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ALLAHABAD SERIES

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(2020)11ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.11.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 6016 of 2008

Smt. Uma Mukerji ...Petitioner
Versus
The Board of Revenue, Allahabad ...Respondent

Counsel for the Petitioner:
D.C. Mukerji, Devendra Mohan Shukla, Dhruv Mathur, K.K. Sharma, Lalta Prasad Misra, Rajeiu Kumar Tripathi, Sharavan Kumar Shukla

Counsel for the Respondents:
C.S.C., G.S. Nigam, Mohammed Aslam Khan, Mohd. Adil Khan

A. Practice & Procedure - Review - admissibility of engaging fresh counsel to argue a review petition - not open for a fresh counsel engaged for arguing the review petition to say that certain arguments were advanced at the time of initial hearing of the writ petitions but same were not considered by the Court - Constitution of India - Article 22 - has no concern with the right of a fresh counsel to be engaged and to argue a review petition relating to certain property dispute between the parties - Article 22 relates to life and liberty, arrest and detention being carried out without the grounds of such arrest being communicated to the detenue (Para 21)

B. Practice & Procedure - Written Submission filed after judgment reserved - Court is only bound to consider those arguments that are raised and pressed during the hearing in open Court - practice of introducing new grounds by way of written submissions after arguments are over and judgment is reserved not only prejudice the opponents of such parties, but amounts to taking unfair and undue advantage of the liberty granted by the Court (Para 15,16)

Dismissed (E-5)

List of Cases cited:-

1. M. Poornachandran Vs St. of T.N. (1996) 6 SCC 755

2. T.N. Electricity Board & anr. Vs N. Raju Reddiar & anr. (1997) 9 SCC 736

3. Raj. Agricultural University Vs Ram (1999) 4 SCC 196

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

1. Heard.

2. Dr. L.P. Misra, Advocate, assisted by Sri Devendra Mohan Shukla, and Sri Rajeiu Kumar Tripathi, learned counsel for the review petitioners, has pointed out that this Court in its order dated 03.11.2020 has wrongly referred to the arguments raised by him in its paragraph-4. He says that it has inadvertently been stated in the order dated 03.11.2020 that Sri Rajieu Kumar Tripathi, Advocate, had also argued the matter and was present in the Court, however now he has been instructed to say that Sri Rajeiu Kumar Tripathi, Advocate, was not present during the arguments of Writ Petition No.6016 (M/S) of 2008 connected with Writ Petition No.5292 (M/S) of 2010 and only Sri Devendra Mohan Shukla, Advocate, was present along with Sri Dhruv Mathur, Advocate, who have argued both the writ petitions.

3. Dr. L.P. Misra, Advocate, has tried to distinguish the judgements cited by the

learned counsel for the private respondents on earlier occasion regarding the admissibility of engaging a fresh counsel to argue a review petition. He says that in the judgment rendered by Hon'ble Supreme Court in ***M. Poornachandran Vs. State of Tamil Nadu, (1996) 6 SCC 755,*** the civil appeal was filed by one Sudarsh Menon, the Advocate-on-Record and it was heard and decided on merits. Later on, a review petition was filed by one Prabir Chowdhury, who was neither the arguing counsel nor he was present at the time of arguments. It was in this context, the Hon'ble Supreme Court has observed that it is not known on what basis the new counsel had written the grounds in the Review Petition, as if it is hearing of an Appeal against the court's own order and had taken grounds which were beyond the scope of the review. The Hon'ble Supreme Court had therefore observed that it would not be in the interest of the profession to permit such practice. Moreover, the new counsel had not taken the No Objection Certificate from the Advocate-on-Record in the Appeal inspite of the fact that Registry had pointed out this fact to him. Filing of the No Objection Certificate would be the basis for him to come on record and an Advocate-On-Record is answerable to the Court. The failure to obtain No Objection Certificate from the erstwhile counsel had dis-entitled the new counsel to file the review petition. The review petition was therefore dismissed by Hon'ble Supreme Court with the observations that it was an attempt to re-argue the matter by the new counsel.

4. Dr. L.P. Misra, Advocate, says that the judgment in *M. Poornachandran (supra),* is inapplicable to the facts of this particular case as Sri Devendra Mohan Shukla, Advocate, who was the Advocate-on-Record in the earlier round of litigation, is the person who has drafted the review petition, and as also the Advocate who is assisting Dr. L.P. Misra, Advocate in his argument in the review petition. Hence this Court may ignore the judgment of Hon'ble Supreme Court as it is distinguishable on facts.

