meditated mind to commit the crime coupled with the fact that the accused-appellants have not come out with their version of occurrence, clearly amounts to an admission qua the happening of the occurrence in the manner alleged by the prosecution itself.

32. In view of our agreement with the findings recorded by Court below on the various circumstances urged on behalf of the accused-appellants regarding proof of their innocence, the inescapable conclusion is that the prosecution has succeeded in establishing its case. Therefore, the conclusion drawn by the Court below holding that the accused are guilty of committing murder of Laxmi Narain (deceased) cannot be faulted with.

33. However, we find that the case in hand relates to a sudden act. There is nothing on record to show that there was any *mens rea* on the part of present accused-appellants to commit the alleged crime or there was any such circumstance to establish existence of a calculated *mens rea* to take revenge of any such act committed by the deceased prior to the occurrence or there was pre existing enmity between the two. This aspect of the matter has remained untouched by Court-below.

34. Thus the question which arises for determination in this appeal is "whether the case in hand is one relating to culpable homicide amounting to murder (punishable under Section 302 I.P.C.) or culpable homicide not amounting to murder (punishable under Section 304 I.P.C.)."

35. The law takes care of such a situation. Section 300 IPC lays down the exceptions to Section 299 IPC which deals with culpable

homicide not amounting to murder. Any act done upon sudden and

grave provocation is the 4th exception to Section 300 IPC. For ready reference Sections 299 and 300 IPC are reproduced herein-under:

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

300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

(Secondly) --If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

(Thirdly) --If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

(Fourthly) --If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

36. It would be worthwhile to refer to judgment in **Surain Singh Vs. State of Punjab reported in 2017 (5) SCC 796**, wherein Court in paragraphs 13 and 14 has explained law relating to the 4th exception to Section 300 Cr.P.C. The same are quoted herein-below:-

13. Exception 4 to Section 300 of the Indian Penal Code applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 Indian Penal Code covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the First exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A"sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter.

14. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 Indian Penal Code is not

defined in Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general Rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual

manner. The expression "undue advantage" as used in the provision means "unfair advantage".

37. In the light of above, we are of the view that case in hand clearly falls within the exceptions provided for in Section 300 I.P.C.

38. Accordingly, we uphold the view taken by Court below that accused appellants are guilty of committing murder of deceased Laxmi Narain but the offence committed comes within the ambit of Section 304 Part-I IPC and not 302 IPC. However, for the reasons mentioned herein above, we modify the punishment awarded to accused-appellants by Court-below.

39. The conviction of accused-appellants under Section 302 I.P.C. as imposed by VIIIth Additional Sessions Judge, Court No. 8, Kanpur vide judgement and order dated 11.04.1983 is converted into conviction under Section 304 Part-I I.P.C. Consequently, appellants shall undergo rigorous imprisonment for a period of 10 years if not already completed. Appellants shall be released after calculating remission under relevant provisions of Code of Criminal Procedure/completion of sentence. Appellants, namely, Onkar and Uma Shanker are in jail. They shall serve out the sentence so awarded if not already completed.

40. The appeal is partly allowed.

41. Office is directed to send back the lower court record to the concerned Court below forthwith.

42. Let a copy of this order be communicated to concerned Jail Superintendent as well as Legal Services Authority, High Court, Allahabad.

(2020)06ILR A1069
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.06.2020

BEFORE

THE HON'BLE MRS. REKHA DIKSHIT, J.

Criminal Appeal No. 1596 of 2005
&
Criminal Appeal No. 114 of 2006
&
Criminal Appeal No. 1650 of 2005

Ram Sahai & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Pawan Kumar Singh, Ashok Kumar Singh, B.P. Singh, Manish Bajpai

Counsel for the Respondent:
Government Advocate

Criminal Law-Indian Penal Code, 1860-Sections 148, 302/149 and 506.-Appeal against conviction.

Testimony of single witness-
The testimony of the single witness is enough for conviction of found to be reliable on the touchstone of credibility. The statement of P.W.-1 was recorded after lapse of 66 days, without any explanation by the Investigating Officer. (Para-35)

Medical Evidence and Ocular Evidence:-
The medical evidence makes the ocular testimony improbable, it becomes a relevant factor in the process of the evaluation of evidence. (Para-39)

Benefit of doubt-
These facts raise strong suspicion that the accused-appellants committed the murder of the deceased and the sole testimony of single

eye witness be recorded as conclusive of the circumstances of the case. (Para-44)

Criminal Appeals allowed. (E-2)

List of cases cited: -

1. Sajjan Singh & ors. Vs St. of M.P. (1999) SCC (Cri.) 44.

(Delivered by Hon'ble Mrs. Rekha Dikshit, J.)

1. Since above-mentioned appeals have been filed against conviction order passed by the trial court by a common judgment, the same are being decided by a common judgment.

2. These appeals arise against the judgment of conviction and order of sentence dated 25.11.2005 passed by learned Additional Sessions Judge, Lucknow in Sessions Trial No.1189 of 2001, arising out of Case Crime No.92 of 2000, under Sections 148, 302/149 and 506 I.P.C., Police Station - Bakshi-Ka-Talab, District - Lucknow, whereby the learned Additional Sessions Judge has convicted the accused-appellants, namely, Ram Sahai, Lachiman Pasi, Darshan Pasi, Gaya Prasad and Maharaj Deen under Sections 148, 302/149 and 506 I.P.C., and sentenced them under Section 302 IPC read with Section 149 I.P.C. to undergo life imprisonment, under Section 148 I.P.C. to undergo three years' rigorous imprisonment and under Section 506 IPC to undergo one year rigorous imprisonment.

3. At earlier occasion, the learned members of the Division Bench, Hon'ble Prashant Kumar and Hon'ble Dinesh Kumar Singh, JJ. hearing the appeals, had given different opinion and delivered separate judgements in the aforesaid appeals. Hon'ble Prashant Kumar,J. vide order dated 27.10.2018 allowed the aforesaid appeals and set aside the impugned order of conviction and sentence dated 25.11.2005. Hon'ble Dinesh Kumar Singh,J. vide order dated 27.10.2018 dismissed the aforesaid appeals upholding the impugned order of conviction and sentence.

4. In view of difference of opinion, the matter was laid before Hon'ble the Chief Justice under section 392 Cr.P.C and by order dated 17.11.2018 of the Hon'ble the Chief Justice, matter has been nominated to this Bench.

5. On the issue relating to the scope of hearing of appeals by the third Judge nominated under section 392 Cr.P.C., it was admitted to the learned counsel for the parties that in view of settled position of law, the judgment delivered by the third Judge would be the judgment in Appeals and that would bind the outcome of the appeals and the previous opinions expressed by the learned Hon'ble Judges will not affect the determination of the third Judge, whether or not the third Judge agrees with either of them or with both of them or records a separate finding on the issues involved in the appeals. In this regard, it would be sufficient to reproduce, the observations of the Supreme Court given in the case of ***Sajjan Singh and others vs. State of M.P.*** reported in ***(1999) SCC (Cri.) 44***, which is as follows:

"10. Statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the

Constitution or under Article 134 of the Constitution or Under Section 379 of the Code. The third Judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three Judge Bench where the opinion of majority would prevail".

6. The accused-appellant Lachiman Pasi has reportedly died, as such, Criminal Appeal No.1651 of 2005 against him stands abated vide order dated 16.05.2016.

7. Now, the appeal proceeds against Ram Sahai and Darshan Pasi (Criminal Appeal No.1596 of 2005), Gaya Prasad (Criminal Appeal No.114 of 2006) and Maharaj Deen (Criminal Appeal No.1650 of 2005).

8. Narrated concisely, the prosecution case against the appellants is that on 25.08.2000, in the election of Gramsabha of village Shivpuri, Sonapati (PW-3) a candidate of Up-pradhan [supported by Sandeep Singh (deceased)] was declared elected, whereas Ram Dayal, another candidate of up-pradhan (supported by the appellant Maharaj Deen) had lost the election. It is alleged that because of the aforesaid reason the appellant Maharaj Deen had developed animosity with the deceased.

9. On 31.08.2000 in a meeting of Gram Sabha for appointment of various committees, the deceased asked all the non-members to vacate the meeting hall, as such, the deceased along with Devendra Singh (PW-1), Santosh Singh, Ram Vilas Lodh (DW-1), Virendra Yadav (DW-5) came out of the meeting hall and sat on chairs kept under the sycamore (Guller) tree. A little later, the accused persons, namely, Darshan Pasi, Lachiman Pasi, Gaya Prasad, Sahai Pasi and Maharaj Deen also left the meeting hall and went towards their home. After a little while, Darshan Pasi possessed with Addhi (fire arm), Lachiman Pasi and Sahai Pasi possessed with katta (countrymade pistol), Maharaj Deen and Gaya Prasad possessed with Banka (a sharp cutting weapon) exhorted to kill the deceased Sandeep Singh, whereupon Darshan Pasi shot fire on the deceased, who ran and took shelter inside the boundary wall of Ram Avtar. All the accused- appellants chased and kill the deceased inside the boundary wall of Ram Avtar. The aforesaid occurrence was witnessed by Devendra Singh, Santosh Singh, Ram Vilas Lodh, Virendra Yadav, up-pradhan Sonapati and her husband Kallu.

10. The FIR was lodged on 31.08.2000 at 16.05 hours, registered as Case Crime No.92 of 2000, under Sections 147, 148, 149, 506 and 302 IPC against the accused-appellants. The dead body of the deceased Sandeep Singh was sent for postmortem, where he was examined by Dr. Vinod Kumar (P.W.-4), Exhibit Ka-2 is postmortem report in which antemortem injuries are as follows:-

"1. Incised wound 5 cm X 1.5 cm bone deep present on back of head on left side just behind left ear;

2. Incised wound 4 cm X 1.0 cm X bone deep on back of head left side just behind and below injury no. 1;

3. Incised wound 1.5 cm X 1.0 cm bone deep on left side (left side) face 2 cm infront of tragus of left ear;

4. Incised wound 2 cm X 0.5 cm X cartilage deep in upper part of pinna of left ear;

5. Multiple incised wound in area of 12 cm X 6 cm X skin deep on left side neck 3 cm below lobule of left ear;

6. Incised wound 3 cm X 1 cm X bone deep vertically present on right side face just below outer angle right eye;

7. Incised wound 3 cm X 1 cm X muscle deep obliquely situated on upper part of front of neck 4 cm below chin;

8. Incised wound 4 cm X 3 cm X trachea deep present in middle of front of neck underlying trachea larger cut through and through;

9. Multiple incised wounds in area of 9 cm X 7 cm present in front of neck above and below injury no. 8;

10. Incised wound 10 cm X 0.5 cm X muscle deep on top of left shoulder situated anteroposteriorly;

11. Multiple firearm wound of entry in an area of 10 cm X 7 cm present on front of left side chest and outer aspect of left shoulder 8 cm above left nipple varying in size from 0.3 cm X 0.5 cm X skin deep to 0.5 cm X 0.5 cm muscle deep;

12. Firearm wound of entry 4 cm X 3 cm X bone deep present on left palm at the base of index and middle finger;

13. Incised wound 2 cm X 1 cm X muscle deep on back of left wrist joint."

11. Subsequent to lodging the FIR Ram Chandra Dixit (P.W.-5), initially commenced with the investigation, which was handed over to Shri Abdul Rahman (P.W.-7), later on, who proceeded with the same and submitted chargesheet (Exhibit Ka-15) after completion of investigation. The charge was framed against the accused-appellants under Sections 148, 302/149 and 506 IPC by the trial court.

12. To bring home the guilt of the accused-appellants, the prosecution examined as many as eight witnesses, namely, P.W.-1 - Devendra Singh (eye witness), P.W.-2 - Om Prakash Singh (Informant), P.W.-3 - Sonapati (eyewitness), P.W.-4 - Dr. Vinod Kumar, P.W.-5 - Ram Chandra Dixit (Investigating Officer), P.W.-6 - Uday Narayan Shukla, P.W.-7 - Abdul Rahman (Investigating Officer) and P.W.-8 - Vishambhar Singh (scribe of the FIR).

13. P.W.-1, the alleged eyewitness of the said incident, has categorically stated that on the date of incident, the deceased asked all the non-members of the Gram Sabha to leave the meeting hall, as such, he himself along with Santosh Singh, Ram Vilas Lodh, Virendra Pratap Yadav, Kallu Raidas left the meeting hall and sat under sycamore (Guller) tree. It has further been deposed that accused Maharaj Deen, Darshan Pasi, Lachiman Pasi, Gaya Prasad and Sahai Pasi also left the meeting hall and headed towards their houses. After sometime all of them returned back, possessed with firearm, and banka and chased the deceased with the intention of inflicting fatal injuries to him. He has further deposed that Maharaj Deen and Gaya Prasad assaulted the deceased with Banka, whereas Lachiman Pasi and Sahai Pasi inflicted injuries from their Katta, consequently, the deceased received injuries on his neck and skull.

14. P.W.-2 Om Prakash, the complainant and father of the deceased

has deposed in his oral testimony that the incident took place on 31.08.2000 and has reiterated the testimony of P.W.-1. It has further been stated that when he returned from school, Devendra Singh, Santosh Singh, Ram Vilas and Virendra Yadav, who were accompanying the deceased came to him and narrated the incident, thereafter he got the complaint scribed by Vishambhar Singh and after signing the same lodged it in the police station concerned. He has also specified that he received the first information report of murder of a son at his home from Devendra Singh and Santosh Singh around 3.00 PM, subsequently the process of scribing and lodging of FIR commenced.

15. P.W.-3 Sonapati wife of Kallu reiterated the political animosity between the parties and also identified the accused-appellants during the trial. She has further narrated the entire incident and categorically stated that the accused applicant present in the court have not committed the said crime but some outsiders murdered the deceased as such she has been declared hostile by the court.

16. P.W.-4 Dr. Vinod Kumar Singh conducted postmortem of the dead body of the deceased and submitted report (Exhibit Ka-2) in which cause of death of the deceased has been assigned to antemortem firearm injuries.

17. P.W.-5 Ram Chandra Dixit initially was entrusted the investigation of the present case. He prepared necessary prosecution documents relating to the crime and forwarded the dead body for postmortem.

18. P.W.-6 Uday Narain, Head Constable has proved in his oral testimony the chik FIR (Exhibit Ka-13) of the present case.

19. P.W.-7 Abdul Rahman, who received the investigation subsequently from P.W.-5 recorded the statement of the witnesses after completion of the investigation, submitted chargesheet (Exhibit Ka-15) against the accused-appellants.

20. P.W.-8 - Vishambhar Singh, the scribe of the written complaint lodged by the complainant, has proved the said report in his oral testimony which is exhibit Ka-1.

21. Incriminating evidence and circumstances were put to the appellants under Section 313 Cr.P.C. in which they categorically stated that they have been falsely implicated in the present case due to political enmity. The accused-appellants Maharaj Deen has specifically denied his presence at the place of occurrence. It has also been stated that the Investigating Officer has submitted chargesheet on wrong and false facts as he has not committed the alleged offence.

22. The appellants have adduced as many as six witnesses in defence, namely, D.W.-1 Ram Vilas, D.W.-2 Ramdayal, D.W.-3 Nadir, D.W.-4 Prem Ashutani, D.W.-5 Virendra Pratap Yadav, D.W.-6 Aneesh Kumar Singh.

23. D.W.-1 Ram Vilas has deposed in his oral testimony that he is familiar with both the parties as he is resident of the same village. He has categorically denied the murder of the deceased by the accused-appellants and has stated that he

does not know, who were the assailants of the deceased.

24. D.W.-2 Ramdayal, membership of Shivpuri Gram Panchayat, has deposed in his oral testimony that the deceased was killed on the date of incident but the assailants fled away from the place of occurrence. The present accused-applicants are not the assailants. He has also stated that he witnessed the assailants fleeing away but could not recognize them.

25. D.W.-3 Nadir, Member Village Panchayat Committee, has deposed in his oral testimony that meeting of panchayat members was scheduled at Panchayat Bhawan on 31.08.2000 and the deceased was killed on the same day around 2-2.30 P.M. in the courtyard of Ram Avtar situated near Panchayat Bhawan. After hearing a lot of noise, committee member came out and saw six people fleeing from the place of occurrence. They were possessed with country-made pistol, spears and bankas. He has further stated that none of the accused-appellants has caused murder of the deceased as far as the identification of the assailants is concerned, he could not see their faces.

26. D.W.-4 Prem Ashutani, Joint Director, Saudaik Sahbhagita Unit, U.P. Jal Nigam, has established the presence of accused-appellant Maharaj Deen on duty on the date of incident from 10.00 A.M. to 5.00 P.M. as his signatures were obvious on the attendance register and the register was in the custody of dispatcher, Kali Shankar, as such there is no scope of manipulation.

27. D.W.-5 Virendra Pratap Yadav has stated in his oral testimony that he is acquainted with both the parties and is an eye witness of the said incident. It has further been deposed that none of the accused-appellants has committed the murder of the deceased. He has reiterated the version of the other defence witnesses.

28. D.W.-6 Aneesh Kumar Singh, Development Officer, Village Shivpuri, has deposed in his testimony that he was posted at the aforesaid place from 1999 to 2000 and is well-acquainted with the fact of meeting being held at Panchayat Bhawan. The accused-appellants were not involved in the murder of the deceased and has also categorically stated that he saw the assailants, who murdered the deceased but could not recognize them.

29. The trial court held that the appellants committed the said offence and prosecution established the circumstances, proving the appellants' guilty under Sections 148, 302/149 506 I.P.C. and sentenced them under Section 302 IPC read with Section 149 I.P.C. to undergo life imprisonment, under Section 148 I.P.C. to undergo three years' rigorous imprisonment and under Section 506 IPC to undergo one year rigorous imprisonment. Aggrieved by the verdict of the conviction, the appellants preferred the present appeals.

30. Heard Shri Mridul Rakesh, Senior Advocate assisted by Shri Manish Bajpai, learned counsel for the appellants, Shri Arun Sinha, learned counsel for the appellant in connected appeal and Shri Ranvijay Singh, learned AGA for the State of U.P.

31. Learned counsel for the appellants have submitted that the

allegations made in the first information report by the complainant are not in consonance with the facts narrated by P.W.-1 Devendra Singh, the sole witness in support of the prosecution case. It has further been argued that the testimony of P.W.-1 do not correspond with the medical evidence which creates doubt as to whether P.W.-1 has witnesses the incident or not. No firearm injury was found on the neck and skull of the deceased as stated by P.W.-1, instead it was sharp edged weapon injury. It has further been submitted that the alleged eyewitness mentioned in the first information report, namely, Ram Vilas Lodh (D.W.-1), Sonapati (P.W.-3) and Virendra Pratap Yadav (D.W.-5) have not supported the prosecution story, denying the involvement of appellants in the said commission of crime.

32. Learned counsel for the appellants have further submitted that the statement of P.W.-1, the alleged eyewitness was recorded by Investigating Officer after a period of 66 days, though, allegedly he was present at the place of occurrence. It has also not been clarified by the complainant (P.W.-2) as to how he came to know about the alleged incident as he has named the accused-appellants in the first information report, though, admittedly, he was not present at the time of incident. P.W.-1 has categorically stated that he could not meet P.W.-2 to inform about the incident and when he returned to the spot, police was present there. This fact is also admitted that when the first information report was scribed by P.W.-8 at the spot, the police was already present there. It has been specifically submitted that the prosecution has not explained as to how, and on what basis, the police arrived at the spot, which cause a serious dent in the prosecution case.

33. Per contra, learned AGA for the State contended that the prosecution has established the guilt of appellants in the commission of offence through the evidence of P.W.-1 which is fully reliable as his presence at the place of occurrence has not been disputed. The FIR version has fully been supported by oral and documentary evidence, based on the said evidence, the court below rightly convicted the appellants and the impugned judgment warrants no interference . In this context, learned AGA has referred the following judgments:

34. Considered the rival contentions and perused the impugned judgment and order of the trial court and material on record.

35. In the present case, the entire prosecution story rests on the sole testimony of P.W.-1, as the other alleged eyewitness of the occurrence D.W.-1, P.W.-3 and D.W.-5 have not supported the prosecution case and admittedly P.W.-2 (complainant), was not present at the place of occurrence. This legal proposition is not disputed that the conviction in any case can be based on sole testimony of single witness, subject to its trustworthiness and credibility. In this case, the entire case of prosecution rests on the evidence of P.W.-1, who was present at the time of incident, as well as, at the time of preparation of documents by the police, regarding the incident and the dead body, but his statement was not recorded on that day and the reason for the same is unexplained by the Investigating Officer. The statement of P.W.-1 was recorded after lapse of 66 days, without any explanation by the Investigating Officer in his oral deposition also, as P.W.-7. The delay

caused in recording the statement of an eyewitness do not create a doubt in the credibility of his evidence but, then, it has to be scrutinized strictly, while appreciating the evidence.

36. A reference may be made to Mohd. Iqbal M. Shaikh & ors versus The State of Maharashtra reported in 1998 (4) SCC 494, wherein it has been observed as under:

"Let us now examine the reliability of the prosecution witnesses through whom the prosecution has to establish that the case against the appellants has been proved beyond reasonable doubt. As has been stated earlier the six witnesses who were supposed to be the eye-witnesses to the occurrence are PWs 1, 2, 3, 4, 9 and 10. It is to be noticed that while PW 4 was examined by the police on 17.1.1993 and PW 3 was examined by the police on 18.1.1993 but PW 2 Surya Kant was examined on 25.1.1993 and the three other eye- witnesses were examined on 29.1.1993 while the occurrence was on 7.1.1993. It is established from the prosecution evidence itself that these witnesses were the inhabitants of Gandhi Chawl where the ghastly incident occurred and immediately on the next day of the occurrence they were shifted to a local school for safety and were staying there. Normally, therefore, there was no justification on the part of the investigating agency in not examining them for this length of time. The only explanation offered by the investigating officer is that on account of riot the Police was busy with law and order problem but that problem did not continue for this length of time and in fact the investigating officer has failed to indicate as to why the eye-witnesses though available had not been examined till 29.1.1993. We are conscious of the fact that merely because a witness was examined after a considerable period from the date of occurrence his evidence need not be discarded on that ground alone but at the same time while testing the credibility and assessing the intrinsic worth of such witnesses the delay in their examination by the police has to be borne in mind and their evidence would require a stricter scrutiny before being accepted....."
(emphasis added)

37. The foremost argument of learned counsel for the appellants to be considered, relates to the fact averred in the first information report and the facts narrated by P.W.-1, the eyewitness, in his oral testimony. This witness has substantiated the fact related to the scheduled meeting in Panchayat Bhawan on the date of the incident, where a number of people along with accused-appellants and the deceased were present but left the meeting hall before it started. After sometime the accused persons came possessed with addhi (firearm), katta and banka with intention of assaulting the deceased. As per his testimony, Darshan Pasi armed with Addhi, Lachiman Pasi and Sahai Pasi armed with a country-made pistol, Maharaj Deen and Daya Prasad with banka, chased the deceased, who took shelter inside boundary wall of Ram Avtar where Lachiman Pasi and Sahai Pasi inflicted injuries from their Katta on his neck and skull, Maharaj Deen and Gaya Prasad assaulted with banka. At the first instance, Darshan Pasi shot fire at him causing injuries on the chest and hand of the deceased. The factual position of assault and injuries as

narrated by P.W.-1 do not corroborate with the medical evidence and the postmortem report, as, instead of firearm injuries on head and neck, it was sharp edged weapon injuries, which is not in consonance with the oral testimony of P.W.-1. The fact that the Dharshan Pasi shot fire on the deceased on his chest and palm under the tree do not found support from the physical findings of Investigating Officer as neither any empty cartridge or blood was found under or around the tree.

38. It is worth mentioning that P.W.-1 had categorically deposed that after receiving gun-shot injuries on chest and palm, the deceased ran and took shelter inside the boundary wall of Ram Avtar but no blood was found on the way, and, moreover no point of entry of the deceased inside the boundary wall has been shown in the site plan, if it be taken as that the deceased jumped four feet high boundary wall, which appears to be highly improbable, in an injured condition. The aforesaid submission and appreciation of testimony of P.W,-1 raises a question mark on his credibility and trustworthiness.

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect, that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

40. In the instant case as referred to hereinabove, as many as five assailants attacked one person but the prosecution case from the very inception of FIR, is very clear that accused-appellant Darshan Pasi shot fire when the deceased was sitting under the tree, causing him injury on chest and left palm, Lachiman Pasi and Sahai Pasi fired on his neck and skull inside boundary wall and Maharaj Deen and Gaya Prasad assaulted the deceased with banka. This fact is categorically substantiated by P.W.-1 in his oral testimony. The postmortem report reveals no firearm injury, either on neck or skull or any other part of the dead body, whereas remaining injuries relate to sharp edged weapon, which may be attributed to alleged use of banka by Maharaj Deen and Gaya Prasad.

41. In any event unless the oral evidence is totally irreconcilable with medical evidence, it has primacy but here medical evidence makes ocular evidence improbable, thus, ocular evidence may be disbelieved, moreso in view of the fact that the P.W.-1 is the sole witness to shoulder the entire burden of prosecution case, as such, he has to be wholly reliable and trustworthy. A single fact discrediting the testimony of sole witness of prosecution, on whose premise the guilt is to be upheld, may lead towards his untrustworthiness. Thus, it can reasonably be concluded that a strict scrutiny and appreciation of testimony of P.W.-1 do not make him as much reliable and trustworthy to base the conviction of the accused-appellants on his sole and uncorroborated testimony.

42. It is fairly well settled that FIR is not substantive piece of evidence, but in the present case, the issue is whether FIR was exactly lodged as narrated by P.W.-2. The oral testimony of P.W.-2 indicates that he filed a written complaint on the basis of information received from P.W.-1 (Devendra Singh), Santosh Singh, Ram Vilas (D.W.-1) and Virendra Pratap Yadav (D.W.-5), but it has been specifically denied by P.W.-1 that he ever met P.W.-2 (the complainant) before the scribing of written report. As far as the Ram Vilas (D.W.-1) and Virendra Pratap Yadav (D.W.-5) are concerned, they have deposed before the court as defence witnesses and have neither supported the prosecution case nor the version of P.W.-2 (the complainant), and Santosh Singh has not been produced as witness from either side. As per statement of P.W.-1 when he returned back to the spot, the police was already present there. This fact is also substantiated by P.W.-8 (scribe of the FIR), who has gone to the extent of deposing that it was written on the dictation of the police. Thus, it can be logically and reasonably concluded that the police got the information of the incident prior to lodging of any FIR, as they were present on the spot even before scribing of the FIR, therefore, creating a doubt in the entire prosecution case. The aforesaid discussion effectively establishes the fact that it is not clear as to how P.W.-2 got information of the incident and, how come, the police was present at the spot, even before lodging of any first information report, thus leading towards a serious doubt in the prosecution case. It raises an issue about the information given to the police of the incident, may be the present first information report is an afterthought as the enmity has been claimed by the parties.

43. It is pertinent to mention here that the defence witnesses have narrated an entirely different story, though D.W.-1 (Rama Vilas) and D.W.-5 (Virendra Pratap Yadav) are named as eye witnesses in the first information report, filed by the complainant. This fact goes a step further to create suspicion regarding the genuineness of the case.

44. In view of the above, it appears that only facts which have been established by the prosecution beyond doubt are, that there was ill-will between the parties on account of election, that the murder of the deceased was committed and his dead body was found inside the boundary wall of Ram Avtar on 31.08.2000. These facts raise strong suspicion that the accused-appellants committed the murder of the deceased and the sole testimony of single eye witness be recorded as conclusive of the circumstances of the case. It is highly improbable to conclude on the basis of testimony of single eye witness that the accused-appellants committed murder of the deceased. The prosecution has utterly failed to discharge his burden of proving the accused beyond reasonable doubt at the time and place as alleged in the charge. The accused-appellants are entitled to get benefit of doubt.

45. Thus, on the basis of analysis made herein above, this Court is of the view that the trial court's finding on the point of holding guilty the accused appellants, namely, Ram Sahai, Darshan Pasi, Gaya Prasad and Maharaj Deen for the offence under Sections 148, 302/149 and 506 I.P.C. is not in accordance with the evidence and law and the same is not sustainable, and the appeals filed by the appellants namely Ram Sahai, Darshan Pasi, Gaya Prasad and Maharaj Deen are liable to be allowed.

46. For all the reasons stated above, the appellants are entitled to the benefit of

doubt and accordingly are entitled to acquittal.

47. In the result, the appeals are allowed and the judgment and order dated 25.11.2005 passed by learned Additional Sessions Judge, Lucknow in Sessions Trial No.1189 of 2001 is hereby set aside so far as it relates to the appellants, namely, Ram Sahai, Darshan Pasi, Gaya Prasad and Maharaj Deen are acquitted on benefit of doubt of the charges levelled against them.

48. The appellants Ram Sahai, Darshan Pasi and Maharaj Deen are in jail. They shall be released forthwith, if they are not wanted in any other case. The appellant, Gaya Prasad is on bail. He need not surrender. His bail bonds and sureties stand discharged.

49. The Senior Registrar is directed to ensure compliance by forwarding a certified copy of this judgement to the court concerned forthwith.

(2020)06ILR A1079
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.05.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE GHANDIKOTA SRI DEVI, J.

Criminal Appeal No. 2004 of 1986
connected with
Criminal Appeal 2026 of 1986

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

Counsel for the Appellant:
Sri Keshav Sahai, Sri Bhavya Sahai, Sri Kailash Prasad Pandey

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

Criminal Law-Indian Penal Code, 1860-Sections 302/34, 201 and 511 - Appeal against conviction.

Medical Evidence and Ocular Evidence:-
The medical evidence makes the ocular testimony improbable, it becomes a relevant factor in the process of the evaluation of evidence. The medical evidence does not corroborate the ocular version. (Para-26)
Prosecution has failed to prove this case beyond reasonable doubt. (Para-32)

Criminal Appeal allowed. (E-2)

List of cases cited: -

1. Ram Laxman Vs St. of Raj., (2016) 12 SCC 398

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

1. Heard Sri Bhavya Sahai and Sri Kailash Prasad Pandey, learned counsel for the appellants and Sri Jitendra Kumar Sisodia, learned State Law Officer for the State.

2. These two appeals have been filed by the appellants Than Singh and Bhima against the judgement and order dated 22.7.1986 passed by the Special Judge, Mathura in S. T. No. 75 of 1986; State Versus Bhima and three others, under Sections-302/34, 201 and 511 I. P. C., P. S.-Vrindavan, district-Mathura by which the appellants have been convicted and sentenced to imprisonment for life under Sections-302/34 I. P. C.

3. Appellant Bhima (in Criminal Appeal No. 2026 of 1986) died during the pendency of the appeal, hence, Criminal Appeal No. 2026 of 1986 was dismissed

as abated by this Court vide order dated 1.10.2018.

4. The prosecution story in brief is that on 23.11.1985 an engagement ceremony was being held in the house of Jaswant Singh. Keshav Dev, his brother Ranvir alias Ranno, Raghuvir, son of Gyan Singh and others were going towards the house of Jaswant Singh at about 6.00 P. M. to attend the engagement ceremony. When they reached near the house of Kirori, Hari Singh armed with a gun, Bhima and his nephew Rotan armed with "Kattas", suddenly emerged before them. Than Singh caught hold of Ranno from his waist and Hari Singh ordered all others to run away as they were going to kill Ranno. On which, Keshav Dev and other persons, who were accompanying Ranno, ran into the house of Kirori and thereafter all the accused fired with their firearms at Ranno near the "Chabootara" of Kirori's house. The occurrence was seen by the witnesses from inside the house of Kirori in the light of torch. The incident took place at about 7.00 P. M. Before being shot, Ranno had managed to set himself free from the clutches of Than Singh and had retorted that he would see that who kills him. Thereupon Hari Singh fired a shot in the air and then Than Singh again caught him from his waist and immediately thereafter the accused fired at him from their respective weapons. The deceased fell down on the spot. Hari Singh was a known criminal and Ranno was also a spoiled person and due to fear of Hari Singh, Keshav Dev stayed in the village for sometime and thereafter went to the police outpost and lodged the written report of the occurrence (Ext. Ka 1) at about 9.30 P. M. The distance of the police station from the place of occurrence was about three kms. The case was registered in the G. D. No. 32 in police outpost Jait and S. I. S. K. Kulshrestha proceeded to the place of occurrence. The special report was prepared in the night but was not dispatched due to non-availability of any means of transportation or conveyance. S. I. S. K. Kulshrestha held the inquest on the body of the deceased at the place of occurrence on 24.11.1985 between 7.00 to 9.00 P. M. and prepared the inquest report. Thereafter he got the body of the deceased sealed and dispatched to the police lines through constable Nahar Singh and Hhob Singh along with the inquest report, copy of the G. D., letters addressed to the C. M. O and R. I., photo nash and challan lash and other related papers which were prepared by him on the spot. He also took into the custody plain and blood stained soil and two cartridges from the crime scene and prepared the recovery memos of the aforesaid articles (Ext. Ka 16 and Ka 17). After inspecting the two torches produced by the witnesses Keshav Dev and Rootan before him, he prepared 'Fard Supurdgi' of torches. During the course of investigation a 'Katta' was recovered from the possession of the accused Pooran and the same was sent to the ballistic expert along with the recovered empty cartridges and the ballistic expert vide his report (Ext. Ka 17) reported that the recovered empty cartridges sent along with 'Tamancha' were not fired from the 'Tamancha'. Post mortem examination of the body of the deceased Rootan

was conducted on 24.11.1985 by P. W. 5 Dr. P. K. Sharma, Medical Officer, District Hospital, Mathura who found following ante mortem injuries on the body of the deceased:

1. Fire arm wound of entry 3 cm x 2 cm x cavity on the right side of neck just above the wound end of Rt. Clavicle, adjacent in direction towards the back wound and to left arsegun back (bladder) no tatooing or charring;

2. Fire arm wound 4 cm x 3 cm x cavity deep on the back of left scapular region having connecting with one (1) margin inverted;

3. Tangenital fire arm wound 13 cm x 2cm x skin on the part of elbow right to left;

4. Fire arm wound of entry 1 cm x 1 cm x cavity on the left side of middle stratum;

5. Fire arm wound of exit 25 cm x 2 cm x cavity deep on the back left side chest middle 3 cm away from vertebral column connected with injury no. 4;

6. Fire arm wound of entry 1 cm x 1 cm cavity deep on the part of lower left side chest even below upper left, margins black, tattooing and charring;

7. Fire arm wound of exit 2.5 cm x x cavity deep on the back of left scapular region connecting with injury no. 6;

8. Fire arm wound of entry 1 cm x 1 cm x cavity deep outer side of right scapular margins back tattooing direction positively and to left;

9. One metallic bullet of about 1 cm middle left next on the skin near vertebram and connected with injury no. 8;

10. Fire arm wound of entry 1 cm x 1 cm x muscle deep on the part of left angle margins back no tattooing or charring;

11. Two firearm wound of entry 1 cm x 1 cm x muscle deep each 2 cm apart on the part of middle left arm left part no tattooing or charring ;

12. Two firearm wound of exit 3 cm x 2 cm x 2.5 cm corresponding with injury no. 11."

5. Since the offence mentioned in the charge-sheet was triable exclusively by the Court of Sessions, the accused were committed for trial to the Sessions Court by the C. J. M., Mathura where S. T. No. 75 of 1986; State Versus Bhima and three others was registered and was made over for trial from there to the Court of Special Judge, Mathura, who charged all the accused under Sections-302/34 I. P. C. and Pooran was charged separately under Sections-201 and 511 I. P. C. It is noteworthy that the accused Hari Singh is absconding and he has not been arrested till date.

6. The prosecution in order to prove its case examined P. W. 1 Keshav Deo, who is the informant and real brother of the deceased, as an eyewitness of the occurrence. He stated before the trial court that he was going to attend the engagement ceremony of Jasbant's son along with the deceased and some other persons and when he reached near the house of Kirori, the accused armed with deadly weapons accosted them suddenly. He in his evidence has further narrated the manner in which the deceased was killed by the accused as spelt out in the F. I. R. He proved the written report of the occurrence (Ext. Ka 1). He further deposed that he identified the accused in the light of the torch and the same was produced before the Investigating Officer and inspected by him. He proved the memo of torch (Ext. Ka 2). P. W. 2 Raghuvir another eyewitness of the incident who was a resident of the same

village and who was allegedly accompanying Keshav Deo and the deceased Ranno at the time of the incident while they were going to the house of Jaswant Singh, in his evidence tendered before the trial Court corroborated the statement of P. W. 1 in all material details. P. W. 3 Jaswant Singh is the third eyewitness of the incident who deposed that he had gone to invite Keshav and others to participate in the engagement ceremony which was taking place in his house and when he along with the deceased and his family members was returning to his house, the incident took place. He also corroborated the evidence of P. W. 1 Keshav Deo in all material particulars. Apart from the three eyewitnesses, the prosecution also examined four formal witnesses. P. W. 5 Dr. P. K. Sharma, who had conducted the post mortem examination of the deceased's body and proved the post mortem report (Ext. Ka 14) of the deceased. He also deposed that panchayatnama, nakshanash and other connected papers (Ext. Ka 5 to Ext. Ka 13) were received by him along with the dead body. P. W. 6 S. I. S. K. Kulshrestha, the first investigating officer of the case, in his evidence tendered before the trial court, narrated the various steps taken by him during the course of investigation. He proved the site plan of the occurrence (Ext. Ka 15), recovery memo of the blood stained earth and empty cartridges collected by him from the place of incident as (Exts.Ka 16 and Ka 17). He also stated that he had recovered a 'katta' from the possession of Pooran on 27.11.1985 and prepared it's recovery memo which was proved by him as (Ext. Ka 18). P. W. 7 S. I. Veerpal Singh proved the inquest report (Ext. Ka 19) by deposing that it was in his handwriting. P. W. 8, the second investigating officer of the case, who had filed the charge-sheet against the accused and proved the same. After recording the prosecution evidence, the accused were examined under Section 313 Cr. P. C. They pleaded not guilty and alleged false implication on account of enmity. They also stated that since admittedly deceased Ranno was a shady character, he was killed by some other person and the accused were falsely roped in.

7. The accused examined Lal Singh, Kishan Chandra, Nawal Singh and Hari Singh, Head Wireless Operator as D. Ws. 1 to 4.

8. D. W. 1 Lal Singh stated before the trial court that his father Jaswant Singh had neither gone to invite Keshav Deo nor the accused had indulged in any brawl.

9. D. W. 2 Kishan Chandra stated that the copy of the F. I. R. was received on 24.11.1985 in the office of the District Magistrate.

10. D. W. 3 Nawal Singh has stated that no recovery memo was prepared before him and that the I. O. neither inspected the torches of Rootan and Keshav Deo in his presence nor he had given the torches to the custody of the witnesses nor prepared 'fard supurdgi'. In the police station he was made to sign some papers. He also deposed that neither any blood stained earth nor empty cartridges were recovered in his presence nor any recovery memo was prepared in his presence, Darogaji had obtained his signatures on three blank papers.

11. D. W. 4 Hari Singh, Head Wireless Operator, Police Office,

Mathura produced the original wireless set message register, which he stated, had been brought by him. He produced the carbon copy of the original message which was received from the police outpost Jait. He deposed during trial that it was in his handwriting and bore his signatures. He further deposed that the aforesaid message was received by him at about 00.25 hrs. Apart from the aforesaid message, he had not received any other message. The message did not contain any details of weapons, witnesses, and place of incident.

12. The Special Judge, Mathura after considering the submissions advanced before him by learned counsel for the parties and scrutinizing the evidence on record convicted the accused-appellants Than Singh and Bheema and awarded aforesaid sentences to them while the accused Pooran and Rootan were acquitted.

13. Sri Bhavya Sahai, learned counsel appearing on behalf of the appellants submitted that the F. I. R. in this case is ante timed. The genesis of the occurrence has not been established by the prosecution. The medical evidence does not corroborate the ocular version. There are material contradictions in the evidence of eyewitnesses.

14. There is no evidence of any source of light at the place of occurrence, as the recovery of torch, in the light of which, the eyewitnesses of the occurrence claimed to have identified the accused, is doubtful. There is no evidence that Than Singh was previously known to the witnesses and hence, how could he be identified by the informant and the witnesses. The false implication of Than Singh is apparent on the face of record. The trial court strangely acquitted the accused Pooran and Rootan on the basis of the same set of evidence, on which, it had convicted the appellant Than Singh.

15. The prosecution also deliberately did not examine Kirori as an eyewitness during the trial in front of whose house, the incident taken place and it was from his house that the witnesses claimed to have seen the occurrence. Although his evidence on the points of assault and presence of the informant and other witnesses at the place of occurrence would have been the most reliable and material to establish the guilt of the accused. Even his statement under Section 161 Cr. P. C. was recorded on 24.11.1985. Neither the recorded conviction of the appellant Than Singh nor the sentence awarded to him can be sustained and are liable to be set aside.

16. Per contra, learned A. G. A. has submitted that it is fully proved from the evidence of three eyewitnesses examined by the prosecution during trial that Rootan was shot dead by the appellant Than Singh along with other co-accused at about 7.00 P M. on 23.11.1985 in front of the house of Kirori, F. I. R. in this case is not ante timed. There is no material contradiction between the medical evidence and the ocular version. All the accused were identified by the witnesses in the light of the torches which were produced before the I. O. of the case on 24.11.1985, inspected by him and found in working order and their 'fard supurdgi' was prepared. The Court below has given cogent reasons for acquitting co-accused Pooran and appellant Than Singh whose case stands entirely on a different footing, is not entitled to claim acquittal on the

basis of parity. This appeal lacks merit and is liable to be dismissed.

17. We have heard learned counsel for the parties and perused the entire record.

18. As regards, the first submission made by learned counsel for the appellant that the F. I. R. in this case is ante timed. Our attention has been invited to the fact that the special report of the case and the F. I. R. were sent to the concerned authorities after a considerable delay and there is no mention of the crime number on the various memos prepared at the time of the inquest proceedings including the inquest report. There is also evidence of D. W. 4 Hari Singh on the record who disclosed that the radiogram was received as late as at 12.45 A. M. and time of lodging of the F. I. R. and the arms used by the appellant were not mentioned. In the panchayatnama also the names of the accused and the roles assigned to them individually are not mentioned therein.

19. Per contra, learned A. G. A. has submitted that the radiogram which was received at 12.25 A. M. clearly refers to the names of the accused who were armed with firearms and had committed the murder of Ranno. The radiogram further shows that the S. I. had proceeded to the spot. Radiogram is only a brief message conveyed through wireless only with the object to apprise the authorities and nothing more is expected and needed in it. The radiogram clearly shows that the F. I. R. had already come into existence and investigation had been set in motion.

20. With regard to the non-mention of the case crime on the inquest report, it has been submitted by learned A. G. A. that on the top of the inquest report "silsila no. 119 under Section 302 I. P. C., police out post, Jait" has been mentioned and a copy of the F. I. R. was attached with it.

21. Upon perusing the inquest report (Ext. Ka 5), we find that a copy of the F. I. R. was attached to the inquest report and on the inquest report "silsila no. 119, under Section 302 I.P.C." was mentioned and panch witnesses had opined with regard to cause of death that "bandook evam katton ki goli se mara". However in the copy of the site plan which was prepared on the same day and at the same time, the same Ext. Ka 15 case crime no. 380 was strangely mentioned along with "silsila no. 119".

22. In our opinion, the failure of the Investigating Officer to mention the crime number on the inquest report and the other memos prepared at the time of the inquest was merely an irregularity or at the most an instance of carelessness on his part and the same may not in itself be indicative of the fact that the F. I. R. was ante timed but what has to be seen is that where in a case it appears that the investigation is perfunctory and serious irregularities have been committed by the investigating officer and it is not proved that the special report was promptly dispatched to the concerned authorities, cumulative effect of such omissions or irregularities on the credibility of the prosecution story can always be examined by the Court. Although P. W. 4 who had registered the case, prepared and proved the chik F. I. R. and the G. D. entry (Exts. Ka 3 and 4) in his examination-in-chief had deposed that the special report was dispatched to the concerned authorities through a constable on 24.11.1985 itself,

however, he failed to disclose either the name of the constable through whom the special report was dispatched or the name of the constable who had brought back the special report. Record shows that the special report was signed by the C. J. M. and the relevant G. D. entry of 24.11.1985 by which the special report is alleged to have been dispatched, was neither exhibited nor proved during trial although it would have been the best piece of evidence to prove that the special report was sent to the concerned authorities on 24.11.1985 and in that case the delay in signing of the special report by the C. J. M. would not have in any manner adversely affected the prosecution case.

23. Thus, upon consideration of the cumulative effect of the failure of the investigating officer to hold the inquest immediately after the incident on 23.11.1985 and to mention crime numbers on the inquest report and the other memos prepared by him during the inquest, on which, merely "silsila number" was mentioned without any explanation why if the case had been registered, crime number was not mentioned although on the site plan of the place of occurrence (Ext. Ka 15), which was also alleged to have been prepared on the same day, crime number was mentioned and the failure of the prosecution to prove by leading any cogent evidence that the special report was dispatched on 24.11.1985, we hold that the F. I. R. in this case is ante timed. If the F. I. R. had come into existence before holding of the inquest, in that case there was not reason for the I. O. to mention "silsila number" on the inquest report.

24. It has also been argued by learned counsel for the appellant that there is absolute contradiction between the medical evidence and ocular testimony which is irreconcilable. In this regard it may be noted that the prosecution case is that four persons Hari Singh (armed with a gun), his brother Bhola, nephews Rootan and Than Singh (appellant) armed with country made pistols had shot at the deceased from their respective firearms with the intention of causing his death. Recovery memo (Ext. Ka 17) which was prepared by the investigating officer on 24.11.1985 indicates that he had collected two white coloured empty cartridges of 12 bore on which something was written in English and three red colour empty cartridges from the place of incident which were fired by the accused at the deceased Ranno. Ext. Ka 7 was proved during trial by P. W. 6 S. I. Surendra Kumar, the I. O. of the case. The recovery of five empty cartridges from the place of occurrence indicates that at the most five shots were fired by the accused at the deceased. However, the post mortem report of the deceased narrates an entirely different story. As we have already noted that in the post mortem report of the deceased which was proved by P. W. 5 Dr. P. K. Sharma who had conducted autopsy on the dead body of the deceased indicates as many as eight firearm wounds of entry, which indicates that more than five rounds of shots at the time of the incident must have been fired. None of the witnesses have deposed that any of the accused had fired at the deceased twice, hence no explanation is coming forth from the side of the prosecution with regard to the presence of more than five ante mortem gun shot wounds of entry on the body of the deceased. This inconsistency in the oral evidence and medical evidence, in our opinion, is sufficient to discard the prosecution case

and hold that none of the witnesses had seen the occurrence.

25. This brings us to the next ground of challenge by learned counsel for the appellant to the impugned judgement and order. It has been argued that it was pitch dark at the time of the incident and although the three witnesses of fact have deposed that they had seen the occurrence in the light of the torches which were being carried by P. W. 1 informant Keshav Deo and Rootan but none of the torches were exhibited during trial although the I. O. of the case P. W. 6 Surendra Kumar deposed that he had inspected both the torches which were of "Jeep make" and found the same to be in working condition and after inspecting the same, he had given the torches in the custody of P. W. 1 and prepared "fard supurdgi" but since the torches were not exhibited during the trial the prosecution's claim that the witnesses had identified the accused in the light of the torches, appears to be extremely doubtful. The prosecution has failed to come up with any explanation for non-production of the two torches in the light whereof, the witnesses had identified the accused but in view of the fact that the witnesses claimed that all the accused were known to them previously and as alleged by the prosecution a close encounter had taken place before the main incident between the accused and the witnesses when the accused after catching hold of the deceased Ranno had ordered all the witnesses to clear as they were going to kill Ranno and in the process, the witnesses must have had an opportunity to have a look at the accused from a very close proximity and hence even if it is held that the prosecution has failed to prove the instances of any source of light at the place of the incident, even then, in our opinion, the witnesses could have easily recognized the accused when they had met the accused in front of the house of Kirori, even if, there was no light as they were previously known to them.

26. But since we have already held that the F. I. R. in this case is ante timed and the medical evidence does not corroborate the ocular version, we cannot help but hold that the three so-called eye-witnesses produced by the prosecution during the trial were planted to suit the prosecution case and they were tutored to depose inculpatory facts against the appellant and the question whether they could have recognized the accused or not is not at all of any relevance and is merely academic.

27. The last ground on which learned counsel for the appellant appearing for Than Singh has challenged his conviction is that all the four accused in this case stood on the same footings. The role of firing at the deceased was assigned to all the four accused Hari Singh, Bheema, Rootan and Than Singh by all the so-called eye-witnesses of the incident. They deposed in unison that while accused Hari was armed with a gun, the other accused Bhola, Rootan and Than Singh were armed with country made pistols and all the four accused had fired at the deceased. The medical evidence on record indicates that as many as eight wounds of entry were found on the body of the deceased. During the course of investigation a country made pistol was recovered on the pointing out of the accused Pooran which was allegedly used by him in shooting Rootan. The recovered country made pistol was sent to the ballistic expert and according

to his report dated 8.4.1986, the empty cartridges recovered from the place of occurrence were not fired from that country made pistol. The learned trial Judge on the basis of the report of the ballistic expert acquitted the co-accused Pooran holding that Pooran should not be convicted as the country made pistol recovered from his possession was not one, which was used in committing the murder of Rootan, while the appellant Than Singh from whom, no recovery of any country made pistol was made, was convicted along with the co-accused Bhima and sentence for life imprisonment was illegally awarded by the trial Judge although there is no evidence on record on the basis of which the roles of the four accused could be distinguished.

28. It has been argued by learned A. G. A. that the incident had taken place into two parts. Firstly, the appellant Than Singh had allegedly caught hold of the deceased Ranno from his waist and then accused Hari Singh had asked others to run away as they were going to kill Ranno on which the informant and his companions took shelter inside the house of Kirori. The second part of the occurrence started when Ranno managed to escape from the clutches of appellant Than Singh and attacked them shouting " Tum mujhe kya maroge, abhi dekhta hoon", on which, Hari Singh fired a shot in the air and appellant Than Singh again caught hold of Ranno. Due to fear, informant and other persons accompanying him had taken shelter inside the house of Kirori and after closing the door from inside, they had seen the occurrence and identified the accused in the torch light. Since in addition to firing at the deceased, appellant Than Singh has also been attributed the role of catching hold of the deceased hence his case stands on a different footing than that of the co-accused Pooran who was acquitted.

29. We do not find any merit in the aforesaid argument of learned A. G. A. because all the four witnesses of fact have consistently assigned the role of firing at the deceased to each of the accused and the role of appellant Than Singh, cannot be distinguished from that of Pooran merely because he was also ascribed the role of catching hold of the deceased. Moreover, the aforesaid consideration had not weighed with the learned trial Judge while acquitting co-accused Pooran and convicting the appellant Than Singh, as is evident from the perusal of the impugned judgement and order.

30. The trial court by acquitting the co-accused Pooran obviously did not find the testimony of the eyewitnesses qua Pooran reliable, although their evidence could not be split to grant benefit to some co-accused while convicting others who stood on the same footing.

31. Faced with an identical situation, the Apex Court in the case of Ram Laxman Versus State of Rajasthan reported in (2016) 12 SCC 398 in paras 6 and 7 of its judgement held as hereunder:

6. Strangely, the High Court disbelieved Ganesh qua the other co-accused and granted them acquittal but accepted his testimony in respect of the appellants by explaining that the maxim "falsus in uno, falsus in omnibus" stands disapproved since long as per the judgement of this Court in Ugar Ahir Versus State of Bihar.

7. In our considered view the Division Bench committed a serious error in relying upon the aforesaid judgement. No doubt, it is an established principle of criminal law in India that only account of detecting some falsehood in the statement of a witness who is otherwise consistent and reliable, his entire testimony should not be discarded. It is equally settled law that if a witness is found undependable and unreliable his evidence cannot be split to grant benefit to some co-accused while maintaining conviction of another when in all respects he stands on the same footing and deserves parity."

32. Thus, in view of the principle enunciated by the Apex Court in the aforesaid case and after bestowing anxious considerations to the material on record, we are unable to agree with the reasons given by the trial court for convicting the appellant Than Singh and acquitting co-accused Pooran. The evidence of the witnesses of fact examined by the prosecution during trial is not of such nature which may be splitted to grant differential treatment to the different co-accused.

33. Since the case of the appellant Than Singh stands on the same footing as that of co-accused Pooran, who was acquitted, if not on better footing, appellant Than Singh was entitled to acquittal, apart from merits, on parity as well.

34. Thus, in view of the foregoing discussion, we are of the view that neither the recorded conviction of the appellant Than Singh nor the life sentence awarded to him can be sustained and is liable to be set aside. Criminal Appeal No. 2004 of 1986 qua appellant Than Singh is hereby allowed and he is acquitted of all the charges.

35. The impugned judgement and order dated 22.7.1986 passed by the Special Judge, Mathura in S. T. No. 75 of 1986; State Versus Bhima and three others, under Sections-302/34, 201 and 511 I. P. C., P. S.-Vrindavan, district-Mathura is set aside to the extent indicated hereinabove.

36. Appellant Than Singh is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged. However, he shall comply with the provisions of Section 437-A Cr. P. C.

37. There shall however, be no order as to costs.

(2020)06ILR A1088
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.03.2020

BEFORE

THE HON'BLE HARSH KUMAR, J.
THE HON'BLE UMESH KUMAR, J.

Criminal Appeal No. 2938 of 2012

Sunil Singh & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Shiv Nath Singh, Sri Krishna Murari Yadav, Sri Satyam Singh, Sri Ahkilesh Kumar, Sri B.D. Sharma, Sri Jitendra Singh, Sri S.K. Mishra, Sri Sharda Prasad Mishra, Sri Sunil Singh, Sri Kamal Krishna, Sri P.K. Rai

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

Criminal Law-Indian Penal Code, 1860-Sections 302/34 & 201- Appeal against conviction.

Delay in lodging F.I.R.-
F.I.R. of the incident has been lodged after in inordinate delay create doubt of the prosecution case. (Para-9)

Benefit of Doubt-
For the reasons mentioned in preceding paras, considering the possibility of murder of deceased by unidentified culprits in the darkness of night and false implication of appellants, in belated F.I.R. due to enmity and suspicion it will not be safe to base conviction of appellants. Where witnesses and circumstances considered together raised strongly suspicion about the occurrence and involvement of accused. (Para-29)

Criminal Appeal allowed. (E-2)

List of cases cited: -

1. Thulia Kali Vs St. of T.N. AIR (1973) SC 501

(Delivered by Hon'ble Harsh Kumar, J.)

1. The instant appeal has been filed against the judgment and order of conviction and sentence dated 18.11.2010 passed by Additional Sessions Judge, Court No.8, Fatehpur in S.T. No.192 of 2010 "State Vs. Sunil Singh and another" under Sections 302/34 & 201 I.P.C., Case Crime No.10 of 2010 and S.T. No.193 of 2010 "State Vs. Sunil Singh" under Section 25 of Arms Act, Case Crime No.11 of 2010, both P.S. Asother, District Fatehpur, convicting two accused persons for offences under Sections 302/34 and 201 I.P.C. and sentencing each of them with imprisonment for life and fine of Rs.10,000/- and in case of default in payment of fine with simple imprisonment for an additional period of one year, under Sections 302/34 I.P.C. and with rigorous imprisonment for a period of five years and fine of Rs.2000/- and in case of default in payment of fine with simple imprisonment for an additional period of three months under Section 201 I.P.C. Apart from it, accused-appellant Sunil Singh was also convicted and sentenced with rigorous imprisonment for a period of three years and fine of Rs.2000/- and in case of default in payment of fine with simple imprisonment for an additional period of three months for offence under Section 25 of Arms Act.

2. Feeling aggrieved, both the convicts preferred instant appeal for setting aside their conviction and passing an order of their acquittal.

3. The brief facts relating to the case are that Shiv Shankar @ Jhaller lodged F.I.R. at P.S. Asother District Fatehpur on 22.1.2010 at 7:30 a.m. with the averments that "his 38 years old son Santosh Kumar Pandey, who was working as Munshi on private buses of Qasba Asother alongwith Bachcha Singh was falsely implicated by Sunil Singh (accused) in the case of murder of his sister Leelawati, in which case he (Santosh) was acquitted and Sunil Singh in order to take revenge for murder of his sister was having grudge/enmity with Santosh Kumar; that on 20.1.2010, Sunil with his associate Deepak provided liquor to his son in the evening the fetched him and at about 8:00 p.m., (opposite Nahar Kothi, Asother in North of road, on the chack road in front of fields of Chhatrapal Singh) they caused his death by shooting in his head by pistols and in order to make disappearance of his dead body, dragged and thrown it in Ganga canal; that the incident was seen by Baba Singh, Vimal Singh and several others; that shoes and

scarf of his son were found in the mustard fields of Chhatrapal Singh and his dead body, which could not be recovered on 21.1.2010, due to excess water in canal, has been found today (with multiple injuries on his head) in canal opposite the fields of Chhatrapal Singh , when water receded".

4. Upon lodging of F.I.R., investigation started and after preparing memo of recovery of empty cartridges, the shoes and scarf of deceased, bloodstained and plane earth, inquest report etc., body of deceased was sent for post-mortem. During investigation, the weapon of crime, country made pistol was recovered from accused Sunil @ Lambari on 25.1.2010 of which memo was prepared F.I.R. was lodged against him under Section 25 of Arms Act. After obtaining the autopsy report and reports of Vidhi Vigyan Prayogshala, completing the investigation and obtaining prosecution sanction, respective investigating officers submitted charge-sheet in Case Crime No.10 of 2010 under Sections 302/34 & 201 I.P.C. against two accused appellants and in Case Crime No.11 of 2010 under Section 25 of Arms Act against accused-appellant Sunil Singh. The cases were committed to sessions, where charges were framed against both the appellants under Section 302/34 & 201 I.P.C. and against Sunil Singh also under Section 25 Arms Act to which they denied and demanded trial.

5. In joint trial of two cases, prosecution produced as many as nine witnesses viz. Shiv Shanker @ Jhaller, the first informant and father of deceased as P.W.-1, Baba Singh and Vimal Singh, the eye witnesses as P.W.-2 & P.W.-3, Constable Kamal Singh and Head Moharrir Balram formal witnesses to prove chick F.I.R. of two crime cases as P.W.-4 & P.W.-5, Rajiv Verma, Investigating Officer of Case Crime No.10 of 2010, under Sections 302/34 & 201 I.P.C. as P.W.-6, Geetam Singh, S.I. to prove recovery of country made pistol from Sunil as P.W.-7, Balister Singh Investigating Officer of Case Crime No.11 of 2010, under Section 25 of Arms Act as P.W.-8 and Dr. Shiv Shankar, the autopsy surgeon as P.W.-9.

6. Above witnesses of fact as well as formal witnesses proved the prosecution case and documentary evidence as well as prosecution sanction etc. on record, which were marked as Ex.A1 to Ex.A21.

7. After completion of prosecution evidence, statements of accused Sunil Singh and Deepak Kewat were recorded under Section 313 Cr.P.C. and despite affording opportunity, any of them did not produce any oral or documentary evidence in defence.

8. Heard Shri Shiv Nath Singh, Senior Advocate, assisted by Shri Akhilesh Kumar learned counsel for appellant no.1 Sri Sunil Singh, Shri Kamal Krishna, Senior Advocate, assisted by Shri Pradeep Kumar Rai learned counsel for appellant no.2 Deepak Kewat, Shri Rajesh Kumar Mishra brief holder & Shri Mool Chand Singh, learned A.G.A. for State and perused the record.

9. Learned counsel for appellants contended that appellants have been falsely implicated for murder of Santosh; that admittedly first informant is not eye witness of the incident; that admittedly Baba and Vimal P.W.-2 and P.W.-3, were friends of deceased, who have been

falsely planted as eye witnesses of the incident; that this is a case of blind murder under darkness of night and since the assailants could not be seen or identified, the appellants have been falsely implicated on account of old enmity; that deceased Santosh was an accused in the case of murder of Smt. Leelawati, (sister of appellant Sunil Singh) and had been acquitted of the charges of murder under Section 302 I.P.C. by giving him benefit of doubt; that on account of undeserved victory in murder case of Leelawati, deceased Santosh and his father, first informant were having grudge against appellant Sunil Singh; that deceased Santosh was working as a *Munshi (मुंशी)* over private buses of Qasba Asother for which he used to do daily up and down from Naraini to Asother and since he used to recover excessive charges from various bus operators and other persons, so was on inimical terms with several persons and appears to have been eliminated by any of them in darkness of night; that since the unknown assailants could not be seen or identified, the father of deceased on account of suspicion and old enmity, has falsely implicated appellants with absolutely false and concocted story; that admittedly there was no source of light on the place of occurrence except alleged moon light; that neither appellants fetched deceased nor provided him liquor or eggs nor caused his death nor made disappearance of his dead body by throwing it in Ganga Canal or otherwise; that appellants had no motive to cause death of deceased; that since the relations between deceased and appellants were not only strained (on account of litigation with regard to murder case of appellant's sister Leelawati), rather were inimical against each other, the question of fetching of deceased (a matured man) by appellants or going of deceased with them is highly improbable; that P.W.-2 and P.W.-3, having admitted friendship with deceased, were partisan witnesses and their interested testimony without corroboration by any evidence of independent witness, was not reliable; that it is admitted to P.W.-2 and P.W.-3 that they had puccca *latrines* in their houses, which belies their false story of going to attend call of nature in fields in chilly cold night of 20.01.2010 at about 8:00 p.m.; that the prosecution witnesses have alleged to have seen incident and identified culprits in moon light which is absolutely wrong and incorrect and is highly improbable; that on 20.01.2010 it was Basant Panchami night (as has also been discussed by trial Court) and 15.01.2010 was no moon day i.e., अमावस्या; that after अमावस्या the 1st day moon of Parwa is invisible, of Dooj is visible only for a short moment (like Eid-Ka-Chand) and so on, duration of visibility of moon increases gradually; that upto 5th day of new moon, when moon gets increased upto 1/3rd in size there remains very dim moon light which may not be sufficient to identify the culprits from a distance of 20-25 metres or 30-40 metres as respectively stated by P.W.-2 and P.W.-3 or from a distance of 45 steps (nearly 34 meters) as shown in site plan, Ext. A-6, particularly due to heavy and dense fog all over the open area near canal in chilly cold night; that had P.W.-2 or P.W.-3 seen alleged incident of murder of Santosh by appellants, in natural course they would have immediately informed the father of deceased but their conduct in not doing so is quite unnatural and falsifies their contention of being eye witnesses of the incident as well as of identifying the real

culprits from a long distance; that there are material contradictions in the statements of P.W.-2 and P.W.-3, as at one place they state of having informed the father of deceased by phone call on next morning, contrary to which in same breath at other place they state that next morning when his father arrived, they narrated him the entire story; that as per F.I.R. incident was seen by Baba Singh, Vimal Singh & several others but prosecution failed to produce any independent witness; that prosecution failed to corroborate the interested testimony of P.W.-2 and P.W.-3 by producing any independent witness; that the learned trial Court acted wrongly in relying on the untruthful and uncorroborated testimony of partisan witnesses P.W.-2 and P.W.-3; that F.I.R. of the incident has been lodged after inordinate delay of around three days; that in fact the F.I.R. is anti timed and prosecution case is liable to be disbelieved.

10. Learned counsel for appellants further contended that recovery of country made pistol from appellant Sunil Singh has been falsely planted; that nothing has been recovered from appellant Deepak Kewat; that motive to cause death has been assigned to only Sunil Singh and appellant Deepak Kewat had no motive to cause death of Santosh; that it is wrong to say that appellant Deepak Kewat was an associate of appellant Sunil Singh; that there is no link evidence on record to show that empty cartridges allegedly recovered from spot and fire arm allegedly recovered from appellant Sunil Singh on 25.1.2010, were neither kept intact in sealed cover, before sending them to forensic lab nor were sent without any delay, to rule out any possibility of tampering; that delay in lodging of F.I.R. quite often results in embellishment, which is creature of an afterthought; that on account of delay in lodging of F.I.R., it gets bereft of the advantage of spontaneity and danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation; that prosecution has failed to explain inordinate delay in lodging of F.I.R. and in view of law laid down by Apex Court in the case of **"Thulia Kali Vs. State of Tamilnadu AIR 1973 SC 501"**, the prosecution case is liable to be disbelieved; that learned trial Court acted wrongly and illegally in misreading the evidence on record as well as relying on the contradictory, false, interested and uncorroborated testimony of P.W.-2 and P.W.-3, who falsely claimed themselves to be eye witnesses of incident; that before the occurrence of murder, the deceased was allegedly provided with egg and liquor by appellants, but post mortem report of deceased does not corroborate or suggest about finding of any liquor upon his internal examination; that post mortem of the body of deceased was conducted on 22.1.2010 at about 3:00 p.m. and the autopsy surgeon P.W.-9 has stated that death of 38 years old person had taken place about 2 days back.

11. He further contended that there was no blackening, tattooing or scorching over the gun shot wounds, which belies the prosecution story of firing on deceased by appellants from close range; that as per prosecution case, the body of deceased was thrown in canal from where it was recovered after a period of around 2 days, but there were no sign of decomposition of body, which also

creates suspicion over the time and manner of occurrence in question; that as per medical jurisprudence, the dead body, if remains under water for a period of over one day, the decomposition of body is bound to start; that prosecution has failed to prove the charges against appellants beyond reasonable doubts, by any reliable, cogent and independent evidence; that the appellants have been wrongly convicted and sentenced; that the possibility of Santosh having been murdered by some one else in darkness of chilly cold and foggy night, (who could not be seen and identified) may not be ruled out; that suspicion howsoever strong it may be, may not take place of proof; that appellants have been falsely implicated due to enmity and suspicion; that in view of material contradictions in prosecution evidence the appellants are entitled for benefit of doubt; that the appeal is liable to be allowed and setting aside impugned order of conviction and sentence, appellants are entitled to an order of acquittal.

12. Per contra, Shri Rajesh Kumar Mishra, brief holder & Shri Mool Chand Singh learned A.G.A. for State supporting the impugned judgment and order of conviction contended that no inordinate delay has been caused in lodging of F.I.R; that P.W.-1 has stated that on getting knowledge of incident, he reported the matter at police station orally, but his report was not lodged by police until recovery of body; that clothes and shoes of deceased as well as empty cartridges have been recovered from near the place of occurrence; that weapon of crime, the country made pistol has also been recovered from appellant Sunil and it is wrong to say that recovery was falsely planted; that clothes of deceased were sent to Vidhi Vigyan Prayogshala over which human blood was found; that the fire arm recovered from appellant Sunil was also sent to forensic lab, of which report is on record which suggests its use in commission of crime in question; that it is wrong to say that link evidence is missing or there is any possibility of tampering with empty cartridges or the fire arm recovered from appellant Sunil; that prosecution case is fully proved from consistent statements of eye witnesses P.W.-2 and P.W.-3; that it is wrong to say that the case is based on circumstantial evidence and assailants could not be seen or identified in darkness of night or P.W.-2 and P.W.-3 have been falsely planted as eye witnesses of occurrence; that learned trial Court has correctly analyzed the prosecution evidence on record in detail and has come to correct conclusion; that there was no reason for falsely implicating appellants and sparing real culprits; that appeal has been filed with absolutely false and baseless allegations and is liable to be dismissed.

13. Upon hearing parties counsel and perusal of record we find that first informant do not claim himself to be eye witness of occurrence, F.I.R. states that occurrence was seen by P.W.-2, P.W.-3 and several others, however, there is no whisper in F.I.R. about providing of any information to first informant by P.W.-2, P.W.-3 or any other eyewitness. According to prosecution, on 20.1.2010, appellants had taken deceased from Asother, provided him eggs and liquor and after fetching him to Nahar Kothi Asother, in front of fields of Chhatrapal, both of them shot him in head at about 8:00 p.m. resulting in his death. Deceased is not alleged to have been fetched by appellants from his home rather was

allegedly fetched from Asother. There is no evidence of any witness regarding alleged fetching, as to who would have seen the deceased being fetched by appellants or any of them. Prosecution witnesses Baba Singh P.W.-2 and Vimal Singh P.W.-3 are not witnesses of fetching of deceased by appellants or of providing him eggs and liquor by them and have not made any whisper in this respect. First informant Shiv Shankar, the father of deceased has neither made any whisper in F.I.R. nor in his statement on oath as P.W.-1, about the source of information about fetching of deceased by appellants and of providing him eggs and liquor by them, nor has produced any witness about alleged fetching of deceased by appellants or of providing him of eggs and liquor by them. It shows that the allegations about fetching of deceased by appellants are totally imaginary part of prosecution story in F.I.R. which may not be relied in absence of any iota of evidence, even of eggs or liquor vendor.

14. As per prosecution case, Smt. Leelawati, the sister of appellant Sunil Singh was murdered, for which Bachcha Singh (husband of Leelawati) and deceased Santosh were tried together and were acquitted on account of which appellant Sunil @ Lambri was keeping enmity against deceased, which is quite natural and acceptable. Deceased Santosh was not an immature minor boy rather was a 38 years old matured and prudent person and on account of enmity following his prosecution for murder of sister of appellant Sunil, there can be no possibility of his going with his enemy Sunil appellant under any imagination or circumstances.

15. Prosecution witnesses Baba Singh P.W.-2 and Vimal Singh P.W.-3, the alleged eye witnesses of the incident have stated that in the night of 20.1.2010 at about 8:00 p.m., both of them were going to attend the call of nature towards Nahar Kothi Asother and seen appellants Sunil and Deepak taking Santosh to the Chak-road of field of Chhatrapal where they started beating him and upon raising alarm, by him shot him in head with their pistols and dragged his body to canal. Both the witnesses on hearing alarm, have stated to have not reached for rescue of their friend (deceased) rather stated that when accused dragged body of deceased they fled away. P.W.-2 and P.W.-3 have alleged to seen the occurrence at the time of going to attend call of nature and there is no whisper that if at all they defalcated or not under open sky, for which they had come out in chilly cold night. Absence of any specific statement of defalcation before or after occurrence also makes their presence doubtful.

16. Above witnesses P.W.-2 and P.W.-3 have admitted of having *pucca latrines* at their houses. In the month of peak winters, January on chilly cold night of occurrence in question around 8:00 p.m. on 20.1.2010, it is highly improbable that two persons having *pucca latrines* in their houses, would ever go outside to defalcate during chilly cold night. P.W.-2 has stated that in the month of January in chilly cold days sun used to set around 5:30 p.m. and place of occurrence is near Canal. In his statement on oath at page 40 of paper book he has stated to have seen the occurrence in moon light from a distance of 20-25 metres, while at page 43 of paper book P.W.-3 Vimal Singh has stated to have seen the accused persons from a distance of 35-40 metres, which is

in material contradiction with each other. Both P.W.-2 and P.W.-3 have admitted in their cross examination that deceased Santosh was their fast friend.

17. Though 10 years back villagers were habitual of defalcating under open sky, but only for want of facility of pucca latrines at their houses. It is highly improbable that persons having facility of pucca latrine in their houses, would ever go out for defalcating, around 8.00 p.m. in chilly cold night of 20.01.2010. P.W.-2 has also stated that some times he uses the pucca latrine of his house. The interested and sold testimony of P.W.-2 and P.W.-3 about there going out for defalcating in chilly cold night of 20.1.2010, may not be believed in absence of any corroborative evidence.

18. Before proceeding further we find it expedient in the interest of justice to discuss following universal truths which relate to nature and cosmos, such as (i) sun rises in the East and sets in the West (ii) Moon gradually increases from no moon (अमावस्या) to new moon and so on goes upto full moon (पूर्णिमा), then gradually decreases back to no moon (अमावस्या). The cycle from no moon to full moon takes 15 days to complete and after full moon to no moon in next 15 days. The completion of cycle from no moon (अमावस्या) to full moon (पूर्णिमा) and again from full moon (पूर्णिमा) to no moon (अमावस्या) takes a total period of 30 days, which constitutes one month as per Hindi calendar.

19. After no moon (अमावस्या) as the size of moon increases day by day, the moon light and its brightness also increases gradually and on night of full moon (पूर्णिमा), the bright full moon light "Chandni' may be seen all over. Similarly as the size of moon decreases day by day from full moon (पूर्णिमा) to no moon (अमावस्या) the moon light "Chandni' and its brightness also decreases gradually and comes to zero on no moon (अमावस्या) night. Between the 15 days period from 7-8th day from no moon (अमावस्या) when moon gets increased upto half and onwards upto 7 - 8th day from full moon (पूर्णिमा) when the moon gets decreased upto half there remains enough moon light all over (though not for as long and bright as on full moon (पूर्णिमा) night) during period of rest 15 days from 7th - 8th day from पूर्णिमा upto 7th - 8th day from अमावस्या, there remains very dim moon light, that too for shorter periods and rest of the nights happen to be dark nights or Andheri Raat.

20. It is also universal truth that during 15 days period from No Moon (अमावस्या) to Full moon (पूर्णिमा), moon remains in sky since before sun set and can be seen just after sun set and the time of moon set, gradually gets later in night. On the contrary during the 15 days period from full moon (पूर्णिमा) to no moon (अमावस्या), the size of moon not only decreases but it also rises gradually late in night and may be seen during early day hours even after sun rise. It may be better noticed from the fact that after 2 days from no moon (अमावस्या), the increasing moon of **"Dooj Ka Chaand/Eid Ka Chaand"** is seen like a thin line for a very short moment just after sun set, while to the contrary, just after 4 days from full moon (पूर्णिमा) the decreasing moon of 4th day 2/3rd in size **"Karvachauth Ka Chaand"** can not be

seen before 8:30 to 9:00 p.m. or around it and it lasts up-till morning. It is also pertinent to mention that brightness of moonlight also increases and decreases gradually with the size of moon.

21. It is also pertinent that about 10 years back peak winter season used to be longer from now and on account of various climate changes due to global warming etc. in recent years, 8 months of the year are dominated by summer season (including rainy season which has shrinked to 2 months) and less than 4 months of the year pertains to winter season. The months of winter season are known as November, December, January and February according to English Calendar out of which a period of almost 2 ½ months, full of November, first 3/4th of December and later 3/4th of February, are usually period of very light and pleasant winters and rest period of 1 ½ months from last week of December till end of first week of February (Hindi Calendar months of Paush and Magh) usually happens to be period of peak winters or chilly cold days with cold waves. During chilly cold days usually either (i) there remains dense fog with cold waves all over Northern India including State of Uttar Pradesh since evening upto 8.00 - 9.00 a.m. (until sun shines bright) and fog adversely affects visibility particularly over open areas fields and areas near hills, canal, river and other water bodies, or (ii) weather becomes cloudy which decreases fog but clouds put a curtain over sky and dim moon light, further decreases and adversely affects visibility. During chilly cold nights, persons of villages usually cover their heads and ears to protect themselves from cold and even if the culprits were not to hide their identity the possibility of covering of heads and ears, by them may not be ruled out.

22. On fateful chilly cold night of occurrence in question at 8.00 p.m. on 20th January, 2010, it was Basant Panchami night which falls on 5th day from no moon (अमावस्या), when moon gets increased upto 1/3rd in size with very dim moon light for a short period. In such times usually either dense fog engulfs open areas fields etc, particularly near water bodies viz., rivers or canals etc., since evening after sun set and stays throughout nights upto late in morning or clouds cover the sky putting curtain over moon. The place of occurrence in question is open field near canal and so at the time of occurrence around 8:00 p.m. there would have been low visibility of heavy fog in dim moon light 5 of day old moon in its 1/3rd size (even if not affected by clouds). In such conditions distant persons or objects can not be seen clearly and identified correctly. The trial court has discussed in its judgment at page 115 of paper book, the arguments about Basant Panchami night, on day of occurrence which has not been disputed by State and has been reiterated by learned counsel for appellants with the support of photo copy of *Panchang*, (provided during arguments and taken on record). In its discussions, trial Court discussing position of moon in statements of P.W.-2 and P.W.-3, has failed to consider that 5 day old moon in its 1/3rd size may not produce bright moon light.

23. Prosecution witnesses Baba Singh P.W.-2 claims to have seen occurrence and identified culprits from a distance of 20 - 25 meters (which comes around 65 - 82 feet) while Vimal Singh P.W.-3 from 35 - 40 meters (which comes

around 114 - 131 feet) respectively, which are in contradiction with each other, while I.O. has mentioned above distance between the culprits and two witnesses in site plan Ext. A-6, to be 45 steps which comes around 34 meters or 110 feet.

24. Inspite of strong probability either of heavy fog around the place of occurrence or of clouds in sky covering moon further decreasing its dim light, upon consideration of entire evidence, on record since we find no positive evidence with regard to fog or clouds on night of occurrence and even no suggestion of fog or clouds to prosecution witnesses, we find it appropriate to presume as if there was no fog or clouds, and it would have been clear weather with unobstructed dim moon light of 5 days old 1/3rd moon.

25. Even in clear weather without any fog or clouds, it is highly improbable rather just impossible for P.W.-2 and P.W.-3 to see culprits clearly and identify them correctly from such a long distance of around 30 metres or 100 feet in dim moon light of 1/3rd moon on chilly cold night when culprits would have been covering of their heads and ears to for protect themselves from cold. Undisputedly, there was no other source of light and in dim moon light of 5 days old 1/3rd moon even in clear weather, a person may not be clearly seen and correctly identified beyond a distance of 10 to 15 meters which distance may be restricted to 5 to 10 meters in case of fog or clouds. As mentioned earlier P.W.-2 claims to have seen culprits from a distance of 20 - 25 metres or 65 - 82 feet, and P.W.-3 claims to have seen them from at a distance of 35 - 40 metres or 114 - 131 feet. It is also pertinent to mention that 36 years old P.W.-3 Vimal Singh has stated at page 47 of paper book that "मैं कभी कभार चश्मा गाड़ी चलाते समय लगाता हूँ, रात में लिखा पढ़ी में चश्मा नहीं लगाता" which indicates that his distant vision was weak which further reduces the possibility of his correctly identifying the culprits from a distance of 35 - 40 meters or 115 to 130 feet even in clear weather. The prosecution witnesses P.W.-2 and P.W.-3 though claims to be having torches, but do not claim to have thrown torch lights on culprits or identified them in torch light.

26. Prosecution witnesses P.W.-2 and P.W.-3 have stated that upon beaten by appellants when Santosh raised alarm, accused shot him in head and dragging his body thrown it in Canal and they fled away. Their conduct in neither reaching for rescue on alarm of their best friend Santosh deceased nor attempting to chase culprits nor promptly informing the father of deceased also raises strong suspicion over their presence near the spot and of their being eye witnesses of the occurrence. Though admittedly all the three were having phone facility, Baba Singh P.W.-2 at page 38 of paper book claims to have informed father of Santosh deceased by phone early in next morning, in contradiction to which at page 36, he has stated that when father of Santosh came Asother on next morning they informed him about the incident (face to face). Since they are friends of deceased, their testimony is required to be considered with caution and upon considering with caution, no reliance can be placed on their testimony in absence of any corroborative evidence of independent witness.

27. We are of considered view that the prosecution case is based on sold contradictory testimony of partisan

witnesses Baba Singh P.W.-2 and Vimal Singh P.W.-3 (friends of deceased) which is not found reliable in absence of corroboration by some independent evidence. As per F.I.R. averments made in F.I.R. occurrence was seen by several others apart from Baba Singh and Vimal Singh but no one has been produced for corroboration of P.W.-2 and P.W.-3. It is also noteworthy that there is no evidence of fetching of deceased by appellants and even the eggs or liquor vendors were not produced, who were best witnesses of deceased being in company of appellants.

28. The recovery of clothes and shoes of deceased and finding of human blood on his scarf as per report of forensic lab, also does not give any support to prosecution case with regard to involvement of appellants in commission of murder of Santosh. The recovery of fire arm from appellant Sunil Singh after four days of incident, from an open place is highly doubtful and may not be relied in absence of any independent witness of recovery.

29. In view of the discussions made above, we have come to the conclusion that prosecution has failed to prove the charges levelled against accused persons under Section 302/34, 201 I.P.C. or Section 25 Arms Act by any reliable, cogent and independent evidence to the hilt beyond reasonable doubts. For the reasons mentioned in preceding paras, considering the possibility of murder of deceased by unidentified culprits in the darkness of night and false implication of appellants, in belated F.I.R. due to enmity and suspicion it will not be safe to base conviction of appellants on self contradictory, interested, and uncorroborated testimony of P.W.-2 Baba Singh and P.W.-3 Vimal Singh and accused appellants are entitled to the benefit of doubt. The learned trial Court has acted wrongly, illegally and incorrectly in not considering above mentioned material aspects and in believing untruthful, unreliable, interested contradictory and uncorroborated testimony of P.W.-2 and P.W.-3. in holding the appellants guilty. The impugned judgment and order of conviction of appellants and sentence is liable to be set aside and appeal is liable to be allowed.

30. The appeal is allowed and impugned judgment and order of conviction and sentence is set aside. The accused appellants Sunil Singh @ Lambari and Deepak are acquitted of the charges under Section 302/34, 201 I.P.C. and accused appellant Sunil Singh @ Lambari is also acquitted of the charges under Section 25 Arms Act. The accused appellants are on bail, they need not surrender unless wanted in some other case and subject to furnishing of personal bond and two sureties of like amount to the satisfaction of trial Court, by each of them, in view of provisions of Section 437 A Cr.P.C., to appear before higher Court as and when such Court issue notices in respect of any appeal or petition filed against the judgment.

(2020)06ILR A1098
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.02.2020

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 3461 of 2018

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

Counsel for the Appellant:
Sri Umesh Chandra Tiwari

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

Criminal Law-Indian Penal Code, 1860- Sections 307 and 504- Appeal against conviction.

Benefit of undergone-
Conviction upheld sentences reduced to the period of imprisonment has already undergone.

Criminal Appeal partly allowed. (E-2)

List of cases cited:-

1. B.G. Goswami Vs Delhi Administration, 1973 AIR 1457

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

1. This criminal appeal has been filed against the judgement and order dated 13.3.2018 passed by Addl. Sessions Judge, Court no. 1, Budaun in S.T. No. 472 of 2014 (State vs. Munendra and others), under Sections 307 and 504 I.P.C., P.S. Bisauli, district-Budaun, whereby learned Judge convicted and sentenced the appellant to seven years rigorous imprisonment with fine of Rs. 3000/- and in default of payment of fine further additional imprisonment for six months, one year rigorous imprisonment under Section 504 I.P.C. with a fine of Rs. 1000/- and in default of payment of fine, further additional imprisonment for one month.

2. Both the sentences shall run concurrently.

3. The prosecution story in brief is that on 14.6.2014 the complainant along with his other family members had returned back from the 'Lagun ceremony' of his daughter Vimlesh and his other daughter Kanti had come from her in-laws house to attend the marriage. On 15.6.2014 all the family members were present at home in preparation for the marriage ceremony, then resident of same village Munendra son of Amar Singh who was armed with firearm started abusing them. Along with Munendra, the residents of same village namely, Mahipal and Amar Singh, son of Natthu, who were having firearms in their hands also came before us and started abusing. When they objected for abusing then at about 6:00 p.m. Munendra started firing with intention to kill and the shot fired by him hit Kanti, as a result of which she collapsed on the 'kharanja'. The incident was witnessed by Gaurav Kumar, Arvind, son of Chatrapal, Dinesh, son of Munshi and several others. All the accused persons after firing ran away towards fields.

4. At the very outset, Sri Umesh Chandra Tiwari, 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.

5. Learned counsel for the appellant has submitted that at the time of incident the accused was aged about 23 years at present the accused is more than 29 years of age. He is a married person and having children and there is no bread earner in the family of the appellant. He has next submitted that it was the first offence of the accused and after conviction the

accused had not indulged in any other criminal activity. He further submitted that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the family status. Learned counsel for the appellant further submits that the appellant was awarded rigorous imprisonment of seven years and that he has already undergone two years before conviction and more than three years after conviction, meaning thereby that he has undergone about five and half years of the awarded sentence.

6. 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."

7. Considering the facts and circumstances of the case and the substantive period already served in jail by the appellant in this case and the fact that the appellant is young person and he is the only bread earner in the family and that he might have realized the mistake committed by him and might remorseful of his conduct to the society to which he belongs, I am of the considered opinion that he should be given a chance to reform himself and he be allowed to give better contribution to the society to which he belongs to.

8. Considering the fact that the accused has already served more than five and half years imprison and it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced.

9. Considering all the facts and circumstances of the case, the accused-appellant is sentenced to the period already undergone by him in jail during trial and after conviction an amount of fine of Rs. 4000/- be enhanced to Rs. 10,000/-.

10. Accused-appellant is directed to deposit the fine of Rs. 10,000/- before learned lower court at the time of applying for release order, out of which Rs. 9000/- shall be paid to the injured, if he/she is alive and in case he/she is dead, then it would be paid to his/her legal heirs.

11. Appeal is partly allowed in the above terms.

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

(2020)06ILR A1101
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.06.2020

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Appeal No. 3609 of 2009

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

Counsel for the Appellant:
Sri M.P.S. Chauhan, Sri Anil Kumar, Sri Amresh Bahadur Tiwari

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

A. Criminal Law-Indian Penal Code, 1860- Section 376 and Section 3(2)(V) of SC/ST Act- Appeal against conviction.

Delay in lodging F.I.R.- Neither fated nor illegal.

Sterling Witness
The conviction in a rape case could be based on the sole testimony of the victim without corroboration, if the witness is a 'sterling witness. (Para-11)

Non-examination of the Investigating Officer
Does not fatal the prosecution case. (Para-14)

No Test Identification Parade under section 376 IPC
Would not vitiated the testimony of victim. (Para-19)

Therefore modify the sentences reduced to the period of imprisonment has already undergone. (Para-29)

Criminal Appeal partly allowed. (E-2)

List of cases cited: -

1. Deepak Vs St. of Har. 2015 (4) SCC 762.

2. P. Rajagopal & ors. Etc. Vs St. of T.N 2019 (5) SCC 403.

3. Santosh Prasad @ Santosh Kumar Vs St. of Bihar, 2020 SCC Online SC 194.

4. St. of Karnataka Vs Bhaskar Kushali Kotharkar & ors. (2004) 7 SCC 487.

5. Mulla and Another Vs St.of U.P. (2010) 3 SCC 508.

6. Mukesh & anr. Vs St. for NCT of Delhi & Others (2017) 6 SCC 1.

7. Khuman Singh Vs St. of M.P. (2019) SCC Online 1104.

8. Bavo alias Manubhai Ambalal Thakore Vs St. of Gujarat (2012) 2 SCC 684

.

9. Thongam Tarun Singh Vs St. of Manipur (2019) SCC Online SC 709.

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

This is an appeal under Section 374(2) Criminal Procedure Code (Cr.P.C.) preferred by accused/appellant Imshad, challenging the judgment and order dated 15.4.2009 whereby he stands convicted under Section 376 IPC/Section 3(2)(V) of SC/ST Act and sentenced for life with fine of Rs.50,000/- and a default sentence of two years in Sessions Trial No.729/05, by Additional District and Sessions Judge/Special Judge/SC/ST Act, Fast Track Court No.4, Aligarh, Uttar Pradesh.

1. ***PROSECUTION CASE***

I. First informant, Shiv Dhara (PW-2), mother of victim lodged a written report (Ex.Ka-1) at Police Station - Saasni Gate, Aligarh on 17.1.2005 at about 9:40 AM, against an unknown under Section 376 IPC, that she was a resident of Mohalla Sarai Rajaram, P.S. Saasni Gate, Aligarh. On 16.1.2005 (a day before), about 4 PM while her daughter (victim), aged about 9 years was playing in the mohalla, an unknown person allured her to first floor of a vacant and dilapidated house of one Karmesh Chand Maheshwari at Pathak Street of Mohalla Jayganj and committed rape. Victim told her about the mishap in the night of 16.1.2005.

II. Accordingly, an FIR (Ex.Ka-2) was lodged and investigation commenced. Investigation Officer inspected the place of occurrence on 17.1.2005, collected bed sheet, blood stained pillow cover, three portion of cotton mattress and a torn white cloth having blood clots and also recovered blood stained green undergarment and one cream coloured pant. Recovery memos were prepared in presence of witnesses namely Dharmendra Kori and Satya Prakash.

III. Victim was medically examined on 17.1.2005 at about 2:45 PM at MIG 4, Government Hospital, Aligarh by Dr. Suneeta Sagar (PW-4). Details of medical examination are as follows :-

"External Examination - Height - 4'1", Wt. - 23 Kg, Teeth - 12/12, Breast do not developed. No mark on injury present on any part of body."

"Internal Examination - There is an injury present on private part. Hymen fresh torn at 6'O clock position. There is perineal tear present at 6'O clock position, muscle deep, about 2 c.m. long. Vaginal swab taken for pathological examination for spermatozoa and for age, adv. X Ray of right hand for Carpal bones."

IV. Medical Officer, MIG Government Hospital issued supplementary medical report dated 1.2.2005 of the victim. Details of which are as follows :-

"X-Ray report - Done at M.S. Hospital, Aligarh, dated 18.1.05.

X-Ray Rt. Hand < AP Lat - The centre of pisiform bone has not appeared.

Pathology report - Done at M.S. Hospital. Dead spermatozoa seen.

From above report the age of girl is about 8 yrs (Eight) and probability of rape is there."

V. On completion of investigation, the I.O. submitted a charge sheet dated 18.2.2005 against the accused/appellant under Sections 376 IPC and 3(2)(V) SC/ST Act, on which cognizance was taken, case committed to

Sessions and charges framed under abovementioned Sections on 19.4.2005, to which the accused pleaded not guilty and claimed trial.

VI. In support of its case, prosecution examined victim (PW-1), Smt. Shiv Dhara/mother of the victim (PW-2), Shri Kunwar Pal Singh/subsequent Investigating Officer (PW-3) and Dr. Suneeta Sagar (PW-4).

2. ***PROSECUTION WITNESSES -***

I. Victim (PW-1), aged 11 years (at the time of examination) was found to comprehend and possess competence to understand questions on the issue, examined by the trial court on 1.4.2008. She supported the prosecution case that she was allured by the accused for Rs.20, taken to a secluded place and was subjected to rape. She shouted but none came to rescue her. She narrated the incident to her mother, when she came back from work. She denied prior acquaintance with the accused. She recognized the accused when he came to hospital along with police for his medical examination while she was admitted in the hospital. She recognized the accused in the Court also. She was subjected to detail cross-examination but remained unshattered and consistent to the case of the prosecution, however, incorrectly stated about her father's death at the time of occurrence. She admitted about media coverage of the occurrence.

II. Smt. Shiv Dhara (PW-2), mother of PW-1 (first informant) supported the prosecution version and narrated the occurrence as disclosed by her daughter. Her daughter recognized the accused when he came to hospital along with police for his medical examination after 5-6 days of occurrence. Her husband was alive on the day of occurrence, however, being unwell, he was on bed rest. About 100-200 villagers accompanied her to police station for lodging the FIR, however, she denied any media coverage of the occurrence. She denied lodging of the FIR only in order to receive compensation under the SC/ST Act.

III. S.I. - Kunwar Pal Singh (PW-3), the subsequent Investigating Officer authenticated the signatures and handwriting of SI N.S. Dixit, the first I.O. who also prepared recovery memos, recorded statements of the witnesses but was not examined during trial.

IV. Dr. Suneeta Sagar (PW-4), proved the medical report of the victim and confirmed that she was raped. On the basis of supplementary medical report, age of the victim on the day of occurrence was reported to be around 8 years.

3. Accused/appellant denied the prosecution case under Section 313 Cr.P.C., however, chose not to say anything in his defence.

4. ***JUDGMENT OF THE TRIAL COURT -***

The learned trial court, while convicting/sentencing the accused-appellant held as under :-

(i) PW-1 and 2 supported the prosecution case in toto.

(ii) PW-4 proved medical evidence, that victim was about 8 years old at the time of occurrence and was subjected to rape.

(iii) Evidence of victim, aged 11 years (at the time of her examination before the trial court) is reliable and on the basis of her solitary evidence, order of

conviction could be passed. There was no reason to doubt trustworthiness of the witness, coupled with the fact that she also recognized the accused in the Court.

(iv) Even in the absence of non-examination of first I.O. and identification of accused in TIP, order of conviction could be based only on the basis of reliable testimony of the victim.

(v) On the question of sentence, learned trial court held that accused committed heinous crime and while awarding him life sentence took into consideration, the age of victim, social effect of crime etc.

5. ***SUBMISSIONS ON BEHALF OF THE APPELLANT -***

Shri Anil Kumar, learned counsel for the appellant challenging the conviction and sentence submitted that :-

(a) No Identification Parade was conducted even though FIR was lodged against an unknown person. Accused-appellant was falsely implicated in the case due to large scale media coverage of the incident.

(b) According to prosecution case, victim recognized the accused, when he was taken for medical examination at the hospital, which was not proved, thereafter, accused was recognized in the Court by the victim, which is not a substantive evidence.

(c) FIR was lodged after 17 hours of the occurrence, however, no plausible explanation was afforded.

(d) There was no evidence on record to substantiate the offence under Section 3 (2)(V) of SC/ST Act against the accused-appellant.

(e) Alternatively he submitted that appellant is languishing in jail since 6.2.2008 i.e. for more than 12 years, in case conviction is upheld, sentence be reduced to the period already undergone.

6. ***SUBMISSIONS ON BEHLAF OF THE STATE -***

Per contra, Shri A.N. Mulla assisted by Shri Rupak Chaubey, learned AGAs submitted that :-

(a) It is well settled that conviction could be based even on the solitary evidence of the prosecutrix, provided it inspires confidence, as in the present case. Statement of the victim is completely supported by medical evidence.

(b) Non-examination of the first Investigating Officer is not fatal for prosecution case as no prejudice could be demonstrated.

(c) Identification of the accused during trial is substantive evidence, whereas TIP is not. In the present case though no TIP took place but the victim identified the accused-appellant before the trial court, therefore, it is safe to rely upon such identification.

(d) There is no evidence on record which remotely indicates that accused-appellant was falsely implicated due to alleged large scale media coverage of the occurrence.

(e) Delay of 17 hours in lodging the FIR is not fatal for the prosecution case, considering that a 8 years old girl was raped and her mother being alone with an ailing husband has to take care of her daughter, therefore, it must have taken some time for her to lodge an FIR, besides reporting such a case is still considered to be a taboo.

(f) Accused was a resident of a nearby mohalla, where family of victim

resides, therefore, it is highly probable that appellant knew that the victim, belongs to a Scheduled Caste, offence under Section 3(2)(V) of SC/ST Act is also made out.

(g) Appellant committed heinous crime of committing rape of 8 years old girl this Court may not take a lenient view on the quantum of sentence.

DISCUSSION -

7. ***DELAY IN LODGING THE FIR -***

The occurrence took place at 4 P.M. on 16.1.2005. According to prosecution story, victim told her mother (PW-2) about the occurrence same day at about 7-8 P.M. but FIR was lodged next day (17.1.2005) at 9:40 A.M., with delay of more than 12 hours. Learned counsel for the appellant contended that there is no explanation for the delay.

8. In ***Deepak vs. State of Haryana: 2015 (4) SCC 762***, it has been held in para 15 that :-

"15. The Courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in State of Punjab vs. Gurmit Singh & Ors.." ***(emphasis supplied)***

9. In ***P.Rajagopal and others Etc. vs. State of Tamil Nadu*** reported in ***2019 (5) SCC 403***, it has been held in para 12 that :-

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely. [See Apren Joseph v. State of Kerala and Mukesh v . State (NCT of Delhi)]" ***(emphasis supplied)***

10. PW-2 stated in evidence that she neither made any effort to lodge a report on the day of occurrence for fear of shame, nor she shared the same with her neighbours. The report came to be lodged next day, as the condition of her daughter (victim) was worsening, when she was left with no option but to lodge a report. Another relevant circumstance is that her husband was unwell and bed ridden and she alone had to manage everything. Thus, in view of above circumstances and the legal position, there was no inexplicable delay in lodging the FIR so as to falsely implicate the accused.

11. ***STERLING WITNESS -***

In the present case, an eight year girl (PW-1) was raped. She not only identified the accused-appellant during trial but supported the prosecution in its totality. She remained consistent and unshaken during detail cross examination and narrated entire occurrence and manner of sexual assault. Medical evidence corroborates ocular evidence. This solitary witness inspires confidence. It is a settled principle that conviction in a rape case could be based on the sole testimony of the victim without corroboration, if the witness is a 'sterling witness'.

12. In a recent judgment of ***Santosh Prasad @ Santosh Kumar vs. State of Bihar,*** reported in ***2020 SCC Online SC 194***, the Apex Court held that :-

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

5.4.1 x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x

5.4.2 In the case of Rai Sandeep alias Deepu (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, 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."

(emphasis supplied)

13. We have scanned the deposition of PW-1 keeping the aforesaid decisions in mind. She remained consistent during her entire testimony. She withstood entire cross-examination. Her version is also supported by medical evidence, therefore, the witness is absolutely trustworthy, unblemished and of sterling quality.

14. ***NON-EXAMINATION OF INVESTIGATING OFFICER -***

As we have held that PW-1 is a 'sterling witness', there is no material contradiction or improvements in her testimony, therefore, even non-examination of first Investigating Officer is of no consequence, as the second I.O. (PW-3) was examined who confirmed the handwriting/signatures of the first I.O. on relevant papers to which there is no serious challenge, coupled with the fact that non-examination of the first I.O., did not result in any prejudice to the accused.

15. In this regard, it is useful to refer judgment of the Supreme Court in ***State of Karnataka vs. Bhaskar Kushali Kotharkar and Others: (2004) 7 SCC 487*** where it has been held in para 10 and 11 that :-

"10. There is very strong and convincing evidence to prove that these respondents along with others had attacked deceased Prakash, PW-1 and PW-2. The Sessions Judge had given valid reasons for finding these respondents guilty. The Single Judge was not justified in reversing the conviction and sentence solely on the ground that investigating officer was not examined by the prosecution. As the respondents were not prejudiced by the non- examination of the investigating officer and also the constable who recorded the FI statement. The finding of the learned Single Judge is erroneous, therefore, we set aside the same. In Behari prasad and Ors. v. State of Bihar, [1996] 2 SCC 317, this Court held that non examination of the investigating officer is not fatal to the prosecution case especially when no prejudice was likely to be suffered by the accused.

11. In Bahadur Naik v. State of Bihar, [2000] 9 SCC 153, this Court held that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for prosecution was of no consequence and under such circumstance no prejudice had been caused to the accused by such non examination."

(emphasis supplied)

16. ***NO TEST IDENTIFICATION PARADE -***

Learned counsel for the appellant vehemently argued that no TIP was conducted which indicates false implication of the appellant as he was unknown to the prosecutrix/victim. We are not impressed with this contention as TIP is not a substantive evidence unlike dock identification which is substantive evidence.

17. In ***Mulla and Another vs. State of U.P.***, reported in ***(2010) 3 SCC 508***, it has been held by the Apex Court in para Nos.42, 43, 44 and 45 that :-

"42. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction.

43. As was observed by this Court in Matru v. State of U.P.., (1971) 2 SCC 75, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. (Vide Santokh Singh v. Izhar Hussain, (1973) 2 SCC 406).

44. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

45. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian Evidence Act, 1872. It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution." ***(emphasis supplied)***

18. In ***Mukesh & Anr. vs. State for NCT of Delhi & Others reported at 2017 (6) SCC 1***, it has been held in para 143 and 144 that :-

"143. In Santokh Singh v. Izhar Hussain and another, it has been observed that the identification can only be used as corroborative of the statement in court.

144. In Malkhansingh v. State of M.P., it has been held thus:

"7. ... The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the

investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. ..." And again:

"16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. …." ***(emphasis supplied)***

19. In view of aforesaid, mere fact that TIP was not conducted in the present case would not vitiate the testimony of PW-2 (victim) who identified the accused at the hospital and also in the court during trial.

20. We, in view of the above discussions, are of the view that PW-2 (victim) being a sterling witness and conviction under Section 376 IPC can be based on her solitary, reliable and trustworthy evidence.

WHETHER CONVICTION UNDER SECTION 3(2)(V) OF SC/ST ACT IS SUSTAINABLE ?

21. We now have to consider whether conviction u/s 3(2) V of SC/ST Act is sustainable or not ?

22. Learned counsel for the appellant argued that there was no evidence on record that accused committed offence of rape, only because the victim was a member of Schedule Caste or Schedule Tribe.

23. The Apex Court in a recent judgment of ***Khuman Singh vs. State of Madhya Pradesh: 2019 SCC Online 1104*** in para 12, 13 and 14 has held that :-

"12. .....The object of Section 3(2)(v) of the Act is to provide for enhanced punishment with regard to the offences under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that the victim is a member of a Scheduled Caste or a Scheduled Tribe.

13. In Dinesh alias Buddha v. State of Rajasthan (2006) 3 SCC 771, the Supreme Court held as under:-

"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of

Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"- Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable. ***(emphasis supplied)***

24. In the present case, prosecution has not brought any evidence on record which could even suggest that accused committed offence of rape, only for the reason that the victim was a member of Schedule Caste or Schedule Tribe as the accused had no prior acquaintance with the victim. Accordingly, conviction under Section 3(2)(V) of S.C./S.T. Act is not sustainable, liable to be set aside.

25. ***QUANTUM OF SENTENCE -***

Lastly, we have to deal with the argument regarding quantum of sentence. It is useful to refer following judgments passed by the Supreme Court on the issue.

26. In ***Bavo alias Manubhai Ambalal Thakore vs. State of Gujarat: 2012 (2) SCC 684***, in paras 12, 13, 14, it has been held that :-

"12. The learned counsel for the appellant relied on a decision of this Court in Narayanamma (Kum) vs. State of Karnataka and Others (1994) 5 SCC 728 and contended that the life imprisonment is not warranted and sentence may be reduced to the period already undergone. The said decision relates to the rape on a minor girl aged 14 years. While the trial Judge convicted and sentenced the accused to three years RI, the High Court reversed the same and acquitted the accused. It was challenged before this Court. After considering the entire materials, this Court set aside the order of the High Court and affirmed the conclusion arrived at by the trial Court. Though this Court expressed displeasure in awarding only three years RI for the crime of rape, taking note of length of time, not inclined to enhance it and confirmed the sentence awarded by the trial Court.

13. Counsel for the appellant relied on another decision of this Court in Rajendra Datta Zarekar vs. State of Goa, (2007) 14 SCC 560. The said case also relates to the offence under Section 376. The victim was aged about 6 years and the accused was aged about 20 years. Ultimately, this Court confirmed the conviction and sentence of 10 years as awarded by the High Court. However, the fine amount of Rs. 10,000/- awarded under Section 376(2)(f) being found to be excessive reduced to Rs. 1,000/-.

14. Considering the fact that the victim, in the case on hand, was aged about 7 years on the date of the incident and the accused was in the age of 18/19 years and also of the fact that the incident occurred nearly 10 years ago, the award of life imprisonment which is maximum prescribed is not warranted and also in view of the mandate of Section 376(2)(f) IPC, we feel that the ends of justice would be met by imposing RI for 10 years. Learned counsel appearing for the appellant informed this Court that the appellant had already served nearly 10 years. ***(emphasis supplied)***

27. In ***Thongam Tarun Singh vs. State of Manipur: 2019 SCC Online SC***

709, it has been held in paras 11 and 12 that :-

"11. The question falling for consideration is whether there are adequate and special reasons warranting exercise of discretion to reduce the sentence of imprisonment. What is 'adequate and special reasons' would depend upon several factors and no strait-jacket formula can be imposed. No catalogue can be prescribed for adequacy of reasons nor instances can be cited regarding special reasons. They differ from case to case.

12. It is stated that at the time of occurrence, appellant no. 1 was working as a police driver and appellant no. 2 was a singer having good reputation, performing as a singer on the stage and both the appellants were aged about 24-25 years, at the time of the occurrence. It is also stated that both the appellants have no criminal antecedents and they hail from backward area. Learned counsel for the appellants have also produced certificate issued from the Jail Authorities to show that the conduct of the appellants (post conviction) are very good and satisfactory and they have been participating in the sports/garden activities and other programmes of the Jail. Considering the facts and circumstances of the case and that the appellants have no criminal antecedents and also the conduct of the appellants in the Jail (post conviction), the sentence of imprisonment of fifteen years (for the conviction under Section 376 (2)(g) IPC) and sentence of imprisonment of ten years (for the conviction under Section 120B IPC) are reduced to eight years." ***(emphasis supplied)***

28. Considering that no case is made out against the accused-appellant under Section 3(2)(V) of SC/ST Act, he is languishing in jail since 6.2.2008 (i.e. more than 12 years), further he was about 20 years at the time of occurrence and today he is about 34 years and no other criminal history is reported, we, therefore, modify the sentence under Section 376 IPC to sentence already under gone.

29. The appeal is ***partly allowed***. The conviction/sentence under Section 376 IPC r/w Section 3(2)(V) of SC/ST Act is altered to conviction under Section 376 IPC only on sentence undergone while acquitting the appellant under Section 3(2)(V) of SC/ST Act. Appellant is in jail. He shall be released forthwith, if not detained in any other case.

30. A certified copy of this judgment be sent to the trial court for necessary compliance.

(2020)06ILR A1111
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2020

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 5665 of 2013

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

Counsel for the Appellant:
Sri S.K. Verma, Sri Devendra Kumar Mishra, Sri Dheeraj Kumar Dwivedi, Sri Sharad Kumar Srivastava, Sri Virendra Kumar Yadav

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

Section 376, 308 IPC- Appeal against conviction.

A. Criminal Law-Indian Penal Code, 1860-Section 376-delay in lodging FIR- Delay in lodging FIR is not fatal its indicates that FIR has not been convincingly explained. (Para-25)

Medical Evidence -Medical evidence does not support the prosecution case in entirety. (Para-27)
Criminal Appeal allowed. (E-2)

List of cases cited: -

1. Niranjan Prasad Vs St. of MP, 1996 CrLJ 1987 (SC).

2. Thaman Kumar vs St. of UT of Chandigarh, (2003) 6 SCC 380.

3. Ram Narain Popli Vs CBI, (2003) 3 SCC 641.

4. Vallabhaneni Venkateshwara Rao Vs St. of AP, 2009 (4) Supreme 363.

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

1. Heard Sri Sharad Kumar Srivastava, learned counsel for the appellant, learned AGA for the state and perused the record.

2. This criminal appeal has been filed against the impugned judgment dated 23.11.2013, passed by Additional Sessions Judge, court No. 9, Fatehpur, in Sessions Trial No. 15 of 2011, arising out of Case Crime No. 204 of 2010, under Section 376, 308 IPC, Police Station Bindki, District Fatehpur by which the accused-appellant Kuldeep has been convicted and sentenced for ten years rigorous imprisonment and Rs. 50,000/- fine and in default three months additional simple imprisonment for the offence under Section 376 IPC and five years rigorous imprisonment along with fine of Rs. 5000/- and in default fifteen days additional simple imprisonment for the offence under Section 308 IPC. It has further been directed that all the sentences shall run concurrently.

3. The brief facts of this case is that the informant is the resident of Mohalla Mahajani Gali Lahauri Town Bindki, Police Station Bindki, District Fatehpur. On 14.07.2010, the accused-appellant Kuldeep committed rape with the daughter of the informant and stabbed by a knife in her stomach. At that point of time, the informant had gone to her relations and when she got information about the incident on phone, the victim was admitted in District Hospital, Fatehpur and the stomach of the victim was operated. Therefore, on 20.07.2010, she gave an application to the police of Bindki mentioning therein that application was already sent to SP, Fatehpur about the incident, although, the same is not on record. On the basis of said information, the offence was registered under Sections 376, 308 IPC and chik was prepared. The offence was investigated by Investigating Officer who recorded the statement of the formal witnesses, informant and has also recorded the statement of the victim in the hospital with the statement of her brother Jeetu and relative Vinod. After receiving the medical report of the victim on 24.07.2010, the same was copied in the case diary. Similarly, the X-ray report, pathology report, supplementary report of the victim was also entered in the case diary. The accused surrendered on 26.08.2010 and his statement was

recorded. He also prepared the site map. After completing the investigation, the charge sheet was submitted for the aforesaid offence. Charges were framed against the accused under section 308/376 IPC to which the accused denied and claimed trial.

4. In support of the prosecution case, PW-1 Shivdevi (informant), PW-2 Golden (victim), PW-3 Jeetu, PW-4 iDr. Kamal Dhawan, PW-5 SI Prem Chandra, PW-6 Subhash Chandra Singh (Chief Pharmacist), PW-7 Dr. D.K. Verma, PW-8 Constable Arvind Kumar Rahi, PW-9 Awadhpal Singh (Ward Boy), PW-10 Dr. V.C. Budhani and PW-11 Dr. Rakesh Pathak have been examined. The statement of Dr. Pradeep Kumar and Dr. Istiyaq Ahmad has also been recorded as CW-1 and CW-2. The prosecution witnesses have proved the incident and also proved the written report as Ext. Ka-1, medical report Ext. Ka-2, supplementary report Ext. Ka-3, site map Ext. Ka-4, letter to C.M.O. Ext. Ka-5, charge sheet Ext. Ka-6, bed head ticket Ext. Ka-7, chik first information report Ext. Ka-8, G.D. Report Ext. Ka-9, photo copy of the extract of the injury register Ext. Ka-10, pathology report Ext. Ka-11, radiologist report Ext. Ka-12 and X-ray plate as material Ext.-1.

5. The statement of the accused-appellant Kuldeep was recorded under Section 313 CrPC. He has put forward the case of denial and stated that the victim sustained injuries by falling down and after consultation and deliberation with malafide and greed, this false case was instituted. In defence, he has also examined DW-1 Dr. Vikas Anand, DW-2 Dr. Vikas Tripathi, DW-3 Dr. A.K. Singh and document Ext. Kha-1 has also been proved.

6. After hearing the counsel for both the parties, the learned trial court has passed the impugned judgment convicting and sentencing the accused-appellant.

7. Feeling aggrieved by the impugned judgment, this criminal appeal has been preferred and the impugned judgment has been challenged on the ground that the conviction and sentence has been erroneously awarded by completely misreading the evidence on record. The accused appellant is innocent and he has been falsely implicated and the prosecution failed to establish the guilt against the accused appellant. The learned trial court did not apply its judicial mind and only on the basis of the statements of the interest witnesses, the judgment has been passed. There is error of law, appreciation of facts is incorrect and evidence of the prosecution witnesses are not reliable. The impugned judgment is not based on direct evidence and is only based on circumstantial evidence. There was contradictions in the statement of witnesses and also with the medical evidence. Therefore, the impugned judgment is not sustainable under law, the appeal is liable to be allowed and the accused-appellant is entitled for acquittal.

8. It appears that 11 witnesses and two court witness have been examined to support the prosecution case. Before analyzing the statement of the prosecution witnesses and the other evidences on record, it appears appropriate to see what

has been stated by the witnesses in this case.

9. PW-1 Shiv Devi is the informant and mother of the victim. She has stated that she knows accused Kuldeep present in the Court who is son of the mother-in-law (Fuferi) of her elder daughter. The incident took place an year before and it was 1:30 PM in the day time. She had gone to her maternal relatives in Raugan. She was informed by Sohan Lal that her daughter (victim) has fallen down from the roof. Sohan Lal is the father of Kuldeep and, therefore, he gave a false information. On that day, she could not return and on the next day, she saw the victim in the district hospital in serious condition who was not in a position to speak and her intestine was coming outside from her stomach. When she became conscious, she told that Kuldeep committed rape with her on the point of knife and when she said that she will make a complaint about it, he stabbed the knife in her stomach. The informant got a written report typed and gave the same to Kotwali Bindki after putting thumb impression on the same, which is Ext. Ka-1. She has also stated that when she went to lodge the report, her daughter was hospitalized. Her son and her elder son-in-law Vinod had reached there and they any how saved the victim. Had they not reached, the accused could have killed the victim. The SO took her statement and inspected the place of occurrence. In the cross-examination, she has stated that she did not see the incident herself.

10. PW-2 is victim herself who has stated that she knows the accused who is son of her sister's mother-in-law (Fuferi). The accused Kuldeep had come to her house on 14.07.2010. Her brother-in-law had gone to Bindki. It was about 01:30 PM. She was cooking and Kuldeep was sitting under the shade. When she went inside to keep vegetables, accused came behind her, caught her and closed her mouth. She said, what stupid he is doing. Then he threatened her to keep quite otherwise he would stab knife. He started doing forcible sexual assault and got her naked and committed rape with her. She cried but he forcibly committed rape. Thereafter, because she was shouting, he stabbed knife in her stomach. When the accused was committing rape, her brother and her brother-in-law came inside. They saw the incident. They saw the accused wearing his pant. She did not know who took her to the hospital as she got fainted. She remained in District Hospital, Fatehpur for one and half months. On 17th of the month her stomach was operated and still she was not able to move. The SO came and inquired about the incident. When she got conscious, she told about the whole incident to her mother who lodged the first information report. She was medically examined in the district hospital.

11. PW-3 Jeetu, the brother of the victim, has stated that he knows accused Kuldeep. The incident took place on 14.07.2010 at about 01:30 PM. He had gone to Bindki Tehsil for getting caste certificate. When he returned, he saw Kuldeep in the house wearing his pant. He had stabbed the victim in her stomach. He warned him to run away otherwise he would kill him and thereafter he fled away from there. Her sister said that he committed rape with her. Sushil also reached there and both took the victim to the hospital where she remained under

treatment in the whole night and then she was referred to the District Hospital, Fatehpur.

12. PW-4 Dr. Kamal Dhawan has stated that on 22.07.2010, he was posted as medical officer in the Emergency of District Women Hospital and in the noon at about 02:40 PM, Constable Manju Yadav brought the victim to the hospital and she was examined by him. Because of the injury, she was admitted in the District Hospital, Fatehpur for some days. She made complaint about commission of rape on her on 20.07.2010. She was slim and 45 Kg. in weight. Teeth 14 X 14 were found. Breasts were average. Hair were present on vagina and no injury was found on the breasts. Urinal tube was inserted. For external injuries, he referred her to District Hospital, Fatehpur for medico legal examination. It was not possible to give any opinion about rape as she told that her period started on that day. The medical report is Ext. Ka-2. Supplementary report was given on 26.07.2010. Vaginal swab was taken which was examined by Dr. B.C. Budhani on 23.07.2010 who gave the supplementary report Ext. Ka-3.

13. PW-5 SI Prem Chandra has stated that on 20.07.2010, he was posted at Police Station Bindki as in-charge officer and took over the investigation on that date. He copied the written report in the case diary and recorded the statement of Constable Kuldeep Yadav on that very day. On 22.07.2010, he recorded the statement of Shiv Devi and on her identification, place of occurrence was inspected and site map Ext. Ka-4 was prepared. The statement of the victim was recorded in the women's ward on bed no. 17 of the district hospital and on the same day statement of Jeetu and Vinod was also recorded. On 24.07.2010, he obtained X-ray report, pathology report, supplementary report and the same were entered in the case diary. On 28.07.2010, he obtained the injury report of victim which was copied in the case diary. On 26.08.2010, the accused surrendered and his statement was taken. The victim was medically examined by PW-4 Dr. Kamal Dhawan and according to medical report, there was no injury on the private parts of the victim. The surgery of the victim was done by Dr. D.K. Verma. He recorded the statement of Chief Pharmacist Subhash Chandra Singh and after completing the investigation, he submitted charge sheet which is Ext. Ka-6.

14. PW-6 Subhash Chandra Singh, Chief Pharmacist has stated that he has come with the bed head ticket of victim. On 15.7.2010, at 2:00 PM, the injured was brought as referred patient from CHC, Bindki and treatment was provided by Dr. D.K. Verma. She was aged about 18 years and she was discharged from the district hospital on 28.07.2010.

15. PW-7 Dr. D.K. Verma has stated that on 15.07.2010, he was posted as surgeon in the District Hospital, Fatehpur and on that day at 02:00 PM, the injured was admitted for treatment with complaint of pain in her stomach. Ultrasound was conducted and it was found that her small intestine was torn. He operated and stitched the small intestine on 17.07.2010 and necessary medicines were given. On being recovered, she was discharged on 28.07.2010. It was possible that the injuries in her stomach may have been caused by the butt of a knife, and if the same was not operated, death was

possible. He has proved the bed head ticked as Ext. Ka-7.

16. PW-8 Constable Arvind Kumar Rahi has stated that on 20.07.2010, he was posted at Police Station Bindki and at 09:30 PM, on the basis of type-written application of Shiv Devi, he registered Case Crime No. 204 of 2010, under Sections 376, 308 IPC against accused Kuldeep. The first information report is Ext. Ka-8 and the carbon copy of the GD in which entry about registration of offence is Ext. Ka-9.

17. PW-9 Awadh Pal Singh has stated that he is working as ward boy in the CHC, Bindki. He had come with the emergency OPD Register dated 01.01.2010 to 11.02.2010 in which on 14.07.2010 at Sl. No. 1978 at 07:50 PM, the name of victim is mentioned and it has been also mentioned that she was referred to District Hospital, Fatebpur. The relevant extract of register is Ext. Ka-10.

18. PW-10 Dr. B.C. Budhani has stated that on 21.07.2010, he was posted as Pathologist in District Hospital, Fatehpur and on that day, he examined two slides of vaginal smears of the victim, which were sent by Dr. Kamal Dhawan, through constable Manju Yadav. In examination of the same, red blood cells were found on the slides and no live or dead spermatozoa was found. The pathology report is Ext. Ka-11.

19. PW-11 Dr. Rakesh Pathak has stated that on 23.07.2010, he was posted as radiologist in the District Hospital, Fatehpur and under his supervision X-ray of wrist and elbow joint of the victim were conducted and on the basis of X-ray plate, he prepared the report which is Ext. Ka-12. According to which all the epiphyses of the joint were found to be fused. In the X-ray of wrist, radius and alna bone, epiphyses were found to be joint. The victim was aged about more than 16 years and less than18 years. X-ray plate is material Ext. -1.

20. DW-1 Dr. Vikas Anand has stated that he was posted in emergency of District Hospital on 15.7.2010 and at 02:00 PM by reference slip of CHC, Bindki, Fatehpur, victim was brought and she was admitted in the hospital on the basis of self inflicted injury and after first aid treatment, she was admitted under the surgeon. Admission ticket Ext. Ka-7 is in his writing and signature. The injured victim told whatever and whatever was written in the reference slip, he also wrote the same at the time of admission. The condition of the victim was quite normal. She did not say anything that she was assaulted by any one and rape was committed on her.

21. DW-2 Dr. Vikas Tripathi has stated that on 16.07.2010, he was posted as EMO in the District Hospital, Fatehpur and on call he examined the victim at 07:40 AM. She was complaining pain in her stomach, upon which treatment advised was written on her bed head ticket. She did not complain anything other than the stomach pain.

22. DW-3 Dr. A.K. Singh has stated that on 14.07.2010, he was attached in PHC as Medical Officer and the victim came for her treatment. The witness has proved the reference slip dated 15.07.2010 as Ext. Kha-1.

23. CW-1 Dr. Pradeep Kumar is just a formal witness who has not stated anything relevant.

24. Cw-2 Dr. Ishtiyaq Ahmad has stated that on 30.05.2013, he was posted as in-charge medical officer in CHC, Bindki. He came with the OPD Register dated 01.01.2010 to 11.09.2010 and duty register dated 14.07.2010 and 15.07.2010 and by way of photo-estate, he has filed after making comparison by his writing and signature which are Ext. Ka-10 and Ext. Ka-11. He has stated that on 15.7.2010, Dr. A. K. Singh was doctor on duty in CHC, Bindki.

25. The first submission is with regard to delay in lodging FIR. The incident took place on 14.7.2010 at any time and on the basis of type-written report given by PW-1 Shiv Devi (mother of victim), the FIR was registered on 20.7.2010 at 7.10 AM. The place of occurrence is situated at the distance of one furlong from the police station. As such, the FIR has been lodged on seventh day from the date of incident. PW-2 Victim has stated that the incident took place at about 1.30 PM. PW-1 has stated that she was not present in the house and had gone to her relatives and came back on the next day after being informed and she met her daughter in the district hospital. She has also stated that she was not present at the place of occurrence and her daughter told her about the incident in the hospital. The prosecution evidence clearly shows that the victim was admitted in the district hospital on 15.7.2010. Thus, on 15.7.2010, the informant had the knowledge of the incident as told to her by the victim. Both victim and informant have stated Jeetu and Vinod to be witness of the incident and they must have also informed the informant about the incident. Therefore, the prosecution had to explain why till 20.7.2010, she did not lodge FIR. The informant, during cross-examination, just to shorten the delay, started saying that on the fourth day, she met her daughter in the hospital. This appears to be self-contradictory to the version of FIR and statement given to the IO under section 161 CrPC. It is true that in cases of rape, the delay in lodging FIR is not fatal but there is no case that the informant took time in taking decision for lodging FIR. This indicates that the delay in lodging FIR has not been convincingly explained by the prosecution.

26. Another defect is that in the written report, it has been mentioned that the accused stabbed the victim in her stomach and PW-1 has stated in her examination-in-chief that she met her daughter in the hospital, her condition was serious and her intestine was coming out from stomach. She said that the victim was stabbed by the accused. PW-2 victim and PW-3 Jitu have also stated that the accused stabbed the victim. The medical report however does not support it as no stabbed wound has been found by the doctor. The prosecution case is that initially the victim was given treatment at CHC and on 15.7.2010, she was brought to district hospital as referred case. The doctor who gave treatment to her at CHC has not been examined by prosecution. He has been examined as defence witness as DW-1 Dr. Vikas Anand, Medical Officer, working in Emergency at District Hospital on 15.7.2010, who has stated that the victim was admitted on the basis of reference slip of CHC and she was admitted for the treatment of self inflicted injury. Similarly, DW-2 Vikas Tripathi,

EMO, District Hospital has also stated that on 16.7.2010, at 7.40 AM, he examined the victim in the ward and she was complaining of stomach pain. Both these witnesses have not been even cross-examined by the prosecution and therefore, there remains no doubt with regard to the correctness of their statements. I find that after the examination of two defence witnesses, CW-1 Dr. Pradeep Kumar, Medical Officer, District Hospital and CW-2 Dr. Ishtiyaq Ahamad, In-charge CHC, Bindki were summoned as court witnesses and on the basis of their statement, Dr. A. K. Singh, the then Medical Officer, CHC, Bindki has been examined who has proved the reference slip of victim as Ext. Kha-1 and has stated that the victim had come for treatment of self inflicted injury. He has been cross-examined, but nothing favorable to prosecution has come out.

27. In the same continuity, the medical evidence given by prosecution on the point, if analyzed, same result comes out and there is no indication of any stab injury to the victim. For instance, PW-4 Dr. D.K. Verma has stated that on 15.7.2010, the victim was admitted for treatment and she was complaining stomach pain and on ultra-sound her intestine was found lacerated. She was operated by him on 17.7.2010 and after being cured, she was discharged on 28.7.2010. He has stated that the intestine may be torn by hitting very powerfully by blunt object such as butt of a knife. He has admitted during cross-examination that she was admitted in hospital on reference for the treatment of self inflicted injury and there was no injury by sharp weapon. He has also stated that Sohan Lal told him on phone that the victim had fallen from roof. PW-7 has stated that there was no injury of sharp weapon to the victim. He has stated that on falling from roof on some blunt object from the side of stomach, such injury is possible. PW-10 Dr. B. C. Budhani has not indicated injury on her private part. Therefore, medical evidence does not support the prosecution case in entirety. On the contrary, it does not rule out the defence case that she sustained injury as she fell down from roof.

28. PW-3 Jitu, the real brother of the victim, was not there in the house and he has stated that that when reached in the house, accused Kuldeep was wearing his pant and the moment he reached, the accused assaulted by knife in the stomach of victim and threatened him to run away otherwise he would assault him also by knife. Thereafter, he ran away from there. His sister, as he saw, sustained injury on her stomach His sister told her that the accused committed rape on her. It is strange that if everything was in the knowledge of PW-3, what prevented him and his brother in law to lodge FIR about the incident. He did not tell about the incident to his relative or neighbors nor took their help. He did not even inform to his mother and strangely, she was informed by the father of accused that victim has fallen. It is difficult to understand the conduct of this witness which appears to be unnatural and not of a prudent person and certainly it reflects upon the credibility of his testimony. His presence at the time of incident or soon after appears to be doubtful.

29. PW-2 is the victim who has stated that the accused committed rape on her on the point of a knife and when she started crying, he threatened to stab her by knife and when she continued crying,

he stabbed her after committing rape. She fell down and at this point of time her brother Jitu and her brother in law Vinod reached there. Then, the accused was wearing his pant. It was bleeding and she got fainted.

30. Now, the evidence of all the three witnesses and prosecution case suffers from serious infirmities. Firstly, there is no medical evidence showing that the victim sustained any incised wound in her stomach caused by knife. The doctors who examined the victim, treated and operated her abdomen, have for reasons best known to them have tried to make out an injury by butt of the knife, which was never the case put forward by the prosecution. The trial court appears to have acted strangely by placing reliance on the opinion of doctors that the injury was possible by the butt of knife as it is beyond the prosecution case. No such statement has been given by the victim or any of the fact witnesses. Moreover, there is always a presumption that a weapon was used in a like manner it is used unless the facts and circumstances permit an otherwise inference.

31. **Niranjan Prasad v State of MP, 1996 CrLJ 1987 (SC)**, was a murder trial, testimony of eye-witnesses was that the deceased and injured were assaulted with sharp cutting weapons but their testimony was not corroborated with medical evidence showing deceased having been injured by blunt object (weapon) only. Post-Mortem Report showing that the deceased had no injury which could be caused by a sharp cutting weapon and, indeed, he had sustained only one injury which could be caused, according to the doctor by a blunt weapon only. Keeping in view the sharp contrast in between the ocular testimony and the medical evidence, the Supreme Court set aside the conviction of the accused persons.

32. Similarly, in **Thaman Kumar v State of Union Territory of Chandigarh, (2003) 6 SCC 380**, the Supreme Court laid down as follows:

"There may be a case where there is total absence of injuries, which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type, which is possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second category and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of the ocular testimony."

33. In this instant case, the first category is applicable where there is total absence of injuries, which are normally caused by a weapon like knife and it may legitimately be inferred that the oral evidence regarding assault having been made by knife is not truthful. There is another logic to support this inference. As said by the victim in her on oath statement, the accused stabbed her after commission of rape. It does not appeal to reasoning. When rape was already committed by accused, there was no need for the accused to assault her by knife. There is no recovery of the said weapon which could show that the make of the weapon was such that it could cause serious injury by butt side. I find apparent perversity and illegality in the finding of the learned trial court holding the accused guilty for the offence under section 308 IPC.

34. Now coming to the charge of rape, the victim has stated during cross-examination that the accused firstly dashed her on wall and she sustained injury on her head. Then he tossed her on the ground and she sustained injury on her back and in the commission of rape, she sustained abraded injuries on her hand and legs. He had got her completely naked and after commission of rape when he was wearing his pant, she was lying naked and her brother and brother in law saw her in completely naked position. She has admitted that her uncles house is adjacent to her house but they could not hear her crying as they had gone to field for agricultural work. If the rape was committed on her in the way she has stated, she should have suffered more injuries but no injury on her head and back has been found in the medical nor there is any abrasion on her her hand or leg. Had the rape committed in such a way, the victim must have sustained some injury on her private part. But no such injury has been found in the medical. PW-3 has stated that when he reached on spot, the accused was wearing his pant but he has not stated that the victim was lying naked. He has stated that he did not call his relatives who lived adjacent to his house as their relation was not good and they were not on talking terms. This is again contrary to what the victim has stated. There is inconsistency in the statement of the informant as in the cross-examination, she has stated that on fourth day she reached in the hospital and the victim told her about the incident which is contrary to what she stated in examination-in-chief that next day she met her daughter in the hospital who told her about the incident. PW-1 and PW-2 have stated that at the time of incident, brother/son Jitu and brother in law/son in law Vinod reached there. In the examination-in-chief, PW-1 has stated that her son Jitu and son in law reached at the time of occurrence and saved her daughter, otherwise, the accused could have killed her. But, PW-3 Jitu has not stated about Vinod but about one Shusheel and he too did not reach with him and reached subsequently. Thus, there is contradiction on this point in the statement of witnesses. The evidence is on record that the victim was taken to CHC, Bindki by her brother Jitu and Shusheel and the victim according to PW-3 had informed him regarding commission of rape by accused. If it was so, nothing prevented them to disclose it to the doctor. There is no medical evidence that the victim was unconscious. The medical report shows that she was normal. Prior to 20.7.2010, she was operated and attended by various doctors

but, she has not stated about rape on her. Then, why the doctors there were informed that the victim was admitted for treatment for self inflicted injury. The reference slip and statement of doctors contains this fact and there is no reason to say that the doctors mentioned this fact wrongly. PW-4 Dr. Kamal Dhawan has stated that the victim was admitted in the hospital from some days and only on 20.7.2010, she complained about rape and on 22.7.2010, when she was brought by local police, he examined her. There was no injury on her private part and she told that her menses started on that very day. She had been subjected to sexual intercourse in view of finger test but no definite opinion of rape was possible. She did not complain any pain in her private parts. Hymen was old torn. Thus, the medical evidence also does not corroborate the incident of rape on the victim.

35. The learned trial court has not considered the inconsistency, improvement and contradiction in the prosecution evidence. The prosecution has introduced and added new facts and story during evidence which makes the prosecution version improbable. In **Ram Narain Popli v CBI, (2003) 3 SCC 641 and Vallabhaneni Venkateshwara Rao v State of AP, 2009 (4) Supreme 363**, it has been held that introduction of or addition of new story or projection of different story by prosecution adversely affects and destroys the prosecution case and it is unsafe to convict the accused and benefit of doubt should be given to accused. There is delay in lodging FIR and no attempt has been made by prosecution to explain the delay. In rape cases, it is settled law that delay in lodging FIR is not material and if the offence has been proved by cogent evidence, the same will be insignificant. In this case, three witnesses of fact including victim have not been able to prove prosecution version in a reliable and credible way and thus, the delay in lodging FIR goes to render additional ground to dislodge the prosecution case. The medical evidence adduced by prosecution is to the effect that the victim was under treatment for self inflicted injury. Thus, the medical evidence also does not corroborate the prosecution case and it does not rule out or improbablize the defence version that the victim fell down from roof. In this case, the facts constituting the offence of attempt to culpable homicide and rape are so intermixed and inter-connected that one of them cannot be isolated from other.

36. In view of above discussion, I find that the learned trial court ignored the infirmities in prosecution version and prosecution evidence. There was variation, contradiction, inconsistency and improvement in the testimony of fact witnesses. PW-1 was not present at the time of occurrence and she lodged FIR on the seventh day on the basis of what was said to her by victim. Since, her son was in the knowledge of the incident and was well informed by the victim, she must have been told by her son about the incident. Her son and son in law could have lodged FIR. Therefore, the delay in lodging FIR assumes importance and creates doubt on prosecution version. There appears to be no reason advanced by prosecution why she was admitted for treatment in the hospital for the treatment of self inflicted injury. It supports the defence case. The prosecution case of causing stabbed injury by knife to victim by accused has been found to be

untruthful. Both the sides are relatives and the presence of accused there, if it is believed that he was there, cannot be said to be unnatural. It has come in the FIR itself and also in the statement of informant that she was informed by Sohan Lal, the father of accused, by phone that victim had fallen down from roof. This has also come in the statement of doctor that Sohan Lal so informed him on phone. He so informed when there was no FIR about the incident. The evidence of prosecution witnesses is shaky, unnatural and untrustworthy and the learned trial court committed error in placing reliance on them. Thus, there is apparent perversity and illegality in the impugned judgment and the same is liable to be set aside and the accused is entitled for acquittal.

37. The Criminal Appeal is **allowed**. The impugned judgment dated 23.11.2013 convicting and sentencing the accused for the offence under section 376/308 IPC is set aside. **Accused Kuldeep is acquitted consequently.**

38. Accused Kuldeep be released from jail forthwith.

39. Office is directed to transmit back the lower court record to the concerned court along with a copy of this judgment for information and compliance.

(2020)06ILR A1122
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 5849 of 2017

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

Counsel for the Appellant:
Sri Krishna Dutt Awasthi, Sri Ghan Shyam, Sri Vivek Mishra

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

Criminal Law-Indian Penal Code, 1860- Sections 323, 504, 506 and Section 3(1)X SC/ST Act- Appeal against conviction.

Benefit of undergone-
Conviction upheld sentences reduced to the period of imprisonment has already undergone.

Criminal Appeal disposed of. (E-2)

List of cases cited: -

1. B.G. Goswami Vs Delhi Administration, 1973 AIR 1457.

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

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

4. St. of MP Vs Najab Khan, (2013) 9 SCC 509.

5. Jameel Vs St. of UP (2010) 12 SCC 532,

6. Guru Basavraj Vs State of Karnatak, (2012) 8 SCC 734,

7. Deo Narain Mandal Vs St. of UP (2004) 7 SCC 257

8. Shyam Narain Vs State (NCT of delhi), (2013) 7 SCC 77

9. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323,

10. State of Punjab Vs Bawa Singh, (2015) 3 SCC 441,

11. Raj Bala Vs St. of Har., (2016) 1 SCC 463

12. Kokaiyabai Yadav Vs St. of Chhattisgarh(2017) 13 SCC 449,

13. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166,

14. Jameel Vs St. of UP (2010) 12 SCC 532,

15. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734,

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

1. This criminal appeal has been filed against judgement and order dated 14.9.2017 passed by Special Judge SC/ST (Prevention of Attrocities) Act/Addl. Sessions Judge, F.T.C-I, Auraiya in S.T. No. 124 of 2015, under Sections 323, 504, 506 I.P.C. and Section 3(1)X SC/ST Act, P.S. Kotwali Auraiya, district-Auraiya, whereby learned Judge convicted and sentenced the appellant to one year rigorous imprisonment under Section 323 I.PC. with fine of Rs. 1000/- and in default of payment of fine further one month R.I. Two years rigorous imprisonment under Section 504 I.P.C. with fine of Rs. 5000/- and in default of payment of fine further one month additional R.I. Three years R.I. under Section 506 I.P.C. with fine of Rs. 3000/- and in default of payment of fine further three months addl. R.I. Five years R.I. under Section 3(1)X SC/ST Act with fine of Rs. 10,000/- and in default of payment of fine further six months additional rigorous imprisonment.

2. All the sentences shall run concurrently.

3. At the very outset, Sri Vivek Mishra, 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.

4. Shri Ravi Prakash Pandey and Sri S.B. Maurya, learned Additional Government Advocates representing the State have stated that they have no objection, if the Court considers the mitigating circumstances.

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

6. However, on the quantum of sentence, learned counsel for the appellant has argued that the appellant is not a previous convict; he is 30 years old married person and he is having children. He is the only bread earner member in his family that is why a lenient view be taken by this court in sentencing the appellant.

7. Learned counsel for the appellant submits that the injured/victim has received only simple injury and his trial was conducted under Section 323 I.P.C. due to sustained injury.

8. Learned counsel for the appellant further submits that the appellant was awarded simple imprisonment of three years and that he has already undergone for more than one month before conviction and two years and five months after conviction, meaning thereby that

now the appellant has served more than two and half years in prison.

9. 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."

10. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926,** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:-

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by re-culturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform

him, you must improve him and, men are not improved by injuries."

11. **In Sham Sunder vs Puran, (1990) 4 SCC 731**, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

12. In **State of MP vs Najab Khan, (2013) 9 SCC 509**, the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in **Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734**, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

13. Earlier, "Proper Sentence" was explained in **Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

14. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In **Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime

committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323, **State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463**.

15. In **Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449**, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

16. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,** the Supreme Court referred the judgments in **Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441,** and Raj Bala vs State of Haryana, (2016) 1 SCC 463 and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

17. Considering the facts and circumstances of the case and the substantive period of sentence more than two and half years already undergone by the appellant in this case and the fact that the appellant is a young person; there is no bread winner 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 and he be allowed to give his better contribution to the society to which he belongs.

18. Consequently, the sentence is modified to the period already undergone by the appellant in this case, i.e. two years and five months under Section 3(1)X SC/ST Act and the fine imposed by the trial court is modified/reduced to Rs. 2000/-.

19. The appeal stands disposed of in the above terms.

20. Office is directed to transmit a copy of this order to the learned Sessions Judge, Auraiya for compliance and compliance report be submitted to this Court also.

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

(2020)06ILR A1127
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2017

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Contempt No. 1690 of 2017

Dr. Satendra Prakash Rastogi...Applicant
Versus
Prashant Dwivedi, Prin. Secy. Medical Health & Family Planni ...Opposite Party

Counsel for the Applicant:

Jai Krishna Sinha

Counsel for the Opposite Party:

Civil contempt - Contempt of Courts Act (70 of 1971) - Section 12 - deliberate disobedience - Merely seeking legal advice to challenge writ court order before superior forum - cannot be said to be deliberate disobediance - every litigant, including the State, has a right to take recourse to the legal remedy available to them under law (Para 14)

Allegation that though Opposite party assured Court that writ court order would be complied with but subsequently he sought legal advice to file Special Leave Petition against the said order - which amounts to breach of the undertaking given by opposite party in his affidavit before and amounts to deliberate disobedience of the order - ***Held*** - Merely because respondent sought legal advice from Chief Standing Counsel regarding feasibility of filing S.L.P. against the writ court order it cannot be said that there is a deliberate disobediance of the said order (Para 14)

Dismissed. (E-5)

List of cases cited:

1. Kapildeo Prasad Sah Vs St. of Bihar (1999) 7 SCC 569

2. Sudhir Vasudeva Vs M. George Ravishekaran (2014) 3 SCC 373

3. J.S. Parihar Vs Ganpat Duggar, (1996) 6 SCC 291

4. Chhotu Ram Vs Urvashi Gulati (2001) 7 SCC 530

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. This contempt petition under Section 12 of the Contempt of Courts Act, 1971 (for short 'the Act') has been filed for initiating action against the

respondents for wilful disobedience of the order dated 09.05.2013, passed by this Court in Writ Petition No. 1755 (S/B) of 2010, Dr. Satendra Prakash Rastogi v. State of U.P.

2. Dr. Satendra Prakash Rastogi, the applicant, was a Medical Officer in the Medical and Health Department of the State of Uttar Pradesh. By an order dated 03.10.2003 passed by the Principal Secretary, Medical, Health and Family Planning, U.P., Lucknow the applicant was dismissed from service. The writ petition bearing No. 1755 (S/B) of 2010 preferred by the applicant against the order 03.10.2003 was partly allowed by this Court vide its order dated 09.05.2013 in the following terms:-

"Accordingly, the writ petition is allowed partly with regard to continuity of service of the petitioner only. The impugned order dated 03.10.2003 passed by the opposite party no.1 (annexure no.1) is hereby, quashed.

Although, we are not inclined to grant arrears of salary to the petitioner during the period of unauthorized absence from duty, but we direct that the petitioner shall be reinstated in service w.e.f. 15.05.2013. It is also directed that the disciplinary authority shall proceed afresh from the stage of filing of the reply to charge sheet and pass fresh order after providing due opportunity of hearing to the petitioner and in view of the observations made above, conclude the fresh enquiry within a period of six months from the date of production of a certified copy of the present order and communicate the same to the petitioner.

No order as to costs."

3. The applicant filed a contempt petition before this Court bearing Criminal Misc. Case No. 2117 (C) of 2013 for initiating action against Sri Pravir Kumar, the then Principal Secretary, Medical, Health & Family Welfare Department, Lucknow for deliberate disobedience of the order dated 09.05.2013, mentioned above. In the said contempt petition, Sri Pravir Kumar filed an affidavit dated 29.10.2013 and brought on record two orders bearing nos. 2744 and 3599. Both these orders were dated 28.10.2013, and had been passed by the State of Uttar Pradesh in compliance of the order dated 09.05.2013 passed by this Court. By order no. 2744, the applicant was reinstated in service. It was specifically mentioned in the said order that the decision regarding payment of salary to the applicant for the period of his unauthorized absence from 08.01.1992 to 14.05.2013 would be taken after the decision in the disciplinary enquiry pending against the applicant. By order no. 3599, an Enquiry Officer was appointed to hold an enquiry against the applicant in terms of the order passed by this Court. Since the order dated 09.05.2013 stood complied with, the contempt petition was dismissed by this Court vide order dated 31.10.2013.

4. The disciplinary enquiry against the applicant culminated in an order dated 25.05.2015, whereby three annual increments of the applicant with cumulative effect were withheld. On 06.07.2017, after more than two years since the passing of the order dated 25.05.2015, the Director, Medical & Health Services, wrote a letter to the Chief Medical Officer, Bareilly and Chief Medical Officer, Saharanpur asking them to seek legal advice from the Chief Standing Counsel regarding the feasibility of filing a Special Leave Petition before the Apex Court against the order dated 09.05.2013, in so far as it relates to the grant of continuity in service to the applicant for the period of his unauthorised absence from duty.

5. Sri J.K. Sinha, learned counsel for the applicant has submitted that in the affidavit filed by Sri Pravir Kumar in Criminal Misc. Case No. 2117 (C) of 2013 he had assured that the order dated 09.05.2013 would be complied with. The counsel submits that the action on the part of the respondent in not granting continuity in service and now seeking legal advice to file Special Leave Petition against the said order is a breach of the undertaking given by Sri Pravir Kumar in his affidavit dated 29.10.2013 and amounts to deliberate disobedience of the order passed by this Court.

6. Section 2(b) of the Contempt of Courts Act defines "civil contempt" as wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of undertaking given to a court.

7. The contours of the power of the Court so far as commission of civil contempt is concerned have been elaborated upon in a number of pronouncements of the Apex Court. Reference may be made to the following observations in *Kapildeo Prasad Sah v. State of Bihar, (1999) 7 SCC 569:*

"9. For holding the respondents to have committed contempt, civil contempt at that, it has to be shown that there has been wilful disobedience of the judgment or order of the court. Power to punish for contempt is to be resorted to when there is clear violation of the court's order. Since notice of contempt and punishment for contempt is of far-reaching consequence [and] these powers should be invoked only when a clear case of wilful disobedience of the court's order has been made out. Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Judicial orders are to be properly understood and complied with. Even negligence and carelessness can amount to disobedience particularly when the attention of the person is drawn to the court's orders and its implications." (emphasis supplied)

8. In *Sudhir Vasudeva v. M. George Ravishekaran, (2014) 3 SCC 373*, the Apex Court held that the Courts must not:

"travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. *Only such directions which are explicit in a judgment or order or are plainly self-evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or wilful violation of the same."* (emphasis supplied)

9. In *J.S. Parihar v. Ganpat Duggar, (1996) 6 SCC 291*, the Apex Court in para 6 of the said report has held as under:-

"6. ... It is seen that *once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the wilful violation of the order.* After re-exercising

the judicial review in contempt proceedings, a fresh direction by the learned Single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible under Section 12 of the Act. (emphasis supplied)

10. In *Chhotu Ram v. Urvashi Gulati, (2001) 7 SCC 530*, the Apex Court has held that the proceedings under the contempt of Court Act are quasi criminal and, as such, the breach has to be established beyond all reasonable doubt. The Apex Court held:

"2. As regards the burden and standard of proof, the common legal phraseology "he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the "standard of proof", be it noted that *a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of the Contempt of Courts Act is quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond all reasonable doubt."* (emphasis supplied)

11. In the case at hand, in pursuance of the order dated 09.05.2013 passed by this Court, the applicant was reinstated in service and a fresh enquiry was conducted against the petitioner from the stage of filing of the reply to the charge sheet as directed by this Court. The contempt petition filed by the applicant earlier for initiating contempt proceedings against the applicant for disobedience of the order dated 09.05.2013 was dismissed by this Court holding that the said order stood complied with. It is not in dispute that on the basis of the enquiry report, by an order dated 25.05.2015, three increments with cumulative effect of the applicant have been withheld. The order dated 25.05.2015 is not on record. The averment, as to whether or not the said order has been put to challenge is conspicuously missing in the contempt application.

12. In order to appreciate the first part of the submission of the learned counsel for the applicant, it would be imperative to reproduce the contents of the affidavit filed by Sri Pravir Kumar in Criminal Misc. Case No. 2117 (C) of 2013 in extenso. The affidavit reads as under:

"1. That the deponent himself is the Opp. party no. 1 in the above noted case he is fully conversant with the facts of the case and circumstances, of the case as deposed hereinunder.

2. That before making any submission before this Hon'ble Court the deponent tenders unconditional and unqualified apology before this Hon'ble Court if this Hon'ble Court if this Hon'ble Court finds any contempt from any conduct of the dependent. The deponent is a law-abiding citizen and a responsible govt officer, he always obey the order passed by this on Hon'ble Court.

3. That the present contempt petition has been filed for the alleged non-compliance of the order dated 09-05-2013 passed in W.P. No. 1755 (S/B) of 2010, Dr. Satendra Prakash Rastogi Vs. State of U.P. & others. The operative portion of the order is quoted here in under:-

"Although, we are not inclined to grant arrears of salary to the petitioner during the period of unauthorized absence from duty, but we direct that the petitioner shall be reinstated in service w.e.f. 15.05.2013. It is also directed that the disciplinary authority shall proceed afresh from the stage of filing of the reply to charge sheet and pass fresh order after providing due opportunity of hearing to the petitioner and in view of the observations made above, conclude the fresh enquiry within a period of six months from the date of production of a certified copy of the present order and communicate the same to the petitioner."

4. That in compliance of the order dated 09.05.2013, two orders dated 28.10.2013 have been passed by the Deponent. The copy of the orders dated 28.10.2013 are being addressed herewith as ***Annexure No. CA-1 & Annexure No. CA-2.***

5. That the delay in the matter is neither deliberate nor intentional as some time was consumed in official correspondence in the matter and obtaining approvals of the competent authority and as such the same is liable to be condoned by this Hon'ble Court.

6. That in the above noted circumstances the order passed by this Hon'ble Court has been fully complied with and it is necessary in the interest of justice that the notice may kindly be discharged and Contempt petition may be dismissed."

13. From a perusal of the affidavit extracted above, it is apparent that there is no such undertaking as alleged by the counsel for the applicant and as such there is no question of any breach of any undertaking on the part of the respondent.

14. In so far as the second limb of the submission of the learned counsel for the applicant, relating to the legal advice sought for approaching the Apex Court, is concerned, every litigant, including the State, has a right to take recourse to the legal remedy available to them under law. Merely because the respondent has sought legal advice from the Chief Standing Counsel regarding the feasibility of filing a Special Leave Petition against the order dated 09.05.2013 passed by this Court, it cannot be said that there is a deliberate disobediance of the said order.

15. On merit, this Court is of the opinion that no case of civil contempt is made out. Besides, it is also clear that the prayer is also barred by limitation. A limitation period of one year is provided under Section 20 of the Contempt of Courts Act. The application is hopelessly barred by limitation and is liable to be dismissed as such.

16. The contempt petition is devoid of merit and is accordingly dismissed.

(2020)06ILR A1131
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2020

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 2810 of 2020

Abhishek Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd Ateeq Khan

Counsel for the Respondents:
C.S.C.

(A) No Right to claim or ask for re-evaluation of his marks - absence of any provision for reevaluation of answer-books in the relevant rules - no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks -In the absence of any provision in the relevant Rules / Regulations providing for re-examination or re-evaluation of answer-books of a candidate in an examination, the Court cannot direct such re-examination or re-evaluation . Para - 7,9

Petitioner appeared in the Intermediate Examination conducted by the Board of High School and Intermediate, Uttar Pradesh, Allahabad - petitioner, alongwith two other students, filed a writ petition - praying for re-evaluation of his answer-books pertaining to Mathematics and English question papers - In the absence of any provision for re-evaluation in the Board Examination, the prayer made by the petitioner for re-evaluation of his answer-books was rejected by a learned Single Judge. Para – 2

HELD:- In the absence of any provision for re-evaluation or re-assessment , the claim of the petitioner for re-evaluation of his answer-sheets cannot be upheld.Para-11

Writ petition dismissed. (E-7)

List of cases cited:-

1. CBSE Vs Aditya Bandopadhyay & ors. , (2011) 8 SCC 497

2. Maharashtra State Board of Secondary and Higher Secondary Education Vs Paritosh Bhupeshkumar Sheth , (1984) 4 SCC 27

3. Pramod Kumar Srivastava Vs Chairman, BPSC , (2004) 6 SCC 714

4. Board of Secondary Education Vs Pravas Ranjan Panda , (2004) 13 SCC 383

5. Board of Secondary Education Vs D. Suvankar , (2007) 1 SCC 603

6. W.B. Council of Higher Secondary Education Vs Ayan Das , (2007) 8 SCC 242

7. Himanchal Pradesh Public Service commission Vs Mukesh Thakur , (2010) 6 SCC 759

8. Tanya Malik Vs Registrar General of the Delhi High Court , (2018) 14 SCC 129

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Heard Shri Mohd. Ateeq Khan, learned counsel for the petitioner and the learned Standing Counsel appearing on behalf of the State respondents.

2. The petitioner appeared in the Intermediate Examination, 2019 conducted by the Board of High School and Intermediate, Uttar Pradesh, Allahabad (for short "the Board') as a regular student from S.S. Bhupati Singh Memorial Inter College, Alambagh, Lucknow (for short "the College'). He passed the said examination in first division. However, the petitioner, alongwith two other students, filed a writ petition bearing Misc. Single No. 14803 of 2019 before this Court praying for re-evaluation of his answer-books pertaining to Mathematics and English question papers. In the absence of any provision for re-evaluation in the Board Examination, the prayer made by the petitioner for re-evaluation of his answer-books was rejected by a learned Single Judge of this Court by an order dated 24.05.2019. The learned Single Judge, however, granted liberty to the petitioner to invoke the provisions of Right to Information Act for getting copies of the answer-books in order to enable the petitioner to know the pattern of marking.

The operative portion of the order dated 24.05.2019 is extracted below:

"Learned counsel for the petitioners also could not bring to the notice of the Court any statutory or otherwise provision contained in any circular/executive order/rules/regulations or any enactment which permits re-evaluation of answer books. In the aforesaid view of the matter, the prayers made in this petition as such cannot be granted.

At this juncture, learned counsel for the petitioners has prayed that the petitioners may be permitted to invoke the provisions of Right to Information Act for getting true/photostat copies of their answer books so that they can know the pattern of marking.

Hon'ble Supreme Court in the case of *CBSE vs. Aditya Bandopadhyay and others*, reported in [(2011) 8 SCC 497] has held that under Right to Information Act if demanded, the answer books are to be permitted to be shown/copies thereof given to the candidates by the bodies conducting public examination.