5. It has also been submitted by Dr. L.P. Misra, Advocate, that the judgment rendered by Hon'ble Supreme Court in ***Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another, (1997) 9 SCC 736,*** the other judgment on which the counsel for the private respondent has relied, is also inapplicable to the facts of the present case. He says that in *Tamil Nadu Electricity Board* (supra), the review petition had been styled as 'application for clarification', on the specious plea that the order was not clear and unambiguous. The counsel who had filed the said application for clarification was not the Advocate-on-Record and had neither appeared nor was a party in the main case. The Hon'ble Supreme Court had also observed that the change of counsel had been carried out without obtaining consent of the earlier Advocate-on-Record, which was not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary tradition of profession. The Court had referred to its earlier order passed in *M. Poornachandran* (supra) and observed that Advocate-on-Record being answerable to the Court, only he should have been heard or at least his No Objection Certificate should have been taken before filing the application for clarification. It has been submitted that Sri Devendra Mohan Shukla, Advocate, was the Advocate-on-Record in the earlier round of litigation and he has also drafted the review petition and is also instructing Dr. L.P. Misra,

Advocate, who is the arguing counsel, therefore, the judgment rendered in *Tamil Nadu Electricity Board* (supra) is distinguishable.

6. Dr. L.P. Misra, Advocate, has also argued that under Article 22 of the Constitution of India, a litigant is entitled to protect his life and liberty by engaging a counsel of his choice and it would be a violation of Article 22 of the Constitution of India, in case this Court does not permit the litigant/ review petitioner to engage any counsel of its choice to argue on the review petition as the judgment affects the life and liberty of the review petitioner.

7. Sri Mohd. Arif Khan, learned Senior Advocate, assisted by Mohd. Aslam Khan, learned counsel for the private respondent, has countered such argument made by Dr. L.P. Misra, Advocate, to the preliminary objection raised by him as recorded in the order dated 03.11.2020 passed by this Court. He says that Dr. L.P. Misra was not arguing the matter at the time when the Court heard the parties in detail and passed its judgment dated 30.07.2020. Sri Devendra Mohan Shukla, Advocate, may have assisted Sri Dhruv Mathur but the arguing counsel was Sri Dhruv Mathur at the time of initial hearing of the writ petitions and regarding their consideration in the judgment.

8. Learned counsel has referred to the strict language of Hon'ble Supreme Court in the case of *M. Poornachandran* (supra), which refers to change of counsel to file and argue the review petition and says that "it would be not in the interest of the profession to permit such practice. More so, when there was an attempt to re-argue the matter by the new counsel."

9. Learned Senior Advocate has also referred to the language of the judgment rendered by Hon'ble Supreme Court in *Tamil Nadu Electricity Board* (supra) to say that it is a new practice which is unbecoming and not worthy of, or conducive to the profession to engage fresh counsel to argue a review petition or clarification application as the earlier Advocate-on-Record is answerable to the Court and being answerable is also responsible.

10. Learned Senior Advocate has referred to placitum 'b' of paragraph-1 of the judgment in *Tamil Nadu Electricity Board* (supra) to say that change in counsel leads to fresh arguments being raised which is only an attempt for hearing the matter again on merits. He has referred to paragraph-2 of the judgment also to say that this practice of changing the advocates and filing repeated review petitions should be deprecated with a heavy hand for purity of administration of law and salutary and healthy practice of the Bar.

11. Sri Mohd. Arif Khan, learned Senior Advocate, has also referred to certain grounds raised in the review petition to say that the review petitioner attempts to argue afresh before this Court by placing before this Court certain arguments saying that they were advanced at the time of initial hearing of the writ petitions but were not considered by the Court. It has been stated in the review petition also that in the written submissions certain grounds were taken by the writ petitioners which have not been considered while dictating the judgment by this Court.

12. Dr. L.P. Misra, Advocate, says that such preliminary objection as raised by Sri Mohd. Arif Khan, learned Senior

Advocate, must be confined only to the permissibility of hearing of another advocate engaged for arguments in the review petition, and learned senior advocate of the respondents should desist from pointing out paragraphs/ grounds in the review petition as it would amount to arguing the review petition also on merits.

13. This Court finds from the arguments raised by both the counsel that on one hand Sri Mohd. Arif Khan, learned senior advocate, seeks to rely upon the judgments rendered by Hon'ble Supreme Court as cited hereinabove, and on the other hand Dr. L.P. Misra, Advocate, seeks to distinguish the judgments only on the ground that in those cases the Advocate-on-Record has been changed while filing the review petition without obtaining the No Objection Certificate from the earlier counsel.

14. This Court does not find any merits in the arguments raised by Dr. L.P. Misra, Advocate, that the Advocate-on-Record in this case is the same i.e. Devendra Mohan Shukla. It is the case of Sri Devendra Mohan Shukla, Advocate that Sri Dhruv Mathur, Advocate, is now unavailable for arguments for reasons best known to him.

15. This Court is of the considered opinion that the arguments should be made by the counsel before this Court accepting full responsibility regarding correctness and also for the consequences that may arise therefrom. It is not good practice to first argue the matter and when the judgment is reserved with liberty to file written arguments, pointing out in the review petition that written arguments have not been considered in their entirety. This Court is only bound to consider those arguments that are raised and pressed during the hearing in open Court, as has been held by Hon'ble Supreme Court in ***Rajasthan Agricultural University Vs. Ram 1999 (4) SCC 196.***

16. The practice of introducing new grounds by way of written submissions after arguments are over and judgment is reserved not only prejudice the opponents of such parties, but amounts to taking unfair and undue advantage of the liberty granted by the Court. Later on, if the Court refuses to consider these new grounds, a grievance is invariably made either in a review petition or otherwise, that the Court has omitted certain material from consideration and therefore the order is erroneous.

17. It is not open for a fresh counsel engaged for arguing the review petition to say that the matter was argued in a particular manner by the arguing counsel in the writ petition and certain points were raised by that arguing counsel while the arguing counsel has not come forward to point out the mistake of the Court or the error apparent on the face of the record, in the limited scope for review petition.

18. This Court would have permitted Sri Devendra Mohan Shukla, Advocate, to argue the matter as he was present at the time when the writ petitions were heard and judgment was reserved. It cannot permit Dr. L.P. Misra, Advocate, to now come forward and raise arguments regarding the review petition saying that there is an error apparent on the face of the record only because certain arguments raised by Sri Dhruv Mathur, Advocate, were not considered by this Court at the time of passing of the judgement. More so, when Dr. L.P. Mishra, Advocate, claims that such

instructions have been given to him by Sri Devendra Mohan Shukla, Advocate. It would only amount of hearsay as Dr. L.P. Misra was not present at the time of arguments and he has been instructed by Sri Devendra Mohan Shukla to say that Sri Dhruv Mathur had argued the matter on certain points which were not considered by the Court while passing the judgment.

19. As regards the arguments made by Dr. L.P. Misra, Advocate, regarding Article 22 of the Constitution of India and that it would be a violation of Article 22 of the Constitution if this Court does not permit a litigant to engage a counsel of his choice; it would be suffice to say that the language of Article 22(1) of the Constitution of India is very clear, which is quoted hereinbelow:-

*"**22. Protection against arrest and detention in certain cases.**- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."*

20. Dr. L.P. Misra, Advocate, wants this Court to ignore the first half of clause-1 of Article 22 only to consider the second half of clause-1 of Article 22, which says that a person may not be denied " the right to consult, and to be defended by, a legal practitioner of his choice."

21. This Court cannot ignore the context in which such an observation has been made by the framers of the Constitution. It relates to life and liberty, arrest and detention being carried out without the grounds of such arrest being communicated to the detenue and it has no concern at all with the right of a fresh counsel to be engaged and to argue a review petition relating to certain property dispute between the parties.

22. Sri Devendra Mohan Shukla, Advocate, at this stage has submitted that he may be permitted to approach Sri Dhruv Mathur, Advocate, for arguing this review petition and in case of his inability to argue, Sri Devendra Mohan Shukla, Advocate, may be permitted to argue the review petition.