In view of the aforesaid judgment, the petitioners are permitted to move appropriate application under the Right to Information Act for being provided with photostat/true copies of their answer books and in case any such application is made, the same shall be dealt with in accordance with law and the provisions contained in Right to Information Act by the Public Information Officer within the time stipulated for the said purpose under the Right to Information Act. On receipt of the photostat/true copies of the answer books if any grievance to the petitioners still subsist, it will be open to them to take recourse to the legal remedy which may be available to them under law for redressal of their grievances, if any.

With the aforesaid observations and directions, the writ petition stands disposed of."

3. After obtaining copies of his answer-books of Mathematics and English papers, the petitioner, alongwith two other students, filed another writ petition bearing Misc. Single No. 30776 of 2019, Shivam Tiwari and others v. State of U.P. and others before this Court. On an objection being raised by the learned Standing Counsel with regard to mis-joinder of cause of action, this Court permitted the petitioner to withdraw his name from the said writ petition with liberty to him to file a fresh petition.

4. In the above background, the petitioner has approached this Court again, by means of the present writ petition, seeking a writ of mandamus directing the respondents to re-evaluate his Mathematics and English answer-books, wherein the petitioner has secured 53 and 56 marks respectively. It is averred that the petitioner had secured highest marks in other subjects and had also answered the questions in Mathematics and English papers correctly and was expecting more than 80 marks in the said subjects. It is alleged that the answers given by the petitioner to some questions, mentioned in paragraph 14 and 15 of the writ petition, in the Mathematics and English paper were correct answers but have been marked as incorrect, whereas in some questions less marks have been given by the examiner. It is averred that "it is common knowledge and sometimes also reported in the newspapers that unqualified persons

check the copies of High School and Intermediate Examinations. Sometimes, copies are taken by the examiners at their homes and they are checked by family members and that all the examiners who check the copies are not expert of the concerned subject. These copies are checked in cursory manner without giving them sufficient time." In paragraph 9 of the writ petition it has been averred that mischief has been done at the place where the answer books were sent for evaluation and in paragraph 17 of the writ petition it has been averred that about 70 students appeared from the College in Intermediate Examination conducted by the Board and all aforesaid students have been awarded less marks in the Mathematics paper. The petitioner, it is alleged, tallied his answer copies and also showed them to his Mathematics and English teachers and he was told by them that the examiners have not given him marks for the correct answers and in some of the questions less marks have been awarded by the examiners. It is on the basis of these vague and general averments, the petitioner prays for re-evaluation of his answer-books.

5. The learned counsel for the petitioner, relying upon an order dated 11.11.2019 passed by a learned Single Judge of this Court in writ petition bearing Misc. Single No. 30776 of 2019 prays that a direction be issued for re-evaluation of answer-books of Mathematics and English papers of the petitioner by an Associate Professor of Lucknow University of the subject concerned.

6. Per contra, the learned Standing Counsel has submitted that in the absence of any provision for re-evaluation in the Regulations of the Board, the Court cannot direct such re-examination or re-evaluation.

7. By a series of decisions of the Apex Court, it is now a well settled proposition of law that in the absence of any provision in the relevant Rules / Regulations providing for re-examination or re-evaluation of answer-books of a candidate in an examination, the Court cannot direct such re-examination or re-evaluation.

8. In *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27*, the Apex Court held that in the absence of a specific provision conferring a right upon an examinee to have his/her answer-sheets re-evaluated, no such direction can be issued. The principles set out in the said case have been consistently followed by the Apex Court in a series of judgments.

9. In *Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, (2004) 6 SCC 714,* a three Judge bench of the Apex Court observed as under:-

"7. ..... Under the relevant rules of the commission, there is no provision wherein a candidate may be entitled to ask for re-evaluation of his answer-book. There is a provision for scrutiny only wherein the answer-books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totaling of marks of each question and noting them correctly on the first cover page of the answer-book. There is no dispute that after scrutiny no

mistake was found in the marks awarded to the appellant in the General Science paper. *In the absence of any provision for reevaluation of answer-books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks."*

(emphasis supplied)

10. The same view has been expressed by the Apex Court in *Board of Secondary Education v. Pravas Ranjan Panda, (2004) 13 SCC 383, Board of Secondary Education v. D. Suvankar, (2007) 1 SCC 603, W.B. Council of Higher Secondary Education v. Ayan Das, (2007) 8 SCC 242, Himanchal Pradesh Public Service commission v. Mukesh Thakur, (2010) 6 SCC 759 and Tanya Malik v. Registrar General of the Delhi High Court, (2018) 14 SCC 129.*

11. In the present case, admittedly, there is no provision for re-evaluation with respect to examination conducted by the Board. In view of the settled legal position discussed above, in the absence of any provision for re-evaluation or re-assessment, the claim of the petitioner for re-evaluation of his answer-sheets cannot be upheld

12. As stated above, the learned counsel for the petitioner has placed heavy reliance upon an order dated 11.11.2019 passed by a learned Single Judge of this Court in Misc. Single No. 30776 0f 2019. The order dated 11.11.2019 is extracted below in extenso:

"1. Heard learned counsel for the petitioners and learned Standing Counsel for the State respondents Sri Upendra Singh.

2. Learned Standing Counsel has raised a preliminary objection as to the maintainability of the writ petition jointly by the petitioners, saying that petitioner no.3 wants his answer copy of English examination to be reevaluated, whereas petitioner nos.1, 2 and 4 want reevaluation of their answer copies of Mathematics examination. There is mis-joinder of cause of action.

3. Learned counsel for the petitioners has submitted that petitioner no.3 wants his Mathematics answer copy as well as English answer copy to be reevaluated and, therefore, it cannot be said that there is total mis-joinder of cause of action.

4. This Court grants liberty to petitioner no.3 to file fresh petition, both for his Mathematics and English answer copies and his name be deleted from the array of the petitioners.

5. It has been submitted by the learned counsel for the petitioners that the petitioners had earlier approached this Court by filing Writ Petition No.14803 (MS) of 2019 and this Court had disposed of the writ petition on 24.5.2019, granting liberty to the petitioners to file an application under Right to Information Act to procure the photocopies of their answer books with respect to Mathematics and English papers as written by them in their Intermediate Examination of the year 2019.

6. The petitioners thereafter applied under the Right to Information Act for getting two photocopies of their answer books. From the photocopies that were supplied by the respondent nos.2 and 3, the petitioners have come to know that the answer books of their Mathematics paper have not been marked correctly. In Paras 13, 14 and 15 of the

writ petition, the petitioners have mentioned the followings facts.

"13. That the petitioner no.1 allotted the number as 0902018. The correct answers of question number 1(b), 1(c), 2(a), 2(b), 2(c), 2(d) and 2(e) but the examiner has held the said answer wrong although they are correct answers. The examiners have given less mark to question number 3 a, b, c, d and question number 4-a, b, c, d.

14. That the petitioner no.2 allotted the number as 0901994 and petitioner no.3 0901989. The correct answers of question number 5 (b) e, 6-b, c, d, f but the examiner has held the said answer wrong although they are correct answers. The examiner has given less mark to question number 5a, and question number 9-d.

15. That the petitioner no.4 allotted the number as 0902014. The correct answers of question number 1(b), 1(c), 2(a), 2(e), 3-a, b, d and 4 c, d are correct but the examiner has held the said answer wrong although they are correct answers. The examiner has given less mark to question number 5-a, d, e, f and question number 6-a, b, c, d, e question no.8-b question no.9-a and question no.2-b."

7. Since the petitioners have filed photocopies of the answer sheet for Mathematics paper as Annexure to the writ petition, it would be in the interest of justice that this Court entertains the writ petition, although as submitted by the learned counsel for the State respondents, there is no provision for reevaluation.

8. Since the petitioners have raised doubts with regard to correct answers in regard to Mathematics for which, this Court does not consider itself to be an expert, copies of the answer books of the petitioners in Mathematics paper shall be given to a Professor or an Associate Professor in Mathematics in Lucknow University for evaluation of the petitioners' contention as raised by them in Paras 13, 14 and 15 of the writ petition.

9. The respondent no.3 shall provide true photocopies of the answer sheet of the petitioners in Mathematics paper for Intermediate Examination of the year 2019 in sealed cover to the learned counsel for the State respondents Sri Upendra Singh, who shall request the learned counsel for the Lucknow University Sri Savitra Vardhan Singh to ask the Associate Professor of the Mathematics Department to look over the doubts raised by the petitioners herein and submit a report to this Court within a period of four weeks. The report shall be submitted to this Court in a sealed cover through the Registrar of the Lucknow University.

10. Let the answer copies of Mathematics paper of petitioner nos.1, 2 and 4 be provided to the learned counsel for the State respondents Sri Upendra Singh within ten days from the date of receipt of a certified copy of this order through the petitioners, which shall be forwarded by him to the learned counsel for the Lucknow University Sri Savitra Vardhan Singh within a further period of three days.

11. List this matter on 9.12.2019"

13. The order dated 11.11.2019 is only an interlocutory order. Before passing the said order the learned Judge has not considered and discussed the law on the subject. It is trite that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein. Any declaration or conclusion arrived at without application of mind or not preceded by any reason

cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. The petitioner, thus, derives no benefit from the order aforesaid.

14. That apart, in almost identical circumstances, in the case of *Pramod Kumar Srivastava* (supra), while setting aside the judgment and order passed by the Patna High Court, the Apex Court deprecated the manner in which the High Court had directed the answer-book of General Science paper of the petitioner, in that case, to be re-evaluated by expert teachers through the Principal of a Science College. Paragraph 8, 9 and 10 of the said report are being extracted below:

"8. Adopting such a course as was done by the learned Single Judge will give rise to practical problems. Many candidates may like to take a chance and pray for re-evaluation of their answer-books. Naturally, the Court will pass orders on different dates as and when writ petitions are filed. The Commission will have to then send the copies of individual candidates to examiners for re-evaluation which is bound to take time. The examination conducted by the Commission being a competitive examination, the declaration of final result will thus be unduly delayed and the vacancies will remain unfilled for a long time. *What will happen if a candidate secures lesser marks in re-evaluation? He may come forward with a plea that the marks as originally awarded to him may be taken into consideration. The absence of clear rules on the subject may throw many problems and in the larger interest, they must be avoided.*

9. Even otherwise, the manner in which the learned Single Judge had the answer-book of the appellant in General Science paper re-evaluated cannot be justified. The answer-book was not sent directly by the Court either to the Registrar of Patna University or to the Principal of Science College. A photocopy of the answer-book was handed over to the Standing Counsel for Patna University who returned the same to the Court after some time and a statement was made to the effect that the same had been examined by two teachers of Patna Science College. The names of the teachers were not even disclosed to the Court. The examination in question is a competitive examination where the comparative merit of a candidate has to be judged. It is, therefore, absolutely necessary that a uniform standard is applied in examining the answer-books of all the candidates. It is the specific case of the Commission that in order to achieve such an objective, a centralised system of evaluation of answer-books is adopted wherein different examiners examine the answer-books on the basis of model answers prepared by the Head Examiner with the assistance of other examiners. It was pleaded in the letters patent appeal preferred by the Commission and which fact has not been disputed that the model answer was not supplied to the two teachers of Patna Science College. *There can be a variation of standard in awarding marks by different examiners. The manner in which the answer-books were got evaluated, the marks awarded therein cannot be treated as sacrosanct and consequently, the direction issued by the learned Single Judge to the Commission to treat the marks of the appellant in General Science paper as 63 cannot be justified."*(emphasis supplied)

15. In view of the above discussion, no ground for interference is made out.

The writ petition, being devoid of merit, is hereby dismissed.

(2020)06ILR A1138
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.05.2020

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 8109 of 2020

Gold Star Green Seeds Pvt. Ltd & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Amol Kumar, Shivanshu Mishr

Counsel for the Respondents:
A.S.G., Vijayant

(A) Constitution of India - Article 226 - maintainability of the writ petition within the territorial jurisdiction - 'right to action' and 'cause of action' are two different things - A person residing any where in the country being aggrieved by an order of Government Central or State or authority or person may have a right to action at law but it can be forced or the jurisdiction under Article 226 can be invoked of that High Court only within whose territorial limits the cause of action wholly or in part arises. The cause of action arises by action of the Government or authority and not by residence of the person aggrieved." Para – 16

Supply of Dhaincha Seeds made to the Nigam/Institution -- terms of the agreement - Nigam/Institution is under obligation to pay the amount of seeds supplied by the petitioner to the NAFED - on receipt of the amount from Nigam/Institution, the NAFED is under obligation to make the payment to the petitioner for the Seeds supplied by the petitioner to the Nigam/Institution situated at State of Bihar - Agreement executed at Lucknow between the petitioner and National Agriculture Cooperative Marketing Federation of India (in short "NAFED") and the Dhaincha Seeds were supplied to the opposite party No. 4/Bihar State Beej Nigam Limited, Bihar (Nigam/Institution) - main dispute is between petitioner/supplier and Nigam/Institution, which is situated in the State of Bihar - all the transaction with regard to supply of Seeds took place within territories of State of Bihar. **Para - 6,9,11,13**

HELD:- Taking into consideration the facts of the case as also keeping in view the principles regarding cause of action, territorial jurisdiction and forum conveniens, we are of the view that the present writ petition, for payment of due amount, which in fact has to be paid first by the opposite party No. 4-Bihar State Beej Nigam, Bihar to NAFED and thereafter the petitioner can get the same from NAFED, is not maintainable before this Court. **Para -18**

Writ petition dismissed.(E-7)

List of cases cited:-

1. Om Prakash Srivastava Vs U.O.I. & anr., (2006) 6 SCC 207

2. Nawal Kishore Sharma Vs U.O.I., (2014) 9 SCC 329,

3. Daya Shankar Bharadwaj Vs Chief of Air Staff, New Delhi & ors., AIR 1988 Allahabad 36

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Sri Amol Kumar, learned counsel for the petitioners, Sri Nishant Shukla, learned counsel for the Union of India and Sri Vijayant, learned counsel for the National Agriculture Cooperative Marketing Federation of India (in short

"NAFED") appeared before this Court through video conferencing.

2. Learned counsel for the petitioners submitted that the petitioner/Gold Star Green Seeds Pvt. Ltd. (in short "Supplier") supplied Dhaincha Seeds to opposite party No. 4/Bihar State Beej Nigam Limited, Bihar through its Managing Director (in short "Nigam/Institution"). With regard to supply of Dhaincha Seeds, the Nigam requested NAFED. The NAFED in terms of the agreement dated 10.01.2011 directed the petitioner/Gold Star Green Seeds Pvt. Ltd. to supply Dhaincha Seeds to the Nigam vide letter dated 20.04.2011. The total amount of the Seeds supplied by the petitioner on the basis of the supply order issued by the NAFED in terms of the agreement dated 10.01.2011 amounts to Rs. 10,37,59,457.20. In terms of the agreement dated 10.01.2011, the Nigam was/is under obligation to pay the amount related to Dhaincha Seeds supplied to the NAFED and thereafter the NAFED was/is under obligation to pay the amount of Seeds supplied to the petitioner. Out of Rs. 10,37,59,457.20, the petitioner received Rs. 7,44,73,352.00 and the amount still due is Rs. 2,92,86,105/-. The amount due is undisputed and in this regard learned counsel for the petitioner placed reliance on para 14 to 18 to the writ petition as also Annexure Nos. 4 to 8 to the writ petition. The amount due i.e. Rs. 2,92,86,105/- has not been paid till date and accordingly the petitioner has been compelled to file the present writ petition for the reliefs sought. Main reliefs sought are as under:-

"01- Issue a Writ, Order or direction in the nature of Mandamus thereby directing the opposite parties, more particularly opposite party no. 2 & 3, to pay the admitted amount i.e. 2,92,86,105/- along with admissible interest.

02- Issue a Writ, Order or direction in the nature of Mandamus thereby directing the opposite parties to decide the representations dated 19.12.2019 pending before them."

3. Learned counsel for the petitioner further submitted that in similar facts and circumstances, the Writ Petition No, 8117 (MB) of 2015 filed by the petitioner against NAFED and U.P. Beej Vikas Nigam was entertained and allowed by this Court vide judgment and order dated 14.02.2020.

4. It is further submitted that in the facts and circumstances of the case, NAFED be directed to pay the admitted amount amounting to Rs. 2,92,86,105/- to the petitioner.

5. After taking into account the contents of the writ petition and documents annexed therewith particularly para 3, 7 to 11 and 13 & 14 as well as the terms of agreement dated 10.01.2011, quoted hereunder, we raised the issue/point related to the maintainability of the writ petition within the territorial jurisdiction of this Court.

"Relevant paras of the writ petition.

3. That the petitioner is seeking for a writ, order or direction in the nature of mandamus thereby commanding the opposite parties to release the amount/pay the outstanding to the tune of Rs. 2,92,86,105/- with respect to the supply of Dhaincha Seeds to opposite party no. 4 through opposite party no.2 & 3.

7. That accordingly an agreement was entered into by & between the petitioner and the opposite parties

no.2 & 3 by means of which amongst others it was agreed that the petitioner will participate in the tenders/orders floated by various institutes for supply of the seeds etc. on behalf of NAFED, the petitioner would quote the rates in consultation with NAFED. The copy of the agreement dated 10.01.2011 entered into by & between the parties is annexed herewith this petition as ***ANNEXURE 1.***

8. That vide letter dated 19.04.2011 the opposite party no.4 requested for the Dhaincha Seeds from the opposite party no.2 & 3. The opposite party no.2 & 3 through their letter dated 20.04.2011 directed the petitioner to supply Dhaincha Seeds to opposite party no.4. The copy of the letter dated 20.04.2011 is annexed herewith this petition as ***ANNEXURE-2.***

9. That opposite party no.4 used to issue supply orders to the NAFED and thereafter the NAFED used to direct the petitioner to supply with the seeds to the opposite party no.4 on behalf of the NAFED in furtherance of the aforesaid agreement.

10. That meanwhile the opposite party no.2 requested the opposite party no. 4 to release the payment however, no heed was paid by the opposite party no.4.

11. That time & again the petitioner was asked to supply Dhaincha Seeds to opposite party no. 4 by the opposite party no.2 & 3 in furtherance to the aforesaid agreement and the petitioner as per the terms agreed supplied a total quantity of 30092.65 quintals of the said seed to the opposite party no.4, as per the supply order issued by the opposite party no.2 & 3 from time to time.

13. That the total amount of the seeds which were supplied by the petitioner to the opposite party no. 4 on the basis of the supply order issued by opposite party no.2 & 3 amounted to Rs. 10,37,59,457.20. (at the rate of Rs. 3448/- per quintal for 30092.65 quintals) was due. The opposite party no.2 & 3 served a letter dated 22.12.2011 upon the opposite party no.4 requesting therein that the total amount due be released.

14. That thereafter the total amount of the seeds which were supplied by the petitioner to the opposite party no.4 on the basis of the supply order issued by opposite party no.2 & 3 amounted to Rs. 10,37,59,457.20. (at the rate of Rs. 3448/- per quintal for 30092.65 quintals) against which a total sum of Rs. 7,44,73,352.00 was paid to the petitioner in the following matter:

Date of Payment/Nature of Payment	*Amount paid*
27.02.2012	*Rs. 5,05,27,940*
31.08.2012	*Rs. 1,23,09,927*
11.02.2013	*Rs. 70,50,918*
25.050.2019	*Rs. 23,50,366*
3% Service charge deducted by the NAFED	*Rs. 22,34,201*
Total	*Rs. 7,44,73,352*

"

"Agreement dated 10.01.2011.

This deed of agreement made at Lucknow signed on this day of 10-01-2011 and effective from Gold Star Green Seeds (P) Ltd. Kasganj between ***NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA LIMITED****, Lucknow A National Level cooperative Society registered under state cooperative societies Act. 1984, having its registered office at Nafed House, Ashram Chowk, Sidhartha Enclave, New Delhi 110014 represented by (BRANCH MANAGER) Hereinafter referred to as NAFED which*

expression shall wherever the context so admits, mean and includes its successor or successors in office and assigns of the one part and M/s. Gold Star Green Seeds (P) Ltd. Kasganj having its registered office at Kasganj and represented by Shri Subhash Mahewari S/o Shri Ghanshyam Das Hereinafter called the supplier, which expression shall wherever the context so admits, mean and include its legal heirs, representatives, executors, administrators, successors in offices and assigns on the second part.

Whereas Nafed is engaged in the supplies of certified / truthfully labeled / hybrid seed of various crops, viz. cereals, fodder, green manure, oil seeds, pulses etc. planting material/saplings to institutions all over India, directly/indirectly. In order to fulfill the objective Nafed is desirous to have back to back arrangements with suppliers of the above items who may secure orders or participate in the tenders on behalf of Nafed and are in a position to arrange the supplies as per the following terms and conditions:

1. Supplier will participate in the tenders/ orders floated by various institutions for the supply of truthfully labeled, certified and hybrid seeds and planting material / saplings of various agricultural crops viz. cereals, fodder, green manure, oil seeds, pulses, vegetable, flowers and horticulture planting material and agro inputs and on behalf of Nafed the supplier would quote the rates to various institutions in consultation with Nafed. In case rates quoted by supplier are accepted by the Institutions the supplier will arrange purchase order in favour of Nafed and after inspection of the stock by Nafed representative / surveyor which should be strictly as per specification and B.O.S., obtain DC from Nafed for supply of stock. The supplier will obtain the receipt of the stock form the institutions, indicating therein the quantity/ quality of stock/ material supplied, as per tender/ purchase order and submit, the same to Nafed for record and responsibility of the supplier that goods/commodity so supplier are passed by the authorities of the institutions and a certificate to this effect to Nafed that goods commodity Supplier have been accepted as per quality and quantity norms and terms of supply order required by the institution.

2. After arranging delivery of the goods as per terms and conditions of the tenders/orders and arranging delivery of bills of Nafed to institutions, Supplier will take all necessary steps to receive payment in favour of Nafed the institutions within stipulated period.

3. After receiving the payment from the institution, Nafed will release the amount to supplier, after deducting service charges for Nafed which shall vary from item to item (specified herein after) and deductions imposed by the institution on account of shortage, quality cut, late delivery charges, if any or any other expenses.

4. After the supplier gets empanelled with Nafed BRANCH and required agreement with Nafed, is executed, the supplier will be required to separately give a letter of intent to the concerned branch of Nafed, through which it wishes to make supply and to which it wants raise bills in a particular state. A branch of Nafed will generally accept such letters of intern only for the states, in which they are normally operating and they will entertain proposals of other state, only if the local branch of Nafed for that state is not willing or koen to enter into this business.

RESPONSIBILITY OF THE SUPPLER

1. The supplier will provide the interest free performance guarantee of Rs. 5.00 lacs by demand draft in favour of NAFED which would remain with NAFED till the validity of the agreement, depending upon the performance of the supplier in getting and servicing the orders of seed supply on behalf of Nafed. The performance guarantee may be forfeited by NAFED at any point of time without prior intimation to the suppler to recover any outstanding dues or in case at any point of time the performance of the supplier is not found to be satisfactory.

2. The supplier will deposit tender money and security amount with Nafed if any, required by the institution to be deposited before getting tender/order by the Nafed. Nafed will in tum, deposit the required security amount with the institutions (Nafed has right invoke the performance guarantee to make good the losses, if any, suffered on account of the acts of a omission or commission on the part of the suppliers and breach in the terms of present agreement).

3. The supplier shall undertake supply of seed on behalf of NAFED as per the prescribed quality and guidelines of the buyer and shall indemnify NAFED against all losses that be caused on account of action or inaction on part of the supplier. The associate shall be fully responsible to ensure supply of seeds as per the prescribed quality. Nafed will not entertain any complaint from any institution about the quantity, quality of the material with the institution and settle the same in the best interest of both the organization. In case of any defected goods supplier, the supplier will be solely responsible for the same and will also be responsible for meeting the entire legal expenses to be incurred, by Nafed in case of any legal compensation/litigation for any complaint regarding defected/impure goods should be resolved within 6 months time from the date of complaint.

4. If there is any delay in delivering the ordered goods as per the specificatión of the purchase order or any risks emanating due to non delivery of goods in time, supplier will be solely responsible for, same and shall bear all consequences on account of the same.

5. The supplier will not work simultaneously, with any other empanelled company/supplier, for supply of seeds of same crop variety to the same department in a state.

Other Terms and Condition

1. Nafed and the supplier have agreed the and conditions for the supply of particular item/ items on FOR/FOL basis, ie, inclusive of transport cost and all other taxes. expenses duties etc. upto godown of the indenting institution as the case may be.

2. The supplier will certify that the quality and the quantity of the good to be supplied are as per the terms and conditions of the tender/PO. If possible, Nafed's representative will accompany the goods to deliver to the purchaser to ensure that the stock has really landed the godown of the institution. Nafed may appoint a surveyor, if required, for supervision of supplies. The two certificates i.e. from surveyor about the quality/quantity and Nafed's representative about actual stock delivered at the party's godown are important document for processing of the payment to the supplier. The expenses incurred towards surveyor's fee will be bome by the supplier alone.

3. After receipt of the payment form the buyer regarding goods supplied by the supplier. Nafed will release the payment to the supplier after deducting the pre-decided service charges and deduction if any made by the institution on account of quality, shortage and late delivery 3. or any other charges etc.

4. Supplier will ensure that all goods supplied to various institution are in conformity to the specification required by the buyer.

5. Supplier will inform Nafed in writing in advance before participating in any tender of 5. behalf of NAFED.

6. Nafed reserves the right to terminate the contract without assigning any reason within the validity period of agreement by giving on month notice and has aright to appoint one or more supplier/agent for the supply of goods to the same institutions.

7. In case stocks and quality indicated in the purchase order are available with Nafed and supply rates indicated in purchase order are higher that the sale rates of Nafed the supplier shall allow Nafed to supply such items directly to the institution at agreed rates without any intervention of the supplier. In such transaction, supplier is not entitled to any financial benefits.

8. Service Charges:- The service charges to NAFED shall be 3% for seed and 5% for saplings and planting material of the order value of each supply order.

9. In such back-to-back deliveries of stock Nafed will not invest its own money in any manner whatsoever. It is the responsibility of the suppliers to invest their own funds.

10. In case the performance of the supplier is not found to be satisfactory, the empanelment of the suppler may be cancelled by giving one month's notice and the agreement may be terminated accordingly. The performance guarantee may be forfeited by NAFED at any point of time without prior intimation to the supplier to recover any outstanding dues or in case at any point of time the performance of the company is not found to be satisfactory.

11. The guidelines framed by NAFED for supply of seeds form inherent part of this agreement.

12. ARBITRATION :- In case any dispute arises between Nafed and supplier in respect of the supplies of different items on the interpretation and any clause of the present agreement on any subject touching the present agreement, same shall be referred to the Managing Director of Nafed, who is entitled to be the sole arbitrator appoint any official of Nafed at act as arbitrator. The decision of the Managing Director of Nafed or any officer authorized be the Managing Director to act as an arbitrator would be final and binding on both the parties.

All disputes arising out of this agreement shall be subject to jurisdiction of Delhi courts only. The party shall be governed by the arbitration and conciliation Act. 1996. The venue of the arbitration will be Delhi.

13. This agreement is valid for the period of 3 years and can be extended on mutual consent for a period of one year on each occasion.

In witness whereof, the parties hereto have set and subscribed their respective hand and seal on this agreement on the day, month, year first as mentioned in the presence of the following witness:

FOR & ON BEHALF OF SUPPLIER FOR ON BEHALF OF NAFED"

6. It is relevant to clarify here that we raised the issue of territorial jurisdiction of this Court as in fact the supply of Dhaincha Seeds was made to the Nigam/Institution and as per the terms of the agreement, the Nigam/Institution is under obligation to pay the amount of seeds supplied by the petitioner to the NAFED and on receipt of the amount from Nigam/Institution, the NAFED is under obligation to make the payment to the petitioner for the Seeds supplied by the petitioner to the Nigam/Institution situated at State of Bihar.

7. With regard to the issue/point of maintainability of the writ petition at Lucknow, learned counsel for the petitioner submitted that agreement between NAFED and petitioner was executed at Lucknow and in terms of the agreement, the Seeds were supplied to the Nigam/Institution and on account of non-payment of amount due, the right to sue accrued to the petitioner and accordingly, the writ petition at Lucknow is entertainable and maintainable.

8. We took note of arguments raised by the learned counsel for the petitioner as well as pleadings and documents on record.

9. It appears from the record that the agreement dated 10.01.2011 was executed at Lucknow between the petitioner and NAFED and the Dhaincha Seeds were supplied to the opposite party No. 4/Bihar State Beej Nigam Limited, Bihar (Nigam/Institution).

10. From the pleadings and documents on record, which include the agreement dated 10.01.2011 particularly the term No. 2, 3 and the term No. 3 under the head "Other Terms and Conditions", it transpires that right to get the payment of Seeds supplied to Bihar State Beej Nigam, Bihar-opposite party No. 4 in fact has been infringed by the opposite party No. 4-Bihar State Beej Nigam, Bihar, as in absence of making the payment by Nigam/Institution to NAFED, the petitioner would not get the amount of Seeds supplied to Nigam/Institution from NAFED.

11. From the terms of the agreement dated 10.01.2011 particularly term No. 1 and 4, term No. 5 under the head of "Responsibility of Supplier" and pleadings as well as documents on record, it transpires that all the transaction with regard to supply of Seeds took place within territories of State of Bihar.

12. In addition, if there exists a dispute between the petitioner and NAFED, then in view of term No. 12 under the head "Other Terms and Conditions" of the agreement dated 10.01.2011, the same has to be decided through Arbitration and the Court at Delhi alone can entertain any petition with regard to the dispute under the agreement.

13. Taking into account the entire facts of the case, it further transpires that main dispute is between petitioner/supplier and Nigam/Institution, which is situated in the State of Bihar.

14. In *Om Prakash Srivastava vs. Union of India and another,* (2006) 6 SCC 207, it was observed that writ petitioners have to establish that a legal right claimed by them has prima facie either been infringed or is threatened to be infringed

by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.

15. In the case of *Nawal Kishore Sharma v. Union of India, (2014) 9 SCC 329,* in para 16 the Apex Court observed as under:-

"16. Regard being had to the discussion made hereinabove, there cannot be any doubt that the question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limit of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, the petitioner has to establish that a legal right claimed by him has been infringed by the respondents within the territorial limit of the Court's jurisdiction."

16. In *Ex. No. 1387-5234-M Sepoy/D.B./M.T., Chabi Nath Rai vs. Union of India & others,* 1997 (1) UPLBEC 236, a Division Bench of this Court, while considering the question whether the cause of action had arisen at Allahabad on communication of the decision on the representation of the appellant therein, had observed that the 'right to action' and 'cause of action' are two different things. This distinction was earlier considered by a Division Bench of this Court in *Daya Shankar Bharadwaj v. Chief of Air Staff, New Delhi and others,* AIR 1988 Allahabad 36, wherein it was observed:-

"A right of action arises as soon as there is an invasion of right. But 'cause of action' and 'right of action'..... are not synonymous or interchangeable. A right of action is the right to enforce a cause of action (Americal Jurispurdence 2nd Edition Vol.1.) A person residing any where in the country being aggrieved by an order of Government Central or State or authority or person may have a right to action at law but it can be forced or the jurisdiction under Article 226 can be invoked of that High Court only within whose territorial limits the cause of action wholly or in part arises. The cause of action arises by action of the Government or authority and not by residence of the person aggrieved."

17. On the issue of territorial jurisdiction and maintainability of the writ petition before this Court, we have also took note of the observations made by the Full Bench of this Court in the judgment dated 01.05.2020 passed in Writ-A No. 2071 of 2017 and other connected matters. The relevant paras are quoted hereunder:-

"129. Article 226 confers upon the High Court power to issue writs to any person or authority or any Government, within its territorial jurisdiction, and with the insertion of clause (1-A) subsequently renumbered as clause (2), the said power may also be exercised in relation to the territories within which the cause of action, wholly or in part has arisen, notwithstanding that seat of such Government or authority or residence of such person is not within those territories. The use of non-obstante clause under clause (2) clearly manifests that residence of the party is not a relevant consideration for determining the territorial jurisdiction under Article 226.

130. The relief sought by the writ petitioner, though would be one of

the relevant criteria for consideration, but not the sole consideration in this regard. The maintainability, or otherwise, of a writ petition in a High Court would depend on whether the cause of action for filing the same arose, wholly or in part, within the territorial jurisdiction of that Court. The High Court would have jurisdiction if any part of cause of action arises within the territorial limits of its jurisdiction even though the seat of the Government or authority or residence of person against whom direction, order or writ is sought to be issued is not within the said territory.

131. The expression "cause of action" has been understood to be a bundle of facts which are required to be proved. The entire bundle of facts pleaded, however, need not constitute a cause of action as what would be necessary to be proved would be the material facts on the basis of which a writ petition can be allowed. It may also be considered as a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed. The Court would be required to take into consideration all the facts pleaded in support of the cause of action without embarking upon an enquiry as to the correctness or otherwise of the said facts. The facts as pleaded in the petition may be considered, truth or otherwise whereof being immaterial.

132. In legal parlance the expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a Court or a Tribunal; a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain the remedy in Court from another person.

133. The meaning of the expression "cause of action" as distinct from "right of action", as evolved in terms of the precedents, would go to show that a right of action is a remedial right affording a redress for the infringement of a legal right and a right of action arises as soon as there is an invasion of rights whereas a cause of action would refer to the set of operative facts giving rise to such right of action. A person residing anywhere in the country being aggrieved by an order of the Government (Central or State), or authority or person may have a right of action at law but the same can be enforced by invoking the jurisdiction under Article 226 of only that High Court, within whose territorial limits the cause of action wholly or in part arises.

134. The "right of action" being the right to commence and maintain an action is therefore distinguishable from "cause of action" in that the former is a remedial right while the latter would comprise the operative facts giving rise to such remedial right. The former would be a matter of right and would depend upon the substantive law whereas the latter would be governed by the law of procedure.

135. It is, therefore, seen that a "cause of action" is the fact or corroboration of facts which affords a party right to judicial interference on his behalf. The "cause of action" would be seen to comprise: (i) the plaintiff's primary right and the defendant's corresponding primary duty; and (ii) the delict or wrongful act or omission of the defendant, by which the primary right and duty have been violated. The term "right of action" is the right to commence and maintain action or in other words the right to enforce a cause of action. In the law of pleadings, "right of action" can be distinguished from "cause of action" in that the former is a remedial right while

the latter would comprise the operative facts giving rise to such remedial right. The former would be a matter of right and depend on the substantive law while the latter would refer to the bundle of operative facts and would be governed by the law of procedure.

136. A right of action, may therefore, be said to have arisen upon the invasion of primary rights of the person residing anywhere in the country being aggrieved by an act or omission of the Government or authority or a person, but in order to enforce the same, the jurisdiction under Article 226 of the Constitution of only that High Court can be invoked, within whose territorial jurisdiction, on the basis of the bundle of facts, the cause of action can be said to have arisen wholly or in part.

137. The question as to whether any particular facts constitute a cause of action or not has thus to be determined with reference to the facts of each case taking into consideration the substance of the matter rather than the form of action. The cause of action must be antecedent to the institution of the proceedings and before a petition can be entertained the petitioner would be required to demonstrate that one of the essential facts giving rise to the petition has arisen within the territorial jurisdiction of the High Court.

138. The powers to issue directions, orders or writs to any government, authority or person, may be exercised, as per terms of clause (2) of Article 226, by any High Court exercising jurisdiction in relation to the territories within which the cause of action, "wholly or in part", arises. This exercise of power, may be made notwithstanding that the seat of such government or authority or residence of such person is not within those territories.

139. In determining the objection of lack of territorial jurisdiction, the Court must, therefore, take all the facts pleaded in support of the cause of action into consideration without embarking upon an enquiry as to the correctness or otherwise of the said facts. The question of territorial jurisdiction thus must be decided on the facts pleaded in the petition, the truth or otherwise, whereof being immaterial.

140. It may, however, be added as a caveat that if from the averments of the petition, as they are, no part of cause of action can be held to have arisen within the jurisdiction of a High Court, that High Court cannot assume territorial jurisdiction on the ground of residence of the petitioner or the like.

141. The expression "in part" has been held to be comprehensive and includes within its ambit even an infinitesimal fraction of cause of action. The expression "wholly or in part" used under clause (2) of Article 226 would therefore be referable entirely to the facts stated and the grounds set forth in the petition as the cause of action has no relation to the defence set up or the objection raised by the opposite party.

142. In order to invest the High Court with jurisdiction to entertain a petition under Article 226, the transaction in question must be an integral part of the cause of action which must arise within its territorial jurisdiction, and would depend upon the facts of the case and the nature of the order impugned giving rise to the cause of action.

143. Notice may also be had to the fact that Article 226(1) begins with a non-obstante clause and in terms thereof every High Court shall have power "throughout the territories in relation to which it exercises jurisdiction", to issue to any person or authority, including in appropriate cases, any Government, "within those territories" directions,

orders or writs, for the enforcement of any other rights conferred by Part III or for any other purpose. In terms of clause (2) of Article 226 the power conferred by clause (1) may be exercised by the High Court if the cause of action, wholly or in part, had arisen within the territory over which it exercises jurisdiction, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

144. A plain reading of the two clauses of Article 226 makes it clear that a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories.

145. Article 226(1) states that every High Court shall have power, throughout the territorial jurisdiction in relation to which it exercises jurisdiction, to issue directions, orders or writs to any person or authority, including in appropriate cases, any Government, within those territories. The powers so conferred under Article 226(1) have been further amplified with the insertion of clause (1-A), subsequently renumbered as clause (2), which provides that the powers conferred under clause (1) may also be exercised by the High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such powers, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. It provides an expansion to the normal rule of the respondent being sued at his place of residence by providing for exercise of jurisdiction "notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories". The non-obstante clause appearing under clause (2) thus enlarges the scope of jurisdiction which is primarily founded on the ground of cause of action.

146. We may therefore observe that Article 226(1) provides the source of power of the High Court as well as its territorial jurisdiction, whereas Article 226(2) amplifies the jurisdiction in relation to a cause of action by providing that the territorial jurisdiction would be exercisable in relation to the territories within which the cause of action, arises, wholly or in part. The cause of action would include material and integral facts and accrual of even a fraction of cause of action within the jurisdiction of the Court would provide territorial jurisdiction for entertaining the petition.

147. The territorial jurisdiction is to be decided on the facts pleaded in the petition and in determining the objection of lack of territorial jurisdiction the Court would be required to take into consideration all the facts pleaded in support of the cause of action without embarking upon an enquiry as to the correctness or otherwise of the said facts. The question whether a High Court has territorial jurisdiction to entertain a writ petition is to be answered on the basis of the averments made in the petition, the truth or otherwise, whereof being immaterial. The expression "cause of action", for the purpose of Article 226(2),

is to be assigned the same meaning as under Section 20(c) CPC, and would mean a bundle of facts which are required to be proved. However, the entire bundle of facts pleaded, need not constitute a cause of action as what is necessary to be proved are material facts on the basis of which a writ petition can be allowed.

148. In order to confer jurisdiction on the High Court to entertain a writ petition, the Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts constitute a cause so as to empower the Court to decide a dispute which has, at least in part, arisen within its jurisdiction. Each and every fact pleaded in the application may not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts are such which have a nexus or relevance with the lis that is involved in the case. Facts, which have no bearing with the lis or the dispute involved in the case would not give rise to a "cause of action" so as to confer territorial jurisdiction on the Court concerned, and only those facts which give rise to a cause of action within a Court's territorial jurisdiction which have a nexus or relevance with the lis that is involved in that case, would be relevant for the purpose of invoking the Court's territorial jurisdiction, in the context of clause (2) of Article 226.

149. The situs of the office of the respondent would not be relevant for the purposes of territorial jurisdiction in the context of Article 226(2), and a place where appellate or revisional order is passed may give rise to a part of the cause of action although the original order was made at a place outside the said area, and a writ petition would be maintainable in the High Court within whose jurisdiction it is situate, having regard to the fact that the order of the appellate authority may also be required to be set aside since the order of the original authority has merged with that of the appellate authority. In such cases, where a part of a cause of action arises within one or the other High Court, it would be for the litigant who is the dominus litis to have his forum conveniens. In such cases, it would not be wholly correct to say that the litigant chooses a particular Court; the choice, would be by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of that Court, and it would ultimately be upon the Court to find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action.

150. The doctrine of forum conveniens can be invoked only where the Court having jurisdiction decides not to exercise jurisdiction by invoking the doctrine forum conveniens. The invocation of doctrine of forum conveniens or forum non conveniens pre-supposes that the Court refusing to entertain a case on the basis of this doctrine, otherwise has jurisdiction. The argument of forum non conveniens cannot be raised in conjunction with the argument of lack of jurisdiction or forum non competens. The doctrine would be available only in a case where although the Court has jurisdiction but an adequate alternative forum is also available.

151. It may also be added that where a small fraction of cause of action accrues within the jurisdiction of a Court, although it may have jurisdiction in the matter, but the same by itself may not be considered to be a determinative factor compelling the Court to decide the matter on merits and in appropriate cases the

Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

152. The question whether or not cause of action, wholly or in part, has arisen within the territorial limits of any High Court is to be decided in the light of the nature and character of the proceedings and in order to maintain the writ petition, the petitioner would be required to establish that the legal right claimed by him has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction causing him actual injury or threat thereof.

153. The accrual of cause of action having been made an additional ground to confer jurisdiction on the High Court after the Constitution (Fifteenth) Amendment, cause of action would be a relevant and germane factor for determination of the jurisdiction of a High Court under Article 226 and a writ petition can be instituted in a High Court, within territorial jurisdiction of which, cause of action, in whole or in part, arises.

154. As to whether the facts averred by the writ petitioner, in a particular case, constitute a part of cause of action, has to be determined, on the basis of the test whether such facts constitute a material, essential or integral part of the lis between the parties; if it is, it forms a part of cause of action and if it is not, it does not form a part of cause of action. In determining the said question the substance of the matter and not the form thereof has to be considered, and even if a small fraction of cause of action arises within the jurisdiction of the Court, it would have territorial jurisdiction to entertain the petition.

155. In dealing with the cases relating to forces operating under special statutes, as is the case from which the present reference has arisen which pertains to the C.R.P.F. Act, we may take notice of the fact that these special statutes have an inbuilt provision for filing statutory appeals/revisions and representations. In the event the statutory appellate/revisional authority is located beyond the territorial jurisdiction of the Court and the petitioner has availed such remedies, the jurisdiction of the Court cannot be invoked on the ground that the head office of the department is located within the jurisdiction of the Court. From a practical stand point also, this would be a more acceptable view for the reason that records of all the authorities whose jurisdiction might have been invoked during the pendency of departmental proceedings would be available at the offices of the authorities, which would be beyond the territorial limits of the Court.

156. The intent of the Parliament to grant territorial jurisdiction to the High Court within whose jurisdiction the entire or part of cause of action has arisen may be seen to have a nexus to the expeditious disposal of the proceedings. The exercise of jurisdiction under Article 226 would, in our view, take within its ambit remedies which are effective and efficacious.

157. Keeping in mind the objective of expeditious disposal of the proceedings and the need to balance the convenience between the parties to the lis it may be appropriate for the Courts to determine the question of jurisdiction at the very threshold. The doctrine of forum conveniens may be considered while determining the issue of jurisdiction. The petitioner no doubt is the dominus litis but the rights in this regard would be subject to the law of jurisdiction. In a case where the necessary ingredients of the territorial jurisdiction are not satisfied the Court may not assume jurisdiction merely on the ground of the residence. The doctrine of forum conveniens and forum

non conveniens would be a relevant factor for the Court to examine whether the claim should or should not be entertained for the reason that there is another forum which is more appropriate. This doctrine would, however, not be the determinative factor and in a case where no fraction or even an infinitesimal part of the cause of action as arisen within its territorial limits the jurisdiction of the Court may not be invoked.

158. The aforementioned propositions broadly set out the contours with regard to the position of law in respect of the territorial jurisdiction of the High Courts under Article 226 of the Constitution of India. We may add that though an attempt has been made to cover the expanse of the precedents which are available, the discussion in the preceding paragraphs, is by no means exhaustive, in view of wide expanse of the scope and the varying interpretations rendered by the Courts keeping in view the complexities which arise in the interpretation of the scope of the writ jurisdiction of the High Courts."

18. Taking into consideration the facts of the case as also keeping in view the principles regarding cause of action, territorial jurisdiction and forum conveniens, we are of the view that the present writ petition, for payment of due amount, which in fact has to be paid first by the opposite party No. 4-Bihar State Beej Nigam, Bihar to NAFED and thereafter the petitioner can get the same from NAFED, is not maintainable before this Court.

19. For the foregoing reasons, the writ petition is ***dismissed*** being not maintainable before this Court.

20. No order as to costs.

(2020)06ILR A1151
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2018

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 26942 of 2017

Udit Yadav ...Petitioner
Versus
U.P. Sainik School Sarojini Nagar Lko ...Respondent

Counsel for the Petitioner:
Arvind Kumar Srivastava, Dr. V.K. Singh

Counsel for the Respondents:
Lalit Shukla, Devendra Mohan Shukla

(A) Matter of discipline of an educational institution - Constitution of India - limited scope of interference under Article 226 - more res integra - this Court is not just a Court of law, but is also a Court of equity - person who invokes the writ jurisdiction of this Court is duty-bound to place all the facts before the Court without any reservation - well settled that in exercising jurisdiction under Article 226 of the Constitution, this Court always keeps in mind the conduct of the party who is invoking such jurisdiction - If the petitioner does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. Para - 19,23

Teacher of the School made a complaint against the petitioner (student) - Disciplinary Committee of the School, after affording an opportunity of hearing to the petitioner and his father, found that the petitioner was guilty of gross misconduct - Committee took a

lenient view in the matter and recommended that "Transfer Certificate' be issued to the petitioner - recommendation made by the Disciplinary Committee was accepted by the Principal of the School - petitioner deliberately and intentionally concealed material facts and has tried to mislead the Court . Para - 3,22

HELD:- The petitioner has not approached this Court with clean hands. He has not only concealed material facts but has deliberately and intentionally made a false averment. This is highly improper. The writ petition was liable to be dismissed on this ground alone. The Court has, however, considered the merits of the case and even on merits, the petitioner has no case. Para – 31

Writ petition dismissed.(E-7)

List of cases cited:-

1. Prestige Lights Ltd. Vs S.B.I. , (2007) 8 SCC 449

2. K.D. Sharma Vs SAIL , (2008) 12 SCC 481

3. Board of High School & Intermediate Education Vs Bagleshwar Prasad , AIR 1966 SC 875

4. Maharashtra State Board of Secondary and Higher Secondary Education Vs K.S. Gandhi , (1991) 2 SCC 716

5. Varanaseya Sanskrit Vishwavidyalaya Vs Rajkishore Tripathi (Dr) , (1977) 1 SCC 279

6. Chairman, J & K State Board of Education Vs Feyaz Ahmed Malik , (2000) 3 SCC 59

7. Guru Ghasidas University Vs Craig Macleod , (2012) 11 SCC 275

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. The U.P. Sainik School, Lucknow (for short "the School') is affiliated to the Central Board of Secondary Education, New Delhi. The School is run by the U.P. Sainik School Society with the Chief Minister, Uttar Pradesh as its Chairperson. The main aim of the School is to prepare the cadets academically, physically and mentally for entry into the commissioned ranks of the Defence Services through the National Defence Academy.

2. The petitioner was admitted in the School on 30.04.2012 in class VII for session 2012-13. In the year 2018, the petitioner was due to appear in Class XII Board Examination.

3. On 17.08.2017, Sri N.S. Babu, English Teacher of the School made a complaint against the petitioner. The Disciplinary Committee of the School, after affording an opportunity of hearing to the petitioner and his father, found that the petitioner was guilty of gross misconduct. The Committee, however, took a lenient view in the matter and recommended that "Transfer Certificate' be issued to the petitioner. The recommendation made by the Disciplinary Committee was accepted by the Principal of the School and on 18.08.2017 itself the "Transfer Certificate' was issued to the petitioner and it was also uploaded on the website of the school.

4. The last date for submission of examination form for Class XII Board Examination - 2018 was 10.11.2017. On 01.11.2017, just nine days prior to the said date, the father of the petitioner made a representation to the Principal of the School wherein he admitted that the petitioner was out of school for quite some time. It was stated that he was apologetic for the mistake of his son. It was prayed that keeping in view the future of the petitioner, the petitioner be

permitted to appear in the ensuing Board Examination. The said representation contained a note / forward by the Sub Divisional Magistrate, Sarojini Nagar, Lucknow asking the Principal of the School to consider the said representation sympathetically. Relevant portion of the representation is extracted below:

"विषय– कैडिट उदित यादव पुत्र श्री बिजेन्द्र सिंह 3384 ॅभ को इण्टर बोर्ड परीक्षा तथा प्रयोगात्मक परीक्षा में बैठने की अनुमति के सम्बन्ध में प्रार्थना पत्र।

महोदय,

सविनय निवेदन यह है कि प्रार्थी का पुत्र कैडिट उदित यादव उपरोक्त विद्यालय में कक्षा 12 का छात्र है किसी कारणवश विद्यालय के शिक्षक से विवाद हो गया था। *जिस कारण छात्र सैनिक काफी समय से विद्यालय से बाहर है। प्रार्थी अपने पुत्र की गलती के लिए क्षमाप्रार्थी है।*

अतः आपसे विनम्र अनुरोध है कि छात्र सैनिक के भविष्य को ध्यान में रखते हुए बोर्ड परीक्षा में सम्मिलित कराने की अनुमति प्रदान करने की कृपा करेगे।

प्रार्थी आपका व सभी गुरूजनों का सदैव आभारी रहेगा।

प्रार्थी

बिजेन्द्र सिह **F/O** उदित यादव"

(emphasis supplied)

5. Just four days after the making of the said representation, the petitioner has approached this court by means of this writ petition seeking a writ of mandamus directing the Principal of the School to allow him to attend his classes and to permit him to appear in the Board Examination of Class XII as a regular student.

6. Pleadings have been exchanged between the contesting parties. Sri Devendra Mohan Shukla, learned counsel appearing on behalf of the respondent no. 3 states that he does not wish to file any counter affidavit. With the consent of the counsel for the parties the matter has been heard and is being finally disposed of.

7. According to the petitioner the complaint made by Sri N.S. Babu against him was absolutely false. In the writ petition the petitioner has projected himself to be a meritorious student. It is alleged that the work and conduct of the petitioner was always satisfactory and there was no complaint against him. It is on the strength of the categorical statement that there was nothing adverse against the petitioner, except for the false complaint made by Sri N.S. Babu against him, that the petitioner has prayed for permission to attend the classes and appear in the Board Examination as a regular student of the School.

8. In their counter affidavit, the respondent nos. 1 and 2 have denied all the material averments made in the writ petition. It has been inter alia stated that at the time of his admission, the father of the petitioner had signed an agreement which contained a clause to the effect that if at any time it is found that the cadet has involved himself in a serious breach of discipline or has been found repeatedly involving himself in a conduct unbecoming of a cadet in U.P. Sainik School as determined by the school authorities, he will be removed from the school with full penalty; that the averment that except for the incident of 17.08.2017 there is nothing adverse against the petitioner is absolutely false and incorrect; that after due opportunity of hearing to the petitioner and his father the

Disciplinary Committee found that the petitioner was guilty of gross misconduct; that taking a lenient view of the matter a decision was taken to issue "Transfer Certificate' to the petitioner.

9. In the rejoinder affidavit the petitioner has reiterated the averments made in the writ petition.

10. Dr. V.K. Singh, learned counsel for the petitioner has submitted that the petitioner is in the last term of the school and the session is already over and in case the petitioner is not permitted to fill the examination form of the ensuing Board examination, one full year of the petitioner would be lost which, in turn, would affect the whole career of the petitioner. The counsel submitted that the petitioner would not indulge in any untoward activity in case he is allowed to appear in the examination as a regular student of the school.

11. Per contra Sri Lalit Shukla, the learned counsel for the respondent nos. 1 and 2 has supported the action of the respondents. He has submitted that the petitioner has not only concealed material facts but has made a false averment in the writ petition that the work and conduct of the petitioner was good and, except for the incident of 17.08.2017, there is nothing adverse against the petitioner. In the circumstances, the counsel submitted that the writ petition is liable to be dismissed on this ground alone. The counsel has further submitted that discipline is the most important part of training in the School and the action against the petitioner has been taken in consonance with the principles of natural justice, after due opportunity of hearing to the petitioner and his father and calls for no interference from this Court. The writ petition, according to the learned counsel, is liable to be dismissed with heavy cost.

12. It appears, that the whole unsavoury episode started on 17.08.2017 at about 12.30 hours, when the petitioner is alleged to have abused and assaulted Sri N.S. Babu, English Teacher of the School in the presence of Sri Avi Scott, History Teacher and Sri Sangeet Mishra, Laboratory Assistant. This led to the filing of a complaint by Sri N.S. Babu before the Principal of the School on the same day. The relevant portion of the complaint is extracted below:

"Cadet Udit Yadav School No. 3384 of Class XII-B has committed a shameful criminal offence of assaulting me today in the school campus around 1230 hrs. in front of class VII-B.

Cdt Udit Yadav accousted (sic) me when I was returning after taking class. *The said cadet started hurling abuses and tried to threaten me with serious consequences* on the pretext that I have no right to discipline class VII boys as being a senior most cadet this responsibility comes under him. When I scolded him for behaving in an indiscipline manner, *he said: "I can set you right here and now as you don't know the tradition of the school that senior cadets rule over everybody."* When it was too much for me to swallow I told him to leave the place but instead of leaving the place *he pounced on me and grabbed my shirt and started hitting me,* but thankfully two of my colleagues namely Mr. Avi Scott and Mr. Sangeet Mishra came to my rescue and the violent situation was subsided somehow.

You are hereby requested to take strictest action against the Cdt Udit

Yadav by rusticating him from the school with immediate effect in order to set an example to other cadets and to save this glorious institution from being ruined.

Though the above mentioned action requested by me is being decided with a heavy heart, to save the institution and for larger interest, the action is mandatory."

(emphasis supplied)

13. Looking into the seriousness of the charge, the Principal of the School entrusted the enquiry to the Disciplinary Committee of the School on that very day. On being required, the petitioner appeared before the Committee headed by the Headmaster at about 2 p.m. on 17.08.2017 itself. In the presence of the petitioner, Sri N.S. Babu gave his written statement in support of his complaint, which was confirmed by Sri Avi Scott and Sri Sangeet Mishra. Despite repeated opportunity, the petitioner refused to give his explanation. Sri Brijendra Singh, the father of the petitioner, on being required, appeared before the Committee on 18.08.2017. Sri Brijendra Singh acknowledged the fault of the petitioner. He, however, showed his helplessness in the matter. He, in fact, went to the extent of saying that he had no control over his son. Thereafter, Sri Brijendra Singh left the school. The information of the said incident was also given to Sri Brijendra Pal, an employee of the school and the local guardian of the petitioner. The Committee, after taking into account the evidence on record, came to the conclusion that the petitioner was guilty of gross misconduct. The Committee took into account the past record of the petitioner and then deliberated and discussed the issue and finally concluded that the continuance of the petitioner in the school would neither be conducive to his future nor to the dignity of the school. The Committee, however, instead of recommending rustication of the petitioner from the school, took a lenient view of the matter and recommended that "Transfer Certificate' be issued to the petitioner. The Disciplinary Committee, accordingly, submitted its report dated 18.08.2017 to the Principal of the School. The report is extracted below:

"जांच समिति की रिपोर्ट

1. दिनांक 17 अगस्त 2017 को लगभग 1230 बजे विद्यालय के अंग्रेजी अध्यापक श्री एन0एस0 बाबू के साथ छात्र सैनिक उदित यादव द्वारा मारपीट की घटना के संबंध में प्रधानाचार्य के आदेशानुसार जॉच कमेटी की बैठक प्रधानाचार्य कार्यालय में अपरान्ह 0200 बजे हुई।

2. उक्त बैठक में श्री एन0एस0 बाबू व छात्र सैनिक उदित यादव को बुलाया गया व वयान दर्ज करने की प्रक्रिया आरम्भ हुई। श्री एन0एस0 बाबू ने अपना लिखित बयान/प्रार्थना पत्र दिया जिसमें दो अन्य गवाहो श्री अवी स्कॉट, इतिहास मास्टर एवं श्री संगीत मिश्रा, प्रयोगशाला सहायक ने श्री एन0एस0 बाबू के साथ हुई घटना की पुष्टि की। *छात्र सैनिक उदित यादव को बयान दर्ज कराने के लिए बुलाया गया लेकिन कई बार कहने के बावजूद उसने लिखित बयान दर्ज करने से इंकार कर दिया।*

3. घटना की गम्भीरता को देखते हुए छात्र सैनिक उदित यादव के पिता श्री बिजेन्द्र सिंह को बुलाने का निर्णय लिया गया। उपरोक्त घटना क्रम के चलते प्रशासन के आदेशानुसार जॉच समिति ने दिनांक 18 अगस्त 2017 को पुनः जॉच की कार्यवाही को आगे बढ़ाने के निर्णय के साथ सम्पन्न हुई।

4. *दिनांक 18 अगस्त 2017 को छात्र सैनिक उदित यादव के पिता बिजेन्द्र सिह प्रधानाचार्य कार्यालय में उपस्थित हुए* साथ ही विद्यालय में कार्यरत श्री बिजेन्द्र पाल को भी स्थिति से अवगत कराया गया जो उक्त छात्र के पिता श्री बिजेन्द्र सिंह के परिचित एवं छात्र के स्थानीय अभिभावक भी है। *जब इस घटना में लिप्त होने पर छात्र सैनिक उदित यादव के पिता*

से उनको पक्ष जानने के लिए प्रशासन ने उनसे प्रश्न पूछे जब उनसे इस बारे में कारण पूछा गया तो उन्होने असमर्थता जताते हुए यहा तक कहा कि मेरे पुत्र पर कोई नियन्त्रण नही रह गया है। इस दौरान प्रधानाचार्य कार्यालय में श्री एन0एस0 बाबू एवं जांच समिति की वरिष्ठ सदस्या श्रीमती संगीता सुनील भी उपस्थित थी। इस पर प्रधानाचार्य महोदय ने उनसे कहा कि आप थोड़ी देर बाहर प्रतीक्षा करें। इस विषय पर हम पुनः आप से विमर्श करेंगे।

5. इस बीच जांच समिति ने उदित यादव के पत्रावली का अवलोकर किया। फिर भी बिजेन्द्र सिंह को बुलाया गया। *इस पर पता चला कि वो बिना सूचना किए विद्यालय छोड़ कर चले गए।* प्रधानाध्यापक महोदय ने उनसे फोन से सम्पर्क करने की कोशिश की परन्तु 15–20 प्रयासों के बावजूद उन्होने जानबूझकर प्रधानाध्यापक से सम्पर्क नहीं किया इन विषम परिस्थितियों एव छात्र सैनिक उदि यादव की व्यक्तिगत पत्रावली के अवलोकन के पश्चात जॉच समिति की या सिफारिश है कि उक्त छात्र को विद्यालय में रखना उसके भविष्य एवं विद्यालय की गरिमा दोनो के ही अनुकूल नही होगा।

दिनांक 18 अगस्त 2017

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14. The recommendation made by the Disciplinary Committee was accepted by the Principal of the School and, on 18.08.2017 itself, the "Transfer Certificate' was issued to the petitioner and it was also uploaded on the website of the school.

15. The contention of the learned counsel for the respondents that the petitioner is guilty of concealment of material facts and of making false averments is not without substance.

16. In paragraph 14 of the writ petition the petitioner has categorically stated that his work, conduct and behavior was always satisfactory and nothing adverse was ever communicated to him. This averment of the petitioner has been vociferously refuted by the contesting respondents in paragraph 9 of their counter affidavit. In paragraph 8 of his rejoinder affidavit the petitioner has made a vague denial to the averments made in paragraph 9 of the counter affidavit. Paragraph 14 of the writ petition, paragraph 9 of the counter affidavit and paragraph 8 of the rejoinder affidavit are extracted below:

PARAGRAPH 14 OF THE WRIT PETITION

"14. That the work, conduct and behavior of the petitioner was always satisfactory and there was never any adverse/complaint against him during the entire life of student in the institution."

PARAGRAPH 9 OF THE COUNTER AFFIDAVIT

"9. that the contents of paragraph 8 of the writ petition are misconceived and are denied. It is submitted that Cadet Udit Yadav has been involved in various acts of indiscipline in the past out of which some of them are as follows :

a. Cdt was counseled in presence of his father Mr. Bijendra Singh Yadav for act of indiscipline on 02 February, 2013. A copy of the counseling report dated 02 February, 2013 is annexed as Annexure CA-3 to this affidavit.

b. Cdt was counseled in present of this father on 06 July, 2013 and was suspended for seven days. Copy of suspension order dated 06 July, 2013 is being annexed herewith as annexure CA-4 to this affidavit.

c. Cdt was involved in yet another act of indiscipline case and was suspended from the school from 17 July, 2016 to 27 July 2016. Copy of the suspension order dated 17 July, 2016 to

27 July, 2016 is being annexed herewith as annexure CA-5 to this affidavit.

d. Mr. Bijendra Singh Yadav father of Cdt Udit Yadav himself gave a written statement on 22 October 2016 by giving complete liberty to the school administration about the decision regarding his son and his misconduct. True copy of the letter dated 22 October, 2016 is being annexed herewith as Annexure CA-6 to this affidavit.

e. Cdt was caught using unfair means during the school exam on 07 February, 2017 and later on accepted his mistake in writing. True copy of the letter of acceptance for his mistake in exam is annexed herewith as Annexure CA-7 to this affidavit.

f. Mr. Bijendra Singh Yadav himself was so fed up that he requested for issuing of Transfer Certificate of his ward on 28th March, 2017. However, again Mr. Bijendra F/o Cdt Udit Yadav bagged for not to issue TC and him one more chance. Hence keeping his father's request school did not issued TC at that time. True copy of the letter dated 28th March, 2017 is being annexed herewith as Annexure CA-8 to this affidavit.

g. Mr. Suresh Kumar Singh father of Cdt Rudra Pratap Singh of Class IX lodged complaint against Cdt Udit Yadav for his misbehavior and physical abuse towards junior cadets. Then Cdt was suspended w.e.f. 10th July, 2017 to 16th July, 2017. On the basis of this application a board of enquiry was constituted on 11 July, 2017. True copy of the order containing constitution of the Board of inquiry on 11 July, 2017 is being annexed herewith as Annexure CA-9 to this affidavit. It is further submitted that inquiry committe submitted its report and same is annexe as Annexure CA-10 to this affidavit."

PARAGRAPH 8 OF THE REJOINDER AFFIDAVIT

"8. That the contents of para 9 of the counter affidavit stated in the manner are not admitted hence denied being false, incorrect and misconceived. In reply thereto reiterating the averments made in para 8 of the writ petition it is submitted that some incident, which is not appropriate to apprised this Hon'ble Court, took place with the petitioner in the year 2013 and since then the teaching and non-teaching staff as well as the classmate students were harassing the petitioner which continued till March 2017 and in this circumstances, the father of the petitioner was pressurized for taking the Transfer Certificate of the petitioner but on the several requests, the petitioner was again allowed to continue in the class/school but his harassment was not stopped and the petitioner has been ousted from the school in mid of the session 12th class, when the board examination is near, in most arbitrary and illegal manner whereas the opposite party No. 2 was required to allow the petitioner to attend the class for only about 06 months to complete his intermediate examination i.e. last session of the school but the petitioner has been ousted from the school without adopting the due procedures and also without issuing any transfer certificate. In such situation, where the petitioner will continue his study in mid-session is not understood and his last and final year will be lapsed. Thus the future career of the petitioner has not been considered by the opposite parties in ousting the petitioner."

17. In paragraph 8 of the rejoinder affidavit, the petitioner has made a vague

denial to the averments made in paragraph 9 of the counter affidavit. It is settled that a vague denial is no denial. That apart, in the representation dated 01.11.2017, the father of the petitioner has admitted the act of indiscipline on the part of the petitioner and has tendered his apology for the same. But, in the writ petition the petitioner has repeatedly alleged that the complaint made by Sri N.S. Babu was false. It is, thus, apparent that the petitioner has made a false averment.

18. The inquiry against the petitioner was held on 17.08.2017 and 18.08.2017 and according to the contesting respondents the "Transfer Certificate' was issued to the petitioner on 18.08.2017 and the same was also uploaded on the website of the school. Admittedly, the petitioner has not been permitted to attend the classes since then. The last date for filling the examination form for Class XII Board Examination - 2018 is 10.11.2017 and the petitioner has approached this Court on 05.11.2017, just five days before the last date, with a categorical averment in the writ petition that the complaint made by Sri N.S. Babu, the English teacher, was false and that except for the incident of 17.08.2017 there was nothing adverse against the petitioner. This false averment, it appears, was made with a view to gain sympathy of the Court and to somehow get an order for filling up the examination form.

19. In exercising power under Article 226 of the Constitution, this Court is not just a Court of law, but is also a Court of equity. A person who invokes the writ jurisdiction of this Court is duty-bound to place all the facts before the Court without any reservation. It is well settled that in exercising jurisdiction under Article 226 of the Constitution, this Court always keeps in mind the conduct of the party who is invoking such jurisdiction. If the petitioner does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits.

20. In *Prestige Lights Ltd. v. State Bank of India (2007) 8 SCC 449*, the Apex Court has observed that the said rule has been evolved in larger public interest to -

"deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

(emphasis supplied)

21. In *K.D. Sharma v. Steel Authority of India Limited, (2008) 12 SCC 481*, the Apex Court reiterated that the petitioners approaching this Court under Article 226 of the Constitution must disclose all the material facts without any qualification. It was held as under:

"38. 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 Commrs. [(1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)] is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". *Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits.*

If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."(emphasis supplied)

22. From the narration of the facts above, it is apparent that the petitioner has deliberately and intentionally concealed material facts and has tried to mislead the Court. The writ petition is liable to be dismissed on this ground alone.

23. Even on merit, the writ petition is liable to be dismissed. It is no more res integra that in the matter of discipline of an educational institution, the scope of interference under Article 226 of the Constitution is very limited.

24. In *Board of High School & Intermediate Education v. Bagleshwar Prasad, AIR 1966 SC 875* the Apex Court has held as under:

"12. .... In dealing with the validity of the impugned orders passed by Universities under Article 226, *the High Court is not sitting in appeal over the decision in question;* its jurisdiction is limited and though it is true that if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. *Enquiries held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the Tribunals must scrupulously follow rules of natural justice; but it would, we think, not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary courts of law."*

(emphasis supplied)

25. In *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi, (1991) 2 SCC 716* the Apex Court reiterated that while exercising powers under Article 226 of

the Constitution, this Court does not act as an appellate authority. The Apex Court held:

"10. .... We remind ourselves that while exercising the powers, under Article 226 or Article 136 of the Constitution, by the High Court or of this Court, *we are not sitting as a court of appeal on the findings of facts recorded by the Standing Committee (domestic enquiry body), nor have power to evaluate the evidence as an appellate court and to come to its own conclusions.* If the conclusions reached by the Board can be fairly supported by the evidence on record then the High Court or this Court has to uphold the decision, though as appellate court of facts, may be inclined to take a different view."

(emphasis supplied)

26. In *Varanaseya Sanskrit Vishwavidyalaya v. Rajkishore Tripathi (Dr), (1977) 1 SCC 279* the Apex Court observed that

"in a matter touching either the discipline or the administration of the internal affairs of a university, *courts should be most reluctant to interfere."*

(emphasis supplied)

27. Again in *Chairman, J & K State Board of Education v. Feyaz Ahmed Malik, (2000)* 3 SCC 59 the Apex Court reiterated that -

"In matters concerning campus discipline of educational institutions and conduct of examinations the duty *is primarily vested in the authorities in charge of the institutions. In such matters the court should not try to substitute its own views in place of the authorities concerned nor thrust its views on them.* That is not to say that the court cannot at all interfere with the decisions of the authorities in such matters. The court has undoubtedly the power to intervene to correct any error in complying with the provisions of the rules, regulations or notifications and to remedy any manifest injustice being perpetrated on the candidates."(emphasis supplied)

28. In Guru Ghasidas University v. Craig Macleod, (2012) 11 SCC 275 the Apex Court has observed that the -

"maintenance of discipline in the University is equally important for a conducive academic environment and that the larger interests of the academic community are more central than the individual interests of a student."

(emphasis supplied)

29. In the present case, no animus is suggested and no malafides have been pleaded. Furthermore, the petitioner has not made any allegation of procedural irregularity or violation of the principles of natural justice. Admittedly, in the enquiry held against the petitioner, he as well as his father were afforded an opportunity of hearing. Despite opportunity the petitioner did not contest the charge levelled against him. In the representation dated 01.11.2017, the father of the petitioner has admitted the act of indiscipline on the part of the petitioner and has tendered his apology. The decision to issue "Transfer Certificate' has been taken by the school after due deliberation and after taking into account the past record of the petitioner.

30. As stated above, the main aim of the School is to prepare the cadets for

entry into the commissioned ranks of the Defence Services. Thus, discipline being the most important part of training, one act of gross misconduct on the part of a cadet warrants major punishment, including rustication from school. However, despite the repeated indulgence of the petitioner in various acts of indiscipline and his gross misconduct with Sri N.S. Babu, the English teacher, on 17.08.2017, the contesting respondents have taken a lenient view and instead of rusticating the petitioner from the school have decided to issue "Transfer Certificate' to him. That being so, no interference, whatsoever, is called for.

31. Moreover, in the case at hand, the petitioner has not approached this Court with clean hands. He has not only concealed material facts but has deliberately and intentionally made a false averment. This is highly improper. The writ petition was liable to be dismissed on this ground alone. The Court has, however, considered the merits of the case and even on merits, the petitioner has no case.

32. For the foregoing reasons, the writ petition deserves to be dismissed and is accordingly dismissed.

33. This Court was inclined to saddle the petitioner with exemplary cost but, keeping in view the fact that the petitioner is a student, the Court has refrained itself from doing so.

(2020)06ILR A1161
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.12.2017

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 23671 of 2017

Ratna Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Tung Nath Tiwari, Ashish Kumar Singh, Lohitaksha Shukla

Counsel for the Respondents:
C.S.C., Savitra Vardhan Singh

(A) Constitution of India - Article 226 - seeking a direction to the University of Lucknow - to provide admission to the petitioner in the LL.M. - averment regarding non issuance of 'Attendance Slip' in the rejoinder affidavit appears to be an afterthought as the same is conspicuously missing in the writ petition - Vague denial is no denial. Para-12

Petitioner appeared in the written examination conducted by the University for admission to the two year Master of Law (LL.M.) course - reported for counselling - asked by some official to wait in the side room - would be called upon when her turn comes - kept waiting in the side room till 2 p.m., but she was not called for counseling - Neither in the writ petition, nor in the rejoinder affidavit, has the petitioner disclosed the name of the official who had asked her to wait in the side room. - With regard to 'Attendance Slip', the petitioner in her rejoinder affidavit, for the first time, has vaguely alleged that "even though the petitioner had reached the counseling venue in time, no attendance slip was ever provided to her". Para - 3,12

HELD:- In the present case, no animus is suggested and no malafides have been pleaded. The petitioner is a law graduate. She was well aware about the counselling procedure. The contention of the petitioner that she reported for counseling at 9.30 a.m. sharp and kept sitting in the side room till 2

p.m., on the asking of some official, waiting for her turn, and that too without obtaining an attendance slip, is too naive for acceptance.Para – 13

Writ petition dismissed.(E-7)

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. This writ petition under Article 226 of the Constitution has been filed on 03.10.2017, more than two months after the classes of LL.M. (2017-2018) course have started, seeking a direction to the University of Lucknow (for short "the University') to provide admission to the petitioner in the said course.

2. The learned Standing Counsel, appearing on behalf of the State-respondent, states that he does not wish to file any counter affidavit. Pleadings have been exchanged between the contesting parties. With the consent of the counsel for the parties the matter has been heard and is being finally disposed of at the admission stage itself.

3. The petitioner appeared as a general candidate in the written examination conducted by the University for admission to the two year Master of Law (LL.M.) course (2017-2018). The petitioner secured 5th Rank in the merit list. As per the schedule, counselling for open category for admission to the said course was to be held on 18.07.2017, whereas counselling for OBC/SC/ST category was to be held on 19.07.2017. According to the petitioner, she reported for counselling on 18.07.2017 at 9.30 a.m. sharp in the Commerce Faculty, New Building where she was asked by some official to wait in the side room and that she would be called upon when her turn comes. It is alleged that the petitioner kept waiting in the side room till 2 p.m., but she was not called for counselling. Thereafter, it is alleged, the petitioner met the Dean Faculty of Law and put forth her grievance. Having received no response, the petitioner is alleged to have made a representation to the Dean, the Vice Chancellor and the Officer-in-charge of the Admission Committee. The following day, it is alleged, the father of the petitioner met the Vice Chancellor personally, who assured him of a favourable action. Having failed to elicit a favourable response, the petitioner is now before this Court.

4. In their counter affidavit, the respondent nos. 2 and 3 have denied all the material averments made in the writ petition. It has been inter alia contended that the petitioner had reported for counselling after all the seats of her category had been filled up; that as per the Counselling Guidelines candidates reporting late have no claim if the seats are filled up; that the entire admission process was completed in the month of July, 2017 and the classes of LL.M Course started from 01.08.2017.

5. In her rejoinder affidavit, the petitioner has reiterated the averments made in the writ petition.

6. Shri Lohitaksha Shukla, the learned counsel for the petitioner has vehemently submitted that the petitioner had secured 5th rank in the written examination and she had reported for counselling in time. He submits that the action of the University in denying admission to the petitioner is absolutely arbitrary.

7. Per contra, Shri Savitra Vardhan Singh, learned counsel for respondent nos. 2 & 3 has submitted that by the time the petitioner reached the counselling venue, the reporting time was over and as

such the petitioner cannot claim admission to the course in question.

8. The Counselling schedule of 18.07.2017 and the relevant part of the General Counselling Guidelines to which the attention of this Court was drawn by Shri Savitra Vardhan Singh are extracted below:

Counselling Schedule
July 18, 2017

List	**Open Rank**		**Reporting Time**
Subcategory DP Selected	401		9:30 AM
List	**Open Rank From**	**Open Rank To**	**Reporting Time**
Open Selected	1	23	9:30 AM
List	**Open Rank From**	**Open Rank To**	**Reporting Time**
Subcategory DP Select	541623		11:30 AM
List	**Open Rank From**	**Open Rank To**	**Reporting Time**
Open Waiting 12.30 PM	24	40	12:30 PM
Open Waiting	41	60	2.30 PM

UNIVERSITY OF LUCKNOW

LUCKNOW POST GRADUATE ADMISSIONS 2019

General Counselling Guidelines

DETAILS OF STEPS PHASE

1 Reporting (In the Department)

• Candidates will be required to report for counselling in the Department where the course is being run on the designated date and time slot only.

o Reporting would open for only 30 minutes from the time the rank has been called.

o Candidates reporting late for any reason will not be considered for counselling during that session. However they may be considered in the subsequent session if seats are available.

o Since seats would be allotted on the basis of rank of candidates who have reported for counselling within the stipulated time, candidates reporting late will have no claim if seats of higher choice are filled up.