23. The permission as prayed for is granted.

24. **List this case in the first week of December, 2020.**

(2020)11ILR A5
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.11.2020

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Misc. Single No. 12536 of 2020
with
Misc. Single No. 12498 of 2020
and other cases

Zee College of Pharmacy, Unnao ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Utsav Mishra

Counsel for the Respondents:
C.S.C., Atul

Civil law - Pharmacy Act, 1948 - Pharmacy Council of India (PCI) – Power of State Govt. viz-a-viz PCI- PCI is the apex statutory body & final authority for

Pharmacy education - State Government and all concerned are bound to follow the policy of PCI - Once PCI had taken a policy decision with regard to norms for opening new pharmacy institutions or permission for new pharmacy courses in the existing approved pharmacy institutions, it was beyond the ambit of the State Government or any of its committees to take a stand at variance with that of PCI. (Para 9)

PCI policy decision dated 09.09.2019 allowing existing approved pharmacy institutions to start additional pharmacy courses - Petitioners were already running Diploma courses under approval of PCI, applied for approval of Bachelor of Pharmacy course - State Review Committee rejected the proposals of the petitioners by the impugned decision - Held - it was beyond the ambit of the State Government or any of its committees to take a stand at variance with that of PCI (Para 9)

Allowed (E-5)

List of Cases cited:-

1. Jaya Gokul Educational Trust Vs Commissioner & Secretary to Government Higher Education Department, Thiruvananthapuram, Kerala State & anr. (2000) 5 SCC 231

2. State of Maha Vs Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya & ors. (2006) 9 SCC 1

3. The Pharmacy Council of India Vs Dr. S.K. Toshiwal Educational Trusts Vidarbha Institute of Pharmacy & ors. Etc (2020) SCC 296

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. As counselling was due Supreme Court required this court to decide the matter on the date it is listed. Therefore, on 21.10.2020 the present bunch of petitions was heard and operative portion was pronounced in court providing that reasons shall follow, hence present detailed judgment.

2. I have heard Dr. L.P. Mishra, learned Advocate assisted by Sri Utsav Mishra, learned counsel for petitioners in leading case, Sri Rajat Rajan Singh, Sri Dharm Raj Mishra, Sri Piyush Kumar Agarwal, Sri Paavan Awasthi, learned counsels for petitioners in connected cases, learned standing counsel for State of UP, Sri Atul Kumar Dwivedi, learned counsel for respondent No.3-Dr. APJ Abdul Kalam Technical University and Sri Ravi Singh, learned counsel for Pharmacy Council of India (PCI).

3. Petitioner pharmacy colleges have approached this Court against the recommendation/decision dated 15.05.2020 of the Review Affiliation Committee of the State of UP refusing No Objection Certificate (NOC) to the petitioner institutions for recognition of additional course of Bachelor in Pharmacy. The review committee consists of senior officers of State of UP and of the affiliating university. The said decision of the Review Affiliation Committee is later approved by the State Government. Petitioners are pharmacy colleges who were granted approval for running diploma courses in Pharmacy for academic year 2019-20 by the PCI. In its 106th Central Council meeting held on 9th and 10th April, 2019, PCI resolved to put a moratorium on the opening of a new pharmacy colleges for running diploma as well as degree course in pharmacy for a period of five years, beginning from the academic year 2020-21. The said decision was duly circulated to all the concerned by a communication dated 17.07.2019. In its 107th Central Council meeting held on 5th and 6th August, 2019, PCI carved out certain exceptions to the said policy. The same were also circulated by PCI through its communication dated 09.09.2019. Relevant exception for our

purposes is *"(e) Existing approved pharmacy institutions will be allowed to apply for increase in intake capacity as per P.C.I. norms and/or to start additional pharmacy courses."* Petitioners, who were already running Diploma courses under approval of PCI, applied for approval of Bachelor of Pharmacy course from the academic year 2020-21, which was also granted by PCI, it being subject to consent of Affiliation of Examining Authority and No Objection Certificate and approval of the State Government. The State Review Committee rejected the proposals of the petitioners by the impugned decision dated 15.05.2020 on the ground that colleges in surplus of present requirement are being run in the State and new colleges should be permitted only in districts which do not have such Colleges or where admission of students is in excess of 80% of the capacity.

4. The submission on behalf of petitioners is that once PCI has taken a policy decision, taking into consideration the difficulties being faced by Pharmacy colleges due to excess number of colleges coming into place and has prescribed the norms on the said issue for the entire country, it is beyond the purview of the State Government or its Committee to prescribed different norms. Any policy decision which stands pronounced for the entire country by the PCI, apex statutory body, has to be complied by the State Government in letter and spirit. Counsel for PCI supports the contention of the petitioners.