(emphasis supplied)

GENERAL INFORMATION

• *Candidates are advised to go through the counselling procedure and follow the guidelines strictly.*

• The cut-offs will be declared on the basis of open rank for the OPEN seats while for OBC, SC and ST candidates these will be declared on the basis of their category rank.

• Only candidates whose ranks are within the cut-off range for which the counselling is going on will be allowed to enter the counselling premises. Parents and Guardians are requested not to try to enter the premises.

• Please follow the given time schedule and ensure that you come according to the time slot allotted for your rank.

• A list regarding information about the reporting venue (Phase1) and fee submission venue (Phase 2) will be released separately.

• Candidates have to first report at the reporting venue and after completing all the formalities of Phase 1

have to go to the designated venue for Phase 2 of the counselling. Both Phase 1 and Phase 2 have to be completed on the same day.

• Candidates should fulfil all eligibility conditions on the day of counselling.

(emphasis supplied)

9. It is not in dispute that counselling is a continuous process and the terms and conditions of counselling are binding upon the parties. As per the General Guidelines, the candidates reporting late for counselling could not claim admission, if the 4 seats of their category were filled up. Thus, the only question for consideration in this case is as to whether in the facts and circumstances of the case, the petitioner is entitled to admission in the course under consideration.

10. Admittedly, as per her rank in the entrance examination, the petitioner was to report for counselling on 18.07.2017 at 9:30 a.m. at the counselling venue. According to the petitioner, she reported for counselling at 9:30 a.m. sharp at the counselling venue where on the asking of some official, she kept waiting in the side room till 2 p.m. for her name to be called for counselling. This averment of the petitioner has been vociferously refuted by the contesting respondents in their counter affidavit. Paragraph 6 and 7 of the writ petition, paragraph 10, 11, 12, 14 and 15 of the counter affidavit and paragraph 14 of the rejoinder affidavit being relevant are being extracted below:

PARA 6 AND 7 OF THE WRIT PETITION

"6. That it is also relevant to mention here that the Petitioner after downloading the information from internet had gone to Lucknow University for counseling and *reported there at 9:30 a.m. sharp in Commerce Faculty New Building and just after reporting there, she was intimated by one of the officials to wait in the side room and she will be called when her turn will come.*

7. *That it is further relevant to mention here that after waiting right from 9:30 till 2 p.m. on 18.07.2017 when the name of the Petitioner was not called for counselling, she was constrained to approach Deen Faculty of Law and ventilated her problems but was of no use.* Consequently, she was constrained to submit a written application to Deen Faculty Of Law, Vice Chancellor, Lucknow University as well as Officer in-charge of Admission Committee on 18.07.2017 itself. However, when her counselling was not conducted, she being disappointed had come back to her residence and spoken to her father explaining all the correct facts and circumstances. True Photostat/Typed Copies of the Applications dated 18.07.2017 submitted to Deen Faculty of Law, Vice Chancellor, Lucknow University & Officer In-Charge LL.M (2017-18) Entrance Examination are collectively annexed herewith as ANNEXURE NO.4 to this Writ Petition."

PARAGRAPHS 10, 11, 12, 14 AND 15 OF THE COUNTER AFFIDAVIT

"10. That it is specifically mentioned that the petitioner reported the counseling venue after all the seats have been filled up as per the schedule of the counseling.

11. That as per issued guidelines for counseling, the candidate was supposed to report at 9:30 AM but the petitioner was absent at that time,

when candidates were called inside the counseling center for reporting and completing the further process of admission LL.M admission.

12. That at around 2:30 pm on 18/07/2017 someone claiming to the brother of the petitioner came with the problem and said that his sister was coming from some place outside Lucknow and her train got late so she could not report on time. By that time all the OPEN seats of LLM course were filled up as the, waiting list candidates
were scheduled for 12:30 PM itself.

* * *

14. That it is also submitted that *the candidates, who have reported at the counseling venue, Attendance Slip to the candidate was provided, on which the authorized person at the reporting counter put his signature, which confirms that the candidate had reported for counseling in time but the petitioner had not reported in time, as per time slot fixed, as such she did not get the Attendance Slip, which itself proves that she failed to report in time for the counseling at the counseling venue,* as the Attendance Slip was given to each and every candidate, who had reported for counseling in time

15. That in view of above mentioned facts and circumstances of the case; it is evidently clear that the petitioner failed to report at the counseling venue as per the time slot provided for counseling to her, she was not considered for selection the LLM course. She had reported at the counseling venue after all the seats have been filled up as such you of the General Counseling Guidelines and time scheduled fix for PG Admissions-2017, Lucknow University, Lucknow for LLM course, petitioner failed to report in time as such she has no claim. *The counseling process was completed in July, 2017 itself and the classes were also started from 01/08/2017 itself. Therefore, no*
relief can be granted to petitioner."

PARA 6 OF THE REJOINDER AFFIDAVIT

6. That the contents of Paras 6 to 15 of the Counter Affidavit so long relate to the date of Counseling, uploading Counseling programme on internet and rankwise details are not disputed. Rest allegations thereof are denied. *In reply thereto it is submitted that the factum of petitioner reporting late for the counseling are denied categorically, emphatically and specifically as being false and baseless.* It is further submitted that the Opposite Parties have concocted a false and baseless story to save their skin as it was only due to the malafide intention of the answering Opposite Parties and there mismanagement as well as callousness, that the Petitioner was never called for counseling even after the reaching the venue at the scheduled time. It is further reiterated that the Petitioner had ventilated her grievance before the Dean Faculty of Law, Vice Chancellor and Admission Committee on 18.07.2017 but despite her complaint, neither any action was taken against the guilty, nor any remedial measures taken by the Dean. *It is also submitted that even though the petitioner had reached the counseling venue in time, no attendance slip was ever provided to her.*

It will not out of place to mention here that Lucknow University is State Law University in which the participants come from all over India and the Counselling programme was uploaded on internet for LL.M. only on 16.07.2017 fixing LL.M. Counselling on 18.07.2017 and providing time of only 30 minutes for reporting of entire list Candidates of Open Category. Further more, even the waiting list

candidates were called for Counselling on the same date and same venue at 12.30 P.M. which establishes the malafide on the part of the concerned authorities mainly to adjust their choice candidates for their vested interests and for that very purpose they have uploaded the contradictory Counselling programme as evident from Annexure CA-I & CA-2 (relevant page 18 of the Counter Affidavit) wherein the venue of counselling has been shown to be New Commerce Building, situated in main campus while the Annexure CA-2 mentions that the counselling shall take place "in the Department where the course is being run."

(emphasis supplied)

11. In the counter affidavit the contesting respondents have categorically averred that the petitioner had reported for counselling after all the seats of her category were filled up. In 7 paragraph 12 of the counter affidavit it has been specifically stated that around 2.30 p.m. someone claiming himself to be the brother of the petitioner came and informed the officials present there that the petitioner was coming from outside and could not report for counselling in time as her train got delayed. Since by that time all the seats of her category were filled up, nothing could be done in the case of the petitioner. In the rejoinder affidavit, except for a vague denial, the petitioner has said nothing more. It is settled law that a vague denial is no denial.

12. Neither in the writ petition, nor in the rejoinder affidavit, has the petitioner disclosed the name of the official who had asked her to wait in the side room. It is not in dispute that all the candidates who had reported for counselling in time were given 'Attendance Slip'. With regard to 'Attendance Slip', the petitioner in her rejoinder affidavit, for the first time, has vaguely alleged that "even though the petitioner had reached the counseling venue in time, no attendance slip was ever provided to her". The averment regarding non issuance of 'Attendance Slip' in the rejoinder affidavit appears to be an afterthought as the same is conspicuously missing in the writ petition.

13. In the present case, no animus is suggested and no malafides have been pleaded. The petitioner is a law graduate. She was well aware about the counselling procedure. The contention of the petitioner that she reported for counseling at 9.30 a.m. sharp and kept sitting in the side room till 2 p.m., on the asking of some official, waiting for her turn, and that too without obtaining an attendance slip, is too naive for acceptance.

14. In view of the discussion made above, there is no merit in the writ petition. The writ petition, accordingly, stands dismissed.

15. No order as to cost.

(2020)06ILR A1166
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.06.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 4528 of 2010
connected with
Misc. Single No. 367 of 2012 & Ors.

C/M Motilal Memorial Society...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dr. L.P. Mishra, Prasant Sigh Atal, Ramesh Kr. Singh, Ramesh Pandey, Sarvesh Kumar Dubey, Sharad Pathak,

Uttam Kr. Srivastava, Vinod Kr. Singh, Virendra Singh Chandel, Vivek Raj Singh

Counsel for the Respondents:
C.S.C., Anupam Mehrotra, Apoorva Tiwari, M.B. Singh, Prasant Singh, Sandeep Dixit, Shree Prakash Singh, Vikas Vikram Singh

(A) Election to the Society - Societies Registration Act of 1860 - Section 25 - Disputes regarding election of office bearers - Rule 12(1)(2),(3) –

A dispute of Motilal Memorial Society, the parent Society - Motilal Memorial Society (hereinafter referred to as "the Society') was brought into being by Former Chief Minister of the State of U.P., Sri Chandra Bhanu Gupta along with other like minded people as an Educational and Charitable Society - Society has vast resources and runs 13 Institutions in the State. Para – 2

HELD:- Since the Society runs several Educational and Charitable Institutions and there is great animosity generated amongst the members of the Society due to repeated litigations, it would be appropriate that this Court constitutes a Committee of respected and responsible citizens to look after the affairs of the Institutions run by it . A Committee of two Members only shall not be able to discharge the responsibility of running the Society and its Institutions in the period during which the elections to the various constituents of the Governing Council are held and new office bearers take charge. I, therefore, nominate four persons as Members of the new Interim Committee to look after the affairs of the Society and the institutions, namely, employees and staff run by it. Para – 144

Writ petition partly allowed.(E-7)

LIST OF CASES CITED:-

1. N.P. Ponnuswami Vs RO, Namakkal Constituency & ors. , AIR 1952 SC 64
2012 (11) SCC 531

2. Umesh Chandra & anr. Vs Mahila Vidyalay Society & ors. , 2006 (24) LCD 1373

3. Satyavart Sidhantalankar Vs The Arya Samaj , 1946 Bombay Law Reports 341

4. Shanti Sarup Vs Radhaswami Satsang Sabha, AIR 1969 Allahabad 248

5. Khiri Ram Gupta & anr. Vs Nanalal J. Parekh, AIR 1964 Patna 114

6. Sunni Central Board of Waqfs Vs Sri Gopal Singh Visharad , 1990 LCD 417

7. Puran Singh Vs St. of Punja , 1996 (2) SCC 205 1974(2) SCC 706

8. Babubhai Muljibhai Patel Vs Nandlal Khodidas Barot & ors. , (1974) 2 SCC 706

9. St. of U.P. & ors. Vs Dr. Vijay Anand Maharaj , AIR 1963 SC 946

10. Commissioner of Endowments & ors. Vs Vittal Rao & ors., (2005) 4 SCC 120

11. Sardar Amarjit Singh Kalra (dead) by Lrs. & ors. Vs Pramod Gupta (Smt.) (dead) by Lrs. & ors., (2003) 3 SCC 272,

12. Jaladi Suguna (deceased) through LRs. Vs Satya Sai Central Trus & ors., AIR 2008 SC 2866

13. Balwant Singh (dead) Vs Jagdish Singh &ors. , (2010) 8 SCC 685

14. Sunni Central Board of Waqfs Vs Sri Gopal Singh Visharad , 1990 (8) LCD 417

15. Taff Vale Railways vs. Amalgamated Society of Railway Servants , 1901 (1) QB170

16. Taff Vale Railway Corporation Versus Amalgamated Society of Railway Servants , 1901 AC 425

17. Satyavrata Siddhantalankar Versus Arya Samaj , Bombay AIR 1945 Bombay 516

18. Navdeep Bhajan Ashram Versus Commissioner Navdeep Municipality , AIR 1959 Calcutta 361

19. Shri Sant Sadhguru Janardhana Swamy Moin Giri Maharaj. V State of Maharashtra , 2001 (8) SCC 509

20. Shafi K. Joseph Versus V. Vishwanath & Others , 2016 (4) SCC 429

21. A.R. Antulay Vs. R.S. Nayak and another , 1988 (2) SCC 602

22. Ratan Kumar Solanki versus State of U.P., 2010 (1) UPLBEC 369

23. Rajveer Singh versus State of U.P. and others , Special Appeal No.1380 of 2008

24. Jagdambika Prasad Pandey vs. State of U.P. and others, 2019 SCC Online All 4195

25. K. Venkatachalam vs. A.Swamickan and others , (1999) 4 SCC 526

26. North Eastern Railway Administration Gorakhpur vs. Bhagwaan Das , 2008 (8) SCC 511

27. Pirgonda Hongonda Patil vs. Kalgonda Shidgonda Patil and others , (1957) SCR 595

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

1. Heard Dr. L.P. Mishra, Advocate, assisted by Sri Sarvesh Kumar Dubey, Advocate and Sri Vivek Raj Singh, learned Senior Advocate, for the petitioners in Writ Petition No.4528 (M/S) of 2010, Writ Petition No.367 (M/S) of 2012, in Writ Petition No.430 (M/S) of 2012 and Sri Prashant Chandra, learned Senior Advocate, assisted by Sri Kartikey Dubey for the private respondents- Vimal Kumar Sharma (now Dead) and some of the members of the Society who have filed an application for dismissal of the aforesaid writ petition. Sri Madan Mohan Pandey, learned Additional Advocate General assisted by Sri Sashank Bhasin, appears for the State-respondents.

2. This bunch of four petitions have been filed relating to a dispute of Motilal Memorial Society, the parent Society situated at Motimahal, Rana Pratap Marg, Lucknow. Motilal Memorial Society (hereinafter referred to as "the Society') was brought into being by Former Chief Minister of the State of U.P., Sri Chandra Bhanu Gupta along with other like minded people as an Educational and Charitable Society. The Society has vast resources and runs 13 Institutions in the State.

As per the Bye-laws of the Society, detailed reference of which shall be made at the appropriate place. A Governing Council of 17 members, 13 of whom being Foundation/Life Members, and the rest four being elected, act as the Committee of Management of the Society. The main office bearers of the Society are the President, a Foundation Member, who also acts as the Chief Executive Officer, a Vice President, an Honorary General Secretary, who also is a Foundation Member, along with a Joint Secretary and Treasurer. The Committee of Management is elected from amongst the members of the Governing Council and its tenure is of three years or till such time that the newly elected Committee of Management takes over charge. The last undisputed election of the office bearers took place on 22.7.2005.

3. In the election held on 22.7.2005, Vishnu Bhagwaan Agarwal was elected as General Secretary, Vimal Kishore Sharma was elected as Vice President and

Nagendra Nath Singh was elected as President of the Society.

4. Before such elections were finalized one Dr. Ram Krishna, who was dissatisfied with the process of election, filed **Writ Petition No.3740 (MS) of 2005**: Dr Ram Krishna versus Registrar, Firms, Societies and Chits, Lucknow and two others, which was dismissed by this Court on 7.7.2005. While dismissing the writ petition, the Court had observed that the petitioner was free to approach the Registrar to exercise his power under Section 25(2) of the Act, who would then take appropriate action in the matter. Dr. Ram Krishna moved a representation before the Registrar on 3.8.2005. The Registrar invoked the provisions of sub-section (2) of Section 25 of the Act and nominated the Deputy Registrar to act as an Election Officer for holding the elections of the Governing Council of the Society. This order was issued in ignorance of the fact that election had already taken place on 22.7.2005.

5. The General Secretary, Vishnu Bhagwaan Agarwal sent a letter to the Registrar, informing him about the meeting of the Governing Council held on 22.7.2005 and election of new office bearers and requested for cancellation of the order dated 3.8.2005. The Registrar on receiving the representation dated 12.8.2005 of the General Secretary Vishnu Bhagwaan Agarwal, after due verification, was satisfied about the legality of the elections held on 22.7.2005 and of the newly constituted Governing Council. Consequently, the Registrar withdrew the order dated 3.8.2005 by the order dated 8.9.2005.

6. Dr. Ram Krishna filed a regular suit registered as Regular Suit No.603 of 2005 for declaration and permanent injunction in the Court of Civil Judge (Senior Division), Lucknow. The Society was represented through its General Secretary Vishnu Bhagwaan Agarwal. Neither the Registrar or the Deputy Registrar whose actions, nor the President and other office bearers of the Society, whose election was being challenged, were impleaded as defendants in this Suit. Along with the Suit, an application for Temporary Injunction was moved for restraining the defendants from implementing the decisions of the Governing Council taken on 22.7.2005 and 14.8.2005 till valid elections take place under the direction of the Registrar dated 3.8.2005. Written statement as well as objection to the application for Temporary Injunction was filed on behalf of the Society by Vishnu Bhagwaan Agarwal.

7. During pendency of the said suit by Dr. Ram Krishna, the Governing Council was called for a meeting through notice dated 10.3.2007 by the General Secretary, who substituted the original 27 items of the Agenda approved by the President by a list of 38 items without the prior approval of the President Nagendra Nath Singh. On 30.5.2007, Nagendra Nath Singh issued a notice to Vishnu Bhagwaan Agarwal regarding several acts of forgery done by him for personal benefit at the cost of the Society and the fraudulent activities of his having been noticed, he was asked to submit his reply. The notice dated 30.5.2007 was sent through registered post.

8. Vishnu Bhagwaan Agarwal managed to hold a meeting in the meanwhile where Nagendra Nath Singh was removed as President. Nagendra Nath Singh approached the Registrar against such action. After the Registrar passed the order dated 7.7.2007, cancelling the

proceedings of the meeting held on 27.4.2007 and 19.5.2007 in regard to election of new President in place of Nagendra Nath Singh, and declaring that the Committee registered earlier in his office on the election held on 22.7.2005 was valid for the remaining term; Vishnu Bhagwaan Agarwal, the Secretary of the Society preferred a Writ Petition bearing No.3299 (MS) of 2007: Motilal Memorial Society and others versus State of U.P. and others, challenging the order passed by the Registrar on 7.7.2007. On 10.7.2007, this Court was pleased to stay the implementation of the order dated 7.7.2007.

9. Nagendra Nath Singh challenged the interim order dated 10.7.2007 in Special Appeal No.615 of 2007. On 17.7.2007, the aforesaid Special Appeal was disposed of finally, restraining the opposite party nos.4 and 5 of the Special Appeal to take any policy decision relating to the financial and other interests of the Society. A request was made to the learned Single Judge to decide the writ petition expeditiously.

10. Despite service of notice on Vishnu Bhagwaan Agarwal, Vimal Kumar Sharma and Narsingh Narain Tewari, they failed to reply to the notice and were issued two reminders on 5.2.2008 and 1.3.2008 again by registered post. Ultimately on 15.3.2008, in a meeting of the Governing Council, a resolution was passed, expelling opposite party nos.4, 5 and 6 from Foundation Membership of the Society in exercise of power under Rule 10(1)(d) and 10(1)(e) and Rule 10(2).

11. This Court dismissed Writ Petition No.3299 (MS) of 2007 filed by Vishnu Bhagwaan Agarwal by its order dated 15.2.2008. The Court was pleased to observe that the removal of Nagendra Nath Singh from the office of the President in exercise of power under Rule 23(b) of the Rules of the Society, which relates to reduction of term coupled with the fact that the decision relating to removal of Nagendra Nath Singh was not in the Agenda of the meeting circulated on 27.4.2007, was in utter disregard of the directions issued by the President of the Society. The Court affirmed the order passed by the Registrar. This Court observed that it was irrelevant to consider whether power under Sections 24 or 25 of the Act could have been exercised by the Deputy Registrar. If the order passed by the Deputy Registrar was cancelled by the Court, it would amount to putting the seal of the High Court over the illegal action of certain members of the Society through meeting dated 24.4.2007.

12. After the dismissal of the writ petition filed by Vishnu Bhagwaan Agarwal on 15.2.2008, Vishnu Bhagwaan Agarwal entered into a collusive compromise with Dr. Ram Krishna in order to frustrate the judgment of this Court dated 15.2.2008 and the counsel for the two parties made a statement before the Civil Judge (Senior Division) Lucknow that it had been agreed upon between the parties that an order be passed, directing the Registrar to hold the election in exercise of his power under Section 25(2) of the Act.

13. Nagendra Nath Singh filed Writ Petition No.1336 (MS) of 2008, challenging the order passed by the Civil Judge (Senior Division), Lucknow on 19.2.2008 and also praying for a mandamus commanding the opposite

parties not to interfere in the peaceful functioning of office bearers of the Governing Council of the society duly elected in its meeting held on 22.7.2005.

14. One of the members of the Governing Council Veer Sen also filed Writ Petition No.1902 (MS) of 2007 challenging the order passed by the Civil Court and also the order dated 16.3.2008 passed by the Deputy Registrar, recognizing the result of an alleged election held on 16.3.2008, in purported compliance of Civil Court's judgment and order dated 19.02.2008.

15. Both the writ petitions were connected and heard together and finally allowed by this Court by an order dated 12.8.2008. However, this Court also issued a direction that the office bearers elected on 22.7.2005 shall continue in a routine manner, but for a period of one month only. The Registrar was directed to ensure that the office bearers elected on 22.7.2005 shall conduct the election within a period of one month from the date of the order. In case the Society failed to hold the election within time, the Registrar was to conduct the election of the Society under Section 25(2) of the Act.

16. In the judgment and order dated 12.8.2008, this Court made certain adverse observations against the conduct of opposite party nos.4, 5 and 6 and it was held that they were guilty of committing fraud and resorting to deliberate concealment and misrepresentation of facts in obtaining the order from the Civil Judge (Senior Division), Lucknow. It was further held that Vishnu Bhagwaan Agarwal was not competent to enter into a compromise in the Suit without getting the prior approval of the Governing Council. It was also observed that he was not the General Secretary on the date of the compromise. It is apparent from the judgement and order dated 12.08.2008 that the expulsion of opposite party nos.4, 5 and 6 was within the knowledge of this Court at the time of passing of the order.

17. Taking undue advantage of the directions of the Court that the current office bearers will be competent to hold the elections of the Governing Council within one month from the date of the order, Vishnu Bhagwaan Agarwal started acting as the Secretary of the Society on the basis of election held on 22.7.2005.

18. A Review Petition No.184 of 2008 was filed by Nagendra Nath Singh, mainly on two grounds that Vishnu Bhagwaan Agarwal had started claiming himself to be the General Secretary and was not returning the records of the Society despite his expulsion on 15.3.2008, and also on the ground that the Registrar could only supervise the election that was to be held by the Governing Council of the Society itself as no fault had been found by the Court in the elections held on 22.7.2005. Two more review petitions were filed by Vishnu Bhagwaan Agarwal and Dr. Ram Krishna. Review Petition Nos.161 of 2008, 166 of 2008 and 184 of 2008 were all connected and heard together. This Court passed an interim order on 17.9.2008, restraining the opposite party no.4-Vishnu Bhagwaan Agarwal from claiming himself to be the General Secretary of the Society or to discharge any duty in that capacity.

19. Review Petition No.184 of 2008 was partly allowed on 20.10.2008, while

Review Petition Nos.161 of 2008 and 166 of 2008 were both dismissed. The Court held that the Governing Council under the Chairmanship of the President elected on 22.7.2005 shall conduct election of the different constituents of the electoral body so as to fill up the vacancies of the Foundation Members and four other members. After the elections of different constituents of Governing Council, election shall be conducted for office bearers of the Society. The Registrar or the Deputy Registrar was to supervise the elections to ensure fairness and transparency in the conduct of the election. He was directed not to create any hindrance in the election of the office bearers to be held by the Governing Council. Till the new office bearers took charge, the office bearers, who were elected by the Governing Council on 22.7.2005 would continue to carry out the day-to-day administration of the Society.

20. In pursuance of such directions, three vacancies on the expulsion of Vishnu Bhagwaan Agarwal, Narsingh Narain Tiwari and Vimal Kumar Sharma were filled up on 5.12.2008 by inducting Sri Ram Arun, Kunwar Reoti Raman Singh and Raja Anand Singh, as Foundation Members of the Society. Vishnu Bhagwaan Agarwal, in the meantime, had given an application on 22.12.2008 to the Deputy Registrar to set aside the resolution dated 15.3.2008 on his own behalf, stating that the representation is also on behalf of opposite party nos.5 and 6. The representation was not signed by the opposite party nos.5 and 6. The representation was not being decided. Vishnu Bhagwaan Agarwal therefore filed the Writ Petition No.2353 (M/S) of 2010, concealing the fact that the election had already been held in pursuance of the orders passed by this Court, on 31.12.2008, and without impleading the new office bearers. The said writ petition was disposed of by this Court on 28.05.2010, directing the Deputy Registrar to decide the pending Application of the opposite party nos.4, 5 and 6 in accordance with law.

21. The Deputy Registrar issued notice to Nagendra Nath Singh on 31.3.2009 even before this Court passed the order dated 28.05.2010. Nagendra Nath Singh filed his reply on 29.5.2009, mentioning that by the judgment of this Court on 20.10.2008 passed in Review Petition No.184 of 2008, this Court had observed in Paragraph-23 that even without putting the seal of approval on the resolution dated 15.3.2008, the said resolution had legal sanctity because for each and every business of the Governing Council, the seal of the Court is not required and every act or resolution of the Society or the Governing Council is to take effect in the ordinary course of business. It was alleged further that the Deputy Registrar did not have any power under the Act to decide the validity or otherwise of a resolution passed by the Society, expelling an office bearer in terms of its own bye-laws. The notice issued by the Deputy Registrar to the President of the Society was without jurisdiction. It was also mentioned in the reply that the opposite party nos. 4, 5 and 6 were given sufficient opportunity of hearing, but they did not avail the same. The opposite party no.4, 5 and 6 were acting against the interest of the Society, they were therefore, expelled from the Foundation Membership of the Society.

22. Professor Lal Amrendra, who was elected as General Secretary of the Governing Council on 31.12.2008 was also acting against the interest of the Society. The President on 14.8.2009

suspended him and issued a show cause notice to him on 3.9.2009. Ultimately, he was removed as Foundation Member of the Society on 24.2.2010 and on 4.3.2010, information regarding expulsion of Professor Lal Amrendra was sent to the Registrar.

23. On 24.7.2010, an application for adjournment was filed by Nagendra Nath Singh before the Deputy Registrar, bringing to his notice that a recall application had been filed against the judgment dated 28.5.2010 in Writ Petition No.2353 (M/S) of 2010, which was pending disposal before the appropriate Court. As such, no order be passed deciding the representation of Vishnu Bhagwaan Agarwal in the meanwhile. Through the said application, again an objection was also taken before the Deputy Registrar that he had no jurisdiction at all to take any decision on the expulsion of opposite party nos.4, 5 and 6. Ignoring such request, the Deputy Registrar by the order dated 26.7.2010, set aside the resolution of the Governing Council dated 15.3.2008, expelling opposite party nos.4, 5 and 6 as Foundation Members of the Society. The Writ Petition No.4528 (M/S) of 2010 was filed challenging the order dated 26.07.2010.

24. On the first day of hearing on 11.08.2010 the Court directed the matter to be listed along with the records of the Petition No.1902 (M/S) of 2008, with Writ Petition No. 1336 (M/S) 2008, Writ Petition No.2353 (M/S) of 2010, Writ Petition No.3299 (M/S) of 2007 and Review Petition No.161 of 2000, Review Petition No.166 of 2008 and 184 of 2008.

25. The Deputy Registrar in his order dated 26.07.2010 recorded a finding that in the Proceedings Register, after the proceedings dated 13.06.2007, proceedings dated 26.03.2008 were recorded, and thereafter proceedings dated 18.06.2007 were mentioned, which created a doubt on the genuineness of the Proceedings Register. This act of the Deputy Registrar was designed to give benefit to the Opposite Parties Nos.4, 5 and 6, as the main case of the petitioners before the Opposite Party No.3 after the eruption of dispute on 27.04.2007 was that the Opposite Party No.4 was withholding the records of the Society. The Proceedings Register came into the possession of the genuine office bearers only when a direction was issued by the Court in Review Petition on 17.09.2008. It has been submitted that when the original Proceedings Register was in the possession of Opposite Party No.4 the proceedings of the Governing Council of the Society were being transcribed on separate sheets of paper which were pasted on the original Proceedings Register after the present petitioners secured custody of the Proceedings Register.

26. The second ground taken by the Deputy Registrar was that the Petitioner No.2 did not inform the Deputy Registrar regarding expulsion of Opposite Parties Nos.4, 5 and 6 while submitting his objection on 10.03.2008. It has been submitted that the Petitioner No.2 could not have any knowlege of the future events that were to take place on 15.03.2008. He had no reason to mention the fact of expulsion of the Opposite Parties Nos.4 to 6 on 10.03.2008 as on 10.03.2008 only notice has been issued to

the Opposite Parties to appear before the Governing Council, to submit their replies to satisfy it regarding their innocence.

27. The third ground taken by the Deputy Registrar for declaring the proceedings dated 15.03.2008 as void was that no application for registration of the proceedings dated 15.03.2008 had been made to the Deputy Registrar. It has been submitted that there is no provision under the Societies Registration Act to seek the registration of every proceeding relating to internal matters of the Society by the Deputy Registrar. It has been submitted that the Deputy Registrar had no jurisdiction at all to pass the order dated 26.07.2010. The Opposite Parties Nos.4 to 6 were the persons who were responsible for creating a dispute in the functioning of the Society for their vested interest. This fact was recorded by this Court in its judgement and order dated 15.02.2008 and in its judgements and orders dated 12.08.2008 and 20.10.2008.

28. Applications for dismissal of the writ petition at the threshold as not maintainable was filed on behalf of opposite party no.4-Vishnu Bhagwaan Agarwal and opposite Party No.5-Vimal Kumar Sharma. In the affidavit filed in support of such application, a preliminary objection regarding maintainability of the writ petition, it was submitted that under Rule 12 (1) the affairs of the Society shall be run under the control and supervision of the Governing Council. Under Rule 12 (2) the Governing Council could institute, conduct, defend, compound or abandon any legal proceedings by or against the Society. Under Rule 12 (3) the Governing Council may delegate all or any of its powers to any person. Under Rule 25 the Society could sue or be sued against, in the name of the Honorary General Secretary, or such other person who may be nominated by the Governing Council for the said purpose. In this case the General Secretary had not filed the writ petition. Nagendra Nath Singh was the President and he had not been authorized by the Governing Council to file the writ petition. The Governing Council in its Meeting dated 22.07.2010 attended by 10 members had dis-associated itself from the matter regarding expulsion of three Foundation members that was pending before the Registrar. The minutes of the meeting dated 22.07.2010 have already been filed as Annexure to the paper book.

29. It seems that the Governing Council after due consideration had taken a decision that the President Nagendra Nath Singh should defend the matter of Vishnu Bhagwaan Agarwal as the counsel as a whole had no concern with the case. Writ Petition No.4528 (M/S) of 2010 remained pending disposal. In the meantime, the Deputy Registrar passed an order on 22.11.2011 observing that there were only ten Foundation Members left in the Society, who were Nagendra Nath Singh, Vishnu Bhagwaan Agarwal, Vimal Kumar Sharma. J.R. Tripathi, Justice Umesh Chandra Srivastava (Retd.), Dr. Dauji Gupta, Sri Uma Kant Mishra, Narain Dutt Tiwari, Mata Prasad and Narsingh Narain Tewari; and then observed that election of the Society should be held by the Foundation Members within the period in which it was authorized to hold such election and then to submit its list of members of the Governing Council under Section-4 of the Act.

In compliance of the Order No.1903 dated 22.11.2012, the President

had issued two orders dated 22.11.2011 and 28.12.2011. The order dated 28.12.2011 was circulated to all Foundation Members the same day and the signatures were taken on the said notice. The Registrar was informed by a letter on the same day of the election programme.

30. In the letter dated 22.11.2011 reference was made to the Deputy Registrar's order to hold election and in the order dated 28.12.2011, an election schedule was announced. Firstly, elections were to be held on 15.1.2012 for filling up the vacant posts of Foundation Members. Elections for the elected members of the Society were to be held thereafter on 24.1.2012, and elections of office bearers of the Committee of Management were to be held on 31.1.2012. It has been submitted that once the orders were issued announcing the election programme by the Committee of Management whose tenure was upto 30.12.2012, then the Deputy Registrar did not have any power to pass an order under section 25(2) of the Act.

31. However, after notices were circulated and the Deputy Registrar duly informed on 28.12.2011 of the ensuing election programme, the Deputy Registrar passed the order on 10.1.2012, saying that the Committee of Management had become time barred and then passed the order dated 16.1.2012, freezing the operation of the bank account of the Society by the incumbent office bearers.

32. Writ Petition No.367 (MS) of 2012 against the order of the Deputy Registrar dated 10.01.2012 has been filed, arraying Vishnu Bhagwaan Agarwal, Vimal Kumar Sharma, Narsingh Narain Tiwari and Mata Prasad along with one Rajendra Pratap Singh Rajput, as private respondents. In the order dated 10.1.2012 issued under sub-section (2) of Section 25 of the Act by the Deputy Registrar had announced the schedule of elections of the Society to be held from 19.1.2012 to 9.2.2012 in three stages, ignoring the fact that the President of the Society had already issued election notice on 28.12.2011 under the order dated 22.11.2011 of the Deputy Registrar himself, of first filling up the vacancies of Foundation Members and of elected members of the Governing Council, and then for holding election of Committee of Management of the Society. It has been alleged that the notice of election dated 28.12.2011 had been duly served upon all Foundation Members personally, and they had signed the same except for Narain Dutt Tiwari on whom, notices were served through registered post. It has been alleged that even after sending of election programme by the Agenda dated 28.12.2011 before the expiry of the term of office bearers elected on 31.12.2011, the Deputy Registrar took cognizance of letters sent to him by opposite party nos.4 to 7 and a letter sent by opposite party no.8 on 7.1.2012, and without giving any opportunity of hearing to the President, the order was passed on 10.1.2012 by the Deputy Registrar under sub-section (2) of Section 25 of the Act.

33. In Writ Petition No.367 (MS) of 2012, the Society alleged that under Rule 23 sub-clause (d) of the bye-laws, the retiring office bearers could carry on discharging their duties until their successors in office were elected or appointed, as the case may be, and have taken over charge. Under the orders of this Court, the last undisputed elections

were held on 31.12.2008 in which, the petitioners were elected as the Committee of Management. In view of Rule 23 sub-clause (d), the Committee of Management was entitled to continue till their successors in office were elected or appointed and had taken over charge. Since the General Secretary of the Society, Professor Lal Amrendra was expelled as a Foundation Member on 24.02.2010, Mrs. Usha Chaudhary, another Member of the Governing Council was designated as Joint Sectary and duly authorized to file a writ petition on behalf of the Society.

34. It has been submitted by the petitioners in their Writ Petition No.367 (MS) of 2012 that in pursuance of the order passed by the Deputy Registrar on 22.12.2011, the election programme was circulated on 28.12.2011 and it was not open for the Deputy Registrar in view of sub-clause (d) of Rule 23 to pass the order impugned allegedly under Section 25(2) of the Act, saying that the Committee of Management had become time barred and the order passed by the Deputy Registrar being without jurisdiction was liable to be set.

35. It has further been submitted by the petitioners that Section 25(2) of the Act gives the right to the outgoing Committee of Management to convene a meeting for the purpose of holding elections till such time that its tenure does not expire and till such time that Deputy Registrar expresses a satisfaction that the Committee of Management had become time barred. Only after completion of term of the office bearers, the Registrar can pass an order under Section 25(2) of the Act for convening a meeting of the General Body of the Society for the holding of fresh elections for the Committee of Management.

36. It has also been submitted that the Society runs 13 institutions in which, there is one institution in the name of Chandrabhanu Gupta Shiksha Evam Manav Vikas Kendra, Chandrawal. It is a School and Agricultural Farm situated at Chandrawal, Sarojini Nagar and one R.P. Singh Rajput was appointed as Manager by means of order dated 7.4.2011. Sri R.P. Singh Rajput was indulging in several illegal activities and, therefore, a show cause notice was issued to him on 19.11.2011. Sri R.P. Singh Rajput in his reply, accepted the fact of making unnecessary expenditure without taking prior approval. Nagendra Nath Singh, hence appointed one R.R. Chaturvedi as Coordinator of the Institute on 4.1.2012, but by means of the impugned order dated 10.1.2012, the Deputy Registrar has also accepted Sri R.P. Singh Rajput's representation that Nagendra Nath Singh had lost all his authority after 31.12.2011. The Deputy Registrar also accepted the name of the institute being changed unilaterally by Sri R.P. Singh Rajput, who is arrayed also as opposite party in Writ Petition No.367 (MS) of 2012.

The petitioners submit that the Deputy Registrar did not have any power to approve the change of the name of the Institution by exercising his power under Section 25(2) of the Act.

37. This Court on 17.1.2012, on mention being made, directed the writ petition to come up along with pending Writ Petition No.4528 (MS) of 2010. After hearing the matter for sometime, this Court directed that any action taken in pursuance of the order impugned dated

10.1.2012 will be subject to further orders of the Court. On 18.1.2012 when the matter was listed again for hearing, this Court observed that Writ Petition No.4528 (MS) of 2010 was already being heard by another coordinate Bench and, therefore, it directed the matter to be placed before the same Bench where the writ petitions was already being heard.

38. Writ Petition No.430 (MS) of 2012 has been filed against the order of the Deputy Registrar dated 16.01.2012 prohibiting the incumbent office bearers from operating the bank account of the Society. It has been filed by Motilal Memorial Society through its Joint Secretary Mrs. Usha Chaudhary, the President of the Society, and Sri Nagendra Nath Singh in his personal capacity. Besides State-respondents being made parties, the petitioners have arrayed as Vishnu Bhagwaan Agarwal, Vimal Kumar Sharma and Narsingh Narian Tiwari along with one Mata Prasad and Rajendra Pratap Singh Rajput as respondents, besides the UCO Bank, Branchs at Nawal Kishore Road and Charbagh as parties. By the order of the Deputy Registrar dated 16.1.2012, he directed the Bank Branches situated at Hazratganj and at Charbagh to stop the operation of bank accounts of the petitioner's Society as order had already been passed under Section 25(2) of the Society Registration Act on 10.1.2012. The Deputy Registrar in his order dated 16.1.2012 stated that other Foundation Members had objected to the operation of the accounts by Nagendra Nath Singh and Mrs. Usha Chaudhary.

39. The order dated 16.1.2012 has been challenged on the ground that it is without jurisdiction, as there is no power vested in the Deputy Registrar to freeze the bank accounts of the Society after order is passed under Section 25(2) of the Act. Professor Lal Amrendra, the General Secretary of the Society was suspended on 14.8.2009 and terminated from Foundation Membership on 24.2.2010. The President in exercise of his powers vested in him in the absence of the Governing Council, had appointed Mrs. Usha Chaudhary as Joint Secretary on 14.8.2009 and authorized Mrs. Usha Chaudhary to file the writ petition pending approval from the Governing Council as and when it was convened and its meeting was held.

40. In this writ petition, on the first day of hearing on 9.2.2012, this Court issued notice to the private respondent nos. 4 to 10 and directed the matter to be listed again on 13.2.2012. Thereafter, no orders were passed except that of connection of the writ petition with the leading case i.e. Writ Petition No.367 (MS) of 2012.

41. On 13.2.2012, this Court appointed Mr. Justice Khem Karan, a retired Judge of this Court and retired Director General of Police Sri Ram Arun, IPS, as an Interim Committee to manage the affairs of the Society, including Institutions run by it, it's employees, students etc. till disposal of Writ Petition No.367 (MS) of 2012, Writ Petition No.430 (MS) of 2012, Writ Petition No.4528 (MS) of 2010 and Writ Petition No.5443 (MS) of 2005. The President and the Joint Secretary of the former Committee of Management as well as other persons, who were in possession of the records of the Society and Institutions run by it were directed to hand over the same to the Interim Committee forthwith

after making an inventory of the same. The matter was directed to be listed for further hearing.

42. In pursuance of the interim order of this Court dated 13.2.2012, the Interim Committee of Justice Khem Karan (Retd.) and Shri Ram Arun took over charge of the Society on 21.2.2012.

43. On 21.2.2012, an impleadment application was filed by Professor Lal Amarendra, namely, Application No.17772 of 2012, praying for impleadment as opposite party no.9 in the writ petition. Professor Lal Amrendra stated in his affidavit that Mrs. Usha Chaudhary had no right to file the petition and only the Honorary General Secretary or such other person, who may be nominated by the Governing Council could file the writ petition. Mrs. Usha Chaudhary had not been nominated by the Governing Council to file the writ petition. The applicant Professor Lal Amrendra's Civil Suit and his two writ petitions being pending against orders passed by the Governing Council and by the Deputy Registrar, he was entitled to be impleaded as opposite party no.9 in the writ petition. This application remained pending and now with the death of Professor Lal Amrendra on 17.12.2019, it has become infructuous.

44. On 17.9.2012, an application for dismissal of the writ petition was filed by opposite party no.4 Vishnu Bhagwaan Agarwal, saying that the writ petition filed on behalf of the Society through Mrs. Usha Chaudhary, Joint Secretary was not maintainable in view of Rule 25 of the Bye-laws. Nagendra Nath Singh was elected as President of the Governing Council on 31.12.2008 and his term came to an end on 30.12.2011. Moreover, he died on 25.8.2012. After the demise of Nagendra Nath Singh, there was no dispute left and the writ petition could not continue only for academic purpose.

45. Writ Petition Nos.4528 (M/S) of 2010, 367 (M/S) of 2012 and 430 (M/S) of 2012, were dismissed for non-prosecution on 07.01.2013. An application for restoration and recall of the order dated 7.1.2013 was filed on 10.1.2013 on behalf of the Society by Mrs. Usha Chaudhary, which remained pending. An application for dismissal of application for recall was then filed, stating that by means of order dated 11.1.2013, the Deputy Registrar has declared the result of elections held on 9.2.2012. The new office bearers had taken over charge as the Interim order granted by this Court on 13.2.2012 was discharged and the Interim Committee appointed on 13.2.2012 to look after day-to-day affairs of the Society stopped functioning on dismissal of the writ petition on 7.1.2013. The new office bearers of the Society had filed Writ Petition No.918 (MS) of 2013 against the order of the Deputy Registrar passed on 29.1.2013, restraining the new office bearers from taking any policy decision on financial matters during pendency of Recall Application in Writ Petition No.367 (MS) of 2012. This Court passed an order on 8.2.2013 connecting Writ Petition No.918 (MS) of 2013 with all pending writ petitions.

46. In Writ Petition No.918 (M/S) of 2013, the Motilal Memorial Society through its President Vimal Kumar Sharma approached this Court, challenging the order dated 29.1.2013 passed by the Deputy Registrar, Firms,

Societies and Chits, Lucknow, directing that only day-to-day affairs of the Society shall be managed by the Committee of Management, but no policy decision shall be taken by them. This order was passed on a representation moved by one Professor Lal Amrendra, wherein he had stated that there were legal infirmities in the election held in February, 2012.

47. In the said writ petition, the order of the Deputy Registrar was challenged on the ground that the Deputy Registrar was already aware of the fact that Writ Petition No.367 (MS) of 2012 had been dismissed for want of prosecution by this Court on 7.1.2013. The election that was held on 9.2.2012 under the orders of the Deputy Registrar himself had led to a Committee of Management being elected with Vimal Kumar Sharma as its President, Vishnu Bhagwaan Agarwal as its Secretary and Narsingh Narain Tiwari as its Vice President. On the dismissal of the writ petition by the order dated 7.1.2013, the elected Committee of Management of Vimal Kumar Sharma, Vishnu Bhagwaan Agarwal and Narsingh Narain Tewari moved a representation before the Deputy Registrar on 8.1.2013, enclosing a copy of the order dated 7.1.2013 and praying that result of elections of the Society held on 9.2.2012 be declared. On 11.1.2013, the Deputy Registrar declared the results of the elections and Vimal Kumar Sharma was elected as President, Vishnu Bhagwaan Agarwal was elected as General Secretary and Narsingh Narain Tiwari was elected as Vice President of the Society. It has been alleged that on 28.1.2013, Professor Lal Amrendra moved a representation before the Deputy Registrar, saying that the elections were disputed and the Deputy Registrar on mere asking of such member, directed the Committee of Management to file its reply and at the same time, passed the order impugned, by means of which, only day-to-day affairs of the Society were ordered to be managed by the Society, but no policy decision was directed to be taken.

48. It was submitted that the order dated 29.1.2013 was without jurisdiction as under Section 25(1) of the Society Registration Act, only the Prescribed Authority has the power, on a reference being made to it, either by the Registrar or by at least 1/4th members of the Society, to decide in a summary manner any dispute relating to election or continuance in office of the office bearers.

49. On the first day of hearing of Writ Petition No.918 (M/S) of 2013 as fresh, Sri Vivek Raj Singh, learned Advocate, appeared for opposite party no.3- Professor Lal Amrendra and submitted that Writ Petition No.367 (MS) of 2012 along with Writ Petition No.430 (MS) of 2012, Writ Petition No.4528 (MS) of 2010 and Writ Petition No.5443 (MS) of 2005 were being heard together and were listed on 7.1.2013. Due to non-appearance of counsel for the petitioners, the cases were dismissed in default. An application for recall was moved within two days and the said cases were now listed on 11.2.2013.

50. Sri Prashant Chandra, learned Senior Advocate, appearing for petitioners Vimal Kumar Sharma and others, on the other hand, argued that in case any application for recall had been moved in Writ Petition No.367 (MS) of 2012, the same was not maintainable, as

the person making such application was not authorized to move it after the declaration of result and the new Committee of Management coming into existence.

51. This Court took into account the fact that in Writ Petition No.367 (MS) of 2012, this Court had constituted an Interim Committee of a retired High Court Judge and one retired Director General of Police to look into the affairs of the institutions run by the Society. The Deputy Registrar realising the complications and high stakes involved in the matter had subsequently recalled his order dated 11.1.2013 by which, result of election held on 9.2.2012 was declared. The Court on 08.02.2013, therefore, directed Writ Petition No.918 (MS) of 2013 to be connected with the bunch, the leading case of which was, Writ Petition No.367 (MS) of 2012. It seems that no orders were passed thereafter in Writ Petition No.918 (MS) of 2013.

52. Against the order dated 8.2.2013 passed by this Court in Writ Petition No.918 (MS) of 2013, a Special Appeal was filed by Vimal Kumar Sharma and others, namely, Special Appeal No.99 of 2013. The Division Bench requested the Writ Court for early disposal of application for Recall and also directed that all orders passed by the Deputy Registrar after taking over of the Society by the New Committee of Management at various stages consequent upon the dismissal of the writ petition in default, shall remain in abeyance and till the application for recall is decided, the New Committee of Management would also not take any decision on policy matters, which may be prejudicial to the interest of the Society. The Special Appeal was disposed of on 21.2.2013.

53. An application for disposal of application for recall was filed also by the petitioners. In the affidavit filed in support of such application the subsequent events like declaration of result by the Registrar on 11.01.2013 and taking over of charge by the newly elected Office bearers of the Society and the filing of Writ Petition No.918 (M/S) of 2013 by them challenging the order passed by the Deputy Registrar on 29.01.2013 and 08.02.2013 were brought on record. The order of the Court directing connection of Writ Petition Nos.918 (M/S) of 2013, along with Writ Petition No.367 (M/S) of 2013, Writ Petition No.430 (M/S) of 2012, and Writ Petition No.4528 (M/S) of 2010 being challenged in Special Appeal No.99 of 2013, was also brought to the notice of the Court.

54. An Application No.33998 of 2013 was filed in Writ Petition No.367 (M/S) of 2012 on behalf of Kunwar Reoti Raman Singh also by Sri Vivek Raj Singh on 09.04.2013, saying that the application for Recall of order dated 07.01.2013 had been filed by Mrs. Usha Chaudhary. Nagendra Nath Singh had died on 25.08.2012 and the applicant Kunwar Reoti Raman Singh was the Foundation member of the Society and was working as Vice President of the Society before the passing of the order impugned in the writ petition. Under Rule 24 sub-Rule 2 of the Constitution of the Society, the Vice President could exercise the powers of the President during his absence or when on leave. The President could also delegate any office functions, duties and powers to the Vice President for any specified time. Under the Byelaws Rule 23 (d) the Committee of Management whose tenure had expired on 30.12.2011, would continue to function till holding of fresh election and taking over charge by

the newly elected Office bearers. Hence, a prayer was made in the application for permission to be granted to Kunwar Reoti Raman Singh to pursue the Writ Petition No.367 (M/S) 2012. This application remained pending.

55. Writ Petition No.4528 (M/S) of 2010 and Writ Petition No.367 (M/S) of 2012 were restored on 26.04.2013 and Writ Petition No.430(M/S) of 2012 was restored on 17.05.2013. This Court passed an order restoring the writ petition despite objections being raised by the counsel for the contesting-respondent Shri Anil Tiwari. This Court observed that before passing of the order dated 07.01.2013, the Court was considering the question of maintainability of the writ petition. The recall application having being filed, unless the writ petition was restored, the issue of maintainability of the writ petition could not be decided. Moreover, the Court observed that the Interim Committee appointed earlier by the Court dated 13.02.2012 would continue to function till further orders of the Court. In pursuance of the order dated 26.04.2013 the Interim Committee took over the affairs of the Society and the Institutions on 29.04.2013.

56. An Application No.61901 of 2013 was filed by Kunwar Reoti Raman Singh on 16.07.2013 for amendment in the writ petition praying that the name of Petitioner No.3 Nagendra Nath Singh in his personal capacity be deleted and in his place the name of the applicant Kunwar Reoti Raman Singh be substituted as Petitioner No.3. In the affidavit filed in support of such application the deponent stated that the membership of Professor Lal Amrendra had been restored by the Deputy Registrar by order dated 30.11.2012. From the time of suspension of Professor Lal Amrendra from the post of General Secretary till the time of his restoration on such post, Mrs. Usha Chaudhary who was Joint Secretary was assigned the duties of General Secretary and therefore was competent to institute the writ petition. In pursuance of Sub-clause (2) of Rule 24 in the absence of the President, the Vice President discharges the duties of the President. On death of Nagendra Nath Singh on 25.08.2012, Kunwar Reoti Raman Singh who was Vice President was liable to be substituted. In the proceedings dated 5.12.2008, Item No.2 showed that in the place of Vishnu Bhagwaan Agarwal, Shri Ram Arun, in the place of Vimal Kumar Sharma, Kunwar Reoti Raman Singh, in place of Narsingh Narain Tiwari, Raja Anand Singh had been inducted.

57. This application was filed on the basis of proceedings dated 05.12.2008 and 31.12.2008. In this application, the proceedings dated 31.12.2008, of the Society for elections have also been annexed which show Nagendra Nath Singh, Veer Sen, Chatra Pal Sharma, Virender Vikram, Raja Anand Singh, Professor Lal Amrendra, Mata Prasad, Kunwar Reoti Raman Singh, Shri Ram Arun, Justice (Retd.) Dinesh Kumar Trivedi and Mrs. Usha Chaudhary were present. Dr. Dauji Gupta, Justice (Retd.) Umesh Chandra Srivastava, Narain Dutt Tiwari, Umakant Mishra and J.R. Tripathi had informed that due to personal reasons they could not attend the meeting. In Elections that were held Nagendra Nath Singh was appointed as President, Kunwar Reoti Raman Singh was elected as Vice President, and Professor Lal Amrendra was elected as General Secretary, Shri Ram Arun was elected as

Treasurer and Mrs. Usha Chaudhary was elected as Joint Secretary. This application too remained undisposed of.

58. After restoration of the Writ Petition No.367 of 2012 and a reiteration of earlier interim order for the Interim Committee to manage the affairs of the Society, the Deputy Registrar passed an order on 30.4.2013 recalling his order dated 11.01.2013, saying that it was subject to the order passed by the Court on Restoration application.

59. An objection to the amendment application was filed by the Opposite Party No.4 Vishnu Bhagwaan Agarwal through his counsel Apurva Tiwari saying that the term of office of the Committee of Management elected on 31.12.2008 had already expired and Kunwar Reoti Raman Singh had no right or locus to file the Amendment Application. Objections to the application for amendment filed by Kunwar Reoti Raman Singh were also filed by Opposite Party No.5 Vimal Kumar Sharma saying that under Rule 25 of the Byelaws litigation can be pursued only by the Secretary of the Society. Neither Nagendra Nath Singh nor Mrs. Usha Chaudhary could have filed a writ petition. Kunwar Reoti Raman Singh therefore, could not seek any amendment in the writ petition and substitution in place of Nagendra Nath Singh as Petitioner No.3.

60. On 27.08.2014 when the matter was being heard by another Hon'ble Single Judge a suggestion was made that the dispute in the writ petition may be decided by retired Justice Khem Karan, a member of the Interim Committee, the Court passed an order accordingly.

61. A Special Appeal No.572 of 2014 was preferred against the order dated 27.08.2014. The Special Appeal was dismissed on 25.09.2014 with the observation that the order dated 27.08.2014 had been passed with the consent of both the parties. Now that the counsel for the appellant submitted that there was no occasion for giving consent, the question, whether the appellant's counsel had given consent or not is a question of fact for which it would be open for him to approach the same Writ Court.

62. An application was therefore preferred for Review/recall of order dated 27.08.2014 with a prayer that the preliminary objection regarding maintainability of the petition be decided and that the writ petition be dismissed as having abated.

63. On the order of the Court dated 27.08.2014, a report was submitted by Justice Khem Karan on 29.10.2014, wherein he stated that out of the four petitions Writ Petition No.4528 (M/S) of 2010 challenging the order dated 26.07.2010 of the Deputy Registrar appears to be more important as the questions involved therein is whether the Deputy Registrar was justified in setting aside the expulsion of Vimal Kumar Sharma, Vishnu Bhagwaan Agarwal and Narsingh Narain Tiwari as Foundation members of the Governing Council of the Society and in restoring their membership, the second important writ petition is Writ Petition No.367 (M/S) of 2012 which involved the validity or otherwise of the Election schedule given by the Deputy Registrar and the elections that were held pursuant thereto in January and February 2012. The very same persons who had been expelled earlier and whose membership was restored on 26.07.2010 i.e. Vimal Kumar Sharma, Vishnu Bhagwaan Agarwal and Narsingh Narain Tiwari were elected as President

and General Secretary and Vice President respectively in such elections. Four other persons were elected as members for a period of three years so as to complete the full strength of 17 members of the Governing Council. The remaining two Writ Petitions No.5443 (M/S) of 2005 relating to Election of 2005 filed by Sri Ramakrishna, and Writ Petition No.430 (M/S) of 2012 in regard to operation of accounts may now not be of much relevance after the Elections of 2008 and 2012 and Constitution of Interim Committee. Since Vimal Kumar Sharma was not agreeable to the terms as suggested by Kunwar Reoti Raman Singh and Professor Lal Amrendra no compromise was possible.

64. Justice Khem Karan in his report stated also that so long as the dispute with regard to membership of Vimal Kumar Sharma and two others is not settled and so long as these persons were unwilling to budge from the stand they were taking in the context of Election of 2012, there was no possibility of compromise.

65. Another Application No. 52702 of 2018 was filed on 07.05.2018, for vacation of Interim Order by the Opposite Party No.5 saying that the writ petitions were not maintainable as the term of the elected members had come to an end but by an interim order dated 13.02.2012 an Interim Committee was appointed to manage the day to day affairs of the

Society. After the passing of the order dated 13.02.2012 Nagendra Nath Singh died on 25.08.2012, and the writ petition was consequently dismissed for non-prosecution on 07.01.2013. An Application for restoration was filed on 10.01.2013 and the writ petition was eventually restored on 26.04.2013. The Interim Committee of two members, as earlier constituted, took over charge again to manage the day to day affairs of the Society. On the death of Nagendra Nath Singh, the three writ petitions stood abated, although an application was preferred by Kunwar Reoti Raman Singh seeking amendment in the array of the parties and for substitution in place of Nagendra Nath Singh as Petitioner No.3, no orders were passed thereon. The Society was running 17 Charitable Institutions including Schools, Colleges, Hospitals, Museums, Libraries, Students Hostels and the like and all such Institutions required full-time Supervision and management by the elected members of the Society. It was not humanly possible for two member Interim Committee to look after and manage the affairs of the Society. Shri Ram Arun was reported to be confined to bed due to illness. The Balance Sheet for Financial year ending 31.03.2015 showed total receipts of more than Rs.27,00,00,000 (Rs.27 Crores) as income of the Parent Society. Other entities of the Society also have transactions running into crores of rupees. The Interim Committee is not being able to manage the affairs of the Society, in view of the vastness of the area of operations and the various activities and businesses in which the Society is engaged. Huge losses were being incurred by the Society, for instance, the Lawns at Moti Mahal were let out for holding of various functions. Earlier the daily collection ran into lakhs of rupees but the Lawns were now leased out on a long-term basis for a paltry sum of Rs.40 lakhs per year and that too payable in installments. The lessees have been earning huge profits by sub letting the premises.

66. In the meantime, a joint request was made by the members of Interim Committee on 11.10.2017 to the Court that they may be relieved from the responsibilities of running the day-to-day affairs of the Society and the Institutions run by it, as over five years had passed from the date of Interim order passed on 13.02.2012 and 26.04.2012, and because of advancing age and failing health, the members of the Interim Committee found that they could not efficiently perform the duties assigned by the High Court.

Another letter was sent on 03.07.2018 by Justice Khem Karan and Shri Ram Arun praying to be relieved of the responsibilities assigned by the Interim orders of the Court.

67. Application No.96998 of 1018 was filed on 06.09.2018 on behalf of the petitioners for deleting the name of Opposite Party No.4 and Opposite Party No.6, as they were both dead and Application No.101811 of 2018 was filed on 17.09.2018 for impleadmeant of Professor Lal Amrendra as he was reinstated as Foundation member by the order of the Deputy Registrar dated 30.11.2012. The Deponent prayed for permission that the Petitioner No.1 Society be represented through its Honorary Secretary Professor Lal Amrendra in place of Joint Secretary Mrs. Usha Chaudhary. This application too remain pending and has now become infructuous.

It is interesting to note that Writ Petition No.918 (M/S) of 2013 was filed by the Society through its President Vimal Kumar Sharma whereas under the Byelaws as alleged by private respondents in Writ Petition No.367 of 2012 and Writ Petition No.4528 of 2010 litigation on behalf of the Society could be undertaken by the General Secretary or a person authorized in this behalf by the Governing Council.

68. After application for Restoration was allowed by this Court on 26.04.2013, the Deputy Registrar recalled his order dated 11.01.2013 declaring Vimal Kumar Sharma, Vishnu Bhagwaan Agarwal and Narsingh Narain Tiwari as elected office bearers. In pursuance of repeated requests of Justice Khem Karan and Shri Ram Arun to be relieved of their responsibilities, this Court passed an order on 19.09.2018 replacing the members of the Interim Committee by Justice S.U. Khan (retired) and Sri Viresh Kumar (retired IAS) 1983 batch U.P. Cadre Officer. This Interim Committee took charge on 29.09.2018.

69. An Application No.127211 of 2019 has been filed on 01.11.2019 after arguments were heard and judgement was reserved, stating that the aforesaid writ petitions stood abated and the interim order dated 13.02.2012 stood discharged. The affidavit has been sworn by Vimal Kumar Sharma again repeating the preliminary objections regarding maintainability of the writ petition. The argument raised by the learned counsel for the private respondent is that after death of Nagendra Nath Singh on 25.08.2012, the writ petition abated as Nagendra Nath Singh was seeking continuance as President of the Society, even though its tenure had to come to an end on 31.12.2011. A complaint has also been made in Paragraph-4 of the affidavit in support of this Application that the Interim Committee constituted to look after the affairs of the Society and the

Institutions run by it has not been able to safeguard the interest of the Society whose functions are humongous and that two retired individuals who got together two to three times a week for just an hour could not supervise the functioning of such a Society and its institutions effectively. In Paragraph-5 of the affidavit, it has been mentioned that elections were held on 09.02.2012, but on account of Interim Order they were not given effect to, as a result, their three years term/tenure has also expired, the management of the Society has been usurped permanently under Interim Order passed by this Court.

70. While arguing the matter, Sri Prashant Chandra has emphasised the preliminary objections raised by him through his various applications praying for dismissal of the writ petition.

71. The learned counsel for the private respondents has argued against the maintainability of Writ Petition No.4528 (M/S) of 2010. It has been submitted that Writ Petition No.4528 (M/S) of 2010 has been filed arraying the Committee of Management of the Society through its President Nagendra Nath Singh as petitioner no.1. The second petitioner is Nagendra Nath Singh as President of the Society and the third petitioner is Kunwar Reoti Raman Singh, who has only mentioned his address but has not mentioned in which capacity he has filed the petition, so it may be presumed that he has filed the writ petition in his personal capacity. It has been submitted that as per the Bye laws of the Society, the Secretary alone is competent to institute a petition on behalf of the Society. If the Secretary is unavailable, then the Governing Council may authorize a person to file the petition on its behalf. Since the Secretary has not filed the petition, nor there is any Resolution of the Governing Council authorizing any specific person to file the writ petition, the writ petition filed through the President of the Society is not maintainable. Moreover, petitioner no.2 Nagendra Nath Singh died on 25.08.2012 and he has not been substituted by any person, so the writ petition abated in so far as Nagendra Nath Singh is concerned. With regard to the petitioner no.3, it has been submitted that the Governing Council on 22.08.2010 had allegedly authorized only Nagendra Nath Singh to contest the proceedings before the Deputy Registrar. It had been decided by the Governing Council that it will not contest the proceedings before the Deputy Registrar where expulsion of three members was challenged. A copy of said Resolution has been filed by Nagendra Singh in his Supplementary affidavit. It was clear that Nagendra Nath Singh alone could personally if he so desired, contest the proceedings before the Deputy Registrar. In the meeting of the Governing Council where such Resolution was passed, the names of nine Foundation Members have been mentioned as signatories of such a Resolution. The petitioner no.3, who alleges that he was inducted on 05.12.2008 as a Foundation Member is not mentioned in such a Resolution.

72. It has been submitted that the Resolution dated 15.03.2008 had been challenged before the Deputy Registrar by three members who had been expelled. Such Resolution had not inducted any person as a member in place of the three persons who were expelled. Therefore, only those three persons who were

expelled and the President Nagendra Nath Singh were entitled to be heard. The petitioner no.3- Kunwar Reoti Raman Singh could not have been heard. He could therefore not say that there was any denial of the principles of natural justice by the Deputy Registrar while passing the order impugned. It has further been submitted that Nagendra Nath Singh had filed a written submission before the Deputy Registrar in which he alleged that on expulsion of three members, two members were inducted. There is no mention of Kunwar Reoti Raman Singh. It has been further argued that Nagendra Nath Singh who was responsible for expulsion of three members was appearing before the Deputy Registrar in the proceedings held on the representation of Vishnu Bhagwaan Agarwal and he never stated anywhere that Kunwar Reoti Raman Singh was also inducted in the resultant vacancy. The Deputy Registrar was not supposed to issue notice to persons likely to be affected when the very existence of such member or his induction was not brought to the knowledge of the Deputy Registrar at any stage. It has further been argued that Kunwar Reoti Raman Singh having being ousted by the Deputy Registrar's order dated 26.07.2010 and Professor Lal Amrendra not being substituted in time, the writ petition abated automatically.

73. It has also been argued that the Writ Petition No.367 (M/S) of 2012 is not maintainable as it has been filed by Nagendra Nath Singh as President of the Society in his personal capacity, and that the order that was passed by him on 28.12.2011 allegedly promulgating an Agenda for holding of elections was without any authority in law as only the Secretary can circulate such an Agenda for elections. The order issued by Nagendra Nath Singh on 28.12.2011 being in his personal capacity, he alone was aggrieved with the setting aside of the said Agenda by the order of the Deputy Registrar dated 10.01.2012 and on his death nobody else can be substituted in his place as the petitioner, as no one else is aggrieved by such an order. The new Committee of Management whose election results were declared on 11.01.2013 by the Deputy Registrar has already resolved that there shall be no contest further in this writ petition.

74. It has further been submitted that even otherwise the Writ Petition No.367 (M/S) of 2012 being confined to holding or non-holding of elections was not maintainable in view of the law settled by the Supreme Court in ***N.P. Ponnuswami vs Returning Officer, Namakkal Constituency and others; AIR 1952 SC 64,*** that once an election is notified it should not be challenged in any form except by way of an election petition after such election is over. It has been submitted that when the Court passed the interim order on 9.02.2012 and 13.02.2012, the Interim Committee appointed by the Court took over but on dismissal of the writ petition in default such Interim Committee also lost its reason for existence. The election results were declared on 11.01.2013 and the new committee took over, therefore, the Writ Petition No. 367 (M/S) of 2012 itself become infructuous.

75. It has further been argued that on the dismissal of the writ petition for non-prosecution, Professor Lal Amarendra who had been re-inducted as Foundation Member on order of the

Registrar dated 30.11.2012, could not have filed an application for recall of order as the Professor had not been substituted in place of Nagendra Nath Singh and his application for recall of order dated 07.01.2013 was not maintainable.

76. It has also been submitted that Kunwar Reoti Raman Singh has consciously filed an application for amendment and no application for Substitution. Under Order 22 Rule 1 and 2 of the C.P.C., the locus of persons who can apply for setting aside of abatement and for substitution is mentioned. Hence consciously no application for substitution and setting aside of abatement was moved and only an amendment application was moved referring to by Rule 24(2) of the Bye-laws of the Society to say that in the absence of the President, the Vice President shall perform the duties of the President. It has been argued that deponent of the affidavit resorted to misrepresentation to make out as if the President was on leave or was absent for some other reason. He did not disclose that the President had died on 25.08.2012. Moreover, he also did not disclose that he was not the acting Vice President as his induction as a result of vacancies created on the Resolution of the Governing Council dated 15.03.2008 expelling three members, was no longer valid. The Resolution dated 15.03.2008 being set aside by the Deputy Registrar on 26.07.2010, Kunwar Reoti Raman Singh stood automatically expelled. Reference has been made to ***2012 (11) SCC 531*** and paragraphs 42, 44 and 47 to say that since Kunwar Reoti Raman Singh had resorted to suppression of material facts, his application be rejected. It has further been argued that the application was made six years after the original petition was filed. In the affidavit filed in support of the application, it was made out that the applicant was the Foundation Member and, therefore, entitled to pursue the writ petition. A Foundation Member is not equivalent to a Founder Member as the Foundation Member can be inducted by the President. It was Nagendra Nath Singh who had inducted Kunwar Reoti Raman Singh.

77. Also, in the order dated 10.01.2012 passed by the Registrar, another order passed by the Nagendra Nath Singh dated 04.01.2012 removing the Manager of Chandra Bhan Shiksha Manav Vikas Kendra, Lucknow had been set aside. Setting aside of an order passed by Nagendra Nath Singh in his personal capacity would not give rise to any cause of action to the society to pursue the writ petition. In Writ Petition No. 367 (M/S) 2012, the Society has been arrayed as petitioner no.1 through Joint Secretary Mrs Usha Chaudhary. The post of Joint Secretary is not a necessarily duly created post and its incumbent Mrs Usha Chaudhary was never authorized to file the writ petition on behalf of the Society by the Governing Council. Reference has been made to the judgement rendered in ***Umesh Chandra and another Vs. Mahila Vidyalay Society and others; 2006 (24) LCD 1373*** to buttress the argument.

78. Dr. L. P. Mishra in response to arguments of the counsel for the Private Respondent regarding maintainability of the Writ Petition No. 4528 (M/S) of 2010 has submitted that Kunwar Reoti Raman Singh was inducted as a Foundation member on 05.12.2008 along with Shri Ram Arun and Raja Anand Singh, in the vacancy arising consequent to expulsion

of Vishnu Bhagwaan Agarwal, Narsingh Narain Tiwari, and Vimal Kumar Sharma. If the expulsion of these three Foundation members was going to be set aside by the Deputy Registrar then it was incumbent upon the Registrar to have issued notice to him and heard him. His membership being invalidated, he had a cause of action independently to approach this Court in Writ Petition No.4528 (M/S) of 2010. The learned counsel for the petitioner has referred to Kunwar Reoti Raman Singh being inducted as a Foundation member on 05.12.2008 and is being elected as Vice President in the Election held on 31.12.2008. It has also been submitted that the election of Kunwar Reoti Raman Singh has not been challenged by the respondents.

79. It has been submitted further that under section 7 of the Societies Registration Act, a Society can sue or be sued as an independent juristic person capable of perpetual succession. The Society is akin to a Corporation and can continue with the litigation initiated on its behalf by any of its members, even if in a minority to protect the interest of the Society, if the cause of action survives. The learned counsel for the petitioner has also referred to section 6 of the Societies Registration Act and to the judgement rendered by the Bombay High Court reported in **1946 Bombay Law Reports 341** in ***Satyavart Sidhantalankar Vs. The Arya Samaj***. It has been submitted that the judgement rendered by the Bombay High Court has been followed by the Allahabad High Court in a judgement reported in ***Shanti Sarup vs Radhaswami Satsang Sabha,*** **AIR 1969 Allahabad 248,** and by the Patna High Court in a judgement in **Khiri Ram Gupta and Another Vs. Nanalal J. Parekh,** reported in **AIR 1964 Patna 114.**

80. It has been submitted that under Order 22 Rule 4 A of C.P.C., this Court can also nominate anyone to pursue the cause of the Society. It has been pointed out that Professor Lal Amarendra had also filed an application for impleadment on having been restored to the position of General Secretary by the Deputy Registrar by order dated 30.11.2012. This Impleadment Application remained pending. The order passed by the Deputy Registrar on 30.11.2012 restoring Professor Lal Amarendra as Secretary has not been challenged. The order dated 30.11.2012 has attained finality.

81. Dr. Mishra, has also referred to an amendment application moved by Kunwar Reoti Raman Singh which is pending disposal before this Court in which Kunwar Reoti Raman Singh has requested for deletion of the names of Nagendra Nath Singh from the array of the petitioners and the inclusion of the name of Kunwar Reoti Raman Singh being Vice President and entitled to continue the litigation on behalf of the Society.

82. It has been submitted further that in the absence of the President and the Secretary, the Vice President could continue the litigation on behalf of the Society, in view of Rules 23, 24, and 25 of the bye-laws of the Society. It has also been submitted that no election has taken place after 31.12.2008. The Election which was held in February 2012, on the

orders of the Registrar, the result of which was declared in January 2013 has been initially stayed by the Deputy Registrar himself subject to further orders in the writ petition. Reference has been made to the order dated 30.04.2013 passed by the Deputy Registrar by which he has recalled the results of the elections declared by him on 11.01.2013 after restoration of the writ petition on 26.04.2013.

83. It has been submitted by Dr. Mishra, that Nagendra Nath Singh was not defending his personal property or personal Estate. The Writ Petition was filed to protect the interest of the Society. If he was dead, the Court as guardian of the Society cannot allow the interest of the Society to suffer, even in cases of individual Estate this Court has Power Under Order 22 Rule 4A of the C.P.C., in the absence of legal representative, to allow somebody to pursue the litigation. On 09.02.2012, itself this Court passed an interim order in Writ Petition No.367 of 2012 that till further orders of the Court, the orders dated 10.01.2012 and 16.01.2012 shall remain in abeyance and any action taken in pursuance of orders dated 10.01.2012 and 16.01.2012 shall remain stayed. The order was communicated on the same day to the Deputy Registrar by the office of the CSC in pursuance of which declaration of results for the Committee of Management was put in abeyance. On 13.02.2012, this Court appointed the Interim Committee. On the Restoration Application being filed, the Deputy Registrar put on hold the operation of accounts by the newly elected Committee of Management by his order dated 16.01.2013. It has been argued by Dr. L. P. Misra, that the result of the Elections declared on 11.01.2013 was made subject to further orders of the Court in writ petition, therefore, there was no necessity to assail them besides Deputy Registrar has passed an order on 30.04.2013 cancelling the result declared and recalling his order dated 11.01.2013. Dr. Mishra has referred to Section 6 of the Societies Registration Act which refers to the Phrase *"as shall be determined by Rules and Regulation"*. Similarly, it also refers to the phrase *"as determined by the Governing Body"*, it has been submitted that it is only a procedure for convenience and not of mandatory character. The Society by itself is a legal entity and has an independent and perpetual existence separate from its office bearers. Its interest can be considered as paramount interest to be protected by the Court which is the Guardian as *"Parens Patriae"*. The learned counsel for the petitioner has referred to Rule 4 and Rule 4A of Order 22 of the C.P.C. to submit that these Rules deal with situation where the cause of action survives but there is no heir or legal representative to pursue the case, it has been submitted that the Court can even appoint a representative on its own in such matters.

84. It has also been submitted that the notice issued by the Deputy Registrar in 13.05.2009 was to the President of the Society as in the eyes of the Deputy Registrar Nagendra Nath Singh was competent to represent the Society at the time of filling the writ petition. There was no General Secretary as the General Secretary Professor Lal Amrendra had already been removed. Notice was issued to the President and not to the General Secretary. The President was considered competent to represent the Society to defend the decisions of the Governing

Council expelling three Foundation members. The reply submitted by Nagendra Nath Singh on 29.05.2009 to the Show Cause Notice issued by the Deputy Registrar was on behalf of the Society. The lis before the Deputy Registrar was between the Society and the Opposite Party Nos. 4 to 6. It was the internal affairs of the Society which were brought into question by Opposite Party Nos.4 to 6 by moving a representation to the Deputy Registrar. Reference has been made to Rule 24 of the Byelaws which appoint the President as the Chief Executive Officer of the Society entitled to take decision on its behalf and only ratification of the General Council is required of action taken by the President. It has been submitted that in the case this Court accepts the argument made by counsel for the Private Respondent regarding resolution dated 22.07.2010, it would mean that the Society was never put to notice and would vitiate the whole proceedings before the Deputy Registrar. It has been submitted that in the case of **Mahila Vidyalaya** (supra), an individual member had approached the Court against the decision taken by the Deputy Registrar against the Society. On the other hand in Writ Petition No.4528 (M/S) of 2010 and Writ Petition No.367 (M/S) of 2012, it is not just any individual member but the President or the Chief Executive Officer challenging the order passed by the Deputy Registrar without any jurisdiction interfering in the internal affairs of the Society. It has also been submitted that Rule 24 and 25 of the Byelaws should be read together which Section 6 of the Societies Registration Act. Section 6 of the Act is an enabling provision which allows the continuation of a suit or legal proceeding. Dr. L. P. Mishra has also referred to Paragraphs 50 & 51 of Mahila Vidyalay (supra) judgement.

85. It has been further submitted by Dr. L.P. Mishra that the outgoing Committee of Management of which, Sri Nagendra Nath Singh was the President, Professor Lal Amrendra was the Secretary, Kunwar Reoti Raman Singh was the Vice President and Mrs. Usha Chaudhary was the Joint Secretary, should be deemed to be in existence as no valid Committee of Management had come to take its place thereafter. The elections were indeed held by the Deputy Registrar and result was declared after Writ Petition No.367 (MS) of 2012 was dismissed for want of prosecution by this Court, but such elections were not recognized by this Court when it passed an order for restoration of writ petition on 26.4.2013. This Court had earlier appointed an Interim Committee by an order dated 13.2.2012 and had observed that the Interim Committee appointed by the order dated 13.2.2012 shall continue to function. It has been submitted that the Deputy Registrar after passing of the courts order dated 26.4.2013 had himself withdrawn his earlier order dated 11.1.2013. The interim Committee continues to function but it does not represent the Society. The Society can only be represented by the Committee of Management duly elected on 31.12.2008 as no successors have been elected to take over the management of the Society.

86. It has also been submitted by Dr.L.P. Mishra that under Rule 24(2) of the Bye-laws, in the absence of the President, the Vice President can perform all functions of the office of the President. In this case, Sri Nagendra Nath Singh may have died during the pendency of the

writ petition, but Kunwar Reoti Raman Singh, who is the Vice President, continues to be so and in the absence of President, for any reason whatsoever, he can also act as the Chief Executive Officer of the Society in terms of Rule 24.

87. Learned counsel for the petitioner has submitted that the order passed by the Deputy Registrar on 26.7.2010 could not have been passed as it related to removal of three members on disciplinary ground, which is an internal matter of the Society. These three members were removed on 15.3.2008. Sri Vishnu Bhagwaan Agarwal filed a representation against his removal before the Deputy Registrar. The Deputy Registrar could not have seen the validity of the removal before the amendment in the Societies Registration Act, and introduction of Section 4B of the Act in October, 2013. Yet the Deputy Registrar issued a notice to the President of the Society Nagendra Nath Singh, a copy of the notice has been filed at Pages 91 and 92 of the petition.

88. It has been submitted that the Deputy Registrar recognized the President Nagendra Nath Singh as representing the Governing Council and the Society's interest. Had it not been so, notice would not have been issued to Sri Nagendra Nath Singh as President of the Society. Even if the Governing Council adopted a resolution on 22.7.2010 that the Society is not interested in contesting such case before the Deputy Registrar and Nagendra Nath Singh may do whatever he deems proper, Nagendra Nath Singh was in fact defending the resolution passed on 15.3.2008 by the Governing Council before the Deputy Registrar in the said proceedings.

89. Learned counsel for the petitioner has referred to Annexure-13 to the writ petition, which is the reply submitted by Sri Nagendra Nath Singh on behalf of the Society to the Deputy Registrar on 29.5.2009. It has been submitted that the lis that was being decided by the Deputy Registrar was between the Society and Sri Vishnu Bhagwaan Agarwal, Narsingh Narain Tewari and Vimal Kumar Sharma. Yet when Vishnu Bhagwaan Agarwal approached this Court by filing Writ Petition No.2353 (MS) of 2010, praying for a direction to the Deputy Registrar to decide his representation against his expulsion, the Society was not impleaded as a party in the said writ petition. The writ petition was disposed of on 28.5.2010 without notice to the Society by an innocuous order, asking the Deputy Registrar to decide the representation in case the same was pending before him in accordance with law. However, the Deputy Registrar while deciding the representation, had in fact issued notice to the Society through its President and the reply was submitted by the Society through its President.

90. It has also been submitted that any individual member can approach a Court of law to protect the interest of the Society and when the High Court finds that injustice would result that would affect the interest of the Society, then the High Court can entertain a petition filed even by a single member or by minority of members against an order passed by the Executive Authority, which would result in prejudice to the Society. It has been submitted that this Court should also take into account that in earlier rounds of litigation, the High Court had come to a definite conclusion that Vishnu

Bhagwaan Agarwal and other members expelled from the Society have resorted to fraud and misrepresentation and this Court should, therefore, entertain the petition to protect the interest of the Society and should reject the preliminary objection that were raised in earlier litigation by the private respondents. Since the Society was aggrieved, the Society could have been represented by the President or the Joint Secretary in the absence of the General Secretary.

91. Referring to the insistence of the counsel for the private respondents that this Court must decide the preliminary objections regarding maintainability first, Dr. L.P. Misra has referred to 1976 Amendment to the Civil Procedure Code, which made it discretionary for the Court concerned to pass an order deciding a preliminary issue first before entering into the merits of the controversy. It has been submitted on the basis of a Full Bench decision of this Court in ***Sunni Central Board of Waqfs Vs. Sri Gopal Singh Visharad;*** reported in ***1990 LCD 417,*** that the word "shall" has been replaced by the word "may" and it has been left open to the discretion of the Court to consider the preliminary objection along with the merits of the controversy. This Court had observed that only in such cases where the jurisdiction of the Court itself is being challenged either territorial or pecuniary, or where there is a bar against entertainment of suit in any other law for the time being in force, that the Court is enjoined to first consider the preliminary objection and then enter into the merits of the controversy. In the aforesaid decision, the Full Bench observed that if the maintainability of the suit is so interlinked with the merits of the controversy that they cannot be decided separately, they can both be considered and orders can be passed.

92. A Counter Affidavit has been filed by the Deputy Registrar, Firms, Societies and Chits to the Writ Petition No.367 (M/S) of 2012 in which he had stated that by an order dated 22.12.2011 passed by him election had been fixed. Ten valid members of the Governing Council would meet first and complete the membership for the Administrative Council and then hold elections for the Committee of Management, the membership of the Administrative Council had been determined on the basis of order dated 28.05.2010 passed in Writ Petition No.3353 (M/S) of 2010, Vishnu Bhagwaan Agarwal Versus Deputy Registrar.

Professor Lal Amrendra had also filed Writ Petition No.2877 (M/S) of 2010 which was pending since the term of the Administrative Council of the Society expired on 30.12.2011, the said Committee had become time barred and therefore, order was passed under Section 25 (2) for Reconstitution of the Administrative Council. After such order was passed, under Section 25 (3) of the Act, nobody could start any process for election of office bearers. There was a valid list of ten members of the Administrative Council of the Society determined as per the Order No.1903, dated 22.12.2011. The Deputy Registrar in his counter affidavit stated that he had passed the order dated 10.01.2012 to protect the interest of the Society and cancelled the election schedule announced by the then President Nagendra Nath on 28.12.2011. The Elections that were proposed by time barred Committee were not found in the

interest of the Society and therefore, the election proposed by election programme dated 28.12.2011 was legally and rightly cancelled.

93. In Writ Petition No. 430 (M/S) of 2012, an Application No.101811 of 2018 has been filed for impleadment by Professor Lal Amrendra which has not been pressed by any counsel and is rejected for non-prosecution.

An application for dismissal of Writ Petition No.430 (M/S) of 2012; i.e. Application No. 81522 of 2012 has been filed by Professor Lal Amrendra which has not been pressed by any counsel and is rejected for non prosecution.

An application No.97002 of 2018 has been filed on 04.09.2018 by the writ petitioner for deleting the name of respondents nos. 4 and 6 by the counsel for the petitioners which is allowed as respondent nos. 4 and 6 are no more.

94. An application has been filed on 6.2.2020 by Professor Ashok Sharma, Brij Bhushan Jindal, Som Prakash Gupta, Vijender Kumar Agarwal, and Raj Kishore Rastogi, praying for dismissal of the writ petitions as having abated on the death of Nagendra Nath Singh on 25.8.2012. In the said application, it has been stated that the last election of the Society was held on 9.2.2012. The results were declared on 11.1.2013 wherein Vimal Kumar Sharma was elected as President, Vishnu Bhagwaan Agarwal was elected as General Secretary and Narsingh Narain Tewari was elected as Vice President. A meeting of the Governing Council was held thereafter on 20.2.2013 where Professor Ashok Sharma was inducted as a Foundation Member of the Society. The minutes of the meeting were verified by the then General Secretary Vishnu Bhagwaan Agarwal. It has been submitted that the applicant nos.2 to 4 are the Patron Members of the Society and applicant no.5-Raj Kishore Rastogi is a Founder Member of the Society. Besides the applicants, there are three other Foundation Members of the Society i.e. Dr. Dauji Gupta, Mata Prasad and J.R. Tripathi, who are alive. Since eight members are alive, the writ petition be dismissed and the Management of the Society be handed over to these members. It has been stated in this application that the elected members were restrained from functioning as such by an interim order of this Court dated 26.4.2013. This Court appointed an Interim Committee of two members, which has been functioning ever since. After death of Nagendra Nath Singh, the writ petition stood automatically dismissed as having abated w.e.f. 25.8.2012 and the affairs of the Society now stood vested in the Committee constituted in the election of 2012-13, which had already taken a decision that the aforesaid writ petition be not pursued on behalf of the Society.

95. Sri Madan Mohan Pandey, learned Additional Advocate General of State of U.P., had been requested by this court to appear on behalf of the State-respondents and also as a friend of the court to address the Court on the question of abatement of writ petition on the death of Nagendra Nath Singh, Vishnu Bhagwaan Agarwal, Vimal Kumar Sharma and Narsingh Narain Tiwari during the pendency of the writ petition.

96. Sri Madan Mohan Pandey assisted by Sri Shashank Bhasin, learned Standing Counsel, has placed before this Court Section-7 of the Societies

Registration Act which clearly provides that no suit or proceedings shall abate in case the designated person/officer of the Society dies or ceases to hold office. It has been submitted that even otherwise Order 22 of CPC is not applicable in view of Section 141 of CPC and its Explanation added by way of amendment in 1977. It has been submitted that there cannot be any automatic abatement of writ petition. No application under Order 22 is maintainable as the order is not applicable in writ jurisdiction as has been held by the Supreme Court in ***Puran Singh Vs. State of Punjab;*** **1996 (2) SCC 205** and paragraphs 4,5,7,10 and 11 of the report have been read out by him to buttress his submissions. It has also been submitted on the basis of the judgment rendered by the Supreme Court in 1974(2) SCC 706 and Para 10 thereof that in so far as abatement is concerned in writ jurisdiction since Order 22 of C.P.C. is not applicable as it is extraordinary jurisdiction, this Court should consider the facts and circumstances and is free to pass an order looking into the grievance raised by the litigant. It has been submitted that even if the contesting respondents 4,5 and 6 are dead now, the question of validity of the orders passed by the Deputy Registrar on 26.7.2010 and 10.1.2012 are in issue in these writ petitions and these orders have been passed by the State respondents and the legality thereof can be considered by this Court.

97. Having heard the learned Additional Advocate General, this Court shall first consider the argument raised by learned counsel for the private respondents that these writ petitions have abated. The Legislature while amending Section 141 of the Code and while adding the explanation was conscious of the fact that various High Courts and the Supreme Court conferred with powers under extraordinary jurisdiction cannot be subject to the fetters of the technical procedure for the purpose of achieving remedial measures for enforcing the rights of the citizen. It is for this reason, the Explanation has been added to Section 141 of the Code. In the Statement of Objects and Reasons while introducing the Bill which ultimately was passed on 1.2.1977, it has been mentioned in Clause-5 thus:

"The applicability of Section 141 to various types of proceedings has been the subject of controversy, particularly whether the Section applies where an application to set aside ex-parte proceedings or orders of dismissal for default or cases decided ex-parte. The High Court of Bombay held that in such cases, Section 141 applies. The Supreme Court, however, came to a contrary conclusion. In the circumstances, Section 141 is being amended to clarify that this Section applies to proceedings under Order 9. The question whether an application under Article 226 of the Constitution is within the meaning of civil proceedings and Section 141 shall apply to such proceedings, has been the subject matter of a controversy. While the Andhra High Court holds that Section 141 applies to such proceedings. The Allahabad, Calcutta, Madras and Punjab High Courts have held that Section 141 does not apply to such proceedings. In the circumstances, it is being clarified that Section 141 does not apply to proceedings under Article 226 of the Constitution of India....."

98. The effect of explanation being added to Section 141 CPC has been

considered specifically by the Supreme Court in ***Puran Singh*** (supra). The Supreme Court observed in relation to proceedings of Consolidation of Holdings Act arising out of an order passed in favour of the respondents by the Additional Director of Consolidation in Revision that delay in bringing on record the legal heirs and representatives of the respondents, would not lead to dismissal of the writ petition as abated. The Supreme Court in the case of ***Puran Singh*** (supra), observed in paragraph 10, 11 and 12 as under:

"10. On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed "as far as it can be made applicable, in all proceedings". In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression "proceedings' shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any proceeding in any court of civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression "proceedings' occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the Constitution? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be applicable to writ proceedings? Apart from that, Section 141 of the Code even in respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed "as far as it can be made applicable". Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply mutatis mutandis insofar as they are not inconsistent with those rules. In the case of Rokyayabi v. Ismail Khan [AIR 1984 Kant 234 : (1984) 2 Kant LC 114] in view of Rule 39 of the writ proceedings rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.

11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on

many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.

12. As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ appeals, it does not mean that the petitioner or the appellant in such writ petition or writ appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised on well-known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any, in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeal, as the case may be. ....."

99. In **Puran Singh** (supra), the Supreme Court has reiterated the same principles after the referring to the Explanation added by the Parliament to Section 141 of the CPC. It was held that the High Court is not bound by the provisions of Order 22 Rule 4 of CPC and if the High Court comes to the conclusion that the delay on the part of the petitioner in substituting the legal representatives of the respondents is unintentional and sufficient cause for the delay is shown, it can allow the substitution of the legal representatives even after the period of 90 days prescribed under Article 120 of the Limitation Act has expired.

100. In ***Babubhai Muljibhai Patel versus Nandlal Khodidas Barot and others (1974) 2 SCC 706,*** the Supreme Court has observed that the object of Article 226 of the Constitution of India is to provide a quick and inexpensive remedy to the aggrieved party and that the power has been vested in the High Court to issue to any person or authority, orders or writs including Writs in the nature of

Habeas Corpus, Mandamus, Prohibition, Quo Waranto and Certiorari. If the procedure of a suit has to be adhered to in the case of a writ petition, the entire purpose of having a quick and inexpensive remedy would be defeated. It has been observed that the proceedings under Article 226 of the Constitution of India are essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into such proceedings. The relevant extract from the aforesaid judgment is reproduced as under:-

"10. It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitions, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226."

It is apparent from the reading of the judgment rendered by the Supreme Court in ***Babubhai Muljibhai Patel (supra)***, which was rendered before the amendment to the Code was carried out by the Legislature by adding an Explanation, that writ jurisdiction being an extra ordinary jurisdiction conferred upon the High Court by the Constitution, the power to regulate its own procedure to deliver justice in an inexpensive and expeditious way avoiding the delays in regular civil proceedings.

101. Their Lordships have also observed in ***State of U.P. and others versus Dr. Vijay Anand Maharaj, AIR 1963 SC 946***, that the jurisdiction of the High Court under Article 226 of the Constitution of India should not be confused with the ordinary civil jurisdiction of the High Court. When the Constitution has vested extraordinary power in the High Court under Article 226/227 to issue any order, writ or direction, and the power of the superintendence over all Courts and Tribunals throughout the territories, in relation to which such Court is exercising jurisdiction, the procedure for enforcement of the mandate in exercising such power and jurisdiction has to be found in Article 226/227 of the Constitution itself and that no useful purpose would be served by limiting the powers of the High Court by procedural provisions prescribed in the Code.

However, the provisions of procedure prescribed under the Code can be taken up as a guide while granting relief to the persons. It has also been observed that many procedures prescribed in the Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person, as such, the High Court should be left to adopt its own procedure for granting relief to the persons concerned.

102. In ***Commissioner of Endowments and others versus Vittal Rao and others, (2005) 4 SCC 120***, the Supreme Court again held that even though Rule 24 of the Andhra Pradesh Writ Proceedings Rules, 1977 says that the provisions of the CPC have been made applicable to the civil proceedings as far as possible, but proceedings under Article 226 are not included within the expression "proceedings" in Explanation to Section 141 of CPC and observed that even if the Writ Court had not followed the procedure prescribed under Order 23 Rule 3 of CPC and believed the submissions of the counsel for the parties that they had come to a compromise and did not feel it appropriate to cross-examine the deponents of the affidavits concerned, the High Court cannot be faulted with in not following Order 23 Rule 3 of CPC. It observed that *"It would not be correct to say that the terms of Order 23 Rule 3 should be mandatorily complied with while exercising jurisdiction under Article 226 of the Constitution. Otherwise an anomalous situation would arise such as before disposing of the writ petition, issue should be framed or evidence should be recorded, etc. Proceedings under Article 226 of the Constitution stand on a different footing when compared to the proceedings in suits or appeals arising therefrom.'*

103. Also, in ***Sardar Amarjit Singh Kalra (dead) by Lrs. and others versus Pramod Gupta (Smt.) (dead) by Lrs. and others, (2003) 3 SCC 272,*** a Constitution Bench of the Supreme Court has observed that even in cases where Order 22 of the CPC is applicable, even assuming that the decree appealed against or challenged is joint and inseverable, as and when it is found necessary to interfere with the judgment and decree challenged before it, the Court can always declare the legal position in general and restrict the ultimate relief to be granted by confining it to those before the Court only rather than denying the relief to one and all on account of a procedural lapse or action or inaction of one or the other of the parties before it. As far as possible, the Court must always aim to preserve and protect the rights of the parties and extend help to enforce them rather than denying the relief, and thereby render the rights themselves otiose, *"ubi Jus Ibi remedium"* (where there is a right, there is a remedy) being the basic principle of jurisprudence. Such a course would be more conducive and better conform to a fair reasonable and proper administration of justice. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on the merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as a handmaiden of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.

104. A full reading of the provisions contained in Order 22 of CPC as well as

the subsequent amendments thereto, would lend credit and support to the view that they were devised to ensure the continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non suit the others similarly placed, as long as their distinct and independent rights to property or any claim remain intact and are not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 of CPC are not to be construed as a rigid matter of principle, but must be viewed as a flexible tool of convenience in the administration of justice. The Supreme Court observed that the interest of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the application to set aside abatement, condonation and bringing on record the legal representatives did not appear to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as a handmaiden and make it workable and advance the ends of justice, technical objections which tend to be the stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of the law inevitably necessitates it.

105. Mr. Prashant Chandra has placed reliance upon ***AIR 2008 SC 2866, Jaladi Suguna (deceased) through LRs. versus Satya Sai Central Trust and others*** and ***(2010) 8 SCC 685, Balwant Singh (dead) versus Jagdish Singh and others***, to substantiate his arguments regarding automatic abatement of the writ petition on failure to substitute legal heirs and representatives by filing appropriate application for substitution under Order 22 of CPC.

106. However, this Court finds that in writ jurisdiction, which is an extraordinary jurisdiction exercised by this Court, the judgments cited by the learned counsel for the respondents are inapplicable.

107. The question of abatement of writ petition having been dealt with, I will now consider the preliminary objections raised along with the merits of the case set up by the parties. In the Full Bench decision of the Court rendered in ***Sunni Central Board of Waqfs Vs. Sri Gopal Singh Visharad,*** reported in **1990 (8) LCD 417,** paragraphs- 8, 9, 10, 29, 30 and 31 make useful reading. The appellant therein had argued on the basis of Order XIV Rule 2 of the C.P.C. as it stood before its amendment in the year 1976. It was provided therein that where issues of both law and facts arise and the *"court is of the opinion"* that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose *"if it thinks fit,"* postpone the settlement of issues of fact until after the issues of law have been determined. It was argued that the Court had no discretion in the matter as the words used in the Section were "it shall try those issues first". Later on the Order XIV Rule 2 was amended which reads as follows:-

"(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue"

108. This court observed that the word "shall" used in the old Order XIV Rule 2 has been replaced in the present Rule by the words "may". Thus now it is discretionary for the Court to decide the issue of law as a preliminary issue or to decide it along with the other issues. It is no longer obligatory for the Court to decide an issue of law as a preliminary issue. Another change has been brought about by the amended provisions to the effect that not all issues of law can be decided as preliminary issues. Only those issues of law can be decided as preliminary issues which fall within the ambit of Clause (a) and (b) of Sub-Rule 2 of Order XIV.

109. The Court after considering the issues framed by the learned trial court came to the conclusion that none of the issues could be brought within the bar created by the Limitation Act or the Muslim Waqfs Act. The Court observed in paragraphs 30 and 31 as follows:-

"30. We have observed hereinabove that after the amendment brought about in the year 1976 it is discretionary with the Court to take up an issue as a preliminary issue. The court is not bound to take up any issue as a preliminary issue. All judicial discretions have to be exercised reasonably.....From this it would appear that dispute between the parties is pending for the last 10 years. The dispute raised in these suits is of vital importance to the country. It is not a suit between two individuals. It is a dispute between two major communities of the country. Off and on, leaders of these communities adopt hostile postures. The entire nation is waiting for resolution of the dispute by this Court. Delay in resolution of the dispute threatens to disturb peace in one or the other part of the country. It is, therefore, desirable that all the suits should be decided as early as possible. Our decisions on the so called preliminary issues will not be final. Appeal may be preferred against our decision and further hearing in the suits may be stayed. This will cause delay in the final solution of the dispute. Accordingly we are of the opinion that issues 3 and 5 (f) should not be decided as preliminary issues even if they fall within the ambit of clauses (a) and (b) of Rule 2 of Order 14 of the Code of Civil Procedure.

31. In Major S.S. Khanna vs. Brig. F.J. Dillon AIR 1964 Supreme Court 497 their Lordships have observed that normally all issues in a suit should be tried by the Court as not to do so especially when the decision on issues even of law depends upon the decision of issue of fact, would result in a lop-sided trial of the suit. This observation of their Lordships now finds statutory recognition

in sub-rule (1) of Order 14 Rule 2 of the Code of Civil Procedure reproduced hereinabove. According to this sub-rule normal rule is to decide all the issues together. Sub-rule (2) carves out exception to this normal rule. For the reasons already stated hereinbefore the present case does not fall in the exception carved out by sub-rule (2) of Order 14 Rule 2."

110. In the judgement of the Full Bench in the case of ***Gopal Singh Visharad (supra)***, the Court interpreted Order XIV Rule 2 as it now exists on the statute book after its amendment in 1976 and held that it is not mandatory for the Court to decide the preliminary issues first before deciding issues of fact as there are some issues of fact and issues of law which are so intertwined that they cannot be decided separately. It is the discretion of the Court to decide them together.

111. In ***Satyavrata Siddhantalankar Vs. The Arya Samaj (supra)***, the plaintiffs had filed a suit being members of the Arya Samaj Bombay, on behalf of themselves and all the members of the Society against the first defendant who was the President of the said society, as representing the Society of Arya Samaj Bombay and against defendant nos.2 to 4, who were the Members of the Managing Committee of the Society, for a declaration that the Resolutions passed at an extraordinary General Meeting of the Society were ultra vires and a fraud on the minority and null and void and for further other reliefs. The minority of members of the said Society was over borne by the vote of the majority who were acting against the interest of the Society and its objects. The question was raised regarding the maintainability of the suit as the plaintiffs had not obtained the sanction and consent of the Society for the institution of the said suit. The argument before the Court was that the "Arya Samaj Bombay' is a Society registered under the Societies Registration Act and the plaintiffs are admittedly in a minority. The majority of the members of the Society were with the Committee of Management which was arrayed as a defendant. The plaintiffs had wrongly filed a suit in a representative capacity on behalf of themselves and all other members of the Society making out that a Society itself is in the position of the plaintiff. The President of the Society and other defendants also office bearers of the Society, had not sanctioned the filing of the suit. No meeting of the Society had been called for considering the advisability or otherwise of the institution of the suit.

112. It was argued that an Association of individuals which comes into existence and is registered as a Society is different from any other Association or Corporation whose members cannot sue in the name of the Secretary of such a club or association under the provisions of Order I Rule 8 C.P.C. It would not be competent for the Secretary or other members of the governing body of a club or association to sue or be sued alone in respect of matters in which the governing body or the club or association is interested, even though authority in that behalf has been conferred on them by all members of the Association. A partnership Firm is also an association of individuals who have come together for carrying on business in the name of the partnership. Even in case of a partnership it would not be competent to file a suit on behalf of or against the

partnership as such, but for the provision of Order 30 of the C.P.C. Under Order 30 C.P.C., the Firm's name can be used for the purpose of filing a suit by or against the partnership. A society is however quite distinct from a partnership. It has nothing in common with a partnership. A Corporation or a Limited Company which is incorporated under the Indian Companies Act has a corporate existence apart from the members constituting the same. A Corporation has been defined as a collection of individuals united into one artificial form under a special denomination having been vested by the policy of law with the capacity of acting in several respects as an individual. The ideas inherent in the definition of a Corporation are; (1) That its identity is continuous, (2) That it is intangible, it is only an abstract in the intendment and consideration of law, (3) It is a thing distinct from its members. Section 23 of the Indian Companies Act enacts that from the date of incorporation the subscribers of the Memorandum of Association together with such other persons as may from time to time become members of that Company, which shall be a body corporate be capable of exercising all functions of an incorporated company and having perpetual succession and a common seal but with limited liability on the part of the members to contribute to the assets of the company in the event of it being wound up. The Corporations and Companies are conferred the right of being sued and are capable of suing as an independent legal entity. On the other hand, an Association of individuals or partnership Firms are not capable of suing or being sued except in accordance with the statutory provisions contained in the Code. On the registration of the Society under the Societies Registration Act, seven or more persons associated for any literary, scientific or charitable purpose or for any such purpose as described under Section 20 of the Act, as mentioned in the Memorandum of Association, can be registered as a Society. Under Section 6 of the Societies Registration Act, the Society must sue or be sued in the name of the President, Chairman, or the Secretary or Trustees, as will be determined by the rules and regulations of the Society and in default of such determination, in the name of such person as shall be appointed by the Governing Body for the occasion.

113. The Bombay High Court held that any person having a claim or demand against the Society may sue the President or the Chairman or the Secretary of the Society even in the absence of such determination. The Court gave a finding regarding the legal position of a Society registered under the Societies Registration Act. It was observed that the Society is an Association of individuals which is neither a Corporation nor a Partnership nor an individual, which are the only entities is known to law as capable of suing or being sued. Under section 7 of the Act, no Suit or proceeding is to abate or discontinue by reason of the person by or against whom such Suit or proceedings shall have been brought up or continued, dying or seizing to fill the character in the name of which he shall have sued or been sued, but the same Suit or proceeding shall be continued in the name of or against the successor of such person. The judgment delivered against the person or officer named on behalf of the Society, is not to be put in force against the property movable or immovable, of such person or officer but against the property of the Society. The Court observed that the

members of the Society are a fluctuating body who may be admitted in accordance with the rules and regulations thereof after having paid the subscription and signing the roll of membership, but such members may either resign or be removed on incurring a disqualification or on misconduct. The members of the Governing Body as well are not always the same, therefore, the Legislature thought it fit to provide that no Suit or civil proceedings shall abate or discontinue by reason of the person by or against whom such Suit or proceeding may have been brought or continued, dying or seizing to fill the character in which he had been sued, but the same Suit or proceedings shall continue in the name of the successor of such person. Even though the members of the Society or the governing body fluctuate from time to time, the identity of the Society is sought to be made continuous by reason of Section 7 of the Act. A partnership under similar circumstances would come to an end but not the Society. The Society continues to exist and to function as such until the dissolution thereof under the provisions of the Act. The Society by reason of its registration under the Act becomes a legal entity apart from the members constituting the same. The Society once registered enjoys the status of a legal entity apart from the members constituting the same and is capable of suing or being sued. Although it was argued that under Section 6 of the Act that suits by or against the society have got to be filed in a particular manner, but it was held to be not mandatory. The Bombay High Court relied upon judgement rendered in the case of ***Taff Vale Railways vs. Amalgamated Society of Railway Servants; 1901 (1) QB170.***

114. The speech made by Lord Lindley in **Taff Vale Railway Corporation Versus Amalgamated Society of Railway Servants** reported in 1901 AC 425 was quoted with approval. The Amalgamated Society of Railway Servants was a Trade Union which was registered under the Trade Union Act, 1871 and it could acquire property only in the name of its trustees but that property so held was the property of the Union and it was sufficient to treat the registered name of the Amalgamated Society of Railway Servants as one which may be used to denote the Union as an unincorporated Society in legal proceedings as well as for business and other purposes. Any claim against the Society could be enforced against the property of the Trade Union and to reach that property it may not be found necessary to sue the trustees.

The Bombay High Court relied on the observation of the Law Lords that the registered Trade Union is a species of quasi corporation. A registered Trade Union though not a Corporation, is a legal entity governed by Special Rules and reference was made to the Trade Union laws of England. Once it is registered it becomes a legal entity distinct from the unregistered Trade Union and its registered name is applied in legal proceedings.

115. In ***Shanti Sarup vs Radhaswami Satsang Sabha*** (supra), Division Bench of this Court was considering a First Appeal by the defendant appellant against Radha Swami Satsang Sabha, Dayal Bagh, Agra. One of the questions which was raised in the First Appeal was that the Suit could not have been filed by the plaintiff Society in its own name through its Secretary. It was alleged that Under Section 6 of the Act, The Societies Rules and Regulations

should name one of its officers to enable the Society to sue or be sued in that name. The Suit being brought in the name of the Sabha through Secretary was bad in as much as it had been brought in the name of the Society itself and not in the name of the Secretary. The Division Bench of this Court relied upon an earlier Division Bench observation in AIR 1950 Allahabad 480, that a Society when it is registered under the Act, even if it is not a Corporation in the full sense of the term becomes a legal person and letters of administration could be granted to such Society. The right vested in the Society to sue or be sued and the provisions in Section 6 of the Act which begin with the words "may sue or be sued" in the name of one of its officers cannot take away the right of the Society itself to sue or be sued in its own name. Section 6 is merely an enabling provision that the suit be brought by the Society itself or in the name of the President, Chairman or the Principal Secretary or the trustees. The Division Bench at Allahabad came to the conclusion that Section 6 of the Act is merely permissive and the Suit could have been validly filed in the name of the plaintiff Sabha alone which was a registered Society.

116. In ***Nabadweep Bhajan Ashram Versus Commissioners of Navdeep Municipality*** (supra), the Calcutta High Court Division Bench was considering the question whether Navdeep Bhajan Ashram a Society registered under the Societies Registration Act as a religious and charitable institution could have instituted a suit against the commissioners of the Municipality praying for a declaration that certain holdings belonging to it situated in the Municipality were not liable to Municipal taxes on the ground that the holdings were exclusively used as places of worship to which the public have the right of free access. The Trial Court had dismissed the Suit as not maintainable as framed in the name of Navdeep Bhajan Ashram alone. The Division Bench observed that in the Memorandum of Association of the Society Rule 17 provided that the Association shall sue or be sued in the name of the Association or the Honorary Secretary for the time being. The Trial Court held that the Suit could not have been instituted in the name of the Ashram itself as per the provisions of Sections 6 and 7 of the Act a registered society could not sue or be sued in its own name but should sue or be sued in only in the manner indicated in the Sections in the name of either the Chairman or the President or the Principal Secretary or Trustees thereof, or some other person or Officer nominated by the Society. The Division Bench quoted with approval the observations of Justice Bhagwati in *Satyavrata Siddhantalankar (supra)* that these provisions are not mandatory, based upon the judgement rendered by the House of Lords in *Taff Vale Railway Company Versus Amalgamated Society of Railway Servants.* Section 6 of the Act does not take away the inherent right of the Society registered thereunder to sue or be sued in its own name. The Society does not lose the right as a result of such a section but it develops the character of a *quasi* Corporation. It may be true that under the Act, there is no express provision made that a Society registered thereunder can sue or be sued in its own name but that fact alone is not to be taken as sacred on that point. Under the Act, the power is given to the registered Society for acquiring and disposing of any

property and therefore, it could sue in its own name alone as a plaintiff.

117. In **Khiri Ram Gupta** (supra), the Patna High Court was dealing with a Second Appeal filed by the respondent-appellant. A suit was filed by the plaintiff which was a Society registered under the Societies Registration Act with regard to a declaration of title over two plots of land used by the Society as a private land for the convenience of the Institutions set up near it by the Society. The Society had purchased the two plots of land through registered sale deed from the original tenants thereof. Later on, a Sub-tenant of the original tenants sold of the plot of land to the respondent-appellant. Both the Courts below had found that the Suit as framed was maintainable and the disputed land was the private land of the Society and the plaintiff had title to the land in dispute. When the matter went up in Second Appeal it was argued by the appellants that under Sections 6 and 7 of the Societies Registration Act, the suit filed in the name of the Society alone as plaintiff was not maintainable. Reference was made to the language of Section 6 of the Act which prescribes that either the President or the Chairman or Principal Secretary or the Trustees as determined by the Rules and Regulations of the Society and in default of such determination, such person shall be appointed by the Governing Body of the Society alone shall be competent for suing or being sued to advance a claim or demand for or against the Society. Since the Suit was instituted in the name of the Society alone as the sole plaintiff it was not maintainable. The learned Courts below had relied on the decision of **Satyavrata Siddhantalankar Versus Arya Samaj** reported in **Bombay AIR 1945 Bombay 516 and Navdeep Bhajan Ashram Versus Commissioner Navdeep Municipality** reported in AIR 1959 Calcutta 361, and came to the conclusion that the suit as framed was maintainable in law. It was also argued by the appellant that any registration made under the Act of 1860, does not make the Society a corporation. The respondents, however, argued that although the registration of a Society does not make it into a Corporation in the technical sense of the word, it does at least constitute a quasi corporation. It may sue or be sued in its own name even though there is no provision made in this respect.

118. In all the aforesaid cases, the various High Courts have relied upon English case laws. The observations made by Lord Brampton and Lord Lindley were quoted by the Courts where it was observed that the Union being an unincorporated Society could use the name given to it at the time of its registration. In **Taff Vale Railway Corporation** (supra), it appears that while the Appeals Court proceeded on the view that since there was no provision in the Trade Unions Act empowering a Trade Union to sue or be sued in its own name, therefore, it could not do so, the decision of the House of Lords was based on the absence of any provision in the said Act authorizing and directing that it shall sue or be sued in any other name than its registered name. Stress was laid on the fact that a Trade Union on registration came into existence as a separate legal entity created by the Statute which should be known by its registered name for all purposes. Section 9 of the English Trade Unions Act, 1871 contained provisions almost similar to those in Section 6 of the Societies

Registration Act, and there were no provisions in the Societies Registration Act authorizing and directing a registered society to sue or be sued in any other name. It was held by the Division Benches of various High Courts that Sections 6 and 7 of the Societies Registration Act merely contained provisions for institution of suits by or against a registered society and are not mandatory and do not militate against a registered Society suing or being sued in its registered name in the absence of any express provision in the statute barring the Institution of suits by or against the Society in its registered name it could not be said that the suit as framed was not maintainable.

119. This Court is of the considered opinion that the opening phrase of Section 6 use the words *"may"* and therefore such Section is not mandatory but permissive. The language of the proviso to Section 6 uses the expression *"it shall be competent"* that is only an enabling expression and it does not prohibit the Society to come to the Court to protect its interests.

120. Learned counsel for the private respondents has relied upon **Shri Sant Sadhguru Janardhana Swamy Moin Giri Maharaj. V State of Maharashtra** reported in **2001 (8) SCC 509,** and Paragraph 12 thereof to submit that the preparation of electoral roll being an intermediate stage in the process of election which having been set in motion, the High Court should not interfere in the election process.

121. Similarly in **Shafi K. Joseph Versus V. Vishwanath & Others** reported in **2016 (4) SCC 429,** the the Hon'ble Supreme Court had observed in Paragraphs 15 and 16 on the basis of judgement rendered in **N.P. Ponnuswami (supra)**, that once the election programme had been published and there was a statutory remedy available, the High Court should not have interfered with the process of election which had commenced. Several judgements relating to the same issue of maintainability of writ petition after election programme is published have been cited by the learned counsel for the private respondents but they are irrelevant for the controversy as when Writ Petition No.367 (M/S) of 2012 was entertained by this Court and an interim order was granted on 09.02.2012 which was reiterated in the order of this Court dated 26.04.2013, the respondent had approached the Division Bench in Appeal against the order of the Writ Court, the Division Bench had refused to interfere in the order and the Interim Committee constituted by the interim order of this Court continue to function and manage the affairs of the Society and the Institutions run by it till date. Deputy Registrar realizing his mistake had also initially declared the results of the elections on dismissal of the petition but on its restoration, had cancelled his order dated 11.01.2013, by an order dated 30.04.2013 which has been placed before this Court by the learned counsel for the petitioners. The order dated 30.04.2013 was never challenged by the respondents and has attained finality.

122. Although much arguments have been raised regarding the restoration of the Writ Petition No.367 (M/S) of 2012 and Writ Petition No.4528 of 2010 by this Court in April 2013, and restoration of the interim order by it and appointing of an Interim Committee again this Court

cannot go behind the order dated 26.04.2013, as the order passed by this Court was challenged in Special Appeal and the Division Bench has refused to interfere but only observed that the writ Court may decide the writ petition expeditiously along with several applications pending in it, say within a period of three months. The writ petitions have remained pending for more than six years thereafter. Judgement was reserved twice by different Judges but the bunch was eventually released.

123. The Society runs seventeen Institutions like MMS Birla House and a Girls Hostel, National Inter College, National PG College, all at Rana Pratap Marg. Moti Lal Nehru Homeopathic Hospital, Bal Vidya Mandir, Bal Chikitsalaya, Bal Sangrahalaya, Bal Pustakalaya Ravindralay, Bal Ravindralay, MMS Auto Mobile Training Centre. A Nursing School and A Technical Training Centre etc. at Charbagh, Lucknow, and a Homeopathic Hospital and Technical Training Institute at Lakhimpur Kheri. It is obviously a Society which has contributed much to the educational and social well being of the people at large with its charitable work in the past. It has still more to contribute in the future and this Court cannot only on a preliminary objection being raised regarding the form in which the writ petition is drafted, ignore the valid and important questions of law raised regarding the jurisdiction of the Registrar/ Deputy Registrar in interfering with the functioning of the Society.

124. Now let us consider the case set up by the learned counsel for the parties on merits. For this, I shall have to consider the Bye-laws of the Society first. Under the Memorandum of Association of the Society, Para (3) provides for a Governing Council which will consist of 17 members and would include 13 Foundation members and four other members who shall be elected or nominated as prescribed under the Rules framed by the Society. The Council means the Governing Council of Moti Lal Memorial Society. The General Body means all members of the Society taken together consisting of Foundation members, Life members, Associate members, the Patrons and the Ordinary Members.

Rule (3) describes the Categories of Members Rule (4) the Foundation members, and says that only 13 Foundation members shall hold office for life unless any of them resigns or is removed under Rule 10 (1) or Rule 11 (1) of the Rules. All vacancies occurring in Foundation members shall be filled up induction in a meeting of Foundation members. Four members shall form a quorum and a person who is chosen by them to fill up the vacancy caused amongst Foundation members shall become a Foundation member for all purposes.

Rule 6 refers to Life members. A Life member means a person who was enrolled and registered as such by the Governing Council before 31.05.1964 or who shall thereafter, be admitted as such by the Council on the ground of his distinguished and devoted public service. Persons enrolled and registered as Life members of the Sansthan shall also become life members of the Society. The word "Sansthan" has not been defined in the bye-laws or the Memorandum of Association.

Rule 7 refers to Associate members meaning a person who was enrolled as such before 31.05.1964, or who thereafter, paid a donation of Rs.500/- in a lumpsum or gifted property worth that amount or more to the Society. A person registered as Associate member of the Sansthan shall also become an Associate member of the Society.

Rule 7A refers to Ordinary members as person who pays donation of Rs.25/- annually and is admitted as such by the Council and agreed in writing to promote the objects of the Society and to abide by its Rules and Bye-laws. Patron members are described in Rule 8 as persons who were enrolled and registered as Patrons before 31.05.1964 or persons who paid Rs.1000/- or more in lumpsum to the Society and agreed in writing to promote the objects of the Society and are admitted as such by the Council. A person enrolled and registered as patron of the Sansthan shall also become a patron of the Society.

Rule 9 provides that the President and General Secretary of the Sansthan shall supply a certified list of Patrons, Life members and Associate members of the Sansthan before 15th April every year to the Society and the Society shall register the names of such Patrons, Life members, and Associate members, in the Register of its members also.

Under Rule 10 (1) the Governing Council may remove a Foundation member, a Patron, a Life member, an Associate member or an Ordinary Member from membership if he incurs any of the ineligibilities given under Sub-Clause (a) to (g) of Rule 10 (1). The Proviso to the Sub-rule says that a person against whom action under Rule 10 (1) is contemplated may be afforded an opportunity to be heard in camera before action is finally taken but he will not be given anything in writing in relation to allegations against him.

Under Rule 11 the Composition of the Governing Council has been given in detail. The Governing Council would be composed of 17 members in accordance with Article 3 of the Memorandum of Association out of which four members, referred to in Clause (b) of Article 3 of the Memorandum of Association would be elected members. The Governing Council has to elect three from amongst Patrons and Life members and one from amongst Associate and Ordinary members. All casual vacancies among the members, other than Foundation members of the Governing Council, were to be filled up by election by other members of the Council present in the Meeting specially convened for the purpose of which 15 days notice had been given to each member of the Council. The term of an elected members was three years and he was eligible for re-election. Under Rule 11 (I) a Member of the Governing Council could be removed if he incurred any of the ineligibility is mentioned in Sub-clause 1 to 5 of Rule 11 (I). No member of the Governing Council could be removed from his office, unless a resolution to that effect has been passed by the Governing Council at a Special Meeting convened for the purpose, by a majority of not less than three-fourth of the total members present and voting and of which at least 30 days notice had to be given to each member.

Under Rule 12 all the affairs of the Society and the Management and Control of its Institutions and Organizations run by the Society alongwith its property of every nature was

to vest in the Governing Council. Under Rule 12 (2) (I) the Governing Council was competent to institute, conduct, defend, compound or abandon any legal proceedings by or against the Society.

Under Rule 12 (3) the Governing Council may subject to its general control and supervision, and such instructions as it may like to impose, delegate all or any of its powers to any person. Under Rule 16, the notice of meeting of the Council had to be served seven days before the date of the meeting. An emergent meeting of the council would be called at 48 hours notice.

125. This meant that for an Ordinary meeting of the Governing Council seven days notice was required. Fifteen days notice was required for a meeting of the Council to induct a Foundation member. In case of Removal of a member of the Council, *"not being a Foundation member"*, thirty days notice was required to be given.

Under the Rule 17 the General body was to be composed of all members of each category including the Patrons. The quorum for a meeting for the General body was eight members. Under Rule 23 (a), the office bearers or the Committee of Management of the Society have been given as the President, Vice President and Honorary General Secretary elected by the Governing Council from amongst the Foundation members. In case of a Vice President or a Joint Secretary, they could be elected Members of the Council. Governing Council could also a Treasurer or a Joint Secretary. The term of the office bearers was three years but could be curtailed by the Governing Council under special circumstances. The retiring office bearers were eligible for re-election.

Under Rule 23 the outgoing office bearers would carry on discharging their duties until their successors in office were elected or appointed as the case may be, and had taken over charge. Under Rule 24 (1) the President would be the Chief Executive Head of the Society. He would function for and on behalf of the Society during the absence of the Council. All such actions shall be brought to the notice of the Council in due course. Under Rule 24 (2) the Vice President would exercise the powers of the President during his absence or when on leave. The President could delegate any functions, duties, and powers to the Vice President for any specified time.

Under Rule 24 (3), all functions of the Council/Executive Business of the Society were to be carried out by the Honorary General Secretary. The General Secretary was to place all policy and other important matters before the President and obtain orders thereon. The President would call for any papers from the General Secretary and pass such orders on them as he deemed fit and the Secretary was to follow the directions issued by the President. Under Rule 25 the Society was to sue or be sued in the name of the General Secretary or such other person who may be appointed by the Governing Council for the said purpose.

126. Under the Societies Registration Act, the Registrar does not have power to interfere in the normal functioning and internal affairs of the Society. If during the ordinary course of business, action is taken against a member, he cannot examine the resolution and its validity. The powers of the Registrar in interfering in the affairs of the Society are given under Section 24 of the Act and in case the Committee of Management does not hold the election

within time i.e. it does not announce an election programme before the end of its tenure, the Societies Registration Act provides that the Registrar under Section 25(2) of the Act can declare the Committee of Management as time barred and take over the power to hold elections either by himself or by his nominee. Under Section 24 of the Act, on information received under Section 22 or otherwise or in circumstances referred to in sub-section (3) of Section 23, if the Registrar is of the opinion that there is an apprehension that the affairs of the Society registered under the Act are being so conducted so as to defeat the objects of the Society or that the Society or its Governing Body or any officer in control thereof is guilty of mismanaging its affairs or any breach of fiduciary or other obligations, then Registrar may either himself or by any person appointed by him in that regard, investigate and inspect the affairs of the Society or of any institution being run by it, the Registrar may call for the records and inspect the same and on conclusion of such inspection, may pass orders and give such directions to the Society or to its Governing Body or the office bearers, as he may think fit, for the removal of any defects or deficiencies within such time, as may be specified by him and in the event of default in taking action, the Registrar may proceed to take action under Section 12-D or Section 13-B as the case may be. As far as working of the Society is concerned, the Registrar cannot go beyond the powers mentioned under Section 24 of inspection and investigation and giving directions and orders to remove defects by the office bearers or to take action against such office bearers under Section 12 or Section 13 of the Act. Insofar as the working of the Society on a day-to-day basis is concerned, in respect to the induction into the membership or expulsion of certain members from the membership of the Society, which comes within the ordinary course of business of the Society, the Registrar has no role to play.

127. Further, Section 4-B of the Act was introduced by way of amendment by U.P. Act No.23 of 2013 in October, 2013. Only under this newly added Section, at the time of Registration, Renewal of the Society, the list of members of the General Body of that Society, shall be filed with the Registrar, mentioning the name, parentage, address and occupation of the members and the Registrar shall examine the correctness of the list of members of the General Body of such Society on the basis of the Register of members of the General Body and the Minutes Book thereof, the Cash Book, Receipt Book of Membership fee, and Bank Passbook of the Society.

128. Sub-section (2) of Section 4-B provides that if there is any change in the list of members of the General Body of the Society referred to in sub-section (1), on account of induction, removal, resignation or death of any member, a modified list of General Body members shall be filed with the Registrar within one month from the date of such change.

129. Sub-section (3) of Section 4-B provides that the list of General Body members should be signed by two office bearers and two Executive Members of the Society. The impugned order passed by the Deputy Registrar on 26.7.2010 interfering with the resolution of the Society regarding expulsion of certain members for misconduct, could not have

been looked into by the Registrar before the introduction of Section 4-B by way of amendment in October, 2013. The feeble attempt made by the learned counsel for the private respondents to argue that the Registrar derived jurisdiction to look into the expulsion of members because of judgment and order of the Court in Writ Petition No.2353 (M/S) of 2010 falls flat on its face as no Court can confer jurisdiction on any authority against the provisions of the Statute as has been held by a Constitution Bench in ***A.R. Antulay Vs. R.S. Nayak and another*; 1988 (2) SCC 602.**

130. Even on merits, in the order dated 26.07.2010, one of the grounds taken by the Registrar for cancelling the resolution dated 15.3.2008 was that on perusal of the Proceedings Register, it was apparent that the Minutes of the meetings were mentioned in a haphazard manner, i.e. meetings which took place later on were mentioned before the Minutes of meetings, which took place before them. Vishnu Bhagwaan Agarwal in his representation dated 23.12.2008 did not take any such ground. Even in the show cause notice issued by the Deputy Registrar on 25.09.2009 to Nagendra Nath Singh, there was no mention of any such objection. Had he mentioned such objection, the petitioner no.2 would have given an explanation to the same. Vishnu Bhagwaan Agarwal expelled Nagendra Nath Singh in the meeting dated 27.4.2007 and was thereafter, at the helm of the affairs of the Society. Even after the order passed on 7.7.2007 by the Deputy Registrar, restoring Nagendra Nath Singh as President of the Society, Vishnu Bhagwaan Agarwal filed Writ Petition No.3299 (MS) of 2007, where there was an interim order operating since 10.7.2007 till the disposal of Special Appeal No.615 of 2007 on 17.7.2007. Even thereafter, Vishnu Bhagwaan Agarwal did not return the Proceedings Register till dismissal of Writ Petition No.3299 (MS) of 2007 by this Court on 15.2.2008. He continued to withhold the Proceedings Register thereafter also despite judgment of this Court against him on 12.8.2008. After filing of Review Petitions by Nagendra Nath Singh, Veer Sen and Vishnu Bhagwaan Agarwal, this Court entertained the same and passed an order on 17.9.2008 after which, the Proceedings Register was returned by Vishnu Bhagwaan Agarwal.

131. Since a show cause notice was issued by the Deputy Registrar on the representation of Vishnu Bhagwaan Agarwal to Nagendra Nath Singh as President of the Society and was addressed to him in his personal capacity, the Governing Council of the Society met on 22.7.2010 and authorized Nagendra Nath Singh to present the Society's case before the Deputy Registrar. An application for adjournment was moved by Nagendra Nath Singh on 24.7.2010, saying that an application for recall of the order dated 28.5.2010 had been filed on 23.7.2010, which was pending disposal before the Court, therefore, the hearing on the representation of Vishnu Bhagwaan Agarwal be postponed. The Deputy Registrar, however, passed the order on 26.07.2010 without waiting for disposal of the recall application. The order passed by the Deputy Registrar on 26.07.2010, having been passed without jurisdiction, is set aside.

132. Section 25 Sub-section 2 of the Societies Registration Act is being quoted here in below :- "where on an order being

made under subsection (1) an election is set aside or the *office bearers are held no longer entitled to continue in office or the Registrar is satisfied that any election of office bearers of the society has not been held within the time specified in the rules of that Society, he may call meeting of the General Body of the Society, for electing such office bearer or office bearers and such meeting shall be presided over and be conducted by the Registrar or by any officer authorized by him in this behalf, and the provisions in the Rules of the Society relating to meetings and election shall apply to such meeting and elections with necessary modifications."*

Under Section 25 Sub-clause (3) where a meeting is called by the Registrar under Sub-section (2) no other meeting shall be called for the purpose of election by any other authority or by any person claiming to be an office bearer of the Society.

A bare perusal of the aforesaid Sub Sections to Section 25 would establish that the right to convene a meeting for the purpose of holding of election of the office bearers of the Society is not lost in the outgoing Committee of Management after the expiry of the term automatically. It is only when the Registrar passes an order under Sub-section (2) of Section 25 of the Act for convening a meeting of the General Body of the Society for the purpose of holding a fresh Election of the Committee of Management that the outgoing office bearers are debarred from convening a meeting for the said purpose. The Byelaws of the Society prescribed a term of three years for the office bearers but there is no provision in the Byelaws that makes the elected office bearers defunct after three years.

133. In fact under Rule 23 (d) of the Byelaws of the Society, there is a specific provision that the office bearers shall continue to hold office till such time that their successors are elected, as such no vacuum is contemplated in the Byelaws even after the term of the Committee of Management expires. When the Deputy Registrar issued a direction to the President of the Society to hold elections after completion of induction of Foundation members in accordance with the Byelaws of the Society, and in pursuance thereof Nagendra Nath Singh had issued an Election Programme on 28.12.2011 i.e. before the term of the office bearers expired on 31.12.2011, there was no occasion for the Deputy Registrar to pass the order impugned dated 10.01.2012 directing for holding of elections by him under Section 25 (2) of the Act the Registrar. The order dated 10.01.2012 has completely ignored the provisions of the Byelaws of the Society which clearly prescribed under Rule 23 (d) for the office bearers to continue till their successors are appointed and take over charge. The Registrar has not expressed any satisfaction as is required in accordance with the language of subsection (2) of Section 25 that the election of the office bearers of the Society had not been held within the period specified under the Byelaws of the Society. The order passed on 10.01.2012 being completely without jurisdiction, this Court is satisfied that any person who was a valid member of the Society could have challenged such an order and it was not necessary for the Governing Council of the Society to authorize a person in the absence of the Secretary, to file a writ petition challenging the same issue. Nagendra Nath Singh in his capacity as the outgoing President was also the Chief

Executive Officer of the Society as per the Byelaws of the Society, he was entitled to approach this Court in his personal capacity also. He nevertheless approached this Court by making the Moti Lal Memorial Society as Petitioner No.1 through the Joint Secretary Mrs. Usha Chaudhary as the then Secretary of the Society Professor Lal Amarendra was no longer a member since August 2010.

134. This Court in a Division Bench judgment rendered in ***Ratan Kumar Solanki versus State of U.P., 2010 (1) UPLBEC 369***, has held in its judgment and order dated 16.11.2009 that if a person can show that he has come on behalf of the Society and is also a person aggrieved, he has locus standi to file a writ petition.

135. In ***Ratan Kumar Solanki*** (supra), this Court observed in Paragraph 24 as under:

"24. What is discernible from the above discussion is where the right of an individual is affected or infringed, and, he has no other effective remedy, if such rights of the individual concerned are borne out from the statute or the provision of bye-laws etc. having the flavour of statute, a writ petition at his instance may be maintainable subject to attracting the condition where the Court may decline to interfere namely availability of alternative remedy, delay, laches etc. but where a legal right of an individual is not directly affected, a writ petition expousing the cause of the collective body or other members of the collective body would not be maintainable at the instance of an individual who himself is not directly affected. We may add here that in a given case, if it is found that an election was held by an imposter and he is supported by DIOS or other educational authorities, such an action of DIOS as also the election can be challenged by the individual member since it cannot be said that he is not a person aggrieved but whether a writ petition at his instance would be maintainable or he can challenge the election by filing a civil suit etc., would be a different aspect of the matter and has to be considered in each and every case considering the facts, relevant provision and other relevant aspects of the matter."

136. On the other hand, a Division Bench of this Court while considering the law as settled in ***Ratan Kumar Solanki (supra)*** in its judgment and order dated 7.9.2010 in ***Special Appeal No.1380 of 2008: Rajveer Singh versus State of U.P. and others***, observed as under:

"This Court is already over-burdened with the writ petitions filed by the rival Committees of Management, or the members, who have taken part in the elections, and did not succeed, in the matters arising out of thousands of educational institutions across the State. Every year thousands of writ petitions are being filed. In fact every election of the Committee of Management of educational institution is challenged in the High Court, on the question of its recognition by the Regional Deputy Director of Education (now the Regional Level Committee), under Section-16A (7) of the UP Intermediate Education Act, 1921. A single Judge has been assigned determination relating to only such matters. The valuable time of the Court for deciding important questions of law to reduce inequities and injustice in the

society, is spent in resolving disputes between rival groups to gain control over the educational institutions for the purpose of access to the funds provided by the State Government. In most of the cases the Courts find that the elections are set up only on papers, without holding election meetings.

If the individual members of the general body of the educational society not directly affected by the election results, are also allowed to file objections and to challenge the elections, the fight for gaining control over the school funds will flood the High Courts with litigation. The election may be challenged by members of the general body separately after raising objections before the educational authorities, and thereafter filing writ petitions on variety of grounds.

We may add here that an individual member in such case, is not without remedy. He may file a suit challenging the elections, to enforce his right of association guaranteed under Section 19 (1) (g) of the Constitution of India."

137. In ***Panna Lal*** (supra), this Court observed in Paragraph-19 thus:

"19. In my view, the principle of law which emerges is that though there is no absolute prohibition for maintainability of writ petition at the instance of an individual member but it is a matter of judicial discretion to entertain such writ petition or not. For the said purpose, the Court is guided by well established legal principles on basis of which writ petition is entertained. If it transpires that the individual member is not directly affected by the elections' result but is expousing the cause of the collective body or the members of the collective body, this Court may decline to go into the controversy at his instance. While considering the said question, the totality of facts and circumstances of the case have to be taken into consideration."

138. This Court in ***Jagdambika Prasad Pandey vs. State of U.P. and others, 2019 SCC Online All 4195,*** after placing reliance upon several such observations made by co-ordinate Benches and also the Division Benches of this Court, came to a conclusion that in case the action of the authorities is, on the face of it, illegal or without jurisdiction, it can be challenged even by individual members of the society. Such a challenge shall be entertained to protect the Right of Association of such a member guaranteed under Article 19(1)(c) of the Constitution of India.

139. Moreover, the Supreme Court in its judgment rendered in ***K. Venkatachalam vs. A.Swamickan and others (1999) 4 SCC 526***, has held in Paragraphs 27 and 28 that if a decision is totally without jurisdiction and against the provisions of the Act, the High Court could well interfere in the matter in writ jurisdiction.

140. In ***K.Venkatachalam*** (supra), the Supreme Court observed that alternative remedy cannot be said to be an absolute bar. The High Court in writ jurisdiction has a very wide powers, which cover all violations of the law or the Constitution when recourse to other remedies provided by law are inappropriate due to their complexity, which result in delays. The Supreme Court observed in Paragraphs 27 of the said judgment that Article 226 is cast in the widest possible terms and unless there

is a clear bar to the jurisdiction of the High Court, its powers under Article 226 can be exercised where there is any act, which is against any provision of law or violative of constitutional provisions and when recourse cannot be there to the provisions of the Act for the appropriate relief. The Supreme Court was considering a case where a person was not even qualified to be an elector of the constituency impersonated another in the nomination papers and then contested the election and sat and voted in the legislative assembly of Tamil Nadu. The Supreme Court observed that such a person knew that he was disqualified, yet he impersonated another person and filed his nomination on an affidavit and he may also be held to be criminally liable for such action. If in such a case, he is allowed to continue to sit and vote in the assembly, his action would be a fraud on the Constitution. The High Court rightly exercised its jurisdiction in entertaining the writ petition and declared that the appellant was not entitled to sit in the Tamil Nadu Legislative Assembly and put a consequent restraint order on him.

141. Now I shall deal with all the applications that have been filed by respective parties to the litigation in order of their filing.

In Writ Petition No.4528 (M/S) of 2010, an application for dismissal of the writ petition raising preliminary objection as to its maintainability was filed by Vimal Kumar Sharma registered as Application No.68852 of 2012. This application having been considered along with the counter affidavit filed by the respondent no. 5 to the writ petition itself needs no separate orders to be passed there on.

In the same writ petition, an Application No.81569 of 2012 was filed on 17.09.2012 by the respondent no.4 who is no more. It also relates to the objection regarding maintainability of the petition and after death of Vishnu Bhagwaan Agarwal, it has become infructuous and is dismissed as such.

In Writ Petition No.4528 (M/S) of 2010, an Application No.50531 of 2013 was filed on 22.05.2013 by Professor Lal Amrendra that he had been restored on the position of General Secretary by the Deputy Registrar's order dated 30.11.2012 and he be impleaded as an opposite party. No counsel has pressed this application and it is rejection for non-prosecution.

In the same writ petition Application No.61899 of 2013 was filed by Sri Vivek Raj Singh, on 16.07.2013 where the deponent Kunwar Reoti Raman Singh prayed for amendment in the array of the parties. This application is allowed and Kunwar Reoti Raman Singh is permitted to Pursue the writ petition on behalf of the Society in view of the observations made here in above in this judgement.

Moreover, in ***North Eastern Railway Administration Gorakhpur vs. Bhagwaan Das***; **2008 (8) SCC 511**, the Hon'ble Supreme Court observed in paragraph-16 that Order VI Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In ***Pirgonda Hongonda Patil vs. Kalgonda Shidgonda Patil and others;*** **(1957) SCR 595,** which still holds the field, it was held that all amendments are to be allowed which satisfy the two conditions: *"(A) of not working injustice to the other side, and (B) of being necessary for the purpose of determining the real question which is in controversy*

between the parties. Amendments should be refused only if the other party cannot be placed in the same position as if the pleading had been originally correct but the amendment would cause him an injury which could not be compensated in costs."

An application was also filed on 04.09.2018 by the counsel for the petitioners which has remained pending for deleting the names of opposite party no.4 and 6 as they were both dead registered as Application No.97000 of 2018. This application is allowed.

In Writ Petition No.367 (M/S) of 2012, Application No.17772 of 2012 has been filed on 22.12.2012 by Professor Lal Amrendra paying for substitution which application has not been pressed by any counsel and is rejected for non-prosecution.

Application No.98 of 2013 has been filed on 19.04.2013 praying for permission to persue the writ petition on behalf of the Society by Kunwar Reoti Raman Singh, this application is allowed in view of the observations made here in above in this judgement.

An Application No.61901 of 2013 has also been filed by Kunwar Reoti Raman Singh on 16.07.2013 for amendment in the array of the petitioners and for substitution of the name of the Kunwar Reoti Raman Singh in place of President Late Nagendra Nath Singh, as sitting Vice President of the Society. This application is also allowed.

In the same writ petition, an application for dismissal has been filed Registered as Application No.52702 of 2018 on 07.05.2018 with a prayer for vacation of interim order dated 13.02.2012 on behalf of Vimal Kumar Sharma Which has become infructuous, as a Special Appeal was filed praying for the same relief as mentioned in this Application which has been disposed of by the Division Bench without granting this prayer to the respondent. This application thus stands rejected.

142. The orders dated 10.01.2012 and 16.01.2012 challenged in Writ Petition No.367 (M/S) of 2012 and Writ Petition No.430 (M/S) of 2012 for the reasons aforesaid, are set aside. All consequential actions taken in pursuance of orders dated 26.07.2010, 10.01.2012 and 16.01.2012 are also rendered null and void ab initio.

143. Writ Petition No.4528 (M/S) of 2010, Writ Petition No.367 (M/S) of 2012 and Writ Petition No.430 (M/S) of 2012 stand ***allowed*** and Writ Petition No.918 (M/S) of 2013 stands ***dismissed.***

144. It has been submitted by the learned counsel for the petitioner that after 31.12.2008 no valid elections have been held. The elections held on the orders of the Deputy Registrar in February 2012 have lost their efficacy after the orders of the Deputy Registrar himself on 30.04.2013. It has also been submitted that the Judgement in these writ petitions has to be declared by this Court on the basis of facts as are pleaded before this Court at the time when the writ petition were filed. Reference has been made to Rule 23(d) of the Byelaws which states that the Committee of Management shall continue till the successors are appointed.

This Court, however, finds on due consideration of all submissions made before it that since the Society runs several Educational and Charitable Institutions and there is great animosity

generated amongst the members of the Society due to repeated litigations, it would be appropriate that this Court constitutes a Committee of respected and responsible citizens to look after the affairs of the Institutions run by it.

During the time when this bunch of petitions was heard and judgment was reserved, this Court received a written request dated 13.11.2019 from Justice S.U. Khan (Retd.) to be relieved of the responsibilities given to him by this Court's order dated 26.04.2013.

This Court is also convinced that a Committee of two Members only shall not be able to discharge the responsibility of running the Society and its Institutions in the period during which the elections to the various constituents of the Governing Council are held and new office bearers take charge.

I, therefore, nominate four persons as Members of the new Interim Committee to look after the affairs of the Society and the institutions, namely, employees and staff run by it.

Justice (Retd) Arun Tandon, Allahabad High Court has graciously consented to be the Chairman of the Interim Committee. Sri Birendra Chaubey, Retired Special Secretary, Finance Department, U.P., Sri Murli Dhar Rai, Retired Officer-on-Special Duty, Finance Department, U.P. and Sri V.K. Mathur, Senior Auditor, Retired from Department of Industries, U.P., shall be the three others members of the Interim Committee.

Rs. One Lakh per month shall be given to the Chairman Hon'ble Mr. Justice Arun Tandon (Retd.) and Rs.75,000/- per month to each of the other members of the Committee along with actual expenses from the funds of the Society as honorarium in appreciation of their efforts to bring back the Society on its feet.

All papers, documents, files shall be handed over by the present Interim Committee to this Committee of five Members. The Registrar, Firms, Societies and Chits, U.P. and Deputy Registrar, Lucknow Region, Lucknow, shall provide all necessary assistance regarding documents available in their office to the members of the Interim Committee.

145. There are undisputedly five Foundation Members who are alive; they being Kunwar Reoti Raman Singh, Raja Anand Singh, Dr. Dauji Gupta, J.R. Tripathi and Mata Prasad. For filling up nine vacancies of Foundation Members, steps be taken first. Thereafter, steps be taken to fill up four vacancies in the Governing Council for which elections be held, in accordance with the procedure prescribed under the Bye-laws of the Society.

The last undisputed election to the Society were held under the supervision of the Registrar, Firms, Societies and Chits, U.P on 31.12.2008. The Interim Committee shall procure the list of the Members of the General Body of the Society utilized in the elections held on 31.12.2008 from the office of the Deputy Registrar, Firms, Societies and Chits, Lucknow Region, Lucknow and shall publish this list within one month in two widely read newspapers of the State, one English Daily and one Hindi Daily and invite objections to the said list. All objections are to be filed within three weeks and the list be finalized thereafter within a further period of three weeks. After the list is finalized, it will be

utilized for the purpose of election of four elected members of the Governing Council.

It is expected that the Interim Committee constituted by this order of the Court shall be extended all cooperation by the existing staff of the Society and the office of the Deputy Registrar. The election as aforesaid, shall be held within a maximum period of six months under the guidance of this Interim Committee which shall hand over charge to the newly elected office bearers soon thereafter.

The Registry of this Court shall inform about the order passed today by this Court to the Chairman and Members of the Interim Committee appointed by this Court as aforesaid along with a copy of this order.

(2020)06ILR A1218
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.06.2020

BEFORE

THE HON'BLE ABDUL MOIN, J.

Bail No. 7115 of 2019

Mohd. Irshad ...Applicant
Versus
Sate of U.P. ...Opposite Party

Counsel for the Applicant:
Arun Sinha

Counsel for the Opposite Parties:
G.A.

(A) Criminal law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8 - Prohibitions of certain operations - Section 21 - Punishment for contravention in relation to manufactured drugs and preparations - Section 50 - Conditios under which search of persons shall be conducted - Code of criminal procedure,1973 - Section 50 - Person arrested to be informed of grounds of arrest and right to bail - applicant guilty of the offence - not fit case for grant of bail.

(B) Criminal law - Code of criminal procedure,1973 - Section 439 - Special powers of high court or court of session regarding bail - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 37 - offences to be cognizable and non-bailable - exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause - (i) prosecution must be given an opportunity to oppose the application (ii) Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates. Para -24

Applicant had been arrested - morphine weighing one kilogram and ten grams recovered from the bag which the applicant was carrying - not following the provisions of Section 50 (1) of the Act of 1985

HELD:- The Court is of the view that there has been compliance of the provisions of Section 50 (1) of the Act of 1985, the sample was duly taken, lack of independent witnesses would not vitiate the recovery and arrest of the applicant and merely because the applicant has no criminal history, would not entitle him automatically for grant of bail.(Para - 27)

Bail application rejected.(E-7)

List of Cases Cited:-

1. St. of Raj. Vs Parmanand & anr. , 2014 (2) SCC (Crl.) 563

2. S.K. Raju @ Abdul Haque @ Jagga Vs St. of W.B. , 2019 (1) SCC (Crl.) 371

3. Vijaysinh Chandubha Jadeja Vs St. of Guj., (2011) 1 SCC (Crl.) 497

4. Namdi Francis Nwazor Vs U.O.I. & ors.. 1998 SCC (Crl.) 1516

5. Ajmer Singh Vs St. of Hary., (2010) 2 SCC (Crl.) 475

6. Major Singh Vs St. of U.P. , 2005 Cri.LJ 1001

7. St. of Hary. Vs Jarnail Singh & ors. , 2004 SCC (Crl.) 1571

8. Ravindran @ John Vs Suptd. of Customs , (2007) 3 SCC (Crl.) 189

9. St. of Punj. Vs Baldev Singh , (1999) 6 SCC 172.

10. St. of Karela Vs Rajesh , (2020) SCC Online SC 81.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Arun Sinha, learned counsel for the applicant, and Sri Rao Narendra Singh, learned Additional Government Advocate for the State through video conferencing in terms of orders passed by Hon'ble Chief Justice taking into consideration COVID-19 situation.

2. Present bail application has been filed by the applicant Mohd. Irshad, who is involved in Case Crime No.75 of 2019 registered under the provisions of Sections 8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act of 1985), Police Station Masauli, District Barabanki.

3. From perusal of the first information report dated 24.02.2019 it comes out that on 24.02.2019 the police party noticed two persons moving in suspicious circumstances, who upon seeing the police personnel, tried to run away. The police personnel managed to catch hold of one person namely the applicant while the other person managed to escape. On being arrested, the said person disclosed his name as Mohd. Irshad i.e. the applicant. Upon being asked as to why he tried to run away, the applicant replied that he is carrying morphine in a bag and the person who ran away was his friend/elder brother Mohd. Junaid. The police personnel informed the applicant that he has to be searched by a gazetted officer or a magistrate under the provisions of Section 50 of the Criminal Procedure Code (as indicated in the first information report) to which the applicant informed that as he is carrying morphine, he does not wish to be searched by any other person and that the police personnel may themselves search the applicant. Upon such consent being given by the applicant, the Station Officer searched the applicant and in the bag being carried by the applicant, it was noticed that a polythene was kept. The applicant informed about the contents of the polythene as morphine. The said morphine was weighed in the weighing scale by the police personnel from which it came out that the weight of morphine was one kilogram and ten grams, being brown in colour which was sealed. The applicant was also arrested and the witnesses were said to be the police personnel inasmuch as despite various persons being present none came forward to be a witness on account of not being willing to be involved. The applicant is said to be in jail since 24.02.2019.

4. Sri Arun Sinha, learned counsel for the applicant, on the basis of

averments contained in the bail application argued that the provision of Section 50 (1) of the Act of 1985 was not complied with despite a personal search being carried out which is the mandatory requirement and in the absence of the same, the entire arrest and recovery becomes vitiated in the eyes of law and thus the applicant deserves to be released on bail. In this regard, Sri Sinha has placed reliance on the following judgments:-

(i) 2014 (2) SCC (Crl.) 563 - State of Rajasthan vs. Parmanand and another;

(ii) 2019 (1) SCC (Crl.) 371 - S.K. Raju alias Abdul Haque alias Jagga vs. State of West Bengal;

(iii) (2011) 1 SCC (Crl.) 497 - Vijaysinh Chandubha Jadeja vs. State of Gujarat, and

(iv) 1998 SCC (Crl.) 1516 - Namdi Francis Nwazor vs. Union of India and another.

5. Sri Sinha further argued that no sample was drawn from the article being carried by the applicant which was a mandatory requirement and also there were no independent witnesses to the seizure of the morphine and thus the same vitiates the entire arrest and recovery. It is also argued that the applicant does not have any criminal history and thus deserves to be released on bail. No other ground has been argued.

6. On the ground of Section 50 (1) of the Act of 1985 having been violated at the time of arrest, much emphasis has been placed on the judgments of Hon'ble Apex Court in the cases of **Parmanand (supra), S.K. Raju (supra)** and **Vijaysinh Chandubha Jadeja (supra)** to contend that even if for the sake of argument the applicant gave his consent for being searched by the police personnel yet the mandatory requirement of Section 50 (1) of the Act of 1985 is that the applicant should have been informed that it is his right to be searched by a gazetted officer or a magistrate and in the absence of police personnel informing the applicant of such right, the arrest and recovery of morphine are vitiated in the eyes of law.

7. On the other hand, Sri Rao Narendra Singh, learned Additional Government Advocate, on the basis of averments contained in the counter affidavit has argued that the applicant was arrested from a public place. The applicant had been given an option of being searched by either a gazetted officer or by a magistrate under the provisions of Section 50 (1) of the Act of 1985 to which he submitted that he wished to be searched by the police party itself and thus there was consent of the applicant for being searched not by a gazetted officer or the magistrate but by the police personnel themselves. It is thus contended that once the applicant was specifically informed about his right under Section 50 (1) of the Act of 1985 and he waived off his right then at this stage the applicant cannot be allowed to argue that the mandatory provisions of Section 50 (1) of the Act of 1985 not having been complied with, the same would vitiate the arrest and recovery of the morphine. In this regard, Sri Rao has placed reliance on the following judgments:-

(i) (2010) 2 SCC (Crl.) 475 - Ajmer Singh vs. State of Haryana;

(ii) 2005 Cri.LJ 1001 - Major Singh vs. State of U.P.;

(iii) 2004 SCC (Crl.) 1571 - State of Haryana vs. Jarnail Singh and others, and

(iv) (2007) 3 SCC (Crl.) 189 - Ravindran alias John vs. Superintendent of Customs

8. Heard learned counsel for the parties and perused the records. From perusal of the first information report, it comes out that the applicant had been arrested and morphine weighing one kilogram and ten grams was also recovered from the bag which the applicant was carrying. The main emphasis by the learned counsel for the applicant is upon not following the provisions of Section 50 (1) of the Act of 1985. For the sake of convenience, Section 50 of the Act of 1985 is reproduced below:-

"50. ***Conditions under which search of persons shall be conducted.-***

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

9. Section 50 (1) of the Act of 1985 has been considered by a Constitution Bench of the Apex Court in the case of **State of Punjab vs. Baldev Singh - (1999) 6 SCC 172.** The Apex Court has concluded regarding the provisions of Section 50 (1) of the Act of 1985 as under:-

"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted

officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act."

Subsequently, another Constitution Bench of the Apex Court in the case of **Vijaysinh Chandubha Jadeja (supra)** after considering the judgment of **Baldev Singh (supra)** has held as under:-

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

10. From perusal of two Constitution Bench judgments of the Apex Court, it comes out that the object of the right under Section 50 (1) of the Act of 1985 has been conferred on the suspect by way of a safeguard to check the misuse of power at the hands of the authorities and to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies and thus it has been made mandatory on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a magistrate. Failure to comply with the provisions of Section 50 (1) of the Act of 1985 would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during the search.

11. Being armed with the aforesaid interpretation, as given by two Constitution Benches of the Apex Court, this Court proceeds to consider as to whether provisions of Section 50 (1) of the Act of 1985 were followed in the present case.

12. From perusal of the first information report, it comes out that as the morphine was admitted of being carried by the applicant in a bag, as such,

the applicant was informed that in terms of Section 50, he should get himself searched by a gazetted officer or a magistrate to which the applicant consented for having himself searched by the police party itself. This would be apparent from a persual of the following words in the first information report:-

"पकड़े गए व्यक्ति से पूछने पर अपना नाम मोहम्मद इरशाद पुत्र मोहम्मद नसरुद्दीन निवासी चौखंडी थाना सफदरगंज बाराबंकी बताया। भागने का कारण पूछने पर बताया कि साहब मेरे हाथ में जो थैला है इसमें ekjQhuहै। इसी कारण डरकर भागा था मेरे साथ मेरा दोस्त मेरा बड़ा भाई मोहम्मद tquSn पुत्र मोहम्मद नसरुद्दीन भी था जो डर कर भाग गया। पकड़े गए व्यक्ति us बताया कि आप बता रहे हो कि मेरे पास झोले में ekjQhu रखा है तो आपको अपनी तलाशी किसी राजपत्रित अधिकारी या मजिस्ट्रेट के समक्ष अपनी तलाशी चलकर अंतर्गत धारा 50 सीआरपीसी देनी होगी। तो बताया कि साहब जब आप पकड़ ही लिए हैं तो आप ही मेरी तलाशी ले ले मेरे पास ekjQhu है तो ekjQhuही रहेगी। मुझे किसी और के पास तलाशी देकर अपने विरुद्ध और अधिक सबूत एकत्र नहीं करना है।"

Thus, the essential condition of Section 50 (1) of the Act of 1985 of the person being arrested being informed of having a right of being searched by the gazetted officer or magistrate stood satisfied when the police personnel informed the applicant and the applicant waived off his right and allowed the police personnel to search him. Interestingly in the bail application there is no averment by the applicant of the police personnel not having informed the applicant of having the right of being searched by a gazetted officer or a magistrate in terms of Section 50 (1) of the Act of 1985 rather in paragraph 14 of the bail application, it has been contended that there has been non-compliance of mandatory provisions of Section 50 of the Act of 1985 as the applicant was not taken to the nearest gazetted officer for his search nor the gazetted officer was called for by the complainant for search. From perusal of the aforesaid, it thus clearly comes out that the applicant was informed about his right under the provisions of Section 50 (1) of the Act of 1985 though indicated as Cr.P.C in the F.I.R which provided for a search to be made by a gazetted officer or a magistrate which was specifically waived off by the applicant and thereafter the search was conducted by the Station Officer to which also there is no denial in the bail application of such information not having been given to the applicant and consequently the Court is of the view that the mandatory requirement of Section 50 (1) of the Act of 1985 stood satisfied.