5. Learned Standing Counsel and learned counsel for University strongly dispute the same and place reliance upon the approval letter of PCI which provides that the same is subject to consent of Affiliation of Examining Authority and No Objection Certificate/ approval of the State Government. Respondents argue that thus State Government has sufficient power to place any conditions, including those divergent to the policy of the PCI, while granting approval for new courses in the existing colleges also.

6. The dispute with regard to power of the State Government to take policy decisions viz-a-viz the apex statutory body, All India Council for Technical Education(AICTE) in the given case, with regard to technical education came up for consideration before the Supreme Court in the Case of ***Jaya Gokul Educational Trust Vs. Commissioner & Secretary to Government Higher Education Department, Thiruvananthapuram, Kerala State and another1.*** In the said case, the State of Kerala had taken a policy decision, not to grant approval for establishment of further more engineering colleges in the State, which was at variance with the decision of AICTE. The relevant paragraph 27 of the judgment, settling the issue, reads:

"27. The so-called "policy" of the State as mentioned in the counter affidavit filed in the High Court was not a ground for refusing approval. In Thirumuruga Kirupananda & Variyar Thavathiru Sundara Swamigal Medical Educational & Charitable Trust V. State of T.N. [1996] 3 SCC 15, which was a case relating to medical education and which also related to the effect of a Central law upon a law made by the State under Entry 25 List III, it was held (at SCC p. 35, para 34) that the

"essentiality certificate cannot be withheld by the State Government on any policy consideration because the policy in the matter of establishment of a new

medical college now vests with the Central Government alone".

Therefore, the State could not have any "policy" outside the AICTE Act and indeed if it had a policy, it should have placed the same before the AICTE and that too before the latter granted permission. Once that procedure laid down in the AICTE Act and regulations had been followed under Regulation 8(4), and the Central Task Force had also given its favourable recommendations, there was no scope for any further objection or approval by the State. We may however add that if thereafter, any fresh facts came to light after an approval was granted by the AICTE or if the State felt that some conditions attached to the permission and required by the AICTE to be complied with, were not complied with, then the State government could always write to the AICTE, to enable the latter to take appropriate action.

Decision of University in not granting further or final affiliation wrong on merits. "

7. The aforesaid judgment of ***Jaya Gokul Educational Trust (supra)*** was again followed by the Supreme Court in the case of ***State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others2.*** In paragraphs 63, 64, and 68 of the said judgment, the Supreme Court again retreating its earlier view that final authority lies with the apex technical body (NCTE) only.

The said paragraphs read:

"63. In the instant case, admittedly, Parliament has enacted the 1993 Act, which is in force. The Preamble of the Act provides for establishment of National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development of the teacher-education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher-education system and for matters connected therewith. With a view to achieving that object, National Council for Teacher Education has been established at four places by the Central Government. It is thus clear that the field is fully and completely occupied by an Act of Parliament and covered by Entry 66 of List I of Schedule VII. It is, therefore, not open to the State Legislature to encroach upon the said field. Parliament alone could have exercised the power by making appropriate law. In the circumstances, it is not open to the State Government to refuse permission relying on a State Act or on "policy consideration".

64. Even otherwise, in our opinion, the High Court was fully justified in negativing the argument of the State Government that permission could be refused by the State Government on "policy consideration". As already observed earlier, policy consideration was negatived by this Court in Thirumuruga Kirupananda Trust, as also in Jaya Gokul Educational Trust.

68. In view of the fact, however, that according to us, the final authority lies with NCTE and we are supported in taking that view by various decisions of this Court, NCTE cannot be deprived of its authority or power in taking an appropriate decision under the Act irrespective of absence of No Objection Certificate by the State Government/Union Territory. Absence or non-production of NOC by the institution, therefore, was immaterial and irrelevant so far as the power of NCTE is concerned. "

8. So far as the status of PCI is concerned, in the case of ***The Pharmacy Council of India Vs. Dr. S.K. Toshiwal Educational Trusts Vidarbha Institute of Pharmacy and Ors. Etc.3,*** the issue,

whether PCI or AICTE shall be the apex body in the field of pharmacy education, came up before supreme court. Supreme Court after detailed consideration both the Acts concerned, in paragraph 87 concluded:

"87. In view of the above and for the reasons stated above, it is held that in the field of Pharmacy Education and more particularly so far as the recognition of degrees and diplomas of Pharmacy Education is concerned, the Pharmacy Act, 1948 shall prevail. The norms and regulations set by the PCI and other specified authorities under the Pharmacy Act would have to be followed by the concerned institutions imparting education for degrees and diplomas in Pharmacy, including the norms and regulations with respect to increase and/or decrease in intake capacity of the students and the decisions of the PCI shall only be followed by the institutions imparting degrees and diplomas in Pharmacy. The questions are answered accordingly. "

9. Nothing displacing the aforesaid judgments has been placed by the respondents before this court. In view of the aforesaid settled legal position, there is no dispute that PCI is the final authority for Pharmacy education whose decisions are to be followed by all concerned. Once PCI had taken a policy decision with regard to norms for opening new pharmacy institutions or permission for new pharmacy courses in the existing approved pharmacy institutions, it was beyond the ambit of the State Government or any of its committees to take a stand at variance with that of PCI. The State Government and all other concerned are bound to follow the policy of PCI.

10. In view of above, all the writ petitions are **allowed.**

11. The impugned decision dated 15.05.2020 is set aside to the extent the same relates to the petitioner institutions only. The petitioner institutions are permitted to participate in the counselling being conducted for admission to Bachelors of Pharmacy course for the academic year 2020-21. The respondents are directed to immediately take required steps for the same.

(2020)11ILR A9
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.11.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SAURABH LAVANIA, J.

P.I.L. CIVIL No. 19497 of 2020

Narendra Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shobhit Kant

Counsel for the Respondents:
C.S.C., Rishabh Kapoor

Constitution of India, Art.226 - Allahabad High Court Rules - Chapter XXII Rule 1 Sub-Rule (3-A) - Public Interest Litigation (P.I.L.) - Essential facts to be stated in petition - petitioner must give his credentials, state public cause he is seeking to espouse - state, with proof, what he has done & what expertise he has on the subject matter of PIL - what sufficient exercise has been carried out by him before the administration prior to knocking the door of Court - what injury would be caused to the downtrodden of

the society or public at large if cause under PIL is not espoused by the Court (Para 12)

Petitioner sought quashing of letter of Chief Engineer directing the inspecting agency to inspect a firm - Petitioner simply stated that he is a Lawyer and a social work - without disclosing his credentials - *Held* - dispute is between two groups which is in the realm of a private dispute - cannot be agitated as P.I.L. - Petition not on behalf of any disadvantageous group of persons rather on behalf of competitor - matter does not involve basic human rights - Public Interest Litigation, not maintainable (Para 16, 21, 22)

Dismissed (E-5)

Listed of Cases cited:-

1. Guruvayoor Devaswom Managing Committee Vs C.K. Ranjan (2003) 7 SCC 546

2. Bandhua Mukti Morcha Vs U.O.I. (1984) 2 SCR 67

3. Ramsharan Autyanuprasi & anr. U.O.I. & anr. AIR 1989 SC 549

(Delivered by Hon'ble Pankaj Mithal, J.
& Hon'ble Saurabh Lavania, J.)

1. Heard Sri H. N. Singh, Senior Counsel assisted by Sri Shobhit Kant, learned Counsel for the petitioner, Sri H. P. Srivastava, learned Additional Chief Standing Counsel appearing for respondent No.1 and Sri Rishab Kapoor, learned Counsel for respondent Nos.2 to 5.

2. The petitioner is an Advocate by profession and has preferred this petition in Public Interest. In paragraph - 4 of the petition, he has stated that he is also involved in social work, but he has not disclosed his credentials or the nature of social work so far done by him.

3. The petitioner in Public Interest seeks quashing of letter dated 18.9.2020 of the Chief Engineer (Purchase) of U.P. Jal Nigam requesting M/s Crown Agents (India) Pvt. Ltd. to inspect M/s. Rashmi Metaliks Ltd., Kolkata and issuance of mandamus directing respondent Nos.2 and 3 not to permit re-inspection of M/s Rashmi Metaliks Limited, Kolkata.