13. Another aspect of the matter is that it is admitted that the recovery of drugs was made from the bag which the applicant was carrying and not from his person. The Apex Court in the case of **Ravindran alias John (supra)** has held that if any drug was recovered from the personal search of the accused, he could take the plea of Section 50 of the Act of 1985 to challenge his personal search. However, where the drug is recovered not from the person of the accused but from a separate bag, then Section 50 (1) of the Act of 1985 shall not be applicable. For the sake of convenience, the relevant observations of the Apex Court in the case of **Ravindran alias John (supra)** are reproduced below:-

"11. In our view this question does not survive for our consideration because we have earlier held that Section

50 was not attracted to the facts of this case. If any drug was recovered from the personal search of the appellant as explained in Pawan Kumar's case, the appellant could advance this argument to challenge his personal search. That not being the case, the submission must be rejected. An argument was advanced before us that if the search is found to be illegal that is fatal to the case of the prosecution. Apart from the fact that this question does not arise in the instant case, it cannot be said as a general principle of law that the illegality of the seizure would in all cases prove fatal to the case of the prosecution. As held by this Court in 2006 (9) SCALE 644 Ritesh Chakarvarti Versus State of Madhya Pradesh although the effect of the illegal search may not have any direct effect on the prosecution case, it would all the same have a bearing on the appreciation of evidence of the official witnesses and other materials depending on the facts of each case."

However, the aforesaid question may not detain this Court as it has not been disputed by learned Additional Government Advocate that the personal search of the applicant was not carried out and even otherwise, this Court has held that the condition of Section 50 (1) of the Act, 1985 stood complied with.

14. So far as the judgment in the case of **Parmanand (supra)** is concerned over which strong reliance has been placed by learned counsel for the applicant, the same was a case in which two persons namely Parmanand and Surajmal had been arrested. The Sub-Inspector leading the police party gave a written notice to them informing them about their right under the provisions of Section 50 of the Act of 1985. Upon this, accused Surajmal gave consent in writing in Hindi for himself and for Parmanand and stated that they were ready to get themselves searched by the Sub-Inspector in the presence of Superintendent and he also put his thumb impression and thereafter search was carried out from which opium was found and both Parmanand and Surajmal were charged of the offence under the Act of 1985. Both the accused were convicted by the trial court and upon appeal the High Court acquitted the accused by holding that there was no compliance of Section 50 of the Act of 1985. Upon an appeal being filed by the State, the Apex Court after going through the records, found that the notice given by the police personnel of informing the accused persons of their right under Section 50 of the Act of 1985 had only been signed by one accused namely Surajmal and the same was not signed by accused Parmanand. There was also nothing on record to show that Parmanand had given his independent consent. The Apex Court after considering the Constitution Bench judgment of **Baldev Singh (supra)** was of the view that once Parmanand was not informed about his right of being searched under Section 50 of the Act of 1985 then merely because the written communication was given to one of the accused who signed on behalf of Parmanand the same would not be considered to be sufficient compliance of Section 50 of the Act of 1985.

15. The aforesaid judgment is clearly distinguishable inasmuch as in the instant case there is no denial in the bail application that the applicant was not informed of having a right of being searched under Section 50 of the Act of 1985 by a gazetted officer or magistrate

consequently the judgment of **Parmanand (supra)** will have no applicability in the facts of the present case.

16. As regards the judgment of **Vijaysin Chandubha Jadeja (supra)**, the same only indicates about the mandatory nature of Section 50 of the Act of 1985 which this Court has already held had been followed in the case of the applicant.

17. As regards the case of **S.K. Raju alias Abdul Haque alias Jagga (supra),** the same would also not be applicable in the facts of the present case as in the said case the Apex Court held that where the search of the accused person is also carried out then provisions of Section 50 of the Act of 1985 would be attracted and that there had to be compliance of the requirement of Section 50(1) of the Act of 1985.

18. As regards the case of **Namdi Francis Nwazor (supra)**, the same arises out of Section 50 of the Act of 1985 wherein the search of a person and search of the person's luggage has been considered separately. In the instant case, as it was not disputed by the learned Additional Government Advocate that the search of the person of applicant was made consequently the Court has proceeded on the ground that Section 50 of the Act of 1985 was applicable with regard to the search of the applicant including his person and luggage. Thus, the instant judgment would have no applicability in the facts of the present case.

19. As regards the second ground taken by learned counsel for the applicant of no sample being drawn of the drug that was seized, a specific plea has been taken in paragraph 32 of the bail application to the said effect. However, in paragraphs 5 and 30 of the counter affidavit, it has been contended that of the recovered goods, a sample had been taken and had been sent to laboratory which report mentions the seized goods as being heroine. Copy of the said report has been brought on record as Annexure CA-2 to the counter affidavit. Incidentally paragraphs 5 and 30 of the counter affidavit which mentioned about the sample being taken and a report having been taken which reveals the sample as heroine has not been specifically denied in paragraph 5 of the rejoinder affidavit. Further, in paragraph 21 of the rejoinder affidavit wherein para 30 of the counter affidavit has been replied, it is admitted that a sample seal was prepared. Thus, the Court has no option but to hold that a sample had been taken which revealed the seized goods from the applicant as heroine.

20. As regards the ground of there being no independent witness(s) to the arrest and recovery of drugs, learned Additional Government Advocate has placed reliance on the judgment of Apex Court in the case of **Ajmer Singh (supra)** wherein the Apex Court has held that it cannot be possible to find independent witnesses at all places at all time. The obligation to take public witnesses is not absolute and if after making efforts, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. For the sake of convenience, the relevant observations of the Apex Court in the case of **Ajmer Singh (supra)** are reproduced below:-

"20. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence."

21. From perusal of the judgment in the case of **Ajmer Singh (supra)** and a perusal of the first information report wherein it has been recorded that despite a few persons of the public having been asked to become witness they all declined, goes to show that efforts were made by the police personnel to find witnesses but they declined and thus lack of independent witnesses, as in this case, in view of this Court and taking into consideration the law laid down by the Apex Court in the case of **Ajmer Singh (supra)**, would not vitiate the arrest and recovery of drugs from the possession of the applicant.

22. As regard the ground taken by learned counsel for the applicant that the applicant has got no criminal history, suffice to state that in cases involving the Act of 1985, prior to grant of bail the Court would have to consider the provisions of Section 37 of the Act of 1985. For the sake of convenience, Section 37 of the Act of 1985 is reproduced below:-

"37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."(emphasis supplied)

23. The Apex Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In **Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429**, it has been elaborated as under:-

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who

are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in ***Durand Didier v. Chief Secy., Union Territory of Goa*** *[(1990) 1 SCC 95)] as under:*

24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

24. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second is that the **Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.**

25. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing

that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. A similar view has been taken by the Apex Court in the case of **State of Karela Vs. Rajesh** reported in **(2020) SCC Online SC 81.**

26. Being armed with Section 37 of the Act of 1985, the law as laid down by the Apex Court in the case of **Ram Samujh (supra)** and **Durand Didier (supra)**, what this Court finds is that prior to grant of bail under the Act of 1985 the Court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. As per the discussions made above, it is apparent that only a technical plea has been raised on behalf of the applicant to somehow or the other make the seizure/recovery of drugs and his arrest suspicious but the Court is satisfied that the applicant is guilty of the offence. In this view of the matter also the Court does not deem the instant case as fit for grant of bail.

27. Taking into consideration the aforesaid discussions, the Court is of the view that there has been compliance of the provisions of Section 50 (1) of the Act of 1985, the sample was duly taken, lack of independent witnesses would not vitiate the recovery and arrest of the applicant and merely because the applicant has no criminal history, would not entitle him automatically for grant of bail.

28. Accordingly, the bail application is **rejected.** However, it is provided that none of the observations made above would be considered by the trial court in its trial against the applicant and the trial would proceed in accordance with law.

(2020)06ILR A1228
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.06.2020

BEFORE

THE HON'BLE JASPREET SINGH, J.

Bail No. 2898 of 2020

Sagynbek Toktobolotov & Ors.
...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Pranshu Agrawal, Sufiyan Mohammad

Counsel for the Opposite Parties:
G.A.

(A) Criminal law - Indian Penal Code, 1860 - Sections 188 , Section 3 of Epidemic Disease Act, 1897, Section 12(3) of the Passport Act, 1967 and Sections 3(2) and Section 3 (3) Passports (Entry into India) Act, 1920 and Section 14/14-C of the Foreigners Act, 1946 and Section 51 of the Disaster Management Act, 2005

(B) Constitution of India - Article 21 - heart and soul of the fundamental rights as enshrined in Part III of the Constitution - "personal' before the word "liberty' used in Article 21 - it is an anti-thesis of physical restrain or coercion - basic right of an individual to be free from restrictions or encroachment on his person - unless and until extreme circumstances are pointed out, it cannot be considered that the parameters for considering a bail application for a national or a foreigner would be on a different footing before the Court of law - an application for bail cannot be

rejected solely on the ground the applicants are foreign nationals. Para - 22 ,23,26,27

(C) Criminal jurisprudence - Object of bail is neither punitive nor preventive - Deprivation of liberty is considered a punishment unless it is requires to ensure that an accused person will stand trial when called upon - bail is the Rule and committal to the Jail is an exception - Speedy justice is also a fundamental right which has been recognized by the Apex Court -flowing from Article 21 of the Constitution of India. Para – 28

Applicants are foreign nationals - citizens of Kyrgyzstan - in Jail - Administration imposed section 144 Cr.P.C - widely publicised amongst the public - Information that in a Markaz Mosque situated at District Lucknow - 6 foreign nationals who had entered India on a tourist Visa were being given shelter in the said mosque by its Manager -- foreign nationals attended the religious congregation at Nizamuddin in New Delhi - thereafter had come to Lucknow - without getting their medical examination done, they were residing in the Markaz Mosque.

HELD:- Considering the rival submissions, material available on record as well as balancing the apprehensions of both sides, the nature of accusations against the applicants, severity of punishment if the applicants are convicted and also to ensure their presence at trial, hence, this Court at this stage, without expressing any opinion on merits, is of the considered view that the applicants are entitled to be enlarged on bail. Para – 36

Bail Application allowed.(E-7)

List of cases cited:-

1. Anil Kumar Yadav Vs St. (NCT of Delhi) & anr.,(2018) 12 SCC 129

2. St. of U.P. Vs Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)

3. Prahlad Singh Bhati Vs St. (NCT of Delhi), (2001) 4 SCC 280 : 2001 SCC (Cri) 674

4. Gurcharan Singh Vs St. (NCT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri) 41

5. Kalyan Chandra Sarkar Vs Rajesh Ranjan, (2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)

6. Ram Govind Upadhyay Vs Sudarshan Singh, (2002) 3 SCC 598 : 2002 SCC (Cri) 688

7. Puran Vs. Rambilas [Puran Vs Rambilas, (2001) 6 SCC 338 : 2001 SCC (Cri) 1124

8. State v. Jagjit Singh, (1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215

9. Gurcharan Singh v. State (NCT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri) 41

10. Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13 : 2005 SCC (Cri) 481

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

1. The Court has heard Sri Pranshu Agarwal, learned counsel for the applicant and Shri J.S. Tomar, learned AGA via video conference.

2. ***On application for Amendment in the memo of Bail Application***

3. At the outset, it will be relevant to mention that the learned counsel for the applicants had moved an application for amendment in the bail application and had sought to add two more Sections, in the bail application, with which the applicants have been challaned and remanded.

4. The copy of the amendment application was served on the learned A.G.A. on 30.05.2020 who has reecieved his instructions and all necessary documents in respect of the above bail application.

5. The learned A.G.A. has filed his written instructions, as well as the copyof the case diary, which is taken on record.

6. Considering the amendment application, it is not disputed by the learned A.G.A. that two Sections namely Section 3 (3) of Passports (Entry into India) Act, 1920 and Section 51 of Diasaster Management Act, 2005, which as per the learned counsel for the applicants were inadvertently left out, are also pressed against the applicants, hence the application for amendment shall stands allowed.

7. The bail application shall be considered in respect of the two above mentioned Sections as well which have been inadvertendly left out which will find place in the later part of the order.

8. The learned counsel for the applicants shall carry out the necessary amendments in terms of circular of the High Court dated 14.04.2020.

On merits

9. The applicants before this Court are foreign nationals who are in Jail since 18.04.2020. All the applicants are citizens of Kyrgyzstan and all of them have been accused of offences under Sections 188 I.P.C., Section 3 of Epidemic Disease Act, 1897, Section 12(3) of the Passport Act, 1967 and Sections 3(2) and Section 3 (3) Passports (Entry into India) Act, 1920 and Section 14/14-C of the Foreigners Act, 1946 and Section 51 of the Disaster Management Act, 2005. All the above applicants are accused in Case Crime No. 81 of 2020

10. As per the averments contained in the First Information Report, the Administration on 22.03.2020 had imposed Section 144 C.r.P.C. within the area of Lucknow Commissionarate. It is alleged that the same was widely publicised amongst the public. Information was received that in a Markaz Mosque situated at Dr. B. N. Verma Road within P.S. Kaiserbagh, District Lucknow, 6 foreign nationals who had entered India on a tourist Visa were being given shelter in the said mosque by its Manager namely Ali Hasan. The aforesaid foreign nationals had attended the religious congregation at Nizamuddin in New Delhi and thereafter had come to Lucknow and without getting their medical examination done, they were residing in the Markaz Mosque.

11. It is also alleged that the Manager of the Mosque had given shelter to these foreign nationals for the purposes of propagating and disseminating religious discourse and these persons have violated the norms and were staying at one place. It is also alleged that the local police/Administration were not informed regarding these 6 foreign nationals. The applicants were medically examined and on 31.03.2020 and they were kept at the Lok Bandu Hospital under 14 day's quarantine under medical supervision. It is alleged that the applicants have deliberately violated the Government Orders and have worked against the provisions of law and for the aforesaid they have been accused of having committed offence under the Sections as hereinabove mentioned.

12. Before dealing with the respective submissions of the parties, it would be relevant to notice that Corona

Virus (hereinafter referred to as COVID-19) was declared as a pandemic as it affected various countries across the world. Respective countries resorted to stern measures for the containment of the disease and for the benefit of their citizens. The aforesaid disease assumed a gigantic proportion and consequently assessing the sensitivity and severity of COVID-19, the Government of India had announced a nation wide lockdown. The aforesaid lockdown resulted in cessation of all modes of transport, both inter-state and Intra-State, air travel both domestic as well as international was also prohibited and all persons were directed to stay within their homes and only certain sections of the Society who were engaged and dealing with essential services were permitted to work while remaining activities including all other economic activities not precribed as the essential services were brought to a stand still.

13. It is in this backdrop that Sri Agarwal has submitted that the applicants are absolutely innocent and merely by fortuitous circumstances have been implicated without any fault. It has further been submitted that all the applicants are valid passport holders and were granted valid Visa to arrive in the territory of India. The applicants arrived at New Delhi on different dates and thereafter all the applicants reached Lucknow on 13.03.2020. It is the specific case of the applicants that they had provided all the necessary details regarding their travel and stay within the territory of India including at Lucknow with the Foreigner Regional Registration Office, Lucknow (hereinafter referred to as FRRO), Lucknow which is under the Ministry of Home Affairs, Government of India.

14. Sri Agarwal has also submitted that all the applicants had duly filled in Form-C, copies of which relating to each of the applicants has been annexed as Annexure No. 3. It has been submitted that from the perusal of Form-C, it would indicate that the name of the respective applicant, the address, city, mobile numbers, personal details as well as various other details including the passport and Visa including its number, date of issue, its expiry, place of issue and period of its validity have been clearly mentioned. The said Form-C was duly filled in by each of the applicant and was submitted before the appropriate authority. The learned counsel for the applicants has also specifically stated that apart from submitting Form-C with the FRRO Office, the requisite details in respect of the arrival of the applicants in Lucknow and their programme details were also sent to the Officer of Intelligence Bureau posted at the FRRO Office namely Sri Tiwari on his whatsapp mobile number and the screen shot of the said message sent has also been annexed as Annexure No. 4 with the bail application.

15. It is also submitted that the applicants arrived in Lucknow on 13.03.2020 and as per their disclosed programmes, they were to stay in Lucknow for a period of 22 days. It is during this period that on 22.03.2020 initially a Janta Curfew was observed and thereafter the Government of India announced a National Lockdown due to which the movement of the applicants was completely restricted and they were confined to the place of their stay and could not more or travel out of Lucknow or even the Counrty and thus by circumstances the applicants were confined and because of certain perceptions against the members who attended the Markaz congregation at

New Delhi, the applicants have been framed and various Sections have been imposed against the applicants even though they are completely innocent and are facing incarcaration on foreign soil since 18.04.2020.

16. Sri Agarwal has submitted that since the applicants had already submitted their details including the place of residence at Lucknow, accordingly, the Government already had the details and whereabouts of the applicants. It is in view of the aforesaid, that the police visited the Markaz Mosque at Dr. B.N. Road, Lucknow and from there the applicants were taken in custody. It has been stated that they were taken to the Lok Bandu Hospital where they were put in quarantine for 14 days and during this period they were tested thrice and on all the occasions, all the applicants tested negative for COVID-19 and thereafter they have been put in Jail on 18.04.2020 under the sections as mentioned above.

17. Sri Agarwal has vehemently urged that all the aforesaid Sections which have been levied against the applicants are apparently not met out, inasmuch as, it is not a case where the applicants entered within the territory of India either on a false passport or under false details. The applicants have not violated any Government Order and the Sections which have been imposed against the applicants are all bailable entailing a sentence of 6 months to one year and fine or both except Section 14 and 14-C which provides for a sentence which may extended to 5 years and fine. It has been submitted that the Visa of all the applicants in question was valid till their intended period of stay and only on account of lockdown, their movement was prohibited. On account of COVID-19 lockdown in India which commenced from 25th March till 14th April, 2020 and was thereafter extended from 15.04.2020 till 03.06.2020 and again from 04th May till 17th May, 2020 and yet again was extended from 18th May to 31st May, 2020. Therefore, it cannot be said that the applicants have stayed in the territory of India for a period exceeding the period for which the Visa was issued to them or the applicants violated the condition of Visa deliberately. Any violation, if any, though, not admitted, is purely on account of the pandemic and the affected countries have passed orders to deal with such over stay in the country.

18. Sri Agarwal has also submitted that the applicants are innocent persons and there is no chance for the applicants to abscond as their passports have already been impounded by the police and they are ready to comply with any condition as imposed by the Court and neither there is any criminal history against any of the applicants and consequently, they are languishing in jail since 18.04.2020 and are entitled to be enlarged on bail.

19. Sri Tomar while vehemently opposing the bail application has submitted that the applicants came to the Country under a tourist Visa. A person who enters the territory of India under a tourist Visa is not entitled to participate or undertake any religious seminar or involve onself in any religious discourses. It has also been submitted that the applicants while being within the territory of India did not disclose that they attended the Markaz congregation at Nizamuddin in New Delhi and the fact that thereafter since some persons from the Markaz Congregation in New Delhi had tested positive of COVID-19 and

various announcements were made on public platforms requiring all persons who had attended such a congregation to voluntarily come forward for testing for COVID-19 to contain the spread of virus but all the applicants did not come forward and they remained a threat to the society at large.

20. Sri Tomar has also submitted that it is only when the police received information regarding the foreign nationals being given shelter in the Markaz Mosque at Lucknow that the applicants were rounded and were medically examined and as per the guidelines issued by the Ministries of Home Affairs and Health Affairs, the applicants were put in quarantine for 14 days. It has been further submitted by Sri Tomar that the applicants who are foreign nationals and having no permanent abode in India, hence, if the applicants are enlarged on bail, it will be difficult to keep a track and chances of them absconding and not being available for trial looms large, thus, under the aforesaid circumstances, it would be appropriate that the applicants are not enlarged on bail, coupled with the fact that the investigation is still underway and the charge sheet has yet not been filed.

21. The Court has given anxious considerations to the rival submissions and also perused the record. The question before the Court for consideration is whether in the facts and circumstances, the applicants are entitled to be granted bail, who are foreign nationals.

22. In order to answer the aforesaid questions, it will be important to note that Article 21 of the Constitution of India uses the word "personal liberty'. The addition of the word "personal' before the word "liberty' as used in Article 21 indicates that it is an anti-thesis of physical restrain or coercion. It is a basic right of an individual to be free from restrictions or encroachment on his person.

23. Article 21 is often termed as the heart and soul of the fundamental rights as enshrined in Part III of the Constitution. Needless to mention that Article 21 guarantees every man whether he be a citizen of the country or a foreigner that he shall not be deprived of his personal life and liberty except in accordance with the procedure established by law.

24. Thus, it would be seen that personal liberty is a very precious fundamental right and it can be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case and that too only in accordance with the procedure established by the law.

25. Liberty of a person ought not to be lightly dealt with, since deprivation of liberty has immense impact on the mind of a person. Personal liberty in our country has been exalted to a high pedestal and is also important to any civilized society. Our constitution has conferred certain rights on every human being and certain rights on citizens, however, every person is entitled to equality before the law and equal protection of law. So also no person can be deprived of his life or personal liberty except in accordance with the procedure established by law, and in this context, every person would include a foreign national as well.

26. The applicants who have prayed for bail even though are foreign nationals, cannot be deprived of their personal liberty except in procedure established by law and that they are also entitled to equal protection of law and equality before law. Therefore, unless and until extreme circumstances are pointed out, it cannot be considered that the parameters for considering a bail application for a national or a foreigner would be on a different footing before the Court of law.

27. The law does not permit any differentiation between Indian nationals and foreign citizens in the matter relating to grant of bail. What is permissible while considering the facts and circumstances of each case, the Court can impose different conditions which may be necessary to ensure that the accused is made available for facing the trial and an application for bail cannot be rejected solely on the ground the applicants are foreign nationals.

28. It is now fairly well settled and does not require much elaboration that the object of bail is neither punitive nor preventive. Deprivation of liberty is considered a punishment unless it is requires to ensure that an accused person will stand trial when called upon. It would be quite contrary to the concept and idea of personal liberty as enshrined in our Constitution that any person should be punished in respect of any matter upon which he has yet not been convicted or that in any circumstances, he would not be deprived of his liberty only upon the belief that he may tamper with the evidence or a witness if he is granted the liberty, save in extraordinary circumstances. In our criminal jurisprudence, bail is the Rule and committal to the Jail is an exception. Speedy justice is also a fundamental right which has been recognized by the Apex Court flowing from Article 21 of the Constitution of India.

29. Apparently, from the material available on record, the learned A.G.A. could not dispute that all the applicants entered the country with a valid passport and a valid Visa. The record indicates that the applicants arrived in India between the months of December, 2019 and March, 2020. All the applicants arrived in Lucknow on 13.03.2020 and all of them had given prior information regarding their programme of stay at Lucknow for a period of 22 days. The validity of Visa of the applicant no. 1 is till 24.06.2020, while the Visa of the applicant no. 2 was valid till 22.05.2020, the validity of Visa of the applicant no. 3 was till 02.06.2020, validity of the Visa of the applicant no. 4 was till 26.05.2020, the validity of the Visa of the applicant no. 5 is till 20.02.2021 and the Visa of the applicant no. 6 is also valid till 17.02.2021.

30. The record also indicates that the Form-C submitted by the applicants with the FRRO has indicated the address as Dr. B.N. Verma Road, Markaz Wali Maszid, Aminabad Road, Lucknow. In the aforesaid Form-C under the head of other details, it is clearly mentioned regarding their stay at Delhi in Nizamuddin. The learned A.G.A. could not dispute the aforesaid fact nor could give a reply to the clear averments made in the bail application that the aforesaid Form-C was duly submitted before the FRRO as well as sent on the whatsapp mobile of Intelligence Oficer Sri Tiwari, as specifically mentioned in paragraph 6 and 7 of the bail application.

31. It also could not be disputed by the learned A.G.A. that the stay of the applicants in the country was under a valid passport and Visa which is valid up to the months of May, 2020 and June, 2020 in respect of some of the applicants and even up to the year 2021 in case of two applicants but the fact remains that as per the declared itinery of the applicants they were to remain in Lucknow w.e.f. 13.03.2020 a period of 22 days, thus, in any case, their stay in the city of Lucknow was scheduled till 05.05.2020. The Visa of the applicant no. 1 is to expire on 24.06.2020 while that of applicant no. 2 on 22.06.2020, that of the applicant no. 3 on 22.06.2020 that of the applicant no. 4 on 26.05.2020 and that of the applicant nos. 5 and 6 in the month of February, 2021. It is also not disputed that the national lockdown became effective from 25.03.2020 for 21 days till 14.04.2020 and then extended from time to time,in phases, till 31st May, 2020 when lockdown 4.0 came to be an end. Neither any material could be pointed out at this stage by the learned A.G.A. to indicate that the applicants were engaged in activity regarding propogating or disseminating any religious discourse.

32. Also to be noted that the applicants were tested thrice and each time they all tested negative for COVID-19. The efforts of the administration and the police establishment while dealing with containment of COVID-19 pandemic and enforcement of law and order has been praiseworthy, however, that in itself does not give a blanket clearance to all their acts rather each case, as it comes before the Court, has to be seen and judged on its own peculiar facts and circumstances and the material placed before it.

33. In the aforesaid backdrop if the Sections with which the applicants are accused of are noticed, it would indicate that Section 188 I.P.C. entails a maximum sentence of 6 months or fine or both. Section 3 of the Epidemic Act is merely an enabling Section and the punishment is co-related to Section 188 I.P.C. Section under the Passport (Entry into India), 1920 entails a sentence for a term which may up to 5 years or penalty or with both. While the offence under Section 12 (3) of the Passport Act entails a sentence of 3 months or fine or both, while under Section 51 of the Disaster Management Act, 2005, the punishment as prescribed is upto 1 year or fine or both.

34. The parameters for grant of bail has been the subject matter of various decisions of the Apex Court and it is now fairly well settled that various factors which are kept in mind while considering the application for grant of bail includes the nature of seriousness of the offence, the stage of the investigation, severity of punishment, a reasonable possibility of the presence of the accused being secured at the trial, reasonable apprehension of the evidence being tampered or circumstances regarding chance of the witness being influenced.

35. The Court gainfully relies upon the decision of the Apex Court in the case of Anil Kumar Yadav Vs. State (NCT of Delhi) and another reported in 2018 (12) SCC Pg. 129 wherein the Apex Court relying upon earlier decision has held as under :-

17. While granting bail, the relevant considerations are: (i) nature of seriousness of the offence; (ii) character of the evidence and circumstances which are peculiar to the accused; and (iii) likelihood of the accused fleeing from justice; (iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and (v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard-and-fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court.

18. While considering the basic requirements for grant of bail, in *State of U.P. v. Amarmani Tripathi [State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] , this Court has held as under: (SCC p. 31, para 18)

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) *character, behaviour, means, position and standing of the accused;* (vi) likelihood of the offence being repeated; (vii) *reasonable apprehension of the witnesses being tampered with;* and (viii) *danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. State (NCT of Delhi) [Prahlad Singh Bhati v. State (NCT of Delhi),* (2001) 4 SCC 280 : 2001 SCC (Cri) 674] *and Gurcharan Singh v. State (NCT of Delhi) [Gurcharan Singh v. State (NCT of Delhi),* (1978) 1 SCC 118 : 1978 SCC (Cri) 41]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan [Kalyan Chandra Sarkar v. Rajesh Ranjan,* (2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)

"11. The law in regard to grant or refusal of bail is very well settled. 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 merit 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. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the 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.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh [Ram Govind Upadhyay v.*

Sudarshan Singh, (2002) 3 SCC 598 : 2002 SCC (Cri) 688] *and Puran v. Rambilas [Puran v. Rambilas*, (2001) 6 SCC 338 : 2001 SCC (Cri) 1124] *.)'"*

(emphasis in original

19. The test to be applied for grant of bail was also considered in *Jayendra Saraswathi Swamigal v. State of T.N.* [*Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13 : 2005 SCC (Cri) 481*] , wherein it was held as under: (SCC pp. 21-22, para 16)

"16. ... The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in State v. Jagjit Singh [State v. Jagjit Singh, (1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and Gurcharan Singh v. State (NCT of Delhi) [Gurcharan Singh v. State (NCT of Delhi), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] and basically they are -- the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case."

36. Considering the rival submissions, material available on record as well as balancing the apprehensions of both sides, the nature of accusations against the applicants, severity of punishment if the applicants are convicted and also to ensure their presence at trial, hence, this Court at this stage, without expressing any opinion on merits, is of the considered view that the applicants are entitled to be enlarged on bail.

37. Any observations made by this Court in the order shall not be taken as an expression on the merits of the case and the material considered by this Court is only for the purposes of adjudication of the bail application and shall not affect the trial.

38. The registry of this Court has pointed out certain defects. Learned counsel for the applicants has given undertaking to cure the same soon after the COVID-19 lockdown ends. In this regard. the High Court has issued certain guidelines in terms of Circular dated 14.04.2020. The relevant portion thereof reads as under:-

"2. However, during the lock down period, the requirement of an affidavit/e-affidavit/scanned Notary Affidavit shall not be mandatory in the case of BAIL APPLICATIONS and ANTICIPATORY BAIL APPLICATIONS. In lieu thereof, Counsel shall have to submit, in the e-filed petitions, the Adhar Card Number, full details of the card holder like name, parentage, age and address, as also the mobile number linked to the adhar card, of the person wanting to act as the deponent in the matter along with a declaration of that applicant/petitioner/pairokar affirming the correctness of the disclosures and averments made in the application/petition. In case of civil matters, a prayer for dispensing with the requirement of filing an affidavit may be made along with the urgency application which shall also be considered simultaneous with the issue of urgency.

3. This waiver or relaxation is subject to a proper affidavit being filed, in hard copy, within a period of 15 days from the date the lock down is lifted. No

further time shall be granted for the purpose. In case a proper affidavit is not filed as specified above, the said case shall stand dismissed automatically and any order passed therein, shall stand recalled, without any reference to the Court. A communication, in this regard shall be sent by the Registry to the Court(s) below/authorities concerned, forthwith for consequential action."

The aforesaid order passed by this Court shall be subject to compliance of the aforesaid guidelines of the aforesaid Circular dated 14.04.2020.

Hence, this order shall be subject to the adherence of the said circular dated 14.04.2020.

39. Let the applicants ***Sagynbek Toktobolotov, Sultanbek Tursunbaiuulu, Ruslan Toksobave, Zamirbek Maraliev, Aidyn Taldu Kurgan @ Aidyn Kairbex & Dauren Taldu Kuragn @ Dauren Zhe Xenbekov*** involved in Case Crime No., 81 of 2020 under Sections 188 I.P.C., Section 3 of Epidemic Disease Act, 1897, Section 12 (3) of the Passport Act, 1967 and Sections 3 (2) and Section 3(3) of Passports (Entry into India) Act, 1920 and Section 14/14-C of the Foreigners Act, 1946 and Section 51 of the Disaster Management Act, 2005, Police Station- Kaiserbagh. District Lucknow be released on bail on their furnishing a personal bond of Rs. 50,000/- each and one reliable solvent surety to the satisfaction of the Court concerned and the following conditions are being imposed in the interest of justice.

(i) The applicants will not leave the country without prior written permission of the Court and shall furnish an undertaking to the said effect.

(ii) Each applicant will also deposit a sum of Rs. for deposit of Rs. 11,000/- in the C.M. Covid-19 Relief Fund and shall submit a receipt in this regard before the Court concerned.

(iii) Each 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.

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

(v) In case, the applicants misuse the liberty of bail during trial and in order to secure their presence a proclamation or a look out notice be issued and the applicants fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against them, in accordance with law.

(vi) The applicants 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 them in accordance with law.

40. A copy of this order shall be sent to the Senior Superintendent of Police, Lucknow/Deputy Inspector of General, Lucknow to ensure that the investigation is expedited as soon as possible and direct the Investigating Officer to take all the steps for speedy trial of the case.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2020

BEFORE

THE HON'BLE SIDDHARTH, J.

Criminal Misc. Anticipatory Bail Application U/S 438 CR.P.C. No. 2609 of 2020

Parvez Ahmad ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Santosh Yadav

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

(A) Criminal law - Indian Penal Code, 1860 - Sections 376-D, 376(2)(n) 420, 506 - Section 120-B for offence conspiracy of rape - Code of criminal procedure, 1973 - Section 438 Cr.P.C - anticipatory bail, Section 161 -- Statement recorded before investigating officer , section 164 - State recorded before magistrate , Section 173 (2) - Submission of police report , Section 439 - High Court or the Court of Session vested with power to grant bail to any person accused of an offence and in custody - Right to life and personal liberty are the important fundamental rights guaranteed by the constitution and therefore, no person should be confined or detained in any manner unless he has been held guilty. Para - 18

Prosecutrix lodged the First Information Report against Lekhapal (co-accused) - Promised her to provide job and demanded certain amount for payment to higher officers - sole allegation against the applicant - he along with co-accused recorded the video when the co-accused was committing rape - said version is not supported by the prosecutrix either in her statement under section 161 Cr.P.C. or 164 Cr.P.C. - Applicant not named in the First Information report - He is neither driver nor friend of co-accused - No allegation of gang rape has been alleged against the applicant. Para - 3,14,23

HELD:- Without expressing any opinion on the merits of the case and considering the nature of accusations and his antecedents, the applicant is entitled to be released on anticipatory bail in this case. Para – 24

Criminal Misc. Anticipatory Bail Application allowed. (E-7)

LIST OF CASES CITED:-

1. Sushila Aggarwal Vs St. (NCT of Delhi) , 2020 SCC online SC 98

2. Siddharth Varadarajan Vs St. of U.P.& anr. passed in Bail No. 2778 of 2020 (anticipatory bail)

3. Gurbaksh Singh Sibbiya & ors. Vs St. of Punj., (1980) 2 SCC 565

4. Siddharam Satlingappa Mhetri Vs St. of Mah., (2011) 1 SCC 694

5. Bhadresh Bipinbhai Sheth Vs St. of Guj. , (2016) 1 SCC 152

6. Salauddin Abdulsamad Shaikh Vs St. of Mah. , (1996) 1 SCC 667

7. K.L. Verma Vs St. & anr., (1998) 9 SCC 348

8. Sunita Devi Vs St. of Bihar, (2005) 1 SCC 6087

9. Nirmal Jeet Kaur Vs St. of M.P., 7 SCC 558

10. HDFC Bank Ltd. Vs J.J. Mannan, (2010) 1 SCC 679

11. Satpal Singh Vs St. of Punj. , (2018) 4 SCC 303

(Delivered by Hon'ble Siddharth, J.)

Order on Criminal Misc. Correction Application No. 02 of 2020

1. The notice of the above noted anticipatory bail application was served online on the Government Advocate on 09.05.2020. By the order dated 20.05.2020 the above noted application was decided by this court since despite grant of time to learned Government Advocate no objection was received and the applicant was granted anticipatory bail till the submission of police report under Section 173 (2) Cr.P.C.

2. Correction application has been filed on behalf of applicant on the ground that in the present case chargesheet has been filed by the Investigating Officer therefore the grant of limited anticipatory bail till the submission of report under Section 173(2) is not justified, in view of the recent Apex Court's judgment in the case of ***Sushila Aggarwal vs. State (NCT of Delhi) -2020 SCC online SC 98***. It has further been stated that this court in the case of ***Siddharth Varadarajan vs. State of U.P and another passed in Bail No. 2778 of 2020 (anticipatory bail) on 13.05.2020*** has granted bail to the applicant without any limitation.

3. The facts of the case as pleaded in the affidavit in support of anticipatory bail application are that the prosecutrix lodged the First Information Report dated 29.08.2018 against co-accused, Jai Shankar Upadhyay and two unknown persons under Sections 376-D, 376(2)(n) 420, 506 of I.P.C alleging therein that she works in Delhi and when she was coming to her hometown, she met one Jai Shankar Upadhyay who claimed himself to be Lekhapal, Tehsil Bansi, District-Siddharth Nagar. He promised her to provide job and demanded certain amount for payment to higher officers. Prosecutrix gave him the demanded amount but the said Jai Shankar Prasad did not provided her job and raped her continuously for three years by taking advantage of his position and her helplessness. It was further alleged that he also made her obscene video and when she opposed it, co-accused, Jai Shankar Upadhyay, started hatching conspiracy of her murder with his friends. Jai Shankar Upadhyay is threatening her that he will make the video viral on account of which she had to made complaints to his higher officers. Applicant is not named in the First Information report. He is neither driver nor friend of co-accused, Jai Shankar Upadhyay.

4. During the investigation, the investigating officer recorded the statement of prosecutrix under Section 161 Cr.P.C on 30.08.2018. In her statement she narrated the same story as mentioned in the First Information Report. The statement of the prosecutrix was recorded under section 164 of Cr.P.C. before learned Magistrate on 01.09.2018. In her statement, she reiterated the allegations against Jai Shankar Upadhyay regarding commission of rape and video recording. She very specifically stated that it is Jai Shankar who made the video of rape. She further alleged that she gave about Rs. 4.5 Lacs between 2015 to 2017 to co-accused, Jai Shankar Upadhyay, Lekhpal, by borrowing money from the applicant, Parvez and one Krishna.

5. It is clear from the perusal of the statement of the prosecutrix, that the applicant is well known to her and she borrowed money from him. There is not a

single allegation against the applicant in the statement of prosecutrix recorded under section 164 Cr.P.C. before Magistrate.

6. Co-accused, Jai Shankar Upadhyay, Lekhpal is very influential person. The investigating officer, Mahendra Kumar Chaturvedi colluded with him. First, he threatened the prosecutrix to change her statement and withdraw case against Jai Shankar Upadhyay. When she did not relent, she was mercilessly beaten by the police including the investigating officer. In the said circumstances, the prosecutrix filed a Criminal Misc. Writ Petition No. 27214 of 2018 before this court with the prayer to change of investigating officer and to set an inquiry conducted as to why she was beaten by police. This Court vide order dated 28.09.2018 disposed of the said petition directing the S.P., Basti to inquire into the matter and further directed to ensure the investigation of the case be conducted by competent Investigating Officer in a fair manner, but in vain.

7. Co-accused, Jai Shankar Upadhyay, succeeded in his design and got the applicant falsely implicated along with one Krishna in the case with the help of the Investigating officer. The Investigating officer made entry of false and fabricated statement dated 19.09.2018 of Prosecutrix in the case diary. In the said statement, it has been alleged that the applicant, Parvez and co-accused, Krishna, recorded the video when Jai Shankar was committing rape on the prosecutrix. Thus, on the basis of the said statement, the investigating officer made the applicant and Krishna accused in the case under Section 120-B for offence conspiracy of rape.

8. Prosecutrix moved several applications for the compliance of the order dated 29.09.2018 passed by this this Court in writ petition before S.P., Basti but S.P., Basti neither passed any order on the applications submitted by the prosecutrix nor changed the Investigating officer. She again moved an application/ reminder dated 6.01.2019 before S.P., Basti and prayed for compliance of the order dated 29.09.2018 passed by this Court in Criminal Writ No. 27214 of 2018. In her application she very specifically stated that she has no grievance with the applicant Parvez and the Investigating Officer, Mahendra Kumar Chaturvedi, is falsely implicating him on personal grudge. But the S.P., Basti remained silent and did not take any action on the said application.

9. Despite the repeated requests and order of this Court, the investigating officer was not changed and ultimately a charge-sheet dated 09.03.2019 was submitted against Jai Shankar Upadhyay, Krishna and the applicant under section 376- D, 420, 506, and 120B I.P.C. by the same investigating officer i.e., Mahendra Pratap Chaturvedi.

10. As soon as, prosecutrix came to know about the false implication of the applicant she moved an application before the Circle Officer, Kotwali, District Basti along with Affidavit to the effect that applicant Parvez is not involved in the case and he has been falsely implicated by the police and she further requested that Investigating Officer be directed to not to proceed against the applicant.

11. The Circle Officer did not take any action on the application of the Prosecutrix and forwarded the charge-sheet before the concerned Court. The learned Court below, took cognizance of offences on the charge sheet vide order dated 05.07.2019 and summoned the accused persons.

12. Applicant filed a Criminal Misc. Application (U/S 482 of Cr.P.C.) No. 30523 of 2019 before this Court against the charge-sheet dated 09.03.2019 and cognizance order dated 05.07.2019. The said application is still pending before this Court.

13. Co-accused, Krishna ,who has been assigned similar role has already been released on bail by this Court vide order dated 04.01.2019. Main accused of this case, namely, Jai Shankar Upadhyay, has also been granted bail in the aforesaid case by this Court vide order dated 4.01.2019 passed in Criminal Misc. Bail Application No. 45975 of 2019.

14. The sole allegation against the applicant is that he along with co-accused, Krishna, recorded the video when the co-accused, Jai Shankar Upadhyay, was committing rape. However, the said version is not supported by the prosecutrix either in her statement under section 161 Cr.P.C. or 164 Cr.P.C.

15. The police is regularly visiting the house of the applicant. It is taking coercive action against the applicant despite the fact that Criminal Misc. Application (under Section 482 Cr.P.C) challenging the charge sheet and impugned cognizance order of the court below is still pending before this Court. Applicant is not having any other criminal case registered against him and he is not a previous convict.

16. Before proceeding with this case further the concept of anticipatory bail and its application to the state of Uttar Pradesh is required to be considered.

17. The word 'anticipatory bail' has not been defined anywhere in the Cr.P.C. Under Section 438 Cr.P.C there is no use of term 'anticipatory bail' anywhere. It only provides that where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence he may apply to the High Court or the Court of Session under this Section that in the event of such arrest he shall be released on bail. Therefore it is clear that anticipatory bail is granted before the arrest of the accused takes place. It is pre-arrest bail as distinguished from post arrest bail granted by the High Court or the Court of Session under Section 439 Cr.P.C. Under Section 439 Cr.P.C the High Court or the Court of Session have been vested with power to grant bail to any person accused of an offence and in custody. Therefore it is clear that bail under Section 439 Cr.P.C can only be granted to an accused person when he has been arrested or has surrendered to the custody of the court. In the case of anticipatory bail the custody of accused person is not with the court or the police at the time of grant of bail. The custody of accused person only comes to the court when he is arrested and subsequently released on anticipatory bail on furnishing personal bond and sureties to the satisfaction of the court or the police officer concerned.

18. In the state of Uttar Pradesh the concept of anticipatory bail was

introduced in Cr.P.C. by 1973 amendment but vide U.P. Act No. 16 of 1976 (w.e.f., 28.11.1975) it was omitted during emergency. After about 43 years the anticipatory bail has been restored in Uttar Pradesh vide U.P. Amendment to Section 438 Cr.P.C. The amendment bill received the approval of the President on 01.06.2019 and has been brought into force w.e.f., 06.06.2019. The said provision can be invoked by a person who has a "reasonable apprehension" that he may be arrested for committing a non-bailable offence. The main purpose for incorporating Section 438 in Cr.P.C. was that the liberty of an individual should not be unnecessarily jeopardised. Right to life and personal liberty are the important fundamental rights guaranteed by the constitution and therefore, no person should be confined or detained in any manner unless he has been held guilty. The provision of 438 Cr.P.C., (U.P. Amendment) is reproduced hereinbelow:-

"438. (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

i. the nature and gravity of the accusation;

ii. the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. the possibility of the applicant to flee from justice; and

iv. where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested; either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, consider it expedient to issue an interim order to grant anticipatory bail under sub section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

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

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of

section 437, as if the bail were granted under that section.

Explanation:- The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable -

(a) to the offences arising out of -

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

19. On account of omission of the provision of anticipatory bail from Cr.P.C regarding the State of Uttar Pradesh for long time there is considerable uncertainty regarding the scope of anticipatory bail in the State of Uttar Pradesh. The air of uncertainty has been cleared by the Apex Court by its Constitution Bench judgment ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98.***

20. The Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***. has resolved the conflicting views of different Benches of the Apex Court. Constitution Bench had considered the Constitution Bench judgment in the case of ***Gurbaksh Singh Sibbiya and others vs. State of Punjab (1980) 2 SCC 565; Siddharam Satlingappa Mhetri vs. State of Maharashtra, (2011) 1 SCC 694; Bhadresh Bipinbhai Sheth vs. State of Gujarat, (2016) 1 SCC 152*** on one side which provide that there is no limit to the currency of an order of anticipatory bail and on the other side the judgment of ***Salauddin Abdulsamad Shaikh vs. State of Maharashtra, (1996) 1 SCC 667*** followed in the cases of ***K.L. Verma vs. State and another (1998) 9 SCC 348; Sunita Devi vs. State of Bihar (2005) 1 SCC 6087; Nirmal Jeet Kaur vs. State of M.P., 7 SCC 558; HDFC Bank Limited vs. J.J. Mannan, (2010) 1 SCC 679 and Satpal Singh vs. State of Punjab, (2018) 4 SCC 303*** which laid down restrictive

conditions or terms limiting the grant of anticipatory bail to a definite period.

21. The Apex Court in the Constitution Bench judgment framed two questions for consideration:-

"1. Whether the protection granted to a person under Section 438 Cr.P.C should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

2. Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."

22. The Apex Court has in an elaborate judgment after considering both the sets of judgments mentioned above has answered the above questions as follows:-

(1) Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr. PC should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc. (2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

1. This court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438, Cr. PC:

(1) Consistent with the judgment in Shri Gurbaksh Singh Sibbia and others v. State of Punjab, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his 1980 (2) SCC 565 side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(2) It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

(3) Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified ? and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases.

Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(5) Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

(6) An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(7) An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(8) The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia (supra) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit ofSection 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v Deoman Upadhyaya." (9) It is open to the police or the investigating agency to move the court concerned, which grants

anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. (10) The court referred to in para (9) above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(11) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr; Jai Prakash Singh (supra) State through C.B.I. vs. Amarmani Tripathi). This does not amount to "cancellation" in terms of Section 439 (2), Cr. PC.

(12) The observations in Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in Salauddin Abdulsamad Shaikh v. State of Maharashtra and subsequent decisions (including K.L. Verma v. State & Anr; Sunita Devi v. State of Bihar & Anr ; Adri Dharan Das v.

State of West Bengal; Nirmal Jeet Kaur v. State of M.P. & Anr62; HDFC Bank Limited v. J.J. Mannan 63; Satpal Singh v.

(2011) 6 SCC 189 (2005) 8 SCC 21 2011 (1) SCC 694 (1996 (1) SCC 667) 1998 (9) SCC 348 2005 (1) SCC 608 2005 (4) SCC 303 2004 (7) SCC 558 2010 (1) SCC 679 the State of Punjab and Naresh Kumar Yadav v Ravindra Kumar) which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

2. The reference is hereby answered in the above terms."

23. Now considering the present case in the light of the above consideration of the Apex Court's Judgment this court finds that from the allegation on record it is clear that the prosecutrix is not implicating the applicant for any offence. Her stand is that the applicant was infact helping her. No allegation of gang rape has been alleged against the applicant. The only allegation against the applicant is that he was doing videography when the prosecutrix was subjected to rape by the main accused, Jai Shankar Upadhyay. This allegation has also not been accepted by the prosecutrix and she had approached this court by way of Criminal Misc. Writ Petition No. 27214 of 2018 praying that fair investigation may be conducted. She prayed before this court that the Investigating Officer had beaten her and is harassing her for changing her statement against the main accused. This court directed the Superintendent of Police, Basti to entrust the investigation to a competent Investigating Officer to conduct fair investigation by the order dated 28.09.2018. On 11.03.2019 the prosecutrix herself give application to his Circle Officer, Police Station- Kotwali, District- Basti duly supported by affidavit that the applicant had no role in the incident and he has been falsely implicated but nothing was done. The co-accused, Krishna Gopal Yadav @ Krishna Yadav, has already been granted regular bail by this court vide Criminal

Misc. Bail Application No. 43622 of 2018. The main accused, Jai Shankar Upadhyay, has already been granted bail vide Criminal Misc. Bail Application No. 45759 of 2018 on 04.01.2019. There is specific averment in paragraph 24 of the affidavit in support of the bail application that the police is regularly approaching the house of the applicant and is trying to arrest him. In view of the fact that the two co-accused persons were arrested and then enlarged on bail there appears to be definite apprehension of arrest against the applicant. Hence the applicant is directed to be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

24. Without expressing any opinion on the merits of the case and considering the nature of accusations and his antecedents, the applicant is entitled to be released on anticipatory bail in this case.

25. In the event of arrest of the applicant- **Parvez Ahmad**, involved in Case Crime No. 585 of 2018, under Sections- 376D, 420, 506, 120-B IPC, Police Station- Kotwali, District- Basti, he shall be released on anticipatory bail on furnishing a personal bond of Rs. 25,000/- with two sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:-

1. The applicant shall not leave India during the currency of trial without prior permission from the concerned trial Court.

2. The applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court.

3. That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

4. The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and 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 to ensure presence of the applicant.

5. In case, the applicant misuses the liberty of bail, the trial Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98.***

6. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

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

8. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

26. The order dated 20.05.2020 passed by this court stands corrected and replaced by the present order.

27. The correction application is **allowed.**

(2020)06ILR A1249
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Bail Cancellation Application No. 302 of 2019

Viparna Gaur ...Applicant(In Person)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
In Person

Counsel for the Opposite Parties:
A.G.A., Sri Pankaj Satsangi

(A) Criminal law - Bail cancellation - Code of Criminal Procedure, 1973 - Section 439 - Special powers of high court or court of session regarding bail - Indian Penal Code, 1860 - Sections 147, 302, 307, 504, 506, 120-B - Rejection of bail stands on one footing but cancellation of bail is a harsh order since it interferes with liberty of individual and must not be lightly resorted to - While considering degree of burden of prove lie upon prosecution or complainant/Informant, when an application for cancellation of bail moved, is not to the extent of proving by a mathematical certainty or beyond reasonable doubt but it must establish its case by showing on a preponderance of probabilities that accused has attempted or may attempt to or tamper or has tampered with witnesses - It may also be proved by test of balance of probabilities that accused has abused his liberty or it may show that there is reasonable apprehension that he will interfere with course of justice. Para-14,16

Violating conditions of bail, opposite party 2 intimidated and threatened applicant - in respect whereof Informant/Applicant lodged report under Section 506 IPC at Police Station - Opposite party 2 made another attempt of identifying Informant/ Applicant with his associates with an intention to eliminate her - in respect whereof FIR was lodged - not appearing in trial, delaying the same by absenting on false and artificial reason - filed a false application under Section 156(3) Cr.P.C. before Chief Judicial Magistrate, against Informant/Applicant and others - placed documents, which shows that he has intimidated witnesses and met them repeatedly to influence them - violated terms and conditions of bail with impuginity and without being deterred in any manner. Para – 6

HELD:- Accused/opposite party 2 is not only contacting witnesses but also involving Police officials to influence witnesses and this is a serious aspect. Such a person if continue to remain on bail, there is every likelihood of trial being influenced and may not proceed fairly and objectively. I refrain myself in making further observations as it may prejudice trial but have no hesitation in holding that it is a fit case where bail granted to accused opposite party 2 cannot be held to be a valid exercise of discretion and bail deserves to be cancelled. Para-42

Bail Cancellation Application allowed.(E-7)

List of cases cited:-

1. State (Delhi Administration) Vs Sanjay Gandhi, (1978) 2 SCC 411

2. Madhukar Purshottam Jondkar Vs Talab Haji Hussain 60 Bombay Law Reporter 465

3. Raghubir Singh Vs St. of Bihar, (1986) 4 SCC 481

4. Manjit Prakash & ors. Vs Shobha Devi & anr., (2009) 13 SCC 785

5. Pooja Bhatia Vs Vishnu Narain Shivpuri & ors., (2014)13 SCC 492.

6. Dolat Ram & ors. Vs St. of Har., (1995) 1 SCC 349,

7. Prahlad Singh Bhati Vs NCT, Delhi , (2001) 4 SCC 280

8. Chaman Lal Vs St. of U.P., (2004) 7 SCC 525

9. Ram Govind Upadhyay Vs Sudarshan Singh , (2002) 3 SCC 598

10. CBI, Hyderabad Vs Subramani Gopalakrishnan & ors. , (2011) 5 SCC 296

11. State Represented by the C.B.I. vs. Anil Sharma , (1997) 7 SCC 187

12. Padmakar tukaram Bhavnagare and Ors. vs. The State of Maharashtra and Ors., (2012) 13 SCC 720

13. State of Maharashtra and Ors. vs. Pappu, (2014) 11 SCC 244

14. Neeru Yadav vs. State of U.P. , (2014)16 SCC 508

15. Virupakshappa Gouda and Ors. Vs. The State of Karnataka and Ors. , (2017) 5 SCC 406

16. Sanjay Chandra vs. Central Bureau of Investigation , (2012) 1 SCC 40

17. Prasanta Kumar Sarkar vs. Ashis Chatterjee and Anr.,(2010) 14 SCC 496

18. Dataram Singh vs. State of Uttar Pradesh and Ors.,(2018) 3 SCC 22

19. State of Orissa and Ors. Vs. Mahimananda Mishra and Ors. ,(2018) 10 SCC 516,

20. X vs. The State of Telangana and Ors., (2018)16 SCC 511

21. Seema Singh vs. Central Bureau of Investigation and Ors., (2018) 16 SCC 10

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

1. Heard Ms. Viparna Gaur in person, Sri N.I.Jafri, Senior Advocate, assisted by Sri Pankaj Satsangi, learned counsel for accused opposite party 2 and Sri Ratan Singh and Sri Udit Chandra, learned A.G.A. for State.

2. This is an application under Section 439 of Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* filed by Informant/Applicant with the prayer to cancel bail granted to Accused / Opposite Party 2, Prem Chandra Sharma, vide order dated 26.04.2017 in Criminal Misc. Bail Application No.41324 of 2016 in Sessions Trial No.566 of 2016 arising from Case Crime No.337 of 2016 under Sections 147, 302, 307, 504, 506, 120-B IPC, Police Station Ujhani, District Budaun.

3. A First Information Report *(hereinafter referred to "FIR")* was lodged by Informant/Applicant on 24.5.2016 at 8:25 P.M., at Police Station Ujhani, District Budaun under Sections 147, 304, 504, 323, 506, 120-B IPC alleging that Informant/Applicant's sister Sadhna Sharma and family had a long enmity with Accused Shravan Kumar son

of Mahipal Gupta, Guddu alias Sudhanshu son of Mahendra Nath Sharma, Munna alias Brajendra Nath Sharma son of Brajraj Sharma, Kamal Sharma son of Raghuveer, all are residents of Police Station Ujhani, District Budaun, and, Bhure son of Akhtar, resident of Police Station Bilsi, District Budaun. On 23.5.2016, Informant/Applicant's sister Km. Sadhna Sharma, In-charge D.G.C. (Criminal), District Judgeship Budaun came to District Court alongwith her servant Bihari on Scooty Activa, bearing registration No.UP 24N-9744 where case of Bhure was fixed in Budaun Judgeship. In the evening, at around 5:30 P.M., while Km. Sadhna Sharma was coming back on Scooty as a Pillon Rider, and Scooty was being driven by servant Bihari, near Balaji Temple, a car was waiting in which accused was sitting and Kamal Sharma was on driving seat. They chased Scooty and near Jirauliya Village, hit the Scooty resulting in Scooty rider namely Bihari and Informant/Applicant's sister Km. Sadhna Sharma fell on the road. Accused thereafter passed vehicle over Km.Sadhna Sharma with intention to kill her. They stopped vehicle near Bihari and said to kill Bihari also but at the same time some passengers came and accused ran away. Bihari with the help of persons gathered, brought Km. Sadhna Sharma to District Hospital where she died. On receiving information, Informant/Applicant came to hospital at 11 P.M. and lost control over her seeing her sister dead. Thereafter, she made arrangement for her cremation and then came to Police Station for registering report. She also believed that in the entire incident and conspiracy, BSP MLA Yogendra Sagar was also involved. During investigation, Police recorded statements of Shamshad, Raju and Girish Mishra, who disclosed name of opposite party 2 that he was the kingpin who conspired murder of Km.Sadhna Sharma through contract killers. Shamshad, Raju and Girish Mishra disclosed names of opposite party 2 P.C.Sharma alias Prem Chand Sharma, Mastana alias Abdul Navi, Pintu alias Munendra alias Narendra, Mohabbat alias Sajid, Yasin alias Baba and Ishrat. Police then arrested Mastana and Yasin, whose names surfaced in commission of crime including co-accused Raju and Girish. They confessed their guilt of having committed crime and disclosed complicity of opposite party 2 Prem Chand Sharma stating that he had hatched entire conspiracy of murder of Km. Sadhna Sharma. Opposite party 2 is a powerful political person having money and muscle power. He had contested Assembly Election in 2012 from Bilsi Vidhan Sabha. Since local Police of Ujhani was under his pressure and influence, therefore on the complaint of Informant/Applicant, investigation was transferred to Crime Branch, Bareilly on 22.07.2016. On the same day, Investigating Officer, in his investigation, excluded names of all six accused persons named in FIR. During further investigation, Raju Girish, Mastana and Yasin also disclosed involvement of Kamlesh Sharma wife of Prem Chand Sharma, Sharvan Gupta (accused named in FIR) and Shraddha Gupta wife of Sharvan Gupta for hatching conspiracy of murder of Km. Sadhna Sharma. The statements were corroborated by Call Detail Records of all accused persons and other statements of witnesses. Investigating Officer consequently submitted charge sheet on 23.09.2016 and supplementary charge sheets on 17.10.2016 and 15.11.2016 naming

accused Raju alias Riyaz, Girish Mishra, Abdul Nabi alias Mastana, Yasin alias Baba, P.C.Sharma alias Prem Chand Sharma, Israt, Mohabbat alias Sajid and Pintu alias Munendra. On 29.12.2018, in supplementary charge sheet filed by Investigating Officer of Crime Branch, Breilly, Sharvan Gupta, Kamlesh Sharma and Shraddha Gupta were named.

4. Chief Judicial Magistrate Budaun taking cognizance, summoned accused persons on 21.12.2019. Sri Vinod Kumar. Station House Officer, Ujhani was favouring accused, inasmuch as, on 03.01.2019 without any authority or information to Crime Branch, Bareilly, who was Investigating the case, reached Ram Murty Hospital, Bareilly and accepted bail bond of absconder accused Kamlesh on the ground that she was ill. When Informant/Applicant made complaint, accused Kamlesh Sharma appeared in Court on 28.01.2019 and prayed that she should be sent to District Hospital, Budaun but it was rejected and her bail application was rejected by Sessions Judge. She moved bail application before this Court, which was granted by this Court.

5. Opposite party 2 also moved bail application before this Court i.e. Criminal Misc. Bail Application No.41324 of 2016, which was allowed and bail was granted vide order dated 26.04.2017 but following conditions were imposed :

"i) The applicant ***shall not tamper with the prosecution evidence.***

ii) The applicant ***shall not threaten or harass the prosecution witnesses.***

iii) The applicant ***shall appear on the date fixed by the trial court.***

iv) The applicant shall not commit an offence similar to the offence of which the applicant is accused, or suspected of the commission, of which applicant is suspected.

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

(Emphasis added)

6. Violating conditions of bail, opposite party 2 intimidated and threatened applicant on 15.12.2017 in respect whereof Informant/Applicant lodged report dated 16.12.2017 at 4:14 P.M. under Section 506 IPC at Police Station Civil Lines, District Budaun. Opposite party 2 made another attempt of identifying Informant/ Applicant with his associates with an intention to eliminate her and this incident took place on 06.07.2019 in respect whereof FIR being Case Crime No.250 of 2019 was lodged on 08.07.2019 at Police Station Civil Lines, District Budaun. He is not appearing in trial, delaying the same by absenting on false and artificial reason; has filed a false application under Section 156(3) Cr.P.C. before Chief Judicial Magistrate, Budaun, against Informant/Applicant and others vide application dated 13.08.2019 wherein has placed documents, which shows that he has intimidated witnesses and met them repeatedly to influence them. This all show that he has violated terms and conditions of bail with impuginity and without being deterred in any manner.

7. Manner in which opposite party 2 is violating terms and conditions on

which bail has been granted, has been detailed in paras 16 to 26 of affidavit filed in support of bail cancellation application, which are reproduced as under :

"16. That in spite specific directions issued by this Hon'ble Court while considering prayer for bail of respondent No.2 i.e. P.C.Sharma, who he again and again intimidated and insulted to induce the informant with intend to inflict threat of her personal life and liberty. As such the informant lodged an NCR against the respondent no.2 on 17.12.2017 U/s 506 IPC with respect to the incident occurred on 15.12.2017 at 17.:15 hours. In the said NCR the respondent no.2 inflicted threat against the informant because the informant consistently pursuing her sister's murder case against the respondent no.2 P.C. Sharma. Accordingly the respondent no.2 is wanted to not pursue her case by the informant otherwise she may be face dire consequences. The contents of allegation may be verified from the FIR itself. Copy of NCR bearing No.274/2017 dated 17.12.2017 is being filed here with and marked as Annexure No.5 to this affidavit.

17. That again the respondent no.2 trying to identified the informant with his associates with intention to eliminate her on 06.07.2019 when she pursuing her case before the court. In the court premises, the respondent no. 2 identified the informant with intention to kill her and teach her lession to not pursue her remedy against him. The copy of FIR bearing Case Crime No.250/2019 dated 08.07.2019 is being filed herewith and marked as Annexure No.6 to this affidavit.

18. That it is a consistent case of the prosecution that the P.C. Sharma is habitual lecher and developed illlicit relation with various persons to achieve their goals. In fact the said allegation was verified by the co-accused Kamlesh Sharma who is the wife of P.C. Sharma and alleged that she was keep mum since last several years to save her skin and her wards future but her husband P.C. Sharma assault her and attempted to commit murder with her on 25.07.2019 when after taking liquor he was assaulted her repeatedly by his belt. The manner in which she was assaulted by her husband P.C. Sharma narrated in her FIR which demonstrates that the P.C.Sharma is habitual offender and violated the terms and conditions of bail granted by this Hon'ble Court. The Kamlesh Sharma lodged FIR against her husband P.C. Sharma who is the respondent no.2 in the present bail cancellation applicant for an offence of attempt to commit her murder. The copy of FIR bearing Case Crime No. 277/2019 dated 25.07.2019 is being filed here with and marked as Annexure No.7 to this affidavit.

19. That the third condition imposed by this Hon'ble Court against the respondent no.2 to appear on the date fixed by the Trial Court. Now the respondent no.2 consistently seeks adjournment before the trial court in S.T. No. 566/2016 (State vs. P.C.Sharma & Ors.) U/s 307, 302 IPC registered at P.S. Ujhani, District Budaun. The respondent through his counsel to mislead the court, endorsed section 304-B IPC in place of section 307 and 302 IPC, so that his applications seeking adjournments may not be used for cancellation of his bail application before this Hon'ble Court. Ultimately on 26.08.2017 the resondent no.2 corrected the said offence alleged against him and transcribed the correct section U/s 302, 120-B IPC and seeks adjournment for his non appearance. The

copy of applications dated 24.07.2017, 02.08.2017, 26.08.2017 and 08.09.2017 are being collectively filed here with and marked as Annexure No.8 to this affidavit.

20. That in application dated 08.0.2017 the informant pointed out before the Trial Court that the accused-respondent no. 2 consistently absconding in the court proceeding related to case crime no. 268/2017 U/s 2/3 Gangster Act and avoid the court process issued by the Gangster Court. It is further pointed out that proceeding of proclamation U/s 82 Cr.P.C. was issued against him. Pursuant to the orders of Gangster Court, the concerned Police Station declared P.C. Sharma as a absconder of Rs.5000/-. It is further pointed out that the respondent-accused deliberately absent from the court proceeding to avoid the court proceeding and seeks regular adjournment by filing adjournment application. Accordingly the informant prayed that the Trial Court may pleased to direct the accused-respondent no.2 to appear before the court on the next date fixed, otherwise the trial court may forfeit his personal bail bond and sureties. Upon the said application the Trial Court is directed to place on record and be listed on the next date i.e. 12.09.2017 along with the Court's order sheet. The copy of application dated 08.09.2017 is being filed here with and marked as Annexure No.9 to this affidavit.

21. That on 12.09.2017 the Trial Court issued N.B.W. against P.C.Sharma because the court is of the view that the no counsel appearing on behalf of accused P.C. Sharma. The said finding of fact is against the record because the adjournment application filed on behalf of P.c. Sharma is being preferred by one Vivek Sharma counsel, represented before the court on 24.07.2017, 02.08.2017 and filed his vakalatnama on 08.08.2017. Thereafter again adjournment application was filed on behalf of P.C. Sharma by Rohtash Saxena Advocate on 26.08.2017 and 08.09.2017. As such the Trial Court without perusal of an application passed an order on 12.09.2017 and recorded perverse finding which is against material available on record.

22. That in application dated 26.09.2017 the informant pointed out before the Trial Court that the accused-respondent no.2 consistently absconding in the court proceeding related to case crime no.268/2017 U/s 2/3 Gangster Act and avoid the court process issued by the Gangster Court. It is further pointed out that proceeding of proclamation U/s 82 Cr.P.C. was issued against him. Pursuant to the orders of Gangster Court, the concern Police Station declared P.C. Sharma as a absconder of Rs.5000/-. It is further pointed out that the respondent-accused deliberately absent from the court proceeding to avoid the court proceeding and seeks regular adjournment by filing adjournment application. Accordingly upon the prayer of informant, the Trial Court pleased to issue the N.B.W. Against the accused-respondent no.2 on 12.09.2017 and next date fixed on 26.09.2017 for appearance but the accused-respondent no.2 not appear on 26.09.2017 is being filed here with and marked as Annexure No.10 to this affidavit.

23. That in reply to the said application and order dated 12.09.2017 passed by the Trial Court against P.C. Sharma, the respondent-accused admitted in his application dated 05.10.2017 that he has pursuing his case before the High Court and suffering illness due to which against whom the N.B.W. Was issued by

the court. It is further urged that the said error was not occurred deliberately, as such the trial court may pleased to recall the NBW issued against him. The said application was allowed by the Trial Court without keeping in mind of earlier application filed by his counsel namely Vivek Sharma and Rohtas Saxena and accepted his explanation which is absolutely false and frivolous and cannot be accepted by any common prudent man. The copy of application dated 05.10.2017 is being filed here with and marked as Annexure No.11 to this affidavit.

24. That the informant consistently prayed before this Hon'ble Court that the respondent-accused being designer of the crime hatched conspiracy for murder of existing D.G.C. Criminal Sadhana Sharma to grab her property and eliminate her. The respondent-accused after release on bail by this Hon'ble Court consistently violated the term and condition of the bail bond and sureties and the direction issued by this Hon'ble Court. As such the informant prayed with folded hand before this Hon'ble Court that his bail cancellation application may kindly pleased to allow and direct the Trial Court to taken into judicial custody so that the fair and speedy trial be conducted by the trial court without any biased manner.

25. That it is further relevant to point out here that just to create pressure upon the informant and the witnesses namely Aniruddha Gautam and Munendra Gangawar as well as the formal witnesses Gopichand Yadav (I.O.), Surendra Singh Pawar (I.O.), the accused-respondent no.2 initiated proceeding U/s 156(3) Cr.P.C. for registration of FIR against them. The said application was preferred before the C.J.M. Budaun on 13.08.2019. In the said application P.C.Sharma appended the conversation of call recording of taken place between Gopichand Yadav (I.O.), Munendra Gangwar (witness), Surendra Satoriya (witness), Inspector Naresh Pal Yadav, S.I. A.K.Singh and verified their call recording by sending pen drive before truth forensic lab services mark as item no.1 and after analysis the lab found that the pen drive mark item no.1 did not contained any sign of physical damage like cracks scratch marks and it was in working condition at the time of examination. However it is admitted case of the respondent no.2 in his application u/s 156(3) Cr.P.C. that he regularly negotiated with the witnesses and the Investigating Officers with a view to influence the investigation, threatened the witnesses and destroy the evidence for that purposes he has regularly recorded the conversation taken place between them. As such on the face of record the respondent no.2 admitted in h is application U/s 156(3) Cr.P.C. that he is regularly trying to threatened and influence the witnesses in any manner even against whom an application U/s 156(3) Cr.P.C. was filed to achieve their goal so that they may not be deposed their testimony because of his fear that respondent no. 2 may involved them in anywhere in false cases. However, the accused-respondent no.2 who filed the application u/s 156(3) Cr.P.C. before C.J.M. Budaun is unable to get any benefit of the fats given by him in his application under section 156(3) Cr.P.C., but the ordinary people fears and trembled by any court cases falsely imposed upon him. Copy of application U/s 156(3) Cr.P.C. dated 13.08.2019 along with its annexure and call recording are being filed here with and marked as Anneuxre No.12 to this affidavit.

26. That under the aforesaid facts and circumstances it is evident that the respondent no.2 regularly violated the terms and conditions imposed by this Hon'ble Court and trying to destroy the

evidence by making pressure upon the witnesses. It is further relevant to point out here that the respondent no.2 is regularly influence the witnesses so that they may not be permitted to deposed their testimony before the court against him. As such the free and fair trial and investigation cannot be conducted in the said circumstances because the respondent no.2 has regularly inflicted threat and making pressure upon the witnesses including the S.H.O. Ujhani namely Vinod Kumar who has accepted the bail bond of his wife under the pressure of P.C.Sharma."

8. During course of arguments, Informant/Applicant, who had appeared in person before Court, placed order sheets of Trial Court to demonstrate that opposite party 2 is not attending trial, avoiding on artificial pretext and also placed before Court own document filed by opposite party 2 along with application filed under Section 156(3) Cr.P.C. to show the manner in which he is regularly and constantly contacting witnesses and trying to influence and threatening them so as to pursue them not to adduce evidence against him in pending trial.

9. Sri N.I.Jafri, Senior Advocate, assisted by Sri Pankaj Satsangi, Advocate, has appeared on behalf of opposite party 2. While disputing contention of Informant/Applicant that opposite party 2 is violating terms and conditions on which bail has been granted, he however could not dispute order sheets showing non appearance of opposite party 2 in Court below and also recorded telephonic conversation showing access of opposite party 2 with witnesses with the help of local Police also.

10. It is in this backdrop, this Court has to examine whether opposite party 2 is behaving in a manner so as to justify cancellation of bail or not?

11. Now before going further in detail on this aspect, I find it appropriate to have a bird eye view of judicial precedents on the question as to in what circumstances, bail already granted can be cancelled or must be cancelled.

12. Considerations and relevant aspects by a Court while granting a bail are different than those when an application for cancellation of bail has come up before the Court.

13. A three-Judges Bench of Supreme Court in **State (Delhi Administration) vs. Sanjay Gandhi (1978) 2 SCC 411** had an occasion to consider an order dated 11.04.1978 passed by Delhi High Court rejecting Delhi Administration's application for cancellation of bail of respondent Sanjay Gandhi. Court observed that rejection of bail, when bail applied is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves review of a decision already made and can, by and large, be permitted only, if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow accused to retain his freedom during the trial.

14. While considering degree of burden of prove lie upon prosecution or complainant/Informant, when an application for cancellation of bail moved, is not to the extent of proving by

a mathematical certainty or beyond reasonable doubt but it must establish its case by showing on a preponderance of probabilities that accused has attempted or may attempt to or tamper or has tampered with witnesses. It may also be proved by test of balance of probabilities that accused has abused his liberty or it may show that there is reasonable apprehension that he will interfere with course of justice. Court approved Bombay High Court decision in **Madhukar Purshottam Jondkar vs. Talab Haji Hussain 60 Bombay Law Reporter 465** that test adopted by the Court would be, whether material placed before it is such as to lead to the conclusion that there is a strong prima facie case that accused if allowed to be at large he would tamper with prosecution witnesses and impede course of justice. Mere unfounded apprehension or self imagined threat by prosecution or Informant-Complainant would not justify cancellation of bail, granted to accused.

15. In **Raghubir Singh vs. State of Bihar (1986) 4 SCC 481**, Court said that grounds for cancellation of bail under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc.

16. It was also held that above grounds are illustrative and not exhaustive. Rejection of bail stands on one footing but cancellation of bail is a harsh order since it interferes with liberty of individual and must not be lightly resorted to.

17. Above decision was followed in **Manjit Prakash and Ors. vs. Shobha Devi and Anr. (2009) 13 SCC 785** as also in **Pooja Bhatia vs. Vishnu Narain Shivpuri and others (2014)13 SCC 492.**

18. In **Pooja Bhatia (supra)**, considering conduct of accused i.e. charge of throwing acid on complainant, Court held that it was a serious aspect and therefore, accused is not entitled to continue with the benefit of bail.

19. In **Dolat Ram and others vs. State of Haryana (1995) 1 SCC 349**, Court said that rejection of bail in a non-bailable case at initial stage and cancellation of bail so granted, has to be dealt with and considered on different basis. Very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail, already granted. Court further said that generally speaking grounds of cancellation of bail, broadly i.e. illustrative and not exhaustive are : (i) interference or attempt to interfere with the due course of administration of justice; (ii) evasion or attempt to evade due course of justice; (iii) abuse of the concession granted to the accused in any manner; (iv) Satisfaction of Court, on the basis of material placed on record of possibility of accused absconding.

20. Court also reminded that bail once granted should not be cancelled in a

mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying concession of bail during trial.

21. In **Prahlad Singh Bhati vs. NCT, Delhi (2001) 4 SCC 280** Court said that while granting bail, nature of accusations, severity of punishment, if accusation entails a conviction, nature of evidence in support of the accusations should be kept in mind. Further, reasonable apprehensions of witnesses being tampered with or apprehension of there being a threat for complainant also need be weighed by Court. No discussion of entire evidence to form an opinion whether evidence would established guilt beyond reasonable doubt is expected at the stage of considering matter of bail but prima facie satisfaction of Court in support of charge must be there. Lastly, Court should also consider whether prosecution has element of genuineness or there is some fragility. In case of any doubt as to genuineness, normal course is to grant bail. To the same effect are the observation made in **Chaman Lal vs. State of U.P. (2004) 7 SCC 525.**

22. In **Ram Govind Upadhyay vs. Sudarshan Singh (2002) 3 SCC 598** it was held that grant of bail though discretionary in nature, yet such exercise cannot be arbitrary, capricious and injudicious. Heinous nature of crime warrants more caution.

23. In **CBI, Hyderabad vs. Subramani Gopalakrishnan and others (2011) 5 SCC 296,** in para 23, Court said :

"....that ***there is difference between yardstick for cancellation of bail and appeal against the order granting bail.*** *Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the Court on the basis of the materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."*

24. Position, influence and resources of accused have also been held relevant factors to adjudge whether accused is likely to interfere with administration of justice, trial or tamper with witness or evidence.

25. In **State Represented by the C.B.I. vs. Anil Sharma (1997) 7 SCC 187,** anticipatory bail was granted by Himachal Pradesh High Court and C.B.I. approached for cancellation of bail stating that accused was a former Minister of Himachal Pradesh and being a high authority in power is likely to disrupt even investigation but High Court did not accept application for cancellation of bail. On appeal, Supreme Court accepted C.B.I. contention and observed that in case of such highly influenced political person, the very interrogation and investigation may become a mere ritual

hence Court cancelled order of anticipatory bail.

26. In **Padmakar tukaram Bhavnagare and Ors. vs. The State of Maharashtra and Ors. (2012) 13 SCC 720,** Supreme Court while confirming order of anticipatory bail took into accunt that accused are aged and rustic, not influential persons holding high office who can bring pressure upon investigating agency and it is unlikely that Police would find it difficult to interrogate them because they are protected by an order granting anticipatory bail. That is how judgment in **State Represented by the C.B.I. vs. Anil Sharma (supra)** was also distinguished. However, Court also clarified that grounds for cancellation of bail, broadly, are interference or attempt to interfere with due course of justice or abuse of concession granted to the accused in any manner but an order of bail can also be cancelled where it is found to be perverse, passed ignoring evidence on record or taking into considering irrelevant material. Relying on Dinesh M.N. (S.P.) vs. State of Gujarat (2008) 5 SCC 66 Court said that such vulnerable bail order must be quashed in the interest of justice.

27. In **State of Maharashtra and Ors. vs. Pappu (2014) 11 SCC 244,** accused was convicted under Section 302 read with 120-B IPC for hatching criminal conspiracy in killing of deceased Inder Bhatija. In appeal, High Court while admitting appeal, enlarged accused on bail and this order of bail was challenged in Supreme Court by the State on the ground that accused was involved in as many as 52 cases, out of which 20 cases offences were registered against him before going to jail and while he was in jail; and 32 cases were registered when he was released by Court on conditional bail. The defence taken on behalf of accused, besides other, was that he has already spent 9 years in jail during pendency of trial and no witness has supported prosecution case and that it was a political rivalry in which he was falsely implicated. Supreme Court said that reason given by High Court that father and wife of deceased have turned hostile, cannot be a ground to grant bail since there were other witnesses and material available. High Court should not have ignored the fact that accused was involved in as many as 52 cases out of which 20 were registered before going to jail and during stay in jail, and whenever he was on bail or conditional bail, 32 cases were registered. Court also found that in some cases accused was acquitted but still 15 trials were pending in which two cases were under Section 302 read with 120B IPC. Having said so, Court observed that since accused was in jail for 9 years and as per pendency, High Court would have taken a large number of years in deciding appeal, therefore, Court should decide appeal expeditiously and with the above direction, appeal was allowed and order of bail granted by High Court was set aside.

28. In **Neeru Yadav vs. State of U.P. (2014)16 SCC 508**, this Court had granted bail to accused for offences punishable under Sections 147, 148, 149, 302, 307, 394, 411, 454, 506, 120B and 34 IPC on the ground of parity as another accused Ashok was already enlarged on bail. The wife of deceased filed appeal for setting aside order of bail granted by this Court. Court considered various earlier authorities and said in para 13 of judgment as under :

"...It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail and have not been taken note of bail or it is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court."

29. Thereafter, referring to 15 cases registered again accused showing that he was a history-sheeter and mostly under Section 302 IPC, order of bail was set aside. Court observed that there has to be a balance between personal liberty of an individual and peace and harmony of Society. No individual interest can be allowed to create a concavity in the stem of social stream otherwise it would bring chaos and anarchy in the Society. Relevant observations made in this regard are reproduced as under :

"....We are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bed rock of constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body.

A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the ***liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society.*** *A society expects responsibility and accountability from the member, and it desires that the citizens should obey the law, respecting it as a cherished social norm.* ***No individual can make an attempt to create a concavity in the stem of social stream.*** *It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the Court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its*

own whim or caprice. It has to be guided by the established parameters of law." (emphasis added)

30. In **Virupakshappa Gouda and Ors. Vs. The State of Karnataka and Ors. (2017) 5 SCC 406,** application for bail was rejected by Sessions Judge as also High Court. Even second bail application was rejected by Sessions Judge as also High Court. This time accused went to Supreme Court also but Special Leave Petition was also rejected. Then a third application was filed before Additional Sessions Judge, Raichur, which was allowed and accused were enlarged on bail. Informant brought the mater to High Court under Section 439(2) Cr.P.C. seeking cancellation of bail. He succeeded and High Court cancelled bail. Thereafter accused brought the matter to Supreme Court. Court made serious observations in respect of approach of Trial Court in granting bail by treating filing of charge-sheet as a change of circumstance but ignoring that already two bail applications were rejected and one has attained finality up to Supreme Court. Court said that bail application cannot be allowed solely or exclusively on the ground that in criminal jurisprudence accused is presumed to be innocent till found guilty by the Court. Trial Court has relied on Supreme Court judgment in **Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40** wherein it was observed that object of bail is to secure appearance of accused at trial and not punitive or preventive. Deprivation of liberty should be considered a punishment. Court should appreciate that punishment begins after conviction and every man is deemed to be innocent until duly tried and found guilty. Supreme Court said that above observations in Sanjay Chandra (supra) have their relevance but cannot be made applicable in each and every case for grant of bail. It all depends upon factual matrix of each case, nature of crime and manner in which it was committed. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of factual score and understanding of pronouncements in the field. Court relied on **Prasanta Kumar Sarkar vs. Ashis Chatterjee and Anr. (2010) 14 SCC 496** where it was opined that while exercising power for grant of bail, Court must to keep in mind certain circumstances and factors as under :

"(i) whether there is any prima facie or reasonable ground to be believed that the Accused had committed the offence.

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the Accused absconding or fleeing, if released on bail;

(v) ***character, behaviour, means, position and standing of the accused;***

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; *and*

(viii) danger, of course, of justice being thwarted by grant of bail."

(emphasis added)

31. It also held that where a bail is granted considering irrelevant materials or keeping out of consideration relevant material, the order becomes vulnerable and warrants annulment. The order of

High Court setting aside bail granted by Trial Court was upheld by Supreme Court.

32. In **Dataram Singh vs. State of Uttar Pradesh and Ors. (2018) 3 SCC 22** Court enlarged to certain more aspects for granting bail, whether accused was arrested during investigation when he had best opportunity to tamper with evidence and influence witness or Investigating Officer found it not necessary to arrest accused during investigation and this factor would go in favour of accused. Similarly, whether accused was participating in investigation regularly and not absconding or avoiding investigation. Further, whether accused is a first-time offender or is accused of other offences and if yes, nature of such offences and his general conduct. Poverty or deemed indigent status of an accused, Court held, is also an important factor to be taken note. It observed that grant of bail is a rule and refusal is an exception. Finding that accused was not said to be a person of shady character and there was no history of his involvement in any unacceptable activity etc., accused was granted bail, though it was rejected by Trial Court as well as High Court.

33. In **State of Orissa and Ors. Vs. Mahimananda Mishra and Ors. (2018) 10 SCC 516,** accused was granted bail by High Court and it was set aside by Supreme Court. Court observed that accused was a powerful and influential person in his locality and even Investigating Officer apprehends that he may influence witnesses by intimidating them and this may influence trial by creating fear in the minds of witnesses. Court also looked into past attempt of accused to evade process of law and then found that order of grant of bail was not proper and it was set aside.

34. In **X vs. The State of Telangana and Ors. (2018)16 SCC 511,** accused, a Film Producer, based in Mumbai, was charged of offences under Sections 376, 342, 493, 506, 354(C) of IPC. Accused got anticipatory bail from Sessions Judge on 13.01.2017 and had advantage of that order for about eight months. The said order was cancelled by Sessions Judge on the ground that accused has not disclosed that he was also accused in 2G Spectrum case. This cancellation order was affirmed by High Court and also by Supreme Court. Thereafter accused moved a bail application under Section 439 Cr.P.C., which was allowed by High Court and accused was released on bail. This order was challenged in appeal before Supreme Court. Upholding the said order, Court said that bail once granted should not be cancelled unless a cogent case, based on supervening event has been made out.

35. In **Seema Singh vs. Central Bureau of Investigation and Ors. (2018) 16 SCC 10** bail granted to accused by High Court in the case registered under Sections 498-A, 302, 120-B IPC was challenged in appeal before Supreme Court. Court noticed that accused-2's bail application was rejected by Special Judicial Magistrate, CBI, Ghaziabad and thereafter bail was granted by High Court. Court said that gravity of offence is a relevant factor but not the sole ground to deny bail if there are other overwhelming circumstances justifying grant of bail. Noticing special feature, Court upheld order of High Court granting bail.

36. Thus, the broad principles, which are to be considered by this Court

while granting bail and when bail is already granted but an application for cancellation has come up for consideration, as discussed above, show that there is no thumb rule in both the situations. However, it is true that factors relevant for grant of bail are different and approach required to be adopted while considering application for cancellation of bail is different.

37. A perusal of order dated 26.04.2017 granting bail passed by this Court shows that while granting bail, this court relied on following circumstances and factum:

(i) Opposite party 2 is not named in FIR wherein six persons have been specifically named.

(ii) Informant-applicant is not an eye witness;

(iii) FIR was lodged on the basis of information received from Bihari, eye witness, who was driving scooty on which deceased was pillion rider.

(iv) Bihari in his statement under Section 161 Cr.P.C. has not named opposite party 2;

(v) Opposite party 2 had no motive to commit the crime;

(vi) After a period of one month one Shamsad was introduced, who changed prosecution story and gave description of opposite party 2.

(vii) Role of hatching conspiracy was assigned to Shamshad and Girish Mishra, co-accused;

(viii) Later on confessional statement of Kallu was recorded and in second statement of Bihari, which was recorded, name of opposite party 2 was introduced and he was assigned motive.

(ix) After four months, one Manoj who was introduced, claimed to be an eye witness who said while he was trying to help victim, she uttered that "पी सी शर्मा तूने मुझे मरवा दिया।"

(x) Co-accused Girish Mishra, who was granted bail on 18.11.2016 and case of opposite party 2 was similar.

(xi) Call details relied by Police were still to be verified after adducing evidence.

(xii) Opposite party 2 has no criminal history.

38. No criminal history of accused/opposite party 2 has been placed on record but cancellation of bail is pressed on alleged violation of terms and conditions, on which bail was granted and such terms and conditions, allegedly violated by opposite party 2 are :

i) The applicant shall not tamper with the prosecution evidence.

ii) The applicant shall not threaten or harass the prosecution witnesses.

iii) The applicant shall appear on the date fixed by trial court.

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

39. In order to demonstrate that applicant is not appearing in Court and instead continuously delaying process, my attention has been drawn to proceedings of various dates which may be reproduced as under :

A. On **24.7.2017** opposite party 2 sought adjournment stating as under :

''निवेदन है कि प्रार्थी उपरोक्त वाद में आरोपित है ***परन्तु प्रार्थी निजी काम से बाहर चला गया है।*** *किसी कारण वश आज हाजिर अदालत नहीं आ सका है।*

अतः प्रार्थना है कि प्रार्थी की आज की हाजिरी द्वारा वकील कायम करने की कृपा करें।''

"It is humbly requested that the applicant is an accused in the above case but due to personal work, he has gone out of station. He is unable to appear in the court.

Hence, it is requested that today's presence of the applicant may be marked through his counsel."

(English Translation by Court)

B. **On 02.8.2017** opposite party 2 sought adjournment stating as under :

''निवेदन है कि प्रार्थी उपरोक्त वाद में आरोपित है परन्तु ***प्रार्थी गम्भीर रूप से बिमार है।*** *जिसकी वजह से आज हाजिर अदालत नहीं आ सका है।*

अतः प्रार्थना है कि प्रार्थी की आज की हाजिरी द्वारा वकील कायम करने की कृपा करें।''

"It is humbly requested that the applicant is an accused in the above case but the applicant is seriously ill due to which he has not appeared in the Court, today.

Hence, it is requested that today's presence of the applicant may be marked through his counsel."

(English Translation by Court)

C. On **26.8.2017** opposite party 2 sough adjournment stating as under :

''निवेदन है कि प्रार्थी उपरोक्त वाद में आरोपित है परन्तु प्रार्थी किसी कारण से इलाहाबाद गया है। इसलिए हाजिर अदालत नहीं आ सका है।

अतः प्रार्थना है कि प्रार्थी की आज की हाजिरी द्वारा वकील कायम करने की कृपा करें तथा अथवा कार्यवाही हेतु कोई अन्य तारीख नियत कर आज की तारीख मुल्तवी फरमाई जाने की कृपा करें।''

"It is humbly requested that the applicant is an accused in the above case but due to some reason, the applicant has gone to Allahabad. Therefore, he cannot appear in Court.

Hence, it is requested that today's presence of the applicant may be marked through his counsel and it is requested to fix another date for the proceedings and today's date be deferred."

(English Translation by Court)

D. On this application Court passed following order:

''माननीय उच्च न्यायालय का त्वरित निस्तारण का आदेश है। नियत तिथि को अभियुक्त व्यक्तिगत रूप से हाजिर हो, अन्यथा दण्डात्मक आदेश पारित किया जायेगा।''

"Honorable High court has ordered for expeditious disposal. The accused should appear personally on the fixed date otherwise punitive order would be passed."

(English Translation by Court)

E. On **08.9.2017** opposite party 2 sought adjournment stating as under

''सविनय निवेदन है कि ***प्रार्थी उच्च न्यायालय गैगस्टर के मामले में पैरवी हेतु गया हुआ है। जिस कारण हाजिर अदालत आने में असमर्थ है।*** *तथा आगामी तिथि पर निश्चित रूप से हाजिर अदालत होगा।*

अतः श्रीमान जी से प्रार्थना है कि प्रार्थी की आज की हाजिरी द्वारा वकील कायम की जाय।''

"It is humbly requested that the applicant has gone to High court for pleading a case under Gangster Act, due to which he is unable to appear in the Court and he would definitely appear in the Court on next date.

Hence, it is kindly requested to your good-self that todya's presence of the applicant may be marked through his counsel." (English Translation by Court)

F. On **05.10.2017** opposite party 2 sought cancellation of N.B.W. stating as under :

"निवेदन है कि प्रार्थी को उपरोक्त मामले में आरोपित किया गया है। प्रार्थी पिछली तिथियों पर माननीय उच्च न्यायालय उपचार हेतु गया हुआ था तथा पिछली तिथि पर गम्भीर रूप से बीमार होने के कारण नहीं आ सके। जिस कारण ***प्रार्थी के विरूद्ध एन0बी0डब्लू0 व एन0एस0 हो गये।*** *प्रार्थी ने यह गलती जानबूझकर नहीं की है और न भविष्य में करेगा।*

अतः श्रीमान जी से प्रार्थना है कि प्रार्थी के विरूद्ध जारी एन0बी0डब्लू0 अपास्त करने की कृपा करें।"

"It is humbly requested that the applicant is an accused in the above case. On the previous dates, the applicant had been to the Hon'ble Court for treatment (?) and could not appear on previous dates on account of being seriously ill due to which N.B.W. and N.S. were issued against him. The applicant has not committed this mistake willingly and he would not do the same in future.

Hence, it is requested to your goodself that the N.B.W. issued against the applicant may be discharged."

(English Translation by Court)

40. This Court enquired from Sri Jafri, learned Senior Counsel about the illness suffered by opposite party 2 due to which he did not attend Court below but no reply on this aspect could be given.

41. The recording of telephonic conversation recording whereof was produced by opposite party 2 himself before Magistrate concerned alongwith his application under Section 156(3) Cr.P.C., which documents have not been disputed by Sri N.I.Jafri, Senior Advocate, appearing for opposite party 2. I find it appropriate to reproduce some extract thereof as under :

"गोपीचंद–हैलो

पी–हॉ नमस्कार सर

गोपीचंद–नमस्कार

पी–गोपीचंद साब बोल रहे हैं?

गोपीचंद–हूँ

पी–हॉ। साब मैं पीसी शर्मा बोल रहा हूँ सर

गोपीचंद–बोलो

*पी–**हॉ सर वो आपसे बात हुई थी, साधना मर्डर केस में सर थोडा हमें डिफेंस कर दीजिए कुछ बता दीजिए सर कैसे क्या है***

गोपीचंद– तो अब बाद में बात हो रहे हैं . . . अब ऐसे समय फोन करते हो, ***शाम को फोन करना***

पी– शाम को करें सर?

गोपीचंद–हूँ

पी–अच्छा सर, सर बदायूँ आप आ रहे हैं शिशुपाल भी कह रहे थे, पहलवान भी कह रहे थे आप बदायूँ आने वाले हैं सर, ***हम सोच रहे कि बैठ के बात हो जाती सर आपसे***

गोपीचंद– ***चलों, आयेंगे बताउँगा मैं,*** *तभी तो कह रहा हूँ शाम को बात कर लेना*

पी– ***तो शाम को सर किस समय कर लें सर?***

गोपीचंद– ***सात बजे करीब***

नी– ठीक है सर, जय हिंद सर

x x x x x x

*पी–**सर आपसे एक दिन मुलाकात करना चाहते थे सर,*** *किसी दिन आप बदायूँ आना हो या बरेली आना हो, तो हम मुलाकात करना चाहते थे सर*

गोपीचंद–नहीं, दियोरिया कलां हूँ मैं इस समय

पी– नहीं वो तो सर मुझे मालूम है सर, एके सिंह साब से पूछ लिया था मैंने। तो सर मै ***कुछ आपसे मिलना चाहता था।***

गोपीचंद–बताईये, बताईये

*पी–**अरे सर इसी केस के सिलसिले में अब*** *हम* ***जो होना था वो तो हो गया हमारे साथ।*** *सर कुछ अब.* ***कुछ ऐसे बिन्दु हमें मिल जाये*** *कुछ ऐसा हमें कुछ ऐसी मजबूती मिल जाये, ताकि हम अपने आपको निर्दोष साबित कर सकें*

*गोपीचंद–**अच्छा तो हम बतायेगे बतायेंगे।*** *हम यहॉ दियोरिया कलां हैं इस समय तो*

x x x x x x

नरेश पाल–हैलो

पी–हैलो, जयहिंद सर

नरेश पाल– जयहिंद भैया

*पी–**सर इंस्पेक्टर नरेश पाल सिंह साब बोल रहे हैं?***

*नरेश पाल–**जी बोल रहा हूँ भैया***

*पी–सर **मै बदायूँ से बोल रहा हूँ पीसी शर्मा***

नरेश पाल–जी बताईये

*पी– सर अब बदायूँ आना होता है साब का नहीं? **आपसे मिलना चाह रहा था साब** मैं*

नरेश पाल– बतायें, बतायें

पी– साब ने पहचाना, नहीं पहचाना?

नरेश पाल–नहीं बताये आप . . बतायें

*पी–हॉ हॉ. . . सर वो **साधना मर्डर केस में मुझे फांस दिया गया***

नरेश पाल–अच्छा अच्छा

पी– तो सर जो होना था, वो तो हो गया, जेल भी काट ली सर हमने, गैंगस्टर भी लग गयी, वो भी काट ली सर हमने

नरेश पाल–हूँ हूँ

*पी– तो सर **इस संबंध में चाहते थे सर हमें ऐसी जानकारी कुछ आपसे हासिल हो जाती, क्यों** हमने कोई अपराध तो किया नहीं सर, तो एके सिंह साब से बात भी हुई थी तो उन्होंने कहा कि जो कुछ होगा हम बतायेगे, सहयोग करेंगे। सर ये चाह रहे थे, **आपसे मुलाकात हो जाती, बैठ के कुछ बात कर लेते सर** आपसे हम थोडा सा*

नरेश पाल– नहीं करना क्या है . . . करना क्या है, ये बताओ?

*पी–सर हम . . **अब आप लोग बतायेंगे,** हम साब क्या . . . **हमें किस तरीके से हमें डिफेंस में कुछ मिल सकता है***

*नरेश पाल–**जमानत तो हो ही गयी आप की?***

*पी–**आप सर आजकल देख रहे हो जूडीशियल इतनी सख्त है, वैसे ही सजा ठोके जा रही है, जो हमने कुछ किया नहीं और ठुक जाये***

x x x x x x

पी–सर बस आपको सर ये बताना है कि किस तरीके से इन्होंने कैसे मैनेज किया जैसे वो टवेरा गाडी थी मेरी सुरेन्द्र से भी बात हुई वो भ्ही कह रहा था कि वो अस्पताल से लायी गयी

x x x x x

*पी–नहीं सर, आप गवाह नहीं हैं सर। तभी तो मैं कह रहा हूँ सर। आप मुझे **कुछ ऐसे टिप्स दे सकते** हैं, जो **मैं मेरे डिफेंस में काम आ सकते हों, कुछ ऐसी चीज निकल कर आ जाये,** जिसको हम . . .*

*नरेश पाल– देखों साब अब बात ये है न कि केस डायरी देखे, **हम पढ़े तो तो उसमें मिल सकती है कोई बात ऐसी, कोई बड़ी** बात तो है नहीं। **केस डायरी ले और उसको पढ़ा जाये, अध्ययन करें तो कुछ . .***

पी–तो सर गाडी सर गाडी तो आपके यहॉ से बरामद दिखाई गई। वो दिखाई नहीं गई मतलब जो मुझे पता लगा कि वो तो

नरेश पाल– नहीं हमारे यहॉ लिखा–पढ़ी कुछ नहीं हुई

पी– हॉ हॉ

नरेश पाल– लिखा पढ़ी हमने की ही नहीं, अब उझानी का मैटर है तो उझानी वाले देखे

पी–नहीं सर . . . सुरेन्द्र . . सुरेन्द्र सटोरिया जो है, उससे मेरी पूरी वार्ता हुई, तो उसने भी मुझे . . . हॉ उसने भी कहा कि गाड़ी तो किसी महिला के नाम से थी और हम तो ऐसे ही लपेटे में आ गये। मैंने . . जे तो सब होता ही है वो तो छोड़ दो। तो उसने बताया कि गाड़ी ये नहीं थी, गाडी तो हॉस्पिटल से लायी गयी है और उस व्यक्ति ने खुद ही फोन किया और ये मुझे पता लग गया था कि आपको कोई जानकारी नहीं थी, मुझे बताया कि आप तो खाना खा रहे थे, ये ऐसा बताया किसी ने मुझे और उसने फोन किया आपको कि ऐसे–ऐसे मुझसे एक एक्सीडेन्ट हो गया है एक महिला का

नरेश पाल–हॉ हॉ

*पी–आपने उसे उस समय हल्के में लिया, बाद में सोचा कि कोई आदमी बतायेगा नहीं कि जैसा कि अभी आप बता रहे थे . . ये सब स्थितियां बनी सर। **गोपी चंद साब ने काफी सपोर्ट कर रहे हैं** वो बेचारे बोले मैं अभी आउँगा बताउगा, ऐ सर? तो सर **हमें क्या मिल सकता है ऐसा कुछ जो हमारे डिफेंस में काम आ जाय***

x x x x x x

पी–नहीं भाईसाब देखों, आपने कहा था कि ***डाईवर तो आपका ही था वो***

मुनेन्द्र– ***ड्राईवर था, हमारे पास आज भी है वो***

पी–अब उससे मनोज से बात कर के देख लेते एक बार। मनोज तो मुझसे ये कह रहा था कि वो मुनेन्द्र भाई साहब ने कहा था, ***मंत्री जी के कहने पे, तो मैंने ऐसा कह दिया***

मुनेन्द्र–मेरी बात सुनो, ***गौतम जी हैं इसमें इन्वाल्ब,*** *ठीक है? मगर मैं अकेले कोई डिसिजन लेने में सक्षम नहीं हूँ,* ***भगवत जी डिसीजन लेने में सक्षम हैं, भगवत जी ने कह दिया कि गौतम जी जैसा कहें वैसा करों, हैं ना?***

पी–नहीं भाई साब, मनोज तो ये कह रहा था कि हमने तो मुनेन्द्र भाई साहब के कहने से ऐसा कह दिया

मुनेन्द्र–हूँ

पी–जो मनोज का कहना है वो तो ये है कि हमने मुनेन्द्र भाई साहब के कहने से किया है, और उन्होंने, मंत्री जी ने उनसे कहा मुनेन्द्र से, मुनेन्द्र ने मुझसे कहा। ये बात कह रहा था मुझसे, और कह रहा था कि मैं तो कर नहीं रहा था फिर वो ये भी बता रहा था कि वो उनके संग आए थे और उनकी वजह से वो 25–30 हजार रूपये लडकी डाल गयी जबरदस्ती विपर्णा हमारे पास, ये भी कह रहा था मनोज मुझसे।

मुनेन्द्र– हूँ

पी–तो वो कह रहा था कि हम जो कुछ करेंगे वो सब उनके कहने से ही करेगे तो आप जानते हो भाई साब बगैर मतलब के . . . और ये अब तो विपर्णा को मालूम है कि किसने मर्डर किया है, कैसे किया है, सब केस खुल चुका है और आप . . .इंस्पेक्टर जगदीश अरोरा हैं और जो लोग हैं वहाँ पर, सब कुछ पूरा केस मालूम है, मैं समझता हूँ विपर्णा को भी मालूम होगा। ***आप विपर्णा से बात करके देख लेते एक बार भाई साब हो जाता तो***

*मुनेन्द्र–**आपके पारिवारिक रिश्ते रहे हैं तो आप बात करों न विपर्णा जी से एक बार***

पी–ऐसा है न, मैं बात करूँ लेकिन वो . . जब थोडा सा आप लोग कहेंगे तो . . . ***अगर वो तैयार हो तो हम बात करने को तैयार हैं, हमारा तो कतई निजी मामला था***

मुनेन्द्र–हाँ पारिवारिक मैटर था पारिवारी रिश्ते थे आपके और आपके लिंक ऐसे रहे होंगे . . चूँकि आप अगर परिवार में इस तरह रहे हैं तो रिश्तेदारी में भी संबंध होंगे

पी–बिलकुल भाई साब, सब संबंध हैं

मुनेन्द्र– ***एक बार बैठ कर निपटारा करो, खत्म करो हैं न?*** *जो उनका लेन देन है या जो उनका देना है*

पी–नहीं वो सारा पर्चा मैने उनको दे दिया और उसने अपने बयानो में भी कहा है आप . . आप ही बात कर लीजिए

मुनेन्द्र– हूँ हूँ

पी–भाई सारी चीजें उनके नाम हैं, जो प्रापर्टी उनके नाम है विपर्णा के नाम है, उनकी मां के नाम है और सारा पर्चा उसके पास है, वो कहें और हम तो ये भी चाहते हैं कि उनके मर्डर के जो लोग दोषी हैं उनकी सजा भी हो

मुनेन्द्र–हूँ

पी–हमारे पास सारे साबूत हैं, वो हम उसे दे देंगे। मैंने उससे कहा, मैंने व्हाटसएप पे कई बार मैसेज भी किये, मैने कहा ***पारूल, विपर्णा के घर का नाम पारूल है,*** *मैंने कहा गहराई से सोंचों, चिन्तन करो। पूछो* ***अधिकारियों से, अधिकारियों को सब मालूम है***

मुनेन्द्र–हूँ, क्या बोली फिर?

पी–नहीं, मैसेज ***सीन तो कर लेती थी वो, जवाब नहीं दिया कुछ भी, मैने बहुत बार मैसेज किये***

मुनेन्द्र–हॉ ***जो भी पैसा लेना देना है, दे दवा के बात खत्म करो निपटाओं*** *बैठ के आपस में है न?*

पी– ***भाईसाब मैंने वो पूरा हिसाब दे रखा है उसे, वो कहें तो हम उसको कहां मना कर रहे हैं। हमने तो ये भी कहा कि अगर तुम्हे प्रापर्टी नहीं चाहिए तो जो एमाउण्ट है, वो ले लीजिए और . .***

मुनेन्द्र– एमाउण्ट कितना बन रहा है, आपके ऊपर उनका?

पी–ऐं?

मुनेन्द्र–एमाउण्ट कितना बन रहा है?

पी–शायद, एग्जेक्ट नहीं पता, बाकी तो उसको मालूम है, पूरा पर्चा बनाके पूरा बुकलेट बना के पूरा सब दे आये हैं हम उसे,

मुनेन्द्र– नहीं लगभग कितना बना रहा है आपके हिसाब से लगभग, पूरा एग्जेक्ट नहीं लगभग कितना बन रहा है

पी–लगभग . . . प्रॉपर्टी अगर लगाते हैं, वैसे तो हमने उनसे जो रूपया लिया था, चालीस लाख पचास हजार रूपया लिया था उसमें से बाकी उनके नाम प्रापर्टी है तो वो अगर ***पूरा रूपया चाहते हैं तो पूरा रूपया देने को तैयार हैं,*** *प्रॉपर्टी हम . . . वो बेच दे वो ले ले, या फिर प्रॉपर्टी लेना चाहती हो जो पैसा निकाले वो पैसा ले ले अपना, भाई साब हम तो कम की बात छोडो,* ***एक्स्ट्रा कहें, एक्स्ट्रा भी दे देंगे, कोई दिक्कत नहीं है हमे,*** *लेकिन हम चाहते हैं कि ये काम जरूर करें कि जो लोग दोषी हैं उनको जरूर इसमें दण्डित होना चाहिए बस, इतना चाहते हैं हम तो . . . तो आप एक बार बात करके देख लीजिए कि ऐसे ऐसे मेरे पास फोन आया था पी0सी0 शर्मा का। आप चाहो तो हम बरेली आ जायेगे उसके पास, अगर वो आप के पास आ जाती है तो बरेली आ जायेगे हम*

मुनेन्द्र– मैं बात करता हूँ हैं न?

x x x x x x

मुनेन्द्र–नहीं जो आपने डा0 अमित से कहा कि मेरे पास एविडेन्स है, क्या एवीडेन्स हैं?

पी– मैं अब भी कह रहा हूँ न, मैं अब भी तो कह रहा हूँ, मना तो नहीं कर रहा हूँ, मैंने अमित जी से नहीं, ***विपर्णा जी को मैंने व्हाट्सएप पे मैसेज किये हैं ये, उन्होंने मेरा बेल कैसिलेशन मूव किया है वहॉ पर ये सारी चीजे लगी हुई हैं।*** *हाईकोर्ट पूछेगा तो हाईकोर्ट में दिखाउॅगा–बताउॅगा। आप पूछियेगा अमित जी से,* ***विपर्णा जी ने हाईकोर्ट में हमारा बेल कैसिलेशन मूव कर दिया है और उसमें सारी चीजे लगायी जो मैंने व्हाट्सएप पर मैसेज किये थे, तो हाईकोर्ट ने मुझे नोटिस दिया है, हाईकोर्ट जब मुझसे पूछेगा तो हाईकोर्ट में बताउॅगा,***

मुनेन्द्र– हूँ हूँ

x x x x x x

मुनेन्द्र– लेकिन उस दिन जब आपसे कहा तब भी आपने नहीं बताया कि एविडन्स क्या है? फिर डा0 अमित से आप कह रहे एविडेन्स क्या है, अब या तो आप बताना नहीं चाह रहे हो एविडेन्स क्या है। अगर आप मदद चाहते हो तो मुझे बता दो न एविडेन्स क्या है फिर मैं बात कर लूॅगा उनसे कि गलत आदमी को फंसाया है या सही आदमी को फंसाया है, ये बात तब तय होगी जब एविडेन्स होगे

पी–देखा ऐसा है न भाई साहब, आपने इतनी बात कही जब मैं कह रहा हूँ कि मैने मुझे ध्यान से सुनिये ***मैंने विपर्णा जी को व्हाट्सएप पर मैसेज किये कि मेरे पास सबूत हैं मेरे पास सब चीज है, ठीक ?***

मुनेन्द्र–भाई, भाई अच्छा सुनो, सुनो . जो विपर्णा जी को क्या मैसेज किये आपने क्या नहीं किये इस बात से मुझे मतलब नहीं है कि मेरे पास सबूत है, जब आप मुझसे मदद चाह रहे हो कि विपर्णा से बात करूॅ मैं विपर्णा जी से आप ये चाह रहे हो कि मेरे पास एविडेन्स है फिर अमित से कह रहे हो मेरे पास एविडेन्स है, तो बताओं न, बता दो आप, आज ही बात कर लूॅगा अभी

पी– नहीं तो मैं यही तो चाह रहा हूँ, ***आप उन्हें बुला लिजिए मैं आ जाउॅगा, आप होंगे***

मुनेन्द्र– नहीं ये तो बुलाने की बात बाद में होगी, ***एक चीज मानते हो कि हत्या तो हुई है, इस परिवार में सबसे बड़ी लेडी थी सबके पूरे घर का जो था, पूरा परिवार अनाथ हो गया,*** *बुढी मॉ हैं, विकलांग बहन है, मानसिक विकलांग, अकेली लड़की वो, सब कुछ वो ही कर रही है बेचारी, कैसे*
कर रही है वो ही जानती होगी, है न?

xxxxxx

*मुनेन्द्र–**आप भी मान रहे हैं मर्डर हुआ है***

*पी–**मैं मान रहा हूँ मर्डर हुआ है, अरे मैंने कुछ सबूत इक्ट्ठे किये हैं तभी तो बता रहा हूँ मैं?"***

" Gopichand- Hello

P- Hi, Namaskar sir

P- Is Gopichand sir speaking?

Gopichand- Yes.

P- Yes, Sir, I am P.C. Sharma speaking.

Gopichand- Say.

P- Yes, Sir, I had interacted with you in the Sadhna murder case. Sir, please defend me a little. Sir, please tell some details.

Gopichand- You are now talking afterwards..... You are calling at this time. Call in the evening.

P- Should I call you in the evening?

Gopichand- Yes.

P - Ok Sir, Sir, you are coming to Budaun Shishupal was also telling, sir Pahalwan was also telling that you are about to come Budaun, sir, I wanted to sit with you and talk.

Gopichand - Ok, I will come will tell, it is only because of this that I am telling to talk in the evening.

P- Sir, when to do in the evening, sir?

Gopichand- At about seven.

Ni- Ok sir, Jay Hind Sir.

x x x x x

P- Sir, wanted to meet you someday sir, I wanted to see you in case you are to come to Bareilly or Budaun someday.

Gopichand- No, presently I am at Deyoria Kalan.

P- No, Sir that I know sir, I had asked AK Singh Saab. Sir, I wanted to meet you a little.

Gopichand- Tell, Tell

P- Oh, Sir in connection with this very case now we ... whatever was to happen to us has happened. Sir now ... we need some such points...something which may give strength to us, so that I can prove myself innocent.

Gopichand- Ok I will tell you...will tell. As of now I am here at Deyoria Kalan.

x x x x

Naresh Pal - Hallo

P- Hallo, Jayhind Sir

Naresh Pal - Jayhind brother

P--Sir, is Naresh Pal Singh Saab speaking?

Naresh Pal- Yes brother, I am speaking.

P- Sir, I am PC Sharma speaking from Budaun.

Naresh Pal- Ok, tell.

P- Sir, does Saab visit Budaun now? Sir, I wanted to meet you Saab.

Naresh Pal- Tell, tell.

P- Did Saab recognize, did not recognize?

Naresh Pal- No, you tell .. tell.

P- Yes, yes... sir, I have been implicated in Sadhna murder case.

Naresh Pal- Ok, ok.

P- Whatever was destined, has taken place, I have undergone the imprisonment. Gangster Act was leveled and I have undergone that too, sir.

Naresh Pal- Yes, yes.

P- Sir, in this regard I want that if I could get some such information from you because I have not committed any offense sir; I had talked to AK Singh sahab as well and he assured that he would tell whatever happens and would help. Sir, I wanted to meet you and have a chat with you a bit.

Naresh Pal- No. What is to be done... tell me what to do?

P- Sir I...now you will tell, what I sir... how could I get something in my defense.

Naresh Pal- You have been granted bail, isn't it?

P- Sir, you see that the Judicial is very strict now-a-days, giving punishment, I have not committed any offense and have been punishment.

x x x x x

P- Sir, I have to tell you only that how they managed such as the Tavera vehicle; I had talks with Surendra also, and he too, was saying that it was brought from the hospital.

x x x x x

P- No sir, you are not a witness. Sir, that is why I am saying that you could give me some tips that could be useful in my defense; might be extracted something which I...

Naresh Pal- See sir, the thing is that if I peruse the case diary, I could find some points in that. It is not a big issue. Just take the case diary and it should be read and perused then some...

P- Sir... the vehicle was shown to have been recovered from your place; it was not shown means I came to know that it was...

Naresh Pal- No, paper work was not done at my place.

P- Yes, yes.

Naresh Pal- I had not done any paper work; If the matter is of Ujhani, let the people of Ujhani handle it.

P- No sir... Surendra.... I had complete conversation with Surendra the Better, on which he also ... Yes he also disclosed that car was in the name of some lady and we were implicated unnecessarily. I ..... such things do happen so leave it. On this he told me that this was not the car, car had been brought from hospital and that person himself called on which I cam to know that you had no information, I have been told that you were having meal, such was informed to me by someone and he telephoned you that an accident of a lady was committed by me.

Naresh Pal- Yes Yes

P- You took him lightly at that time, later on thought that no person would disclose anything as you were telling right now.. Sir such circumstances got woven. Gopi Chand Sir have been very supportive, poor guy said that I shall arrive right now and tell, hello Sir? So Sir what can we gather which can help us in our defence.

x x x x x

P- No See, you had said that the driver was your's only

Munendra- Driver was there; he is with me even today

P- Now we can for once, try to talk to him, to Manoj. Manoj was telling me that Munendra Sir had said that, I said such thing on verbal directions of minister.

Munendra- Listen to me, Gautam is also involved in it ok ? However I am not competent alone to take the decision, Bhagwat Ji is competent to take the decision, Bhagwat ji had said that proceed as per the directions of Gautam, ok?

P- No Sir, Manoj was saying that we said such thing on the verbal directions of Mundendra Sir.

Munendra- Hmm

P- What Manoj is saying is that we proceeded on the directions of Munendra Sir who in turn got the green signal from minister and Munendra directed me. He was telling me this and said that I was not doing it, then he also disclosed that he arrived with him and due to him, that lady forcefully gave me 25-30 thousand rupees viparna(?), Manoj was also telling me

Munendra-Hmm

P- Thus he was telling that we shall only act on his directions so you know Sir that without any axe to grind..... and now even Viparna knows that who committed the murder, how was it committed, case has been unravelled in totality and

You..... Inspector is Jagdish Arora and other persons who are there know about the entire case and I think that Viparna would also be knowing. Brother, if possible, please talk to Viparna once.

Munendra- you are relative, so you please talk to Viparnaji once.

P- If you say..... I will talk... if he is ready, we are ready to talk, it was strictly our personal matter.

Munendra- Yes, it was a family matter, family relations, your link would have been such.... since you have been in a family in such a way, there must be relations as well.

P- Definitely brother, all are relations.

Munendra- Wrap it up once for all, put it to an end, right? Whatever be the transactions, or whatever has to pay ?

P- No, I have given him all parchas and he has stated in his depositions you ... you may talk

Munendra- Yes

P- Brother, all the things are executed in his favour, property executed in his favour is executed in favour of Viparna, his mother and all parchas are with him, we want that those who are guilty of murder be punished

Munendra- Yes

P- We have all the evidences, we shall furnish these to him. I stated to him, I send messages on WhatsApp too, I stated that Viparna's nickname is Parul, I asked to think thoroughly, ask the officers, they know everything

Munendra- Yes, what did she say then?

Pi- No, she saw messesage but did not reply; I messaged many times.

Munendra:- Yes, whatever you have to pay, pay it and put it to an end.

Pi- Brother, I have already given him the complete account and if he asks then I am not refusing him. I have even said that if he does not require property, accept the amount whatever and.....

Munendra:- How much amount is due to him ?

Pi- A?

Munendra - What is the amount ?

P- perhaps, I don't know exactly, he knows the rest, we have already handed over everything including the complete receipt and booklet to him.

Munendra -No, according to you, how much it is approximately, not exactly, but tell me approximately how much is it ?

P- approximately...if we evaluate the property, anyway, the money we had received from him was forty lakh fifty thousand. Rest out of it amounts the property in his name. In that condition, if he wants full amount, we are ready to give him the money. If we ... the property.... she sells it, she can take it or if she wants property, she can takes the money of its sale. Dear, we do not want to give less rather we will give extra if she says so, we have no problem. But we want that she must get the people punished who are guilty in this. We want this much only. ..... so, you please talk to her and try to convince explaining that in such way P. C. Sharma's call came to me. We will come to her in Bareilly if you want us to and if she comes to you, we will come to Bareilly.

Munendra - I will talk to her, ok ?

x x x x x x

Munendra - Listen me, do have any evidence as you spoke to Dr. Amit that you had evidence ?

P - I am still saying, ain't I, I still saying it, am I denying?, I have sent these messages to Viparna on WhatsApp not Amit. She has moved my bail cancellation, all these things have been attached there. I will explain in the High Court if I am asked to do so. You please ask Amit whether Aparna has moved out bail cancellation in High Court and enclosed everything what I had messaged her on WhatsApp. High Court has sent me

a notice, when the High Court will ask me, I will explain it there.

x x x x x

Munendra - but on that day, you didn't tell me when I asked you what the evidences were ? Then you asking Dr. Amit what was the evidence? Now may be you do not want to tell me what the evidence is? If you want to help me, tell me what the evidence is, and then I will speak to him whether an innocent has been implicated or a guilty has been caught. This will be decided when evidences exist.

P - See dear, I have said so much, now, I am asking you to listen me carefully that I have messaged it to Aparna on WhatsApp that I have the evidences and I have everything, ok ? Munendra- Brother, brother, please listen, listen...it does not matter to me what message you sent to Viparna Ji and what not, and that I have evidence, when you want help from me to the effect that I should talk to Viparna; you want it from Viparna Ji that I have evidence (sic.), then you are telling to Amit that you have evidence, then tell please, you tell (me), (I) will talk today itself right now.

P- No, I just want that you call him, I will come, you will be present.

Munendra- No, the matter of calling would be discussed later on, you accept one thing that the death has been caused, she was the eldest lady in this family, amongst all in the home; the entire family became orphan, there are old mother, disabled sister, mentally disabled; the only girl is doing everything, and how the poor girl is managing the same, only she must be knowing, isn't it?

x x x x x x

Munendra- You too are admitting that the death has been caused.

P- I am admitting, the death has been caused; I have collected some evidences, therefore I am stating.

(English Translation by Court)

42. The above conversations show that opposite party 2 is not only contacting witnesses but also involving Police officials to influence witnesses and this is a serious aspect. In my view, such a person if continue to remain on bail, there is every likelihood of trial being influenced and may not proceed fairly and objectively. I refrain myself in making further observations as it may prejudice trial but have no hesitation in holding that it is a fit case where bail granted to accused opposite party 2 cannot be held to be a valid exercise of discretion and bail deserves to be cancelled.

43. Application is accordingly **allowed.** Bail order dated 26.04.2017 passed by this Court in Criminal Misc. Bail Application No.41324 of 2016, whereby opposite party 2, Prem Chandra Sharma son of Late Banshidhar Sharma, has been enlarged on bail, is hereby cancelled. The accused-opposite party 2 shall surrender in Court below on 20.03.2020. If not, Police shall ensure arrest of accused-opposite party 2 and send him jail. Trial Court shall expedite trial and make all endeavour to complete it within a year.

(2020)06ILR A1272
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Misc. Bail Cancellation Application No. 77 of 2020

Subhash Chandra Jha ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Santosh Kumar Giri

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

A. Indian Penal Code, 1860-Sections 420,406, Indian Stamp Act, 1899-Sections 69, Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 & Code of Criminal Procedure, 1973-Section 439(2)-application-bail cancellation-rejection-Cancellation of bail can be done in cases where bail has been granted and the order suffers from serious infirmities which would result in miscarriage of justice, the court while granting bail ignores relevant material showing prima facie involvement of the accused or it takes into account irrelevant material which has no relevance to the question of grant of bail to an accused-the court below is just and proper in granting the bail to the accused-hence, no interference requires.(Para 4 to 12)

B. The object of bail is to secure the appearance of the accused person at his trial. The object of bail is neither punitive nor preventative. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. (Para 7,8,9)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Raghubir Singh Vs St. of Bih. (1986) 4 SCC 481

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

3. Sanjay Chandra Vs C.B.I, (2012) 1 SCC 40

4. Manoranjan Singh @ Gupta Vs C.B.I, (2017) 5 SCC 218

5. Prasanta Kumar Sarkar Vs Ashis Chatterjee & anr. (2010) 14 SCC 496

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

1. Heard Sri Santosh Kumar Giri, learned counsel for the applicant, the learned A.G.A and perused the record.

2. This is an application preferred under Section 439 (2) of the Code of Criminal Procedure, 1973 for cancelling the bail of Yuvraj Singh, the opposite party no. 2 which has been allowed by the Chief Judicial Magistrate, Bareilly vide order dated 29.11.2019 in Case Crime No. 629 of 2018 under Sections 420, 406 of the Indian Penal Code, 1860 under Section 69 of Indian Stamp Act, 1899 & under Section 25 of Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 registered at Police Station Baradari, District Bareilly.

3. Learned counsel for the applicant argued that the opposite party no. 2 is the Director of Alliance Builders and Construction Limited, Bareilly. He had developed a colony in the year 2007 in the name of Super City in Bareilly in which the first informant and others took flats and paid money for it. It is further argued that in the present matter a suit has been filed by the accused himself which was after lodging of the F.I.R. The filing

of the said suit was a mischievous act of the accused just in order to take benefit of the same in the present matter. It is further argued that the court below erred in allowing the bail application of the accused by overlooking the fact that during investigation sufficient evidence has been collected against the accused and as per the law laid down by the Apex Court it is for the trial court to weigh the statement and the evidence collected during investigation and arrive at its own conclusion. To make an enquiry into reliability and genuineness of the allegations made in the First Information Report and the material collected during investigation on the basis of which charge-sheet is submitted at the time of deciding a bail application is not a proper appreciation by the court below and the court below overstepped its jurisdiction. It is further argued on the basis of averments in para 10 of the affidavit that though the opposite party no. 2 / accused has delivered the possession of the land / house in dispute several years back, but sale deed has not been executed by him. Further on the pleading in para 11 of the affidavit it is argued that the opposite party no. 2 did not have title of the said property and hence he could not have executed any sale deed in favour of the allottees. It is then argued as per para 12 of the affidavit that the intention of the opposite party no. 2 / accused was dishonest from the very inception itself. The petition for quashing of charge-sheet dated 24.12.2018 in the matter has been dismissed by a co-ordinate Bench of this Court vide order dated 01.10.2019, the copy of which is annexed as Annexure- 2 to the affidavit. It is then argued that on the basis of para 15 of the affidavit that opposite party no. 2 / accused surrendered on the same day i.e. on 29.11.2019, moved his bail application on the same day which has been allowed on the same day itself. It is further argued that the opposite party no. 2 / accused after being released on bail is misusing the liberty of bail and is also tampering with the prosecution witnesses. It is thus argued that the present matter is a heinous and a grievous criminal case and as such the bail granted to opposite party no. 2 is liable to be cancelled.

4. The parameters for cancellation of bail have been laid down by the Apex Court in large number of cases. In ***Raghubir Singh v. State of Bihar (1986) 4 SCC 481*** the Apex Court held that bail can be cancelled where:-

(i) the accused misuses his liberty by indulging in similar criminal activity,

(ii) interferes with the course of investigation,

(iii) attempts to tamper with evidence or witnesses,

(iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation,

(v) there is likelihood of his fleeing to another country,

(vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,

(vii) attempts to place himself beyond the reach of his surety, etc.

Apart from the above grounds for cancellation of bail it is to be kept in mind that rejection of bail and cancellation of bail are two different things wherein the cancellation of bail is a harsh step as it interferes with the liberty of an individual and thus the same should not be resorted to lightly.

5. Cancellation of bail can be done in cases where bail has been granted and the order suffers from serious infirmities which would result in miscarriage of justice, the Court while granting bail ignores relevant material showing *prima facie* involvement of the accused or it takes into account irrelevant material which has no relevance to the question of grant of bail to an accused.

6. The Hon'ble Apex Court in the case of ***Dataram Singh v. State of U.P. (2018) 3 SCC 22*** held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further been held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to

incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

7. It is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** **(2012) 1 SCC 40** has been held as under:-

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

8. In ***Manoranjana Sinh alias Gupta versus CBI***, **(2017) 5 SCC 218**, Hon'ble Apex Court has held as under:

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins

after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

9. The Apex Court in ***Prasanta Kumar Sarkar versus Ashis Chatterjee and another*** **(2010) 14 SCC 496**, has laid down the following principles, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if r released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

The object of granting of bail is to secure the attendance of an accused in trial. The normal rule is of bail and not jail. The Court has to keep in mind the nature of acquisitions, nature of evidence in support thereof, severity of punishment, character of the accused and the circumstances which are peculiar to the accused involved in the matter.

10. Per contra learned A.G.A opposed the prayer for cancellation of bail on the ground that the court below after perusing the entire material came to a correct and a just decision of allowing the bail application and granting bail to the opposite party no. 2. It is further argued that the requirement for cancellation of bail is not made out and spelled out in any of the paragraphs of the affidavit. No misuse of bail has been alleged and even there is no averment regarding the accused tampering with evidence. Since charge-sheet has been submitted the investigation has concluded.

11. In the case in hand it is not the case of the first informant that irrelevant considerations have been taken into

account while granting bail to the opposite party no. 2 / accused. The order granting bail specifically mentions therein that as per the charge-sheet there is no reported criminal antecedent of the accused. There is no averment whatsoever that while the investigation was continuing the accused has tampered or was tampering with evidence. The charge-sheet has been submitted against the opposite party no. 2 / accused. The accused was not arrested during investigation and a notice under Section 41 (1) of the Code of Criminal Procedure, 1973 was served upon him. The allegations as referred to in paragraph 19 and 20 of the affidavit are vague and without any corroboration whatsoever. The same are extracted herein below:-

"19. That accused i.e. (opposite party no. 02) after having being released on bail is misusing the liberty of bail and is also tampering prosecution witnesses.

20. That intention of grant of bail is not to misuse liberty of bail, while in the present case accused i.e. (opposite party no. 02) after being released on bail is tampering First Informant / Applicant to prosecute the Criminal Case against accused i.e. (opposite party no. 02)."

12. After hearing the learned counsel for the parties and perusing the material on record, in my opinion there is no specific ground which would warrant interference by way of cancelling the bail of the opposite party no. 2 granted by the court below. The discretion as exercised vide order dated 29.11.2019 is just and proper and not demanding any interference whatsoever.

13. The present bail cancellation application is thus devoid of any merit and is hereby, dismissed.

(2020)06ILR A1278
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.06.2020

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Transfer Application (Criminal) No. 133 of 2020

Tarun Raj Singh ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Ram Bahadur Singh

Counsel for the Respondents:
A.G.A.

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 407 - Transfer of case permissible only when - *reasonable apprehension that justice will not be done* - however, merely making vague allegation, without any basis/material on record that there is an apprehension in the mind of applicant that justice will not be done - cannot constitute a legitimate ground to transfer a case from one court to another court

Applicant/complainant sought transfer of bail application from Court of Special Judge SC/ST - alleging accused persons & concerned Presiding Officer both are Brahmin by caste, therefore accused will get relief from that court - ***Held*** - allegations leveled wholly vague & general in nature - not supported by any material on record - nothing on record to indicate that the presiding officer did any act calculated to create such an apprehension in the mind of the applicant that applicant would not get justice from Court where case is pending (Para 10)

Dismissed. (E-5)

List of cases cited

1. Gurcharan Dass Chadha Vs St. of Raj AIR 1966 SC 1418

2. Maneka Sanjay Gandhi Vs Rani Jethmalani (1979) 4 SCC 167

3. K.P. Tiwari Vs St. of M.P. 1994 SCC (Cri) 712

4. Abdul Nazar Madani Vs St. of T.N. (2000) 6 SCC 204

5. K. Anbazhagan Vs Superintendent of Police (2004) 3 SCC 767

6. Zahira Habibulla H. Sheikh Vs St. of Guj (2004) 4 SCC 158

7. Captain Amarinder Singh Vs Parkash Singh Badal & ors. (2009) 6 SCC 260

8. Nahar Singh Yadav & anr. Vs U.O.I. & ors. JT 2010 (12) 641

9. Lalu Prasad Vs St. of Jharkhand (2013) 8 SCC 593

10. Amit Agarwal Vs Atul Gupta 2014 (11) ADJ 414 (All.)

11. Usmangani Adambhai Vahora Vs St. of Guj & anr. (2016) 3 SCC 370

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

1. Heard Shri Ram Bahadur Singh learned counsel for the applicant, Shri N.D. Rai learned Additional Government Advocate-1st assisted by Shri Virendra Kumar Maurya learned A.G.A. for the state of U.P./ opposite party no.1 and perused the record.

2. This transfer application u/s 407 Cr.P.C. has been moved by applicant with the prayer to transfer the bail application No. 693 of 2019 (State Vs. Chandra Kumar Mishra), under Sections 323, 307, 504, 506 IPC and 3(2)5 SC/ST Act, Police Station Cantt., District Bareilly from the court of Special Judge SC/ST Bareilly to any other competent court of District court Bareilly.

3. Relevant facts of the case in brief as mentioned by the applicant in the present application are that the applicant is complainant, who has filed complaint dated 20.05.2016 against opposite party no.2 (Chandra Kumar Mishra) for the alleged offence under Sections 323, 325, 307, 357 IPC and 3(2)5 SC/ST Act, on which opposite party no.2 was summoned vide order dated 19.04.2018 by Special Judge, SC/ST Act, Bareilly to face trial. On 05.10.2019, opposite party no.2 filed his bail application praying therein to release him on bail. Thereafter applicant filed transfer application dated 11.10.2019 before District and Sessions Judge, Bareilly alleging that accused persons told the applicant that they are Brahmin by caste and the concerned Presiding Officer, who is their distant relative is also Brahmin by caste, therefore, they will get the relief from that court. It is also alleged that the opposite party no.2 has been spotted on several occasions by the applicant while coming out of the Court of the concerned judge and prayed therein to transfer bail application of opposite party no.2 from the court of Special Judge SC/ST Bareilly to any other competent court. On the aforesaid transfer application of the applicant, comment was called from the concerned presiding officer by the District Judge, Bareilly, who in turn submitted his report mentioning that apprehension expressed by the applicant is baseless, imaginary and fabricated. Neither he has any concern with the

accused or complainant nor has any relation with them. On behalf of opposite party no.2 oral objection was raised before the District Judge, Bareilly, who after giving opportunity of hearing to the parties concerned rejected the transfer application (3 ka) of the applicant vide order dated 20.02.2020. Grounds of transfer of case as mentioned in transfer application are reproduced here in below:-

"1. अभियुक्तगण सम्बन्धित मामले के प्रार्थी से कहते है कि हम जाति से ब्राह्मण है और जो जज साहब एस०सी०ध्एस०टी कोर्ट मे हैए वो भी ब्राह्मण हैए जिनसे हमारी दूर की रिश्तेदारी हैए जिस कारण हमें इस न्यायालय से बहुत राहत मिलेगी।

2. सम्बन्धित मामले के प्रार्थी ने उक्त अभियुक्तगणों को एस०सी०ध्एस०टी० न्यायालय के जज साहब के चैम्बर से निकलते कई बार देखा है।

3. प्रार्थी को एस०सी०ध्एस०टी० न्यायालय के जज साहब से निष्पक्ष न्याय की कोई उम्मीद नही हैए क्योंकि सम्बन्धित मामले के अभियुक्तगण की जज साहब से काफी नजदीकी है।"

4. Learned counsel for the applicant reiterating the aforesaid allegations submits that on the said facts, applicant apprehends that he will not get justice from the court where the bail application of the opposite party no.2 is pending. No other submission has been raised on behalf of the applicant. Lastly, it is submitted that transfer application of the applicant is liable to be allowed.

5. Learned Additional Government Advocate countered the aforesaid submissions of learned counsel for the applicant by contending that the District Judge, Bareilly has rightly rejected the transfer application (3 ka) of the applicant vide order dated 20.02.2020. Except the oral allegation levelled by the applicant there is no material on record in support of allegation levelled by the applicant. It is also submitted that no detail has been given by the applicant on how the opposite party no.2 is related with the concerned presiding officer. The transfer application has been moved by the applicant for ulterior motive on flimsy grounds, therefore same is liable to be dismissed.

6. Here it is apposite to mention that in view of sub-section (1) of Section 407 Cr.P.C. a case can be transferred, whenever it is made to appear to High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto,or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of the code of criminal procedure,or will tend to the general convenience of the parties or witness,or is expedient for the ends of justice.

7. The Apex court has on several occasions considered the issue of transfer of cases in different circumstances and after elaborate and wholesome treatment laid down guidelines in this regard, which would be useful to quote here.

(i) In **Gurcharan Dass Chadha Vs. State of Rajasthan AIR 1966 SC 1418**, the Apex Court held:-

"13. .....A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not office. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

(ii) In **Maneka Sanjay Gandhi Vs. Rani Jethmalani (1979) 4 SCC 167**, the Apex Court has observed as under:-

"2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

(iii) In **K.P. Tiwari Vs. State of M.P. 1994 SCC (Cri) 712** Apex court has held :-

"4....It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

(iv) In **Abdul Nazar Madani Vs. State of Tamil Nadu (2000) 6 SCC 204**, the Apex Court observed as follows:-

"7. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court on

even at any place, the appropriate Court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the Court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

(v) In **K. Anbazhagan Vs. Superintendent of Police (2004) 3 SCC 767** the Apex Court had held as follows:-

"30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

(vi) In **Zahira Habibulla H. Sheikh Vs. State of Gujarat (2004) 4 SCC 158** Apex court propounded that fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.

(vii) In the case of **Captain Amarinder Singh Vs. Parkash Singh Badal and others (2009) 6 SCC 260**, the Apex Court while dealing with two transfer applications preferred under section 406 of the Code, on the ground that with the change in State Government, the trial was suffering setback due to the influence of the new Chief Minister as also the lack of interest by the Public Prosecutor, has observed in paras 18, 19 and 20 as follows:-

"18. For a transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether apprehension alleged is a reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.

19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State underSection 407and anywhere in the country underSection 406Cr.P.C.

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the Court to be a reasonable one."

(viii) In the case of **Nahar Singh Yadav and another Vs. Union of India and others JT 2010 (12) 641**, the Apex Court has observed as follows:-

"Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that the some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

(ix) In **Lalu Prasad Vs. State of Jharkhand (2013) 8 SCC 593**, Apex court has observed as under. :-

"20. Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-a-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the

administration of justice would be fair and independent."

(x) This Court in case of **Amit Agarwal Vs. Atul Gupta 2014 (11) ADJ 414 (All.)** considering the scope of transfer in such a matter has held that:-

"24. Mere suspicion by the party that he will not get justice would not justify transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. (Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Culcutta 26)

25. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

26. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice."

(xi) The Apex Court in case of **Usmangani Adambhai Vahora Vs. State of Gujarat and another (2016) 3 SCC 370** considering the previous judgments of the Supreme Court has held:-

"Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice."

8. In view of dictum and guidelines laid down by the Apex court, as mentioned above, this court is also of the view that the power of transfer of a case must be exercised meticulously with precision under compelling circumstances, where on the basis of material on record it appears to the court that there is strong reason for doing so and by not transferring the case there would be miscarriage of justice. No universal or hard and fast rules can be applied for deciding a transfer application which has always to be decided on the basis of facts of each case. It is also well settled that the apprehension concerned, has to be one which would establish that justice will not be done. The apprehension of not getting a fair and impartial justice is required to be reasonable based on strong material and

not hypothetical. Merely making vague allegation that there is an apprehension in the mind of applicant that justice will not be done in a given case alone does not suffice.

9. Considering the facts and circumstances of the case and submissions of learned counsel for the parties in the light of guidelines laid down by the Apex court, I find that allegations leveled by the applicant as mentioned above are wholly vague and general in nature, which are not supported by any material on record. Now a days such kind of frivolous allegations and triviality are being used unflinchingly by one party of a case as a tool to pressurize the presiding officer to settle its personal score. Entertaining such kind of frivolous allegations without any strong material on record will indirectly cast stigma upon the concerned Presiding Officer for no fault of his. Any such attempt made by any person must be discarded in order to maintain judicial discipline, otherwise on each and every step of proceeding either party will try to hamper the judicial proceeding adopting different modus operandi in justice delivery system and it will very difficult for them to discharge their judicial function with free mind. In the opinion of this court apprehension expressed by the applicant is not reasonable. There is no basis for the apprehension of the applicant that he will not get proper justice. There is nothing on record to indicate that the presiding officer has done any act calculated to create such an apprehension in the mind of the applicant. Illegitimate apprehension without any basis/material on record cannot constitute a legitimate ground to transfer a case from one court to another court. The grounds set out by the applicant do not justify the transfer of case as prayed by the applicant. I do not find any good ground to interfere in the matter. There is no error or illegality in the order dated 20.02.2020 passed by District Judge, Bareilly.

10. Consequently transfer application being sans merit stands **dismissed**.

11. Office is directed to communicate this order to the concerned court below within two weeks.

(2020)06ILR A1285

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 29.05.2020

BEFORE

THE HON'BLE RAJAN ROY, J.

Civil Revision No. 10 of 2009

University Book Depot ...Revisionist

Versus

Amit Mishra ...Opposite Party

Counsel for the Revisionist:

P.V. Chaudhary, A.S. Chaudhary, Brijesh Kr. Saxena, Sudhakar Audichya

Counsel for the Opposite Party:

Mohd. Saeed - Ii

Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 20(4) - Provincial Small Causes Courts Act, 1887 - Section 17 - amount deposited by the tenant u/s 17 of the Act, 1887 for setting aside ex-parte decree - could be taken into account - for relieving the tenant from liability of eviction under Sub-section 4 of Section 20 of the Act, 1972 - but even after treating such amount as one under Section 20 (4), in a

given case, if the amount falls short of the amount referred in Section 20 (4) or it is found that it was not deposited on or before the first date of hearing then the benefit of the said provision may not be available to the tenant (Para 19, 22)

Allowed. (E-5)

List of case cited :.

1. Bhragu Dutt Singh Vs Shyam Kishore 1980 LLJ 62

2. Sunt Ram Gupta Vs Ratan Prakash (1982) 1 ARC Page 16

3. Lacchi Ram Vs Ist ADJ (1984) 1 ARC Page 4

4. Badi Uzzaman Vs DJ, Kanpur (1987) (1) AWC 354

5. Mahadeo Singh Vs Sheshnarayan Pathak (1990) 1 ARC 293,

6. Satish Kumar Dutta Vs A.D.J., Kanpur (2006) 63 ALR 269 (All.)

7. Ravi Shankar Kansal Vs D.J., Aligarh, Writ A no. 53074/1999 14.08.2012

8. E. Palanisamy Vs Palanisamy 2003 (1) SCC,

9. Balwant Singh & ors. Vs Anand Kumar Sharma & ors. 2003 SCC 433,

10. Moinuddin @Mamo & 2 ors Vs St. of U.P. & ors. 2016 (3) ARC 459,

11. Krishna Kumar Gupta Vs. A.D.J. 14th, Allahabad & ors. 2004 (57) ALR 776

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

1. This is a revision under Section 25 of the Provincial Small Causes Courts Act, 1887 (herein after referred as Act, 1887) by the tenant challenging the judgment and decree dated 16.12.2008 passed by the SCC Court in SCC Suit no. 2 of 2006.

2. The facts of the case in brief are that a suit was filed by the respondent landlord before the SCC Court bearing no. 2 of 2006 for arrears of rent, damages and eviction after determining the tenancy. The suit in question was decreed ex-parte on 18.08.2006. The revisionist herein who was the defendant in the suit filed an application under Order IX Rule 13 CPC for setting aside the ex-parte decree on 04.09.2006 which was registered as Miscellaneous Case no. 12 of 2006. On 30.11.2006 an application bearing no. 16(g) was filed for passing the tender for deposit of Rs. 15,775/- which was the decretal amount as per ex-parte decree dated 18.08.2006, under Section 17 of the Act, 1887 which requires the deposit of such amount. The said application was allowed on 08.12.2006 by the Court with the observation that deposit may be made by the applicant tenant at his own risk. Accordingly, on the said date itself the aforesaid deposit was made. Subsequently on 06.10.2007 another application bearing no. 29(g) was filed and was allowed for depositing additional amount of Rs. 3570/- under Section 17 of the Act, 1887. The application under Order IX Rule 13 was allowed by the SCC Court on 13.11.2007 and the ex-parte decree dated 18.08.2006 was set aside. After the decree being set aside, the amount deposited under Section 17 of the Act, 1887 was available to the revisionist tenant for being withdrawn but he did not do so and this fact is not in dispute.

3. It is not out of place to mention that the aforesaid amount under Section 17 of the Act, 1887 is in the nature of security for the decreetal amount as per the ex-parte decree, meaning thereby, in the event the application under Order IX

Rule 13 is rejected then the said deposit can be utilised for satisfying the ex-parte decree. However, if the decree is set aside then there is no question of its satisfaction and the tenant can withdraw the same unless he has filed an application or otherwise requested that that the said amount be treated as a deposit under Section 20(4) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, (herein after referred as Act, 1972) if the said provision applies, in a given case.

4. After the setting aside of the decree, 20.12.2007 was fixed as the date for filing of written statement which was further extended to 09.01.2008, 16.01.2008 and then to 23.01.2008 when the written statement was filed by the revisionist.

5. It is not out of place to mention that in an SCC Suit issues are not required to be framed and every date is a date of hearing as the procedure to be followed is summary in nature.

6. Thereafter, the matter was proceeded by the SCC Court and the suit was again decreed after hearing the parties on 16.12.2008. The SCC Court found the landlord tenant relationship to be established and it also found that tenancy had been determined by a valid notice. On the question of rate of rent as there was a dispute, the Court recorded a finding that the rent was Rs. 100/- per month and not Rs. 375/- per month as was being claimed by the landlord. It needs to be mentioned that the landlord has not challenged this finding. The SCC Court also recorded a finding about the tenant being in arrears of rent. However, on the question of application of Section 20(4) of the Act, 1972, as the said Act was applicable to the facts of the case a plea was raised on behalf of the tenant that the deposit already made under Section 17 of the Act, 1887 should be treated as a deposit under Section 20(4) along with the deposits made under Section 30 of the said Act and the rent paid during pendency of the suit, which, according to him satisfied the requirements of Sub-Section 4 of Section 20. The SCC Court did not accept this plea on the ground that in view of the decision of a Single Judge Bench of this Court in the case of Bhragu Dutt Singh Vs. Shyam Kishore, 1980 LLJ Page 62 it was impermissible to treat or adjust the deposit made under Section 17 of the Act, 1887 as a deposit under Section 20(4) of the Act, 1972. It needs to be mentioned that the Court below did not reject the plea on the ground that no such application for treating the deposit under Section 17 of the Act, 1887 as a deposit under Section 20(4) of the Act, 1972 was made by the tenant on the first date of hearing or thereafter but it was rejected on merits as being impermissible.

7. Accordingly, the suit was decreed in favour of the plaintiff and it was ordered that the defendant would pay to the plaintiff rent of 3 years @ Rs. 100/- per month i.e. Rs. 3600/-, arrears of water tax of 3 years i.e. Rs. 1350/- and damages for illegal use and occupation of the premises for 3 years @ Rs. 100/- i.e. Rs. 3600/- and Rs. 550/- as cost of the notice along with 6% simple interest thereon and shall hand over vacant possession of the tenanted premises to the plaintiff decree holder. If the aforesaid order was not complied by 12.02.2009 then the plaintiff would have a right to get the judgment and decree executed through the Court.

8. Shri B.K. Saxena, learned counsel for the petitioner confined his argument only on the question of permissibility of the deposit made under the proviso to Section 17 of the Act, 1887 being

adjusted or treated as a deposit under Section 20(4) of the Act, 1972 he contended that the Court below erred in holding that it was impermissible. It was also his argument that the Court did not even determine the "first date of hearing'. In this regard, he relied upon Single Judge Bench decisions of this Court reported in (1982) 1 ARC Page 16, Sunt Ram Gupta Vs. Ratan Prakash; (1984) 1 ARC Page 4 Lacchi Ram Vs. Ist ADJ; (1987) (1) AWC 354 Badi Uzzaman Vs. DJ, Kanpur; (1990) 1 ARC 293, Mahadeo Singh Vs. Sheshnarayan Pathak; (2006) 63 ALR 269 (All.), Satish Kumar Dutta Vs. Additional District Judge, Kanpur and judgment dated 14.08.2012 rendered in the case of Ravi Shankar Kansal Vs. District Judge, Aligarh, Writ A no. 53074 of 1999.

9. Learned counsel for the respondent, Shri Mohd. Sayeed contended that revisionist having not made the deposit under Section 20 (4) at any point of time it was not necessary for the Court below to determine the first date of hearing for the purposes of Section 20(4) of the Act, 1972. He submitted that the said provision was discretionary in the sense that the tenant could, if he so chose, make the said deposit to avoid eviction, therefore, it was necessary for the revisionist to have filed an application evincing his intent to avail the benefit of the said provision with the request for treating the amount deposited under the proviso to Section 17 of the Act, 1887 as a deposit under Section 20 (4) of the Act, 1972, which was never done, therefore, the plea was not liable to be accepted and has rightly been rejected by the Court. However, on being asked as to whether it is permissible in law to treat a deposit made under the proviso to Section 17 of the Act, 1887 as a deposit under Section 20(4) of the Act, 1972 and to adjust it accordingly, the learned counsel fairly stated that it was permissible but an application was necessarily requried to be filed in this regard. He also contended that there was no compliance of Order XV Rule 5 CPC in response to which Shri B.K. Saxena submitted that this was not the ground of rejection by the SCC Court and in any case the amount had already been deposited under the proviso to Section 17 of the Act, 1887. He has relied upon the decisions reported in 2003 (1) SCC, E. Palanisamy Vs. Palanisamy; 2003 SCC 433, Balwant Singh and others Vs. Anand Kumar Sharma and others; 2016 (3) ARC 459, Moinuddin alias Mamo and 2 others Vs. State of U.P. and others; 2004 (57) ALR 776, Krishna Kumar Gupta Vs. Additional District Judge 14th, Allahabad and others.

10. The only question which this Court is required to consider in this revision is as to whether the Court below was right in rejecting the plea of the revisionist-tenant regarding permissibility of adjustment of the deposit made under the proviso to Section 17 of the Act, 1887 as a deposit under Section 20 (4) of the Act, 1972 by placing reliance upon the decision of this Court in the case of Bhragu Dutt Singh (Supra) and whether it was right in not deciding thereafter, as to whether after such adjustment the requirements of Section 20 (4) were satisfied so as to enable the tenant to avoid eviction or not.

11. The findings of the SCC Court with regard to other issues have not been challenged and no arguments were advanced by Shri Saxena on these findings, therefore, the said findings have

attained finality between the parties including the finding as to the rate of rent being Rs. 100/- as claimed by the tenant and not Rs. 375/- as claimed by the landlord.

12. On a perusal of the decision of this Court in Bhragu Dutt Singh (Supra), which has been relied upon by the Court below, it is found that the said decision nowhere says that the amount deposited under proviso to Section 17 of the Act, 1887 cannot be adjusted or treated as an amount deposited under Section 20(4) of the Act, 1972. In fact, in the said case the question before the Court below was as to whether such deposit under the proviso to Section 17 could be adjusted or treated as a deposit contemplated under Order XV Rule 5 CPC. The Courts below rejected the plea that it was permissible for treating the said amount as a deposit under Order XV Rule 5 CPC. The High Court discussed the nature of the deposit under the proviso to Section 17 and held that the said amount stands as security only against the ex-parte decree. Once the ex-parte decree is set aside, the defendant is entitled to take back that amount. The amount is not to remain in deposit until the satisfaction of the decree that may ultimately be passed thereafter on contest. It is, however, undisputed that it was not open to the plaintiff-opposite party to have withdrawn that amount. Until a specific order of the Court was passed, the amount lying in deposit could not be treated as available for payment of rent or damages for use and occupation which the defendant is liable to pay under Order XV Rule 5 CPC. Now these observations by this Court nowhere say that the amount deposited under the proviso to Section 17 of the Act, 1887 cannot be treated as available for payment under Order XV Rule 5 CPC. In fact, these observation clearly state that if a specific order of the Court is passed then it can be so treated. Furthermore, the Court set aside the order of the Court below in the said case on the ground that the provisions of Order XV Rule 5 CPC which are penal in nature should be liberally construed in as much as the defendant is being shut out from pleading even true facts in his defence and that in the said case the Courts below had not approached the matter from this angle. It observed that it was incumbent on the Courts below to have considered the question of Condonation of the default. The money was lying in *custodia legis*. Furthermore, the High Court referred to its decision in Lakhveer Singh vs. Sarla Devi, (Civil Misacellaneous Case no. 4 of 1975) decided on 02.08.1979 to record that it had opined in the said case that while Section 20 (4) was to be construed strictly against the tenant, in as much as the tenant, who had become liable to eviction under Section 20 (2) (a), is seeking relief against the liability, the provisions of Order XV Rule 5 CPC, which are penal in nature should be liberally construed in as much as a defendant is being shut out from pleading even true facts in his defence. It observed that in the instant case the Courts below had not approached the matter from this angle and that it was incumbent on the Courts below to have considered the question of condonation of the default as the money was lying in *custodia legis*. It also observed that it is true that until 01.01.1977, the landlord did not have a right to withdraw the amount without an order of the Court but in these circumstances there was no substantial prejudice to the landlord. It referred to a decision of the Hon'ble Supreme Court in

the case of Duli Chand Vs. Moman Chand, AIR 1979 SC 1307; wherein it was held by their Lordships that it was open to the Court to order payment of the money which was in *custodia legis* to the landlord.

13. The High Court further observed that although provision construed in that case by the Supreme Court was different the fact that requisite money was lying in *custodia legis* was a relevant consideration which had been wrongly ignored by the Courts below, and on this ground the revision was allowed by the High Court and the orders of the Courts below rejecting the plea were set aside. In this view of the matter except for the passing observations regarding strict construction of Section 20 (4), there is nothing in the said judgment which could persuade the Court below to arrive at the conclusion that a deposit under Section 17 of the Act, 1887 could not be adjusted or treated as a deposit under Section 20 (4) of the Act, 1972. The Court below has clearly misconstrued the said judgment. In fact, the reliance placed in the said judgment upon the decision of the Supreme Court in Duli Chand, wherein it has been held that it was open to the Court to order payment of the money which was in *custodia legis* to the landlord, far from going against the tenant was in his favour in the facts of the present case also. The question as to whether such deposit could be treated as one under Section 20 (4) of the Act, 1972 was, strictly speaking, not directly involved in Bhragu Dutt Singh.

14. In fact, there are other decisions of this Court wherein it has been held that a liberal interpretation of Section 20 (4) of the Act, 1972 should be given for protecting the object of the said provision which is in favour of the tenant. In the decision of this Court in the case of Lacchi Ram (Supra) the issues specifically considered by the Court were firstly, whether deposit under Section 17 of Provincial Small Causes Courts Act, 1887 for setting aside ex-parte decree could be taken into account for relieving the tenant from liability of eviction under Sub-section 4 of Section 20 of the Act, 1972. Secondly, whether deposit made prior to the date of first hearing, within meaning of aforesaid Sub-section could be deemed to have discharged the tenant of his application only if an application was made to that effect on or before the said date. The Court in the said judgment held as under on Paragraph 2, 4 and 7.

" 2. .....Sub-section (4) manifests Legislature's anxiety to save the tenant from ejectment. By very nature of the objective sought to be achieved by this sub-section it has to be construed liberally....."

4. Unconditional, payment or deposit by the tenant of arrears interest and cost is the other requirement. The sub-section does not provide the manner of deposit. Nor does it require filing of an application. In fact it could not because unconditional governs not only deposit in Court but also to tendering of amount or payment to landlord. Whether deposit or payment was unconditional, therefore, shall depend on facts and circumstances of each case. It cannot depend on filing or non-filing of application. In a case where deposit is made in Court what is of prima importance is if the amount as required has been deposited before first date of hearing. If it has been, then it does not become conditional merely because no application had been filed. Nor any oral

or written request by way of application filed after date of hearing can be ignored as it was not made on or first date of hearing. If deposit is made with no string attached to it then it can be clarified, if necessary by subsequent application which should relate back to the relevant time that is first date of hearing. Moreover, if deposit as required, is made then the last part of the section that is relieving the tenant against his liability for eviction comes into operation automatically Although word is "may' but in the context in which it has been used and the purpose it seeks to achieve it has to be read as "shall'. A decree for eviction in a suit filed under Section 20(2)(a) of the Act where the tenant has deposited the arrears, interest, and costs of the suit at the first date of hearing shall be illegal. Therefore, it is the duty of Court under this sub-section to see it deposit made with it after deducting deposit under Section 30 of the Act is sufficient to relieve the tenant from his liability of eviction or not. It is not the making of application, but deposit as contemplated at the first date of hearing which is material.

5. So far facts of the case are concerned, the Courts below appear to have committed manifest error of law in refusing to extend the benefit of sub-section (4) of Section 20 to petitioner either because no application was filed or the one filed did not indicate that deposit was unconditional. It has already been seen that no application is necessary Manifestation of unconditional deposit could be written or oral either by tenant of his own or at the instance of the Court. In the application filed on 24th April, 1975 it was mentioned, "arrears of rent have been deposited up-to-date in the Court of City Munsif, Meerut under Section 30 is admitted to the plaintiffs also. Now the disputed rent along with costs of the suit have also been deposited in Court of Judge Small Causes by the defendants. If the Court also came to the conclusion that defendant had not paid the disputed arrears of rent to the plaintiff then for the purposes of default benefit of Section 20 (4) be given to the defendant as he has already deposited the disputed rent again, plus costs of the suit. Otherwise so extra deposited rent be returned to the defendant. It clearly mentioned about the deposit of rent and cost of the suit etc. Benefit was claimed under Section 20 (4). Refund was claimed of excess. This could not be construed as rendering deposit conditional. Nor the prayer that if Court finds that petitioner had not paid rent it may be taken as deposit under Section 20(4). What is required to be deposited is the arrears fo rent, interest and costs. If it had been paid and petitioner by way of abundant caution deposited the amount again claiming that if it was found that he was in arrears the amount deposited may be adjusted, it could not be held to be conditional deposit.

6. Now comes the most crucial controversy namely if deposit of Rs. 736.75/- made under Section 17 of S.C.C. Act could be treated as deposit under Section 20(4). The suit was decreed ex parte. Petitioner applied for setting aside of ex parte decree under Section 17 of Small Cause Courts Act, and deposited Rs. 736.75/-, the entire decretal amount, the condition precedent for moving the application. The decree was set aside and order decreeing suit ex parte was recalled. Although under law the amount could have been withdrawn by petitioner but he did not do so and it continued to remain in deposit with Court at the first

date of hearing What would be nature of this deposit. It could not continue to be deposit under Section 17 of the Small Cause Courts Act. At the same time it cannot be disputed that it comprised of arrears of rent found due till then, costs of suit etc. What is urged is that once decree was set aside ownership reverted to petitioner. It did not vest in Court. Not could the opposite party appropriate it under Sub-section (6) of the Act And that being one of the incidents of the deposit under Sub-section (4), the deposit under Section 17 could not be taken into account. The argument proceeds on misapprehension. The amount deposited by tenant for setting aside of ex parte decree is in custody of Court. It continues to be so even after the application was allowed nd the deree was set aside. Even in respect of deposit under Sub-section (4) the landlord does not get any right. The amount becomes available and it can be withdrawn by landlord only after filing of application. Therefore, there is no charm or magic whether deposit was made in once capacity or the other so long it is deposited with Court before first date of hearing. If from circumstances it appears that the tenant in order to save himself from misery or eviction was a bona fide depositing or had deposited and complied with stringent and harsh conditions provided in Sub-section (4), then he should not be denied the benefit on one or the other pretext by finding loophole due to mistake in not making the application or not withdrawing the deposit under Section 17 and then redepositing it under Sub-section (4). The word deposit should not be construed in pedantic manner. It should be understood and interpreted so as to advance the object of the provision. The amount deposited under Section 17 exhausted its purpose one ex parte decree was set aside and it became deposit with Court.

7. Reliance was placed by learned counsel for opposite party on Prem Pal Gupta Vs. Baboo Ram Garg, 1978(1) All India Rent Control Journal 446, and it was urged that the amount deposited under Section 17 does not become ipso facto available for purposes of Sub-section(4). In that case no application was made for treating the deposit under Section 17 of Small Cause Court as deposit under Sub-section (4). In this case, however, the petitioner moved an application on 24th May 1975 stating that now he had deposited costs of suit etc. Although it was not said that deposit under Section 17 may be treated as deposit under Sub-section (4) but apart from deposit under Section 7C of Act III of 1947 and Section 30 of the Act the only other deposit was under Section 17. The averment in the application that cost etc. had now been deposited could not refer to any other deposit except the deposit which had been made under Section 17. Claiming of benefit under Sub-section (4) for deposit made before Judge Small Cause Court left no room for doubt that petitioner had prayed that earlier deposit may be treated as deposit for purpose of granting immunity from eviction. The application may be vague or there may be some technical flaw. Yet there being no misgiving about its content and petitioner's anxiety to save himself from eviction he could not be refused relief because of bad drafting of the application for which petitioner may not have been responsible."

15. The Court categorically held that Sub-section 4 of the Section 20 manifests legislatures anxiety to save the tenant from ejectment. By very nature of the

objective sought to be achieved by this Sub-section it has to be construed liberally. It went on to hold that Sub-section 4 of the Section 20 does not require filing of an application Sine qua non of Section 20 (4) is whether the amount as required has been deposited in the Court before the first date of hearing or not? It was also held that any oral or written request after the first date of hearing cannot be ignored in this regard on the ground that it was not made on or before first date of hearing. If deposit is made on or before the first date of hearing without any strings attached then it could be clarified, if necessary, by subsequent application which should relate back to the relevant time i.e. first date of hearing. It is not the making of application but deposit as contemplated at the first date of hearing which is material. Thus, what follows, from the said decision is that if a deposit has been made under the provisio to Section 17 of the Act, 1887 on or before the first date of hearing as referred in Section 20 (4) of the Act, 1972, then, when on the first date of hearing or even thereafter an oral or written request is made for creating such deposit under the proviso to Section 17 of the Act, 1887, as one under Section 20 (4) of the Act, 1972, then firstly it is permissible to do so and the fact that such request had been made subsequent to the date of first hearing would be immaterial if the deposit has been made prior to it, Secondly, in such eventuality it would be for the Court to see if the deposit made with it is sufficient to relieve the tenant from liability of eviction or not?

16. In the said case an application was filed on date of first hearing and the same was treated to be good enough for the purpose of Section 20 (4).

17. It has also been held in the aforesaid decision that once the decree was set aside under law although the amount deposited under the proviso to Section 17 of the Act, 1887 could have been withdrawn by the petitioner(tenant) in the said case but he did not do so and it continued to remain in deposit with Court at the first date of hearing. It then considered the position as to What would be the nature of such deposit? It held that the nature of this deposit could not continue to be a deposit under Section 17 of the Act, 1887 as the decree has been set aside, but at the same time, it could not be disputed that it comprised of arrears of rent found due till then cost of suit etc. The Court repelled the argument that once the decree was set aside ownership of the amount deposited reverted to the petitioner and it did not vest in the Court nor could the opposite party appropriate it under Sub-section 6 of the Section 2 of the Act, 1972 and that it being one of the incidents of the deposit under Sub-section (4), the deposit under Section 17 could not be taken into account. The Court held that the amount deposited by the tenant for setting aside of ex-parte decree is in custody of the Court and it continues to be so. It is not out of place to once again refer to the reliance placed by the High Court in Bhragu Dutt Singh case upon the decision of the Supreme Court in Phool Chand (Supra) wherein it was held that it was open to the Court to order payment of the money which was in *custodia legis*, to the landlord. In Lacchhi Ram case, the same reasoning has been followed. The High Court in Lacchhi Ram further held the amount to be in the custody of the Court even after the application was allowed and the decree was set aside. Even in respect of the deposit in Sub-section 4 of

the Section 20 landlord does not get any right. The amount becomes available and it can be withdrawn by the landlord only after filing of application by him, which is obviously a reference to Sub-section 6 of Section 20 which requires an application to be filed by the landlord for withdrawal of the amount deposited under Sub-section 4, therefore, the Court observed that there was no charm or magic whether deposit was made in one capacity or the other so long as it is deposited with Court before first date of hearing. Most importantly, it went on to observe that if from circumstances it appears that the tenant in order to save himself from misery or eviction was bonafide depositing or had deposited and complied with stringent and harsh conditions provided in Sub-section (4), then he should not be denied the benefit on one or the other pretext by finding loopholes due to mistake in making the application or not withdrawing the deposit under Section 17 and then redeposit it under sub-section (4). The word deposit should not be construed in pedantic manner. It should be understood and interpreted so as to advance the object of the provision. The amount deposited under Sub-section 17 exhausted its purpose once ex-parte decree was set aside and it became deposit with Court. The Court thus held that it was permissible to treat such deposit as one under Section 20 (4) of the Act, 1972. Reference may also be made in this regard to other decisions rendered in the case of Badi Uzzaman (Supra) wherein a deposit made under the proviso to Section 17 of the Act, 1887 was held to be liable for consideration as a deposit under Section 39 of the Act, 1972. Likewise is the decision of this Court in the case of Mahadeo Singh(Supra) wherein it was held that an amount deposited under Section 20 (4) of the Act, 1972 could be taken into consideration for the purpose of satisfaction of the requirement of proviso to Section 17 of the Act, 1887 and vice versa. Paragraph 7 to 12 of this decision are quoted herein below.

" 7. To appreciate the point raised, it may first be seen what is the purpose for which the decretal amount or security in lieu thereof is required to be deposited as condition precedent to entertain an application for setting aside the ex parte deree passed by Judge, Small Cause Court. Clearly, the purpose is that so long the application for setting aside ex parte decree is not disposed of, the decretal amount or the security should be at the disposal of the Court, so that in case the application for setting aside ex parte decree is dismissed, the decree may be satisfied from the amount deposited or form the security furnished by the judgment debtor. In this connection, observations made in a case reported in 1981 ALJ 989, Smt. Krishna devi Vs. Shobha Chandra, can be beneficially noted.

8. The trial Court has attached mush importance to the fact that the amount in deposit was not an unconditional deposit as the same was deposited under Section 20(4) of the Act No. 13 of 1972 under protest, challenging the rate of rent. As a matter of fact, it is here that the trial Court has misdirected itself. The question of conditional deposit under Section 20 (4) of Act No. 13 of 1972 has no relevance for the purposes of consideratio of question whether the deposit could be accepted as security, if so offered, under proviso to Section 17(1) of the Provincial Small Cause Courts Act. Without recording any finding, whether

the deposit made was conditional or unconditional, it may be observed that so far the prayer for taking this deposit as security is concerned, there was no condition attached to it for the purposes of treating it as security under Section 17 (1) of the Provincial Small Cause Courts Act. It cannot be said that any condition was attached for that purpose. The question whether it was a conditional deposit or not, under Section 20(4) of the Act No. 13 of 1972, would be a matter for consideration while disposing of the case on merits as well as the effect of such a deposit. The amount in depoist in the court is more than the amount as decreed under ex parte decree. In case the application for setting aside the ex parte decree is dismissed, the decretal amount can very well be realised from the deposit for which a request was made to take it as security under proviso to Section 17(1) of the Provincial Small Cause Courts Act. No doubt it has been metioned in the application, moved for accepting the amount in deposit as security, that the said amount was deposited under Section 20(4) of the Act No. 13 of 1972, under protest, but no condition has been attached for accepting it as security; rather the prayer is that the amount of Rs. 7,349.70/- which the applicant had deposited, may be treated as security. In this connection, it may also be observed that as soon as the decree has been passed and so long it subsits the dispute as regards rate of rent will also be taken to have been decided by the ex parte decree, decreeing the rent at the rate of Rs. 100/- per month as claimed by the plaintiff opposite party. After a decree had been passed accepting the rate of rent as claimed by the plaintiff, it could not be said that out of the deposit made, only an amount at the rate of Rs 40/- per month as claimed by the defendant revisionist, could only be realised. The amount in deposit is also more than the amount decreed at the rate of Rs. 100/- per month as rent. In the above circumstances, the trial Court manifestly erred when it thought that the security of the amount deposited could not be accepted as it was a conditional deposit.

9. The trial Court has observed that the defendant can take back the amount once ex parte decree is set aside, but such amount cannot be withdrawn by the plaintiff under Order XV, Rule 5, CPC unless specific order is passed. No specific order for amount in question can be passed because still it is said to be a deposit under protest. The above ground given by the trial Court for not accepting the request for taking the said amount as security is not sustainable. It has already been observed that once a decree has been passed at the rate of rent as claimed by the plaintiff, the question of dispute about the rate of rent ceased to exist. Whole amount under the decree can be realised from the security offered by the defendant-revisionist. In case ex parte decree is set aside, the character of the deposit as security will also cease and it would again be treated as amount deposited under Section 20(4) of the Act No. 13 of 1972 and under Order XV, Rules 5, CPC, if any amount has been deposited under that provision. If under the law, the defendant is entitled to withdraw such a amount, he will certainly be liable to face the consequences which may flow in view of the provisions contained under Section 20(4) of Act No. 13 of 1972 and Order XV, Rule 5, CPC,Consideration of such a situation or condition at this stage, as a matter of fact does not arise.

10. I find no merit in the submission made by the opposite party that the revisionist could withdraw the amunt and re-deosit the same under Section 17 of the Provincial Small Cause Courts Act. Such an exercise would be holly unnecessary Once the amount was still in deposit with the Court, it could easily be adjusted for satisfying the ex parte decree in case it was not set aside. In this connection, a case reported in 1984 ALJ 189; 1984 (1) ARC 4 Lachhi Ram Vs. First Additional District Judge, Meerut and others, may be referred. In that case, the deposits were made under Section 17 of the Provincial Small Cause Courts Act. On setting aside the ex parte decree, it was applied on the first date of hearing that the deposits already made under Section 17 of the Provincial Small Cause Courts Act may be considered for extending the benefit of Section 20(4) of Act No. 13 of 1972. It was held that if the conditions of Section 20(4) of the Act No. 13 of 1972 are fulfilled, the deposit made under Section 17 of the Provincial Small Cause Courts Act can be taken into account for extending benefit under Section 20(4) of the Act No. 13 of 1972. It was further held that so long the amount was in deposit and was available, it is immaterial whether it was made in one capacity or the other. The relevant passage may be quoted as follows:

"Therefore, there is no charm or magic whether deposit was made in one capacity or the other so long it is deposited with Court before first date of hearing. If from circumstances it appears the tenant in order to save himself from misery of eviction was bona fide depositing or had deposited and complied with stringent and harsh conditions provided in sub-section (4) then he should not be denied the benefit on one or the other pretext by finding loopholes due to mistake in not making the application or not withdrawing the deposit under Section 17 and then redepositing it under sub-section 4. The word deposit should not be construed in pedantic manner. It should be understood and interpreted so as to advance the object of the provision. The amount deposited under Section 17 exhausted its purpose once ex parte decree was set aside."

11. Though the above case was in relation to a situation where the amount deposited under Section 17 of the Provincial Small Cause Courts Act was to be taken into account as payments made under the provisions of Section 20(4) of the Act No. 13 of 1972, but what is clear is that even though the amount may have been deposited under some other provisions and it was available with the Court for the purposes of satisfying decretal amount under the ex parte decree, the same could very well be accepted as security under Section 17 of the Provincial Small Cause Courts Act.

12. It is thus clear that the prayer of the applicant for treating the amount already deposited in Court, as security under Section 17 of the Provincial Small Cause Courts Act was not at all conditional. In case the ex parte decree is not set aside, the decretal amount can very well be satisfied from the said deposit. It was not at all necessary to deposit the amount twice. The question whether the depoist under Section 20(4) of the Act No. 13 of 1972 was conditional or not and what would be the effect of conditional deposit under the said provision, was not at all relevant at the present stage. In this view of the matter, the order passed by the trial Court is liable to be set aside. "

On the same lines is the decision of this Court in the case of Satish Kumar Dutta (Supra) wherein also the decision in the case of Lacchi Ram has been relied upon. Paragraph 3 and 4 of the said decision read as under:

"3. The only point involved in this writ petition and argued by learned counsel for both the parties is as to whether tenant had deposited complete amount under Seciton 39 of the U.P. Act No. 13 of 1972 for getting benefit of the said section and consequently of section 20 of the Act or not. Revisional Court has recorded the finding that building would be deemed to have been constructed on01.04.1978. The Revisional Court found that within one month from the said date i.e. by 30.04.1978 tenant had deposited the amount of Rs. 15,600/- which was more than required by Section 39 of the Act however an amount of Rs. 7015/- out of the total amount of Rs. 15,600/- could not be taken into consideration as it was deposited under Section 17 of Provincial Small Cause Courts Act (P.S.C.C. Act in short). An authority of this Court in Lachchi Ram Vs. A.D.J 1 was cited before the Revisional Court. The Revisional Court distinguished the said authority on the ground that in the said authority on the ground that in the said authority it was held that amount deposited under Section 17 of the PSCC Act, could be taken into consideration while granting benefit of Section 20(4) of the Act. In my opinion same principle will apply while considering as to whether tenant is entitled to the benefit of Setion 39 of the Act or not. Learned counsel for the landlord respondent has argued that unless an application is made by the tenant to the effect that amount deposited under Section 17 of PSCC Act, may be treated to have been deposited under Section 39 also, it cannot be taken into consideration. In this regard learned Counsel has placed reliance upon the authorities mentioned in the aforesaid authority of Lachhi Ram. It is undisputed that the amount deposited by the tenant under Section 17 of the PSCC Act, was never withdrawn by him. Tenant since beginning is asserting that he is entitled to the benefit of Section 39 of the Act. In view of this I am of the opinion that the amount deposited under Section 17 PSCC Act can very will be taken into consideration while granting benefit of any of the aforesaid sections to the tenant. I cannot approve too technical approach in this regard.

4. Accordingly, I am of the opinion that tenant was entitled to the benefit of Section 39 of the Act."

18. In the said case benefit of the deposit under the proviso to Section 17 of the Act, 1887 was held to be available in law to the deposit referred in Section 39 of the Act, 1972.

19. In view of the aforesaid, this Court is of the view that the Court below erred in relying upon the decision in Bhragu Dutt Singh(Supra) to reject the plea of the revisionist for treating the amount deposited by him under the proviso to Section 17 of the Act, 1887 as a deposit referred in Section 20(4) of the Act, 1972. The legal position is settled that it was permissible to treat such deposit as one under Section 20 (4). After treating it to be so, how far the requirements of Section 20 (4) of the Act, 1972 were satisfied was another aspect which was required to be considered by the Court below but it has not done so. As

regards the contention of learned Counsel Mohd. Sayeed that no application had been filed by the revisionist for treating the aforesaid amount as one under Section 20 (4), in view of the decision in Lacchhi Ram, such request could be oral or written. The essence of the matter is as to whether there was a deposit with the Court *(custodia legis)* on or prior to the date of hearing or not. If it was, then intimation of such deposit with a request to treat it as a deposit under Section 20 (4) and adjust it accordingly is sufficient. This intimation and request could be made in writing or orally. In fact, it would be better if it is made in writing as it would avoid unnecessary disputes on this issue, but even if an oral request is made as was done in this case at the time of arguments as has been mentioned in the judgment itself, then, in such an event, once cognizance of such request has been taken by the Court below, as has been done in this case, then, there was no way this plea could be rejected as impermissible.

20. As regards the case of Prem Pal Gupta Vs. Baboo Ram Garg (Supra) same has already been considered in the decision of Lacchi Ram (Supra).

21. Reference may also be made to another decision of this Court in the case of Sunt Ram Gupta Vs. Ratan Prakash Garg (Supra) wherein adjustment of the amount deposited under the proviso to Section 17 as a deposit under Section 20 (4) of the Act, 1972 was approved however, with the observation that the only flaw in the decision of the Court below was that it did not say in the operative portion of this judgment clearly that the plaintiff is entitled to withdraw that amount and adjust it towards arrears of rent demanded by him. As regards, reliance placed by the learned counsel for the opposite party upon the decision of this Court in Moinuddin Mammo and others (Supra), the said decision dwells barely on facts before the Court and there is no discussion supported by any reasoning nor is there any binding precedent laid down therein that an application has necessarily to be filed for claiming the benefit under Section 20 (4) of the Act, 1972, whereas, this aspect of the matter has been specifically considered in a detailed and reasoned manner and has been accordingly decided in Lacchi Ram case which has further been explained as above.

22. In view of the discussion made hereinabove, the conclusion and the finding of the Court below on this issue cannot be said to be in accordance with law. Whether after treating the said amount as one under Section 20 (4), the requirements of the said provisions were satisfied or not for avoiding liability of eviction, would depend upon an inquiry into the nature and breakup of the deposits made in the light of the provisions contained in Sub-section 4 of Section 20 and this would be a different aspect, meaning thereby, even after treating such amount as one under Section 20 (4), in a given case, if the amount falls short of the amount referred in Section 20 (4) or it is found that it was not deposited on or before the first date of hearing then the benefit of the said provision may not be available to the tenant, but, in this case the Court below rejected the plea as being impermissible in the first place and has not ventured into the consequential inquiry as to the satisfaction of the Section 20 (4) referred herein above.

23. In view of the above while sustaining the finding recorded by the Court below on other issues, the conclusion and finding recorded by it on the applicability of Section 20 (4) of the Act, 1887 and the impermissibility of the

deposit made by the tenant under the proviso to Section 17 of the Act, 1887, as a deposit under Section 20 (4) of the Act, 1972, as also, the operative portion of the judgment, is hereby set aside. Consequent to this, SCC suit no. 2 of 2006 shall stand **restored** before the SCC Court which shall now proceed to consider the issue of applicability of Section 20 (4) after treating the deposit made by the petitioner under the proviso to Section 17 of the Act, 1887, as one made under Sub-section 4 of Section 20 of the Act, 1972. Consequences shall follow accordingly as per law.

24. The revision is **allowed** in aforesaid terms.

25. The Lower Court Record which are available shall be returned to the District Court concerned for further proceedings as aforesaid.

26. Considering the fact that this revision has remained pending for almost 10 years, the parties, who are represented before this Court, are directed to appear before the Court below on 01.07.2020 for further proceedings. The SCC Court is directed to conclude the proceedings as aforesaid within a period of 3 months subject to regular Court proceedings resuming which are at present affected by COVID-19 pandemic, if need be by conducting the proceedings on day to day basis. The issues which have already attained finality as observed hereinabove, shall not be open for reconsideration.

(2020)06ILR A1299
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2020

BEFORE
THE HON'BLE IRSHAD ALI, J.

WRIT A No. 1821 of 2020

Dr. Hemant Chaudhary & Anr.
...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Krishna Mohan Asthana, Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

A. Civil Law - Intermediate Education Act, 1921 – Section 16-FF – Appointment on the post of Lecturer or Assistant Teacher – Approval – Deemed approval – No appointment on the post of Lecturer or Assistant Teacher in L.T. Grade can be made in the institution recognized under the Act of 1921 without approval of the District Inspector of Schools – On submission of papers in case the District Inspector of Schools do not pass any order within a period of 1 month, the selection is deemed to have been approved. (Para 35)

Held –

36. Here, in the present case, this court issued direction to the DIOS to examine the selection of the petitioners in the light of the provisions contained under Section 16-FF of the Act of 1921. The objection raised in rejecting the claim of the petitioners for grant of approval was taken into consideration by this court in above referred judgment and direction was issued to reconsider the claim of the petitioners for grant of approval. The DIOS in utter disregard of the orders passed by this court has proceeded to pass the impugned order.

37. Once, this court upon examination of material on record issued direction to the DIOS to consider and pass appropriate order in the light of the observation made in the judgment and order referred herein above, it was incumbent upon the DIOS to take notice of the observation made by this court and to pass appropriate order.

Writ Petition allowed (E-1)

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

1) The rejoinder affidavit filed today may be taken on record.

2) Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri K.M. Asthana, learned counsel for the petitioners and Sri Dashrath Prasad, learned standing counsel for respondent Nos.1 to 4.

3) By means of present writ petition, the petitioners have assailed the order dated 11.11.2019 passed by the District Inspector of Schools (DIOS), Mathura - respondent No.3, whereby claim of the petitioners for grant of approval to the selection has been rejected.

4) Factual matrix of the case is that Jain Inter College, Chaurasi, Mathura is a recognized institution under the provisions of U.P. Intermediate Education Act, 1921 and is receiving grant in aid from the State Government. In view of that, the provisions of U.P. Act No.24 of 1971 is applicable to the said institution. The institution is a minority institution recognized under the provisions of Article 30(1) of the Constitution of India. The Committee of Management initiated a proceeding of selection in pursuance to an advertisement issued in two daily newspapers; one in hindi and another in english as per provisions contained under Regulation 17 of the regulations framed under Chapter II of U.P. Intermediate Education Act, 1921 (for short, "Act of 1921").

5) In the advertisement, 11 posts of Lt. Grade teachers were advertised. The petitioners applied in pursuance to the advertisement issued on 24.08.2015 and the Selection Committee made recommendation for appointment to the Committee of Management.

6) In view of the provisions contained under Section 16-FF of U.P. Intermediate Education Act, 1921, before making appointment, prior approval of the DIOS is required for issuance of appointment letter.

7) Accordingly, the Committee of Management submitted papers to the DIOS for grant of approval on 21.07.2016. The DIOS, Mathura raised objection that in view of the provisions contained under Regulation 20 of Chapter II of the Act of 1921, approval cannot be granted as no sanction was obtained for revival of the posts.

8) The Manager of the institution forwarded all the papers to the Director of Education (Secondary) and a letter was also sent to the DIOS in this regard on 31.08.2016, whereupon order was passed by the Director of Education (Secondary) and the posts were revived as per norms provided under the government order for sanction of post. After passing the order by the Director of Education (Secondary), the Committee of Management requested to accord approval to the selection on 11 posts.

9) The DIOS passed an order on 19.04.2017 and 03.05.2017, whereby direction was issued to initiate fresh proceeding of selection in pursuance to the order passed by the Director of Education (Secondary) for revival of posts.

10) The petitioners preferred Writ-A No.26088/2018, which was decided vide judgment and order dated 11.12.2018, whereby direction was issued to the DIOS, Mathura to accord fresh consideration to the claim of the petitioners in the light of the judgment of Hon'ble Supreme Court taking into consideration the provisions contained under Section 16-FF of the Act of 1921.

11) In pursuance to the direction issued by this Court, an order was passed by the DIOS on 13.02.2019, whereby the selection of the petitioners was disapproved. The order of the disapproval dated 13.02.2019 was again challenged before this Court in Writ -A No.8069/2019 and the similar order passed by the DIOS was subject matter of challenge in Writ-A No.4791/2019; Smt. Shweta Tiwari Vs. State of U.P. and others, which was allowed and the impugned order of the same date was quashed and the matter was remanded back to the DIOS, Mathura to pass fresh order.

12) The writ petition filed by the petitioners was also allowed vide judgment and order dated 20.05.2019, whereby the DIOS was directed to pass fresh order in the light of the observation made in the judgment. The DIOS taking the same view, disapproved the appointment of the petitioners. The same date order was under challenge before this Court in Writ-A No.18983/2019; Smt. Babita and others Vs. State of U.P. and others, wherein after noticing the entire facts of the case this Court passed the following order :

"Be that as it may, this Court while rendering judgement in the case of petitioners in Writ Petition No.7856 of 2019 has already rejected the objection taken by the respondent no.3 regarding non-compliance of the procedure provided in the Government Order dated 12.03.2018 in making selection and the selection of the petitioners on the non-existent post, therefore, the said objection taken by the respondent no.3 is misconceived as judgement of this Court in Writ Petition No.7856 of 2019 has become final between the parties. Further, this Court while deciding the issue in Writ Petition No.7856 of 2019 has granted liberty to the respondent no.3 to examine the documents in respect of election of committee of management and this Court finds that respondent no.3 while passing the impugned order has not adverted to any of the documents filed by the petitioners to verify the validity of the Committee of Management, who initiated the selection procedure. The respondent no.3 has placed reliance upon the letter dated 08.12.2017 of the then District Inspector of School in paragraph 9 of the order which nowhere mentions about the validity of committee of management, and thus, facts of the case clearly establishes that respondent no.3 has completely ignored the orders of this Court while passing the impugned order, and thus, has wilfully flouted the orders of this Court. In this view of the fact, this Court finds substance in the argument of learned Senior Counsel for the petitioners.

Thus, in view of above, let notice be issued to respondent no.3, District Inspector of Schools, District Mathura, to show cause as to why the matter should not be referred to the contempt Court for initiating contempt proceedings against him and why his personal responsibility in the matter be

not fixed. He shall remain present personally on the next date alongwith his reply.

Put up on 20.01.2020 in the additional cause list."

13) In pursuance to the order, the DIOS appeared before this Court on the date fixed and assured that the order impugned of the writ petition of Writ-A No.18983/2019 shall be recalled, in case short time is granted to him.

14) Accordingly, the order of disapproval of the appointment of the petitioners of the aforesaid writ petition was recalled vide order dated 23.01.2020 and appointment of the petitioners of the above referred writ petition was accorded approval. The said order was placed before this Court in Writ-A No.18983/2019 and the petition has been dismissed as rendered infructuous.

15) The controversy involved in the present writ petition also pertains to the same selection and similar order of DIOS is under challenge.

16) Assailing the order impugned, submission of learned senior counsel for the petitioners is that the DIOS while passing the impugned order ignored the specific reasons assigned in the order dated 20.05.2019 passed in Writ-A No.8069/2019.

17) His next submission is that the DIOS while exercising the power under Section 16-FF of Act of 1921 is confined and restricted to the scope of inquiry and the said aspect of the matter was duly considered in Writ-A No.26088/2018 decided on 11.12.2018, whereby the writ petition was disposed of in terms of the judgment and order dated 28.11.2018 passed in Writ Petition No.25087/2018.

18) He further submitted that the DIOS has proceeded beyond the scope of inquiry and illegally disapproved the selection and appointment of the petitioners on erroneous consideration, thus, the order impugned cannot sustain in law.

19) In regard to the objection taken in the impugned order that the committee of management is not validly elected committee of management, submission of learned senior counsel for the petitioners is that the election of the committee of management was held on 16.06.2013 and the salary of the teachers and other employees of the institution have been disbursed under the signature of the signature of the manager of the institution, who made the selection, therefore, the objection in this regard is absolutely perverse and vitiated in law.

20) He next submitted that the committee of management with Sri Munish Kumar Jain was elected in earlier election also and continued to discharge duties and functions without any dispute, who held the next election and no dispute of rival claim of election was raised at any stage.

21) His further submission is that the post against which the petitioners have been granted appointment are duly sanctioned posts and the selection has been made by following the procedure prescribed under Section 16-FF and Regulation 17 of Chapter 2 of the regulations framed under the Act of 1921, therefore, the order passed by the DIOS is illegal and legally not sustainable in the eyes of law.

22) His last submission is that in compliance of the judgment and order passed in Writ Petition No.18983/2019; Smt. Babita and others Vs State of U.P. and others and Writ Petition No.7856/2019 decided vide judgment and order dated 17.05.2019, the same date order dated 11.11.2019 was recalled and order of approval was granted to the selection made by the same committee of management, therefore, the petitioners are also entitled to get the same relief in the present writ petition.

23) On the other hand, learned standing counsel submitted that the impugned order dated 11.11.2019 is just and valid and does not suffer from any infirmity or illegality but he does not dispute the fact that in compliance of the order passed by this court, the DIOS has recalled the order dated 11.11.2019 in regard to same selection proceeding and accorded approval to the selection of petitioners of Writ Petition Nos.18983/2019 and 7856/2019. He further invited attention of this court on certain paragraphs of the counter affidavit in regard to proceeding of selection and dispute in the committee of management.

24) I have considered the rival contentions advanced by learned counsel for the parties and perused the material on record and the judgments relied upon by learned counsel for the parties.

25) On perusal of the material on record, it is evident that the petitioners filed Writ Petition No.26088/2018 challenging the order of DIOS dated 03.05.2017 and 19.04.2017, wherein after examining the material on record, the writ petition was finally disposed of vide judgment and order dated 11.12.2018 in terms of order dated 28.11.2018 passed in Writ Petition No.25087/2018. Relevant portion of the judgment is being quoted below:

"One of the other similarly placed person, as the petitioners in this petition, had approached this Court against the same impugned order by filing Writ Petition No. 25087 of 2018, wherein following orders have been passed on 28.11.2018:-

"Jain Inter College, Chaurasi Mathura is a recognized minority institution situated at Mathura. Provisions of Payment of Salaries Act, 1971 are also applicable upon the institution. It appears that a post of Assistant Teacher in L.T. Grade had fallen vacant in the institution concerned, upon which the committee of management proceeded to appoint the petitioner and papers were transmitted to the District Inspector of Schools for according approval to it. The District Inspector of Schools vide its order dated 3.5.2017 has rejected the proposal on the ground that the post itself had lapsed by virtue of Regulation -20 of Chapter-II, framed under the U.P. Intermediate Education Act, 1921. The order records that since the post itself was not available and the revival of post has been allowed granted by the authorities after making of the appointment itself, the Committee of Management would have to initiate fresh process for appointment in the institution concerned.

Learned counsel for the submits that the limited scope of scrutiny available with the Inspector in a minority institution would be as per Section 16-FF of the Act of 1921. Submission is that the

petitioner has been duly appointed and he possess the requisite qualification and, therefore, the direction of the concerned authority for recruitment to be undertaken afresh would result in an exercise which would serve no purpose. It is also stated that a Division Bench of this Court in Tariq Maqbool and others Vs. State of U.P. and others, reported in 2015(1) ADJ, 650 had taken a view that even in a minority institution the institution would not be competent to make an appointment once the post itself stood lapsed by virtue of Regulation-20. This judgment was assailed before the Hon'ble Supreme Court in Special Leave to Appeal No. 5871-5872 of 2015 in which the Special Leave to Appeal has been disposed of vide following orders:-

"After haring the matter at length, learned counsel appearing for the parties agree that the matter may be resolved in the following way;

The common respondent no. 5-College shall, in pursuance of the directions given by the High Court vide the impugned order dated11.12.2014 in Special Appeal Nos. 1359 of 2013, make an application to the competent maturity for fresh sanction of posts and to retify the posts according to the selection of the petitioners already made. The competent authority shall consider granting sanction for the vacant posts either retrospectively or with effect from the date the application is made. We find there is dispute that the petitioners are either unqualified or otherwise not suitable.

We Ravindra Shrivastava, learned Senior Counsel appearing for the petitioners, states that the petitioners would not claim any arrears of their salaries even if their appointment is ratified from the retrospective date.

We order accordingly.

The instant special leave petitions stand disposed of in the above terms.

As a sequel to the above, pending interlocutory applications, if any, stand disposed of."

Learned counsel for the petitioner submits that the petitioner, herein, also undertakes to give up her claim for salary from the retrospective date and that the authority be directed to consider the petitioner's for appointment in accordance with law.

Learned Addl. Chief Standing Counsel for the respondents, although disputes the submission, but does not dispute that the post has already been revived in the institution concerned and that the limited scope for examination to the Inspector would be confined to the parameters laid down in Section 16-FF of the Act of 1921.

Considering the facts and circumstances, noticed above, it would be appropriate to direct the District Inspector of Schools, Mathura to accord consideration to petitioner's claim in light of the orders passed by Hon'ble Supreme Court, extracted above, within a period of three months from the date of presentation of certified copy of this order, after affording an opportunity of hearing to respondent no. 5.The Inspector shall be at liberty to examine the qualification of petitioner and his scope of inquiry would be confined to Section

16-FF of the Act of 1921. No useful purpose would be served in directing a fresh exercise to be undertaken inasmuch as the scope of inquiry by the Inspector, otherwise, would be restricted to Section 16-FF of the Act of 1921.

The order impugned dated 3.5.2017 and 19.4.2017 shall remain subject to the fresh orders to be passed by the Inspector, as intimated above".

Learned Standing Counsel does not dispute that same orders are challenged in the present writ petition also and the controversy raised is identical.

In that view of the matter, this petition is also disposed of in terms of the order dated 28.11.2018 passed in Writ Petition No. 25087 of 2018."

26) The DIOS again passed an order on 13.02.2019, whereby the claim of the petitioners for payment of salary was rejected without considering the parameters of Section 16-FF of the Act of 1921 as directed by this court in earlier litigation came before this court.

27) The order dated 13.02.2019 was assailed by the petitioners in Writ-A No.8069/2019; Dr. Hemant Chaudhary and others Vs State of U.P. and others. The same date order was also challenged by Smt. Shweta Tiwari in Writ-A No.4791/2019, which was allowed vide judgment and order dated 11.04.2019 considering each and every aspect of the matter and the order dated 13.02.2019 was set aside with the direction to accord fresh consideration to the claim of petitioners for grant of approval to the selection vide judgment and order dated 11.04.2019. Relevant portion of the judgment is being quoted below:

"In pursuance thereof, instructions have been furnished to learned standing counsel, which is taken on record. According to it, the term of the last validly elected Committee came to an end on 3.7.2009 and thereafter no valid election was held. It has also been stated that the selection made by the Committee whose term had expired would not be valid. When the said fact came to the knowledge of the District Inspector of Schools, he, by letter dated 23.12.2017, required the Management to hold elections within one month. Thereafter, fresh election was held on 21.1.2018 and which was recognised on 11.7.2018. It is also stated in paragraph 11 of the instructions furnished to learned standing counsel that out of eleven posts, only seven posts were revived.

The first objection that only seven posts were revived by order dated 14.12.2017 does not appear to be correct. The petitioner has brought on record the order dated 16.3.2018 passed by Director of Education, Madhyamik, Uttar Pradesh, Lucknow, whereby four more posts of assistant teachers was revived.

It is noteworthy that the validity of Regulation 20 of Chapter II, which provided that in case a post remains unadvertised for three months, it would lapse unless fresh approval for its revival is obtained, was subjected to challenge before the Supreme Court in Special Leave to Appeal No.5871 - 5872 of 2015 and which was disposed of by the Supreme Court by the following order:-

"After hearing the matter at length, learned counsel appearing for the parties agree that the matter may be resolved in the following way:

The common respondent no. 5-College shall, in pursuance of the directions given by the High Court vide the impugned order dated 11.12.2014 in Special Appeal Nos. 1359 and 1360 of 2013, make an application to the competent maturity for fresh sanction of posts and to ratify the posts according to the selection of the petitioners already made. The competent authority shall consider granting sanction for the vacant posts either retrospectively or with effect from the date the application is made. We find there is no dispute that the petitioners are either unqualified or otherwise not suitable.

Mr. Ravindra Shrivastava, learned Senior Counsel appearing for the petitioners, states that the petitioners would not claim any arrears of their salaries even if their appointment is ratified from the retrospective date.

We order accordingly.

The instant special leave petitions stand disposed of in the above terms.

As a sequel to the above, pending interlocutory applications, if any, stand disposed of."

It has also not been disputed before this Court that when on a previous occasion the District Inspector of Schools declined to grant approval to the appointments in question, the petitioner alongwith other selected candidates filed Writ-A No.26403 of 2018 and Writ-A No.25087 of 2018. These writ petitions were disposed of by this Court with the following directions:-

"Considering the facts and circumstances, noticed above, it would be appropriate to direct the District Inspector of Schools, Mathura to accord consideration to petitioner's claim in light of the orders passed by Hon'ble Supreme Court, extracted above, within a period of three months from the date of presentation of certified copy of this order, after affording an opportunity of hearing to respondent no. 5.The Inspector shall be at liberty to examine the qualification of petitioner and his scope of inquiry would be confined to Section 16-FF of the Act of 1921. No useful purpose would be served in directing a fresh exercise to be undertaken inasmuch as the scope of inquiry by the Inspector, otherwise, would be restricted to Section 16-FF of the Act of 1921.

The order impugned dated 3.5.2017 and 19.4.2017 shall remain subject to the fresh orders to be passed by the Inspector, as intimated above".

It is also not disputed by learned standing counsel that the combined effect of the above orders would be that even if the selection was made prior to revival of the posts, but once the selection is approved having regard to the factors stipulated under Section 16-F, the selected candidates would become entitled for payment of salary atleast from the date of revial of the posts. The orders dated 13.12.2018 and 18.11.2018 in Writ-A No.26403 of 2018 and Writ-A No.25087 of 2018 directing the District Inspector of Schools to confine the scope of enquiry to Section 16-FF has attained finality. In such view of the matter, the District Inspector of Schools was not justified in declining to grant approval to the selection of the petitioner on the same ground that the post came to be revived later on, a dispute which stood settled by the orders

passed in earlier writ petitions. All that he could have done was to impose a condition that the salary would become payable from the date post was revived in case the appointment is otherwise found to be valid. In fact, learned counsel for the petitioner has fairly conceded to the said legal position and has stated that the petitioner would not claim salary for the earlier period.

Coming to the second objection regarding selection having been made by the Committee which is not duly recognised, it is noteworthy that in the instructions furnished, the District Inspector of Schools has not said a word as to how salary bills were being passed under signatures of Munish Kumar Jain, the Manager of the Committee of Management, which held the selection in question. This is despite a specific direction by this Court vide order dated 30.3.2019. The petitioner has come up with the case that the election was duly held on 16.6.2013 in which Munish Kumar Jain was re-elected. Although no document has been brought on record to show that the election was communicated to the educational authorities but the fact which remains undisputed is that the salary bills for the period in question were duly passed under signatures of Munish Kumar Jain. The District Inspector of Schools, while raising the objection in question, has not alluded to the said aspect, therefore, the objection taken in this regard requires re-consideration at his end, being a dispute of factual nature.

The third objection that the procedure prescribed by Government Order dated 12.3.2018 has not been followed, does not survive in view of the discussion made above while dealing with the first objection.

In consequence and as a result of discussion made above, the impugned order dated 13.2.2019 is quashed. The matter is remitted back to the District Inspector of Schools, the third respondent to accord fresh consideration to the claim of the petitioner for grant of approval to her selection having regard to the observations made above. It is desirable that before passing any fresh order, in case any additional representation or document is filed before the District Inspector of Schools by the petitioner or by Committee of Management of the institution, the same shall be duly considered. The decision in this regard shall be taken expeditiously, preferably within a period of eight weeks from the date of receipt of a certified copy of this order.

The writ petition stands allowed to the extent indicated above."

28) The writ petition of the petitioners which was numbered as Writ Petition No.8069/2019 was also allowed and the order dated 13.02.2019 was quashed in the same terms as was decided in Writ-A No.4791/2019 vide judgment and order dated 11.04.2019.

29) Now, again the DIOS on the same set of facts and grounds has proceeded to pass the impugned order dated 11.11.2019. The said order was also assailed by the teachers of the same selection proceeding in Writ-A No.18983/2019, wherein this court after examining the material on record issued notice to the DIOS that why the order passed at earlier point of time by this

court in writ petitions have not been followed and why the matter may not be placed before the contempt court in compliance of the order passed by this court. Thereafter, the DIOS recalled the order dated 11.11.2019 and accorded approval to the petitioners of Writ-A No.18983/2019.

30) To decide the merit of the selection of the petitioner, it is relevant to look into the provisions governing the initiation of selection proceeding in a recognized minority institution under the Act of 1921. The provisions of Section 16-FF of U.P. Intermediate Education Act, 1921 and Regulation 17 of Chapter-II of the Regulations framed under U.P. Intermediate Education Act, 1921 are relevant provision to be taken into consideration in making selection and appointment on the post of Principal, Lecturer and Assistant Teacher in a recognized institution under U.P. Intermediate Education A

31) To resolve the controversy involved in the present writ petition, the provision of Regulation 17 of Chapter-II of the Regulations framed under U.P. Intermediate Education Act, 1921 is quoted below:

"17. The procedure for filling up the vacancy of the head of institution and teachers by direct recruitment in any recognised institution referred to in Section 16-FF, shall be as follows:

(a) After the management has determined the number of vacancies to be filled up by direct recruitment, the posts shall be advertised by the manager of the institution in at least one Hindi and one English newspaper having adequate circulation in the State giving particulars as to the nature (i.e., whether temporary/permanent) and number of vacancies, descriptions of post (i.e., Principal or Headmaster, Lecturer or L.T., C.T. or J.T.C./B.T.C. grade teacher including the subject or subjects in which the lecturer or teacher is required), scale or pay and other allowances, experience required minimum qualification and age prescribed, if any, for the post and prescribing a date which should not ordinarily be less than two weeks from the date of advertisement) by which the applications shall be received by the Manager. A copy of the advertisement shall be simultaneously sent to the Inspector concerned.

Notes-(1) All vacancies in the posts of teachers and the head of institution existing at the time of advertisement shall be advertised.

(2) No new post shall be advertised unless sanction of the appropriate authority for the creation thereof has been received by the management.

(b) All applications shall be made in the form prescribed by the management and shall contain all necessary particulars about qualifications, teaching experience and other activities and be accompanied by certified copies of all the necessary certificates and testimonials. The management may charge cost of the application form not exceeding the amount referred to in Clause (2) of Regulation 10.

(c) An application by a person employed in an institution and applying

for a post elsewhere or in the same institution shall not be withheld by his employer but shall be forwarded to the authority concerned immediately.

(d) All applications received from the candidates shall be serially numbered and entered in a register and particulars of the candidates noted under appropriate columns. The candidates to be called for interview shall be seven for each post (the number of applicants, permitting). The Manager shall intimate by registered post all the members of the Selection Committee as well as all such candidates as are called for interview, the date, time and place of selection at least ten days before it is held. The Selection Committee will hold the selection accordingly. If on account of any unavoidable reason, the expert selected by the Committee of Management under Clause (a) of the proviso to sub-section (1) of Section 16-FF is unable to attend the selection on the date fixed the meeting of the Selection Committee shall be postponed.

(e) The provisions of Clauses (e) and (f) of Regulation 10 and those of Regulations 11, 12 and 16 shall mutatis mutandis apply to selections made under this regulation.

(f) A panel of experts consisting of fifteen or more persons selected from category (a) referred to in Regulation 14 shall be drawn by the Director for each region and be sent to the Regional Deputy Director of Education concerned, The Regional Deputy Director of Education shall out of the said panel communicate the names of three experts in a sealed cover to the management through its Manager as soon as he receives any request for supply of names of experts from him. The regional panel of experts shall, however, remain valid until it is replaced by a new one.

(g) किसी पद के लिए समस्त अभ्यर्थियों का साक्षात्कार कर लिए जाने के पश्चात् चयन समिति का सभापति किये गए चयन की कार्यवाहियों पर दो प्रतियों में एक टिपण्णी तैयार कराएगा जिसमे चुने गए अभ्यर्थी का नाम तथा प्रतीक्षा सूची के दो अन्य अभ्यर्थियों के नाम उल्लिखित किये जायेंगे, इस प्रकार तैयार के गई टिप्पणी पर चयन समिति के सभापति तथा अन्य सदस्य हस्ताक्छर करेंगे और अपना अपना पूर्ण नाम, पद नाम और पता तथा दिनांक उल्लिखित करेंगे, सभापति इस टिपण्णी की एक प्रति तथा विनियम *10* के खंड (च) में निर्दिष्ट विवरण की एक प्रति धारा *16* - चच के अधीन यथा अपेक्षित अनुमोदन के लिए, यथास्तिथि, संभागीय उप-शिक्षा निदेशक या निरीक्षक को तुरंत अग्रसारित करेगा, सम्बंधित अभिलेखों के प्राप्त होने के दिनांक के एक माह के भीतर यथास्तिथि संभागीय उप शिक्षा निदेशक या निरीक्षक, उन पर अपना निर्णय दे देंगे और ऐसा न करने पर अनुमोदन प्रदान कर दिया गया समझा जाएगा।"

32) On perusal of the provisions contained under the aforesaid regulation, the existing vacancy is to be advertised in two newspapers one in Hindi and other in English.

33) In the present case, the vacancy was advertised in daily newspapers; one in hindi and other in english, which are widely circulated newspapers.

34) The candidates, eligible and qualified, including the petitioners, applied for and a selection committee

constituted under the Act of 1921 on the basis of quality point marks, selected the petitioners and recommended for the appointment. Papers were duly submitted to the District Inspector of Schools for the grant of approval as required under Section 16-FF, which is being quoted below:

""16-FF. Savings as to minority institutions.-(1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management :

Provided that one of the members of the Selection Committee shall-

(a) in the case of appointment of the Head of an institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher, be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed, unless-

(a) in the case of the Head of Institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualification prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this section the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final.""

35) On perusal of Section 16-FF, it is evident on the face of it that without approval of the District Inspector of Schools, no appointment on the post of Lecturer or Assistant Teacher in L.T. Grade can be made in the institution recognized under the Act of 1921. It is further clarified that on submission of papers in case the District Inspector of Schools do not pass any order within a period of 1 month, then the selection is deemed to have been approved. "

36) Here, in the present case, this court issued direction to the DIOS to examine the selection of the petitioners in the light of the provisions contained under Section 16-FF of the Act of 1921. The objection raised in rejecting the claim of the petitioners for grant of approval was taken into consideration by this court in above referred judgment and direction was issued to reconsider the claim of the petitioners for grant of approval. The DIOS in utter disregard of the orders passed by this court has proceeded to pass the impugned order.

37) Once, this court upon examination of material on record issued direction to the DIOS to consider and pass appropriate order in the light of the observation made in the judgment and order referred herein above, it was incumbent upon the DIOS to take notice of the observation made by this court and to pass appropriate order.

38) On perusal of the judgment and order dated 11.12.2018 passed in Writ-A No.26088/2018, judgment and order dated 11.04.2019 passed in Writ-A No.4791/2019 as well as judgment and order dated 20.05.2019 passed in Writ-A No.8069/2019, it is evident that while passing the impugned order, the DIOS has not applied his mind and on wholly erroneous assumption has proceeded to pass the impugned order.

39) In the judgment and order dated 11.04.2019, the objection in regard to order passed by the Director of Education Secondary, U.P. at Lucknow dated 16.03.2018, this court found the post to be revived and the DIOS was confined to the scope of inquiry to Section 16-FF of the Act of 1921 and nothing beyond that.

40) Due to non consideration of aforesaid aspect of the matter, the DIOS has totally failed to decide the actual controversy involved in the matter.

41) The objection raised by learned standing counsel was considered in earlier litigation, which came into existence before this court in regard to same selection proceeding and by recording finding on the point, the matter was re-delegated to the DIOS for reconsideration.

42) In regard to initiation of proceeding of selection by a committee of management, this court while examining the material has recorded finding by holding that once the salary of the teachers and other employees has been disbursed under the signature of Sri Manish Kumar Jain, therefore, the objection in this regard cannot be sustained. Therefore, the order taking the same ground in rejecting the claim of approval of DIOS cannot be sustained.

43) Moreover, in regard to similar selection, the DIOS has recalled his order dated 11.11.2019 and accorded approval to the selection of the teachers of the same selection, therefore, refusal to grant approval to the petitioners cannot be termed to be valid and justified.

44) In view of the above, I am of the view that the DIOS while passing the impugned order has travelled beyond his scope of consideration. The order impugned is in utter disregard of the judgment and order passed in earlier proceeding by this court and teachers of the same selection have been accorded

approval by the DIOS, therefore, refusal vide impugned order is illegal and cannot be sustained. Accordingly, the impugned order dated 11.11.2019 is hereby set aside.

45) The writ petition succeeds and is **allowed.**

46) However, the DIOS is directed to pass appropriate reasoned and speaking order of approval to the selection of the petitioners on the post of assistant teachers within a period of four weeks from the date of production of a certified copy of this order.

(2020)06ILR A1312
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2020

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Jail Appeal No. 1807 of 2014

Ajay & Anr. ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Ajay Singh [*A.C.*]

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

Sections 302/34, 201, 376 and 120-B IPC- Appeal against conviction.

Circumstantial Evidence
Necessity of formation of complete chain of the events to conclusively establish guilt of the accused – suspicion is not a substantive prove – prosecution has failed to prove its case beyond the reasonable doubt.

Jail Appeal allowed. (Para-31) (E-2)

List of cases cited:-

1. Sharad Birdhich and Sarda Vs. St. of Maha., AIR 1984 SC 1622.

2. Joseph vs. St. of Kerala, [(2000) 5 SCC 197].

3. C. Chenga Reddy and others v. St. of A.P., AIR 1996 SC 3390.

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

5. St. of H.P. Vs. Raj Kumar, (2018) 2 SCC 69.

6. Vijay Shankar Vs. St. of Haryana, (2015) 12 SCC 644.

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

8. Raja @ Rajinder Vs. St. of Haryana, (2015) 11 SCC 43.

9. Balwinder Singh v. St. of Punjab, 1995 Supp (4) SCC 259.

10. Hanumant v. St. of M.P. AIR 1952 SC 343, 1953 CriLJ 129.

11. Chandru @ Chandrasekaran Versus State rep. By Dy Superintendent of police CB CID & Anr.

12. Ujjagar Singh v. St. of Punjab, (2007) 13 SCC 90 :(2009) 1 SCC (Cri) 272].

13. Mohibur Rahman and Anr. v. St. of Assam (2002) 6 SCC 715.

14. Arjun Marik and Ors. V. St. of Bihar 1994 Supp (2) SCC 372.

15. Godabarish Mishra v. Kuntala Mishraand Another (1996) 11 SCC 264.

16. Bharat v. St. of M.P (2003) 3 SCC 106.

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

1. This appeal has been preferred against the impugned judgment dated 24.10.2013 and order dated 25.10.2013, passed by learned Addl. District & Sessions Judge, Court No, 11, Agra in Session Trial No 1222/08 (State V Ajay & others) under Sections 302, 201, 376 and 120-B of Indian Penal Code (hereinafter referred as IPC), arising out of crime No. 246/08, PS Sadar, Agra, whereby accused-appellants Ajay and Vijay have been convicted under sections 302/34 and Section 376 of IPC and sentenced to imprisonment for life, with a fine of Rs.10,000/- and ten years rigorous imprisonment, with fine of Rs. 5000/- respectively. In default of payment of fine imposed under Section 302/34 IPC, appellants have to undergo one year additional rigorous imprisonment and in case of default of payment of fine imposed under Section 376 IPC, appellants have to undergo six months additional imprisonment. Both the sentences were directed to run currently. Co-accused Jamuna Devi was acquitted of charge u/s 120-B of IPC.

2. Prosecution version is that house of one Navratan Singh was being constructed in the premises adjoining to the house of complainant/PW-1 Lajjawati. On the night of 02.05.2008 at 8:00 PM, complainant's daughter Km. Manisha, aged about 9 years, was taking meal at the roof of her house and at that time, accused Ajay and Vijay were consuming liquor on the roof of under construction house of Navratan Singh. They have given a piece of ice to the complainant's daughter and she brought the same at her house, but she again went at the roof. At around 9:00 pm, complainant searched Manisha at roof, but she was not there. Accused-appellant Ajay and Vijay were also not there. While making search of deceased in and around, one Narayan Singh told the complainant that deceased Manisha was being taken away by accused Ajay and Vijay. However, despite sufficient efforts, Manisha could not be traced. On next day morning at about 6:00 am, complainant was informed that dead body of her daughter is lying in field of dairy farm. Complainant went there and saw that dead body of her daughter Manisha was lying there and that there were injuries on her body and she was bleeding at her private parts. Complainant has alleged that her daughter was molested and killed by accused Ajay and Vijay and thereafter, her dead body was concealed in the field of dairy farm.

3. Complainant/PW-1 Lajjawati, reported the matter to police by submitting written complaint Ex. Ka-1, and on that basis, case was registered against both the accused persons on 03.05.2008 at 8:35 AM under Section 376, 302, 201 of IPC vide FIR Ex. Ka-2.

4. Inquest proceedings were conducted by PW-8 S.I. Surendra Kumar Singh vide inquest report Ex. Ka-2 and the dead body of the deceased was sealed and sent for postmortem.

5. Postmortem on the dead body of deceased was conducted on 03.05.2008 by PW-4 Dr. Surendra Pakhwar, vide postmortem report Ex. Ka-4 and following injuries were found on the person of deceased:

(i) Rigor mortis present on lower part of body.

(ii) Two abrasions 1 cm x .5 cm right side of face distance between 1.5 cm.

(iii) Abrasion 5 cm x 3 cm area on the front of neck surrounding area- swelled.

(iv) pubic area labia majora swelled.

(v) Hyoid bone fractured.

As per Autopsy Surgeon, cause of death of the deceased was due to asphyxia caused by strangulation.

6. Investigation of case was taken up by PW-6 S.S.I. Surendra Nath. He has recorded the statements of witnesses and after completion of investigation, charge-sheet was filed in Court.

7. Trial Court framed charge under Sections 376, 302/34 and 120-B IPC against both the accused persons and they pleaded not guilty and claimed trial.

8. In order to bring home the guilt of accused-appellants, prosecution has examined eight witnesses. After prosecution evidence, accused persons were examined under Section 313 of Cr.P.C., wherein, they have denied the prosecution evidence and claimed false implication.

9. After hearing and analyzing the evidence on record, trial Court convicted both the accused appellants under Sections 302/34 and 376 IPC vide impugned judgment dated 24.10.2013 vide order dated 25.10.2013 they were sentenced, as stated in paragraph no.1 of this judgment.

10. Being aggrieved by the impugned judgment and order accused-appellants have preferred the present appeal.

11. Heard Sri Ajay Singh, learned Amicus Curiae for the appellants and Sri Amit Sinha, learned A.G.A for the State and perused the record.

12. Learned counsel for the appellants has submitted:

(i) that there is no eye-witness account to the alleged incident and that alleged evidence of 'last seen' by PW-3 Jaswant is highly improbable and there is no legal evidence against the appellants.

(ii) that alleged extra judicial confession made before PW-5 Tej Pal Singh, is not reliable. It was stated that PW-5 Tej Pal is uncle of deceased and it cannot be believed that accused persons would make extra judicial confession before uncle of deceased. Further, PW-5 Tej Pal has made inconsistent statement and his version is suffering from various infirmities and thus testimony of PW-5 is not reliable.

(iii) that prosecution case is based on circumstantial evidence, but chain of circumstances is not complete and that no incriminating circumstance has been proved against the appellants. There is absolutely no evidence that deceased was subjected to rape by the appellants.

(iv) that there are several material contradictions and inconsistencies in the statements of witnesses, which make the involvement of appellants fully doubtful.

13. Per contra, it has been submitted by learned State counsel that deceased was last seen in the company of accused persons and that both the accused-appellants have failed to put up any such case that deceased has parted away their company. Besides that, both the appellants have made extra judicial confession before PW-5 Tej Pal, which

has been proved in accordance with law. It was submitted that chain of circumstances is complete and all circumstances proved by prosecution point out the guilt of accused-appellants and that trial court was justified in convicting the appellants.

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

15. In evidence, PW-1 Lajjawati has stated that deceased, aged about 9 years, was her daughter. On 02.05.2008 at 8:00 pm deceased was having meal at her roof and adjacent to her house, on the roof of under construction house of one Jamuna Devi, accused Vijay and Ajay were consuming liquor. They have given ice piece to deceased and consequently, deceased has given the same to her, but deceased has again went at her roof. At around 9:00 pm, PW-1 Lajjawati searched her daughter at roof, but she was not found there and that Ajay and Vijay, who were sitting in adjacent roof, were also not there. While deceased was being searched, one Narayan Singh told her that he has seen accused Ajay and Vijay taking away her daughter and when he has asked them as to where they were taking away the deceased, they have told that they were taking her to shop to provide sweet dish. On the next day morning, PW-1 came to know that dead body of her daughter was lying in field of dairy farm. She went there and saw that there were injuries on the body of deceased and she was bleeding at her private parts. PW-1 Lajjawati has further stated that about 15 days prior to incident, on account of some dispute over purchasing some items from shop of Jamuna Devi, she has threatened to ruin her family and children. PW-1 has stated that Jamuna Devi has hatched a conspiracy with accused Ajay and Vijay and thereafter deceased was raped and murdered by Ajay and Vijay.

16. PW-2 constable Umesh Kumar is a formal witness, who has recorded FIR.

17. PW-3 Jaswant has stated that both accused Ajay and Vijay used to work at house of Jamuna Devi. On 02.05.2008 at about 9:00 PM, when he was coming to his home, accused Ajay and Vijay were taking away deceased Manisha and when he inquired, they have told that they were taking deceased to provide her some sweet dish. When he reached in front of house of Jamuna Devi, she has also told that accused Ajay and Vijay have taken away deceased to provide her some sweet dish. On next day morning, he came to know that deceased has gone missing and after that he came to know that deceased has been murdered. As per PW-3 Jaswant, deceased was raped and murdered by accused Ajay and Vijay and that Jamuna Devi was also involved in this incident and she has got committed this crime from Ajay and Vijay.

18. PW-4 Dr. Surendra Kumar has conducted postmortem on the dead body of deceased vide postmortem report Ex. Ka-4.

19. PW-5 Tej Pal stated that on 02.05.2008 at around 8:30 pm when he was present at Sewla stand, accused Ajay has met him and told that he (PW-5 Tej Pal) has good relations with MLA Gorelal and he needs his help. PW-5 Tej Pal stated that Ajay told him that under influence of liquor, they both have done

evil act with deceased Manisha and thereafter he and Vijay have committed her murder and thus Ajay has sought help from PW-5 Tej Pal but he has refused to help them.

20. PW-7 S.S.I. Anand Kumar Singh, has conducted initial investigation. He has prepared site plan of spot vide Ex. Ka-5. Sleepers and underwear of deceased were taken into possession vide seizure memo Ka-6. Clothes of accused Ajay were also seized vide Ex Ka-7. PW-6 SSI Surendra Nath has conducted subsequent investigation. He has recorded statements of witnesses and has filed charge-sheet

21. PW-8 S.I. Surendra Kumar, has conducted the inquest proceedings.

22. In this case, there is no eye-witness account to the alleged incident and that the case is based on circumstantial evidence. It is well settled that though conviction can be based on circumstantial evidence alone, but for that prosecution must establish chain of circumstances, which consistently points to the guilt of accused and accused alone and is inconsistent with their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, accused and none else have committed the offence. In landmark judgment of Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622**, Hon'ble Apex Court held as under:-

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

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

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

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

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human

probability the act must have been done by the accused.

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

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

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

Similar view has been expressed in Padala Veera Reddy v. State of Andhra Pradesh, (AIR 1990 SC 79). In ***C. Chenga Reddy and others v. State of Andhra Pradesh, AIR 1996 SC 3390***, the Court held:-

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

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

In ***State of Himachal Pradesh Vs. Raj Kumar, reported in (2018) 2 SCC 69***, the Court was considering a case based on circumstantial evidence and taking note of the well settled legal position, in Paragraph 9 and 10, the court held:-

"9. Prosecution case is based on circumstantial evidence. It is well settled that in a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established and that those circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused. Moreover all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

10. In a case, based on circumstantial evidence, the inference of guilt can be drawn only when all the

incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In ***Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681****, it was held as under:-*

"12. .....The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

The same principle was reiterated in State of Rajasthan v. Kashi Ram (2006) 12 SCC 254, Ganesh Lal v. State of Rajasthan (2002) 1 SCC 731, State of Maharashtra v. Suresh (2000) 1 SCC 471 and State of Tamil Nadu v. Rajendran (1999) 8 SCC 679.

In **Vijay Shankar Vs. State of Haryana, reported in (2015) 12 SCC 644**, although the case was based on last seen theory, the Court discussed the principles in respect of evidentiary value and held in Paragraph 8 as under:-

"8. There is no eye-witness to the occurrence and the entire case is based upon circumstantial evidence. The normal principle is that ***in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*** *that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence vide* ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116.*** *The same view was reiterated in* ***Bablu vs. State of Rajasthan, (2007) 2 SCC (Cri). 590."***

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

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

In **Raja @ Rajinder Vs. State of Haryana, reported in (2015) 11 SCC 43**, Court noted down the circumstance with which the court should be satisfied

in a case based on circumstantial evidence alone and held as under:-

"10. As the factual matrix would show, the case of the prosecution entirely hinges on circumstantial evidence. When a case rests on circumstantial evidence, the Court has to be satisfied that:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

In ***Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259***, it has been laid down that:-

"4. ..the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, howsoever strong they may be, to take the place of proof."

The law with regard to appreciation of circumstantial evidence has been clearly enunciated in the case of **Hanumant v. State of Madhya Pradesh AIR 1952 SC 343, 1953 CriLJ 129**, wherein the Apex Court held as follows:

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

In case of **Chandru @ Chandrasekaran Versus State rep. By Dy Superintendent of police CB CID & Anr**, Criminal Appeal No. 1193 of 2011 decided on 12.02.2019, after referring to above stated case of Hanumant v. State of Madhya Pradesh (supra), it has been observed by the Hon'ble Supreme Court that this law has been consistently followed and has been repeated in catena of authorities. It is not necessary to refer to all the authorities. The law can be summarised in the following terms:

1, The circumstances relied upon by the prosecution which lead to an inference to the guilt of the accused must be proved beyond doubt;

2, The circumstances should unerringly point towards the guilt of the accused;

3, The circumstances should be linked together in such a manner that the cumulative effect of the chain formed by joining the links is so complete that it leads to only one conclusion i.e. the guilt of the accused;

4, That there should be no probability of the crime having been committed by a person other than the accused.

From the aforesaid authorities, it is clear that in a case based on circumstantial evidence, Court is required to evaluate circumstantial evidence to see that the chain of events have been established clearly and completely to rule out any reasonable likelihood of innocence of the accused. Needless to say whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted *[See Ujjagar Singh v. State of Punjab, (2007) 13 SCC 90 : (2009) 1 SCC (Cri) 272]*. The principle that emerges from the above discussed decisions is that conviction can be based solely on circumstantial evidence, but it should be tested on the touchstone of law relating to circumstantial evidence laid down by the Hon'ble Apex Court.

23. Keeping in view the above stated position of law, when we revert to the facts of present case, one of the circumstance relied by prosecution is that deceased was last seen in the company of both accused persons. In this regard, statement of PW-1 Lajjawati is to the effect that on 02.05.2008 at 8:00 PM, on the roof of adjoining under construction house, both the accused appellants Ajay and Vijay were having liquor and that they have given an ice piece to deceased girl, which was given by deceased to PW-1 Lajjawati and that deceased girl again went to the roof and at around 9:00 PM, when PW-1 went at the roof to look the deceased, she was not found there and both the accused appellants were also not there. PW-1 Lajjawati has also stated that while making search for deceased, Narayan Singh and Jaswant Singh have told her that they have seen that deceased was being taking away by both the accused persons and that accused persons have told that they were taking the deceased for providing her some sweet dish. It is not in dispute that dead body of deceased was recovered next day morning in the field near the dairy farm. Alleged Narayan Singh has not been examined by the prosecution. In her cross-examination, PW-1 Lajjawati has admitted that above stated Jaswant is her brother and that she has neither seen the incident, nor she has seen the accused persons taking away her daughter. She has clarified that she has not seen as to when her girl has gone, but deceased has brought an ice piece at around 8.00-9.00 PM and she has told her that it was given by accused persons. Considering statement of PW-1 Lajjawati in its entirety, it is apparent that there is no categorical version of PW-1 Lajjawanti that she has seen the deceased girl with accused appellants at the alleged adjoining roof of under construction house, rather her version is that she was told by her daughter (deceased) that she was given an ice piece by accused appellants. Thus, it is clear that PW 1 Lajjawanti has not seen the deceased in

the company of accused persons and her version is that when she was searching her daughter, PW 3 Jaswant has told that he has seen that the deceased was being taken away by accused persons.

24. So far as testimony of PW 3 Jaswant is concerned, it may be noticed that he is brother of complainant. PW-1 Lajwanti has stated in her cross-examination that Jaswant has told her on the same night that he has seen accused appellants Ajay and Vijay taking away the deceased girl but in the night no report was lodged. PW-3 Jaswant has stated that on 02.05.2008 at around 9:00 PM, he has seen that deceased girl was being taken away by accused-appellants Ajay and Vijay and on inquiry, they have told that they were taking the deceased girl to provide her some sweet dish and that when PW-3 Jaswant reached in front of the house of Jamuna Devi, he was told by Jamuna Devi that accused persons have taken away deceased girl by informing her. In his cross-examination, PW-3 Jaswant has stated that at the time of incident, he was with his sister Lajjawati, whereas on other hand he has stated that it was at about 6:00 AM on next day, when he came to know that Manisha (deceased) was missing and that he has not made any search for Manisha. Thus, on the other hand, PW 3 Jaswant states that on 02.05.2008 at about 09.00 PM, he has seen that accused-appellants were taking away the deceased and he has told this fact to PW 1 Lajjawanti and that on that night he was with Lajjawanti and on the other, he says that he came to know next day at 06.00 AM that deceased was missing. Further, version of PW 1 Lajjawanti is that when she was making search of deceased, she was told by PW-3 Jaswant that deceased was taken away by accused-appellants, but PW-3 Jaswant has stated that he has not made any search of deceased on that night and he came to know on next day morning that deceased was missing. All these facts raise doubt about authenticity of the version of PW 3 Jaswant. It may be seen that PW-1 Lajjawati has stated that when she was making search for her daughter, she has also made inquiry from accused Ajay and Vijay, but they have told that deceased girl was not with them, whereas her version in examination-in-chief is that while she was making search for her daughter, she was told by PW-3 Jaswant that deceased was seen going with accused Ajay and Vijay. If it was so, it was quite natural that report must have been lodged against accused Ajay and Vijay in the night of that day itself, but FIR has been lodged on the next day after recovery of dead body. Further statement of PW-3 Jaswant, in his cross-examination, is to the effect that he came to know on the next day morning at 6:00 AM that deceased was missing. Here, it may also be stated that PW-3 Jaswant is brother of PW-1 Lajjawati and that PW-1, in her cross-examination, has stated that her brother Jaswant was not residing in Agra, rather he was residing in Bharatpur, but he used to run a shop in Agra. Considering the inconsistencies and infirmities emerged in statement of PW-3 Jaswant, his statement, that he has seen that deceased was being taken away by accused appellants, does not inspires confidence.

25. After considering the entire evidence, it is apparent that PW-1 Lajjawanti has not seen the deceased in the company of accused-appellants and that statement of PW 3 Jaswant, that he has seen the accused-appellants while

they were taking away deceased, is also suffering from material inconsistencies and infirmities and does not inspire confidence. Here, it has also to be kept in mind that PW-3 Jaswant is brother of PW-1 Lajjawant and that independent witness of alleged 'last seen' namely Narayan, has not been examined by the prosecution. Considering the entire evidence in attending facts and circumstances of the case, it is clear that there is no cogent evidence that deceased was last seen in the company of accused-appellants.

26. Here it may be stated that in **Mohibur Rahman and Anr. v. State of Assam (2002) 6 SCC 715**, the Hon'ble Apex Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in **Arjun Marik and Ors. V. State of Bihar 1994 Supp (2) SCC 372**, it was reiterated by the Hon'ble Supreme Court that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in **Godabarish Mishra v. Kuntala Mishraand Another (1996) 11 SCC 264**, the Supreme Court held that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In **Bharat v. State of M.P (2003) 3 SCC 106**; two circumstances on the basis whereof the appellant had been convicted were (i) the appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. The Supreme Court held:

"Mere non-explanation cannot lead to the proof of guilt against the appellant. The prosecution has to prove its case against the appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the appellant."

Applying the aforesaid legal preposition in the present case, it is quite apparent that the neither the chain of circumstances is complete nor the alleged circumstance of last seen has been established.

27. So far as alleged extra judicial confession made by accused Ajay before PW-5 Tej Pal is concerned, it may be stated that PW 5 Tej Pal has admitted in his cross-examination that he is real uncle of deceased Manisha and thus, it appears highly improbable that accused would make any such confession before him. Further, there is nothing to indicate that PW-5 Tej Pal was a person of such status or position that he could have helped the accused in said case. Even otherwise, the version of this witness PW-5 Tej Pal is quite inconsistent. In his cross-examination, he goes to say that deceased girl was killed in his presence, while there is absolutely no such prosecution version

that incident took place in front of PW-5 Tej Pal. No such statement was made by him during investigation. After recovery of dead body, PW-5 Tej Pal has neither informed this fact to the complainant nor to the police. However, in his further cross-examination, he back-tracks and says that he has not seen the incident by his own eyes and that the fact stated by him earlier, that he has seen the incident, is false. He has also stated that at the time of recovery of dead body, accused Ajay has also met there and he was dragged by him to the house of Lajjawati, while there is no such prosecution version. In view of cross-examination of PW-5 Tej Pal, he appears thoroughly unreliable witness. The trial court has also disbelieved the evidence of this witness. In view of all these facts, it is apparent that prosecution could not establish alleged extra judicial confession.

28. In view of evidence available on record, it appears that there is no categorical and reliable evidence that deceased was last seen with the accused persons. Similarly, alleged extra judicial confession could also not be established. Here it would be relevant to mention that no recovery of any incriminating article has been made from accused-appellants or at the instance of accused-appellants. Though alleged circumstance of 'last seen' has not been established, but it would also be relevant to mention that there is time gap of whole night between alleged last seen and recovery of dead body of deceased. It is established from medical evidence that before her murder, deceased was subjected to rape, however, there is no such forensic report to connect the accused-appellants with said rape and murder of deceased.

29. No doubt, the incident in question is quite heinous as a nine years old innocent girl was ravished and brutally done to death, however suspicion howsoever grave, cannot take place of proof. As held in the case of Balwinder Singh (supra), in a case based on circumstantial evidence, the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, howsoever strong they may be, to take the place of proof. In this case, after taking into consideration the totality of the facts and circumstances of the case and the evidence led on record by the prosecution, we find that many important links are missing so as to form the complete chain of evidence, which could conclusively establish the guilt of the accused persons. The only incriminating evidence against the accused persons, that the deceased was last seen in their company, has not been fully established. The circumstantial evidence relied upon by the prosecution does not satisfy the test laid down by the Hon'ble Apex Court through various pronouncements. Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the prosecution has miserably failed to prove its case against the appellants beyond reasonable doubt that the appellants and they alone committed the offence.

30. In view of the above, it will not be safe to uphold the conviction of the accused appellants Ajai and Vijai in commission of rape and murder of the deceased. The accused-appellants Ajai and Vijai deserve for benefit of doubt.

31. Appeal succeeds and is allowed. The impugned judgment and order dated 24.10.2013/25.10.2013 passed by the Trial Court is hereby set aside and both accused-appellants Ajay and Vijay, are acquitted of the charges levelled against them. Both accused-appellants Ajai and Vijai are in jail, they shall be released forthwith if not required in any other case.

32. We appreciate the assistance rendered Sri Ajay Singh, learned Amicus Curiae and it is directed that he shall be paid Rs 7000/ (Rs Seven thousands) by State Government.

33. A copy of this judgment be sent to the court concerned forthwith for necessary compliance.