4. The normal rule is that a person, who suffers a legal injury or whose legal right is infringed, alone has *locus standi* to invoke the writ jurisdiction to avoid miscarriage of justice. The said common rule of *locus standi* stands relaxed where the grievance is raised before the Court on behalf of poor, deprived, illiterate or the disabled persons, who cannot approach the Court independently for redressal of the legal wrong or the injury caused to them on account of violation of any constitutional or legal right. These are mostly cases in public interest, i.e., cases on behalf of class of persons mentioned above.

5. However, the relaxation so provided from the strict rule of *locus standi* lately came to be misused or abused by unscrupulous persons seeking cheap publicity. Therefore, the Supreme Court in ***State of Uttaranchal v. Balwant Singh Chaufal [(2010) 3 SCC 402]*** observed that as the process of the Court is frequently abused in the name of Public Interest Litigation, all High Courts need to frame Rules to prevent such abuse. In compliance with the directions of the Supreme Court, the Allahabad High Court Rules were also amended and Sub-Rule (3-A) was added under Chapter XXII Rule 1 w.e.f. 1.5.2010. The aforesaid Rule reads as under:-

"(3-A) In addition to satisfying the requirements of the other rules in this

chapter, the petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to espouse; that he has no personal or private interest in the matter; that there is no authoritative pronouncement by the Supreme Court or High Court on the question raised; and that the result of the litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

6. A simple reading of the aforesaid Rule reveals that in addition to the other requirements mentioned under the Chapter for filing a writ petition, the person filing the petition in Public Interest should precisely and specifically, apart from other things, state his credentials and the public cause he is seeking to espouse. Therefore, disclosure of credentials and the public purpose sought to be espoused are also essential elements to be stated in initiating proceedings in public interest.

7. The petitioner in the writ petition, except for mentioning that he is a Lawyer and is involved in a social work, has not stated anything covering any of the above essential requirements. In short, he has not disclosed his credentials.

8. The dictionary meaning of the word 'credentials' is the qualities and the experience of a person that make him suitable for doing a particular job. The Oxford English-English-Hindi Dictionary, 2nd Edition, explains credentials as the quality which makes a person perfect for the job or a document that is a proof that he has the training and education necessary to prove that he is a person qualified for doing the particular job.

9. The petitioner herein claims to be a Social Worker, but in order to substantiate the nature of the social work he is doing or seeks to do, he has not disclosed any experience that makes him suitable or perfect for doing the said job and no document in proof has been furnished.

10. Black's Law Dictionary, 10th edition, defines 'credential' a document or other evidence that proves one's authority or expertise; a testimonial that a person is entitled to credit or to the right to exercise official power.

11. The petitioner, in the absence of any documentary proof to establish his authority or expertise in doing social work, does not have the requisite credentials to initiate petition in Public Interest.

12. Considering the aforesaid definition(s) of the term 'credential' and the law on entertaining the PIL what we feel is that for maintaining the PIL the petitioner in the writ petition, in brief, should state, with proof, that what he has done and what expertise he has on the subject matter of PIL as also that what exercise (sufficient) has been carried out by the petitioner before the administration prior to knocking the door of the Court and that what injury would be caused to the downtrodden of the society or public at large if cause under PIL is not espoused by the Court.

13. In ***Guruvayoor Devaswom Managing Committee v. C.K. Ranjan [(2003) 7 SCC 546],*** it has been observed that the Courts are constitutionally bound to protect the fundamental rights of disadvantageous people and therefore, can entertain petitions under Articles 32/226 of the Constitution of India filed by any interested person in the welfare of the

people who are in a disadvantageous position and are unable to knock the doors of the Courts.

14. The petitioner in filing this petition in Public Interest has not even disclosed that he is filing this petition on behalf of such disadvantageous persons or that injustice is meted out to a large number of people and therefore it has become necessary for him to come forward on their behalf.

15. It is well-settled that Public Interest Litigation is for ensuring basic human rights to the deprived and to secure social, economic and political justice. The Apex Court in ***Bandhua Mukti Morcha v. Union of India [(1984) 2 SCR 67]*** observed that the public interest litigation is not in the nature of adversary litigation but a challenge to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community. It is only to protect such class of persons against violation of their basic human rights which is the constitutional obligation of the executive that ordinarily recourse to public interest litigation may be permitted.

16. In view of the aforesaid reasons and the law as laid down by the Apex Court, the petitioner is not a person, who has any credentials to move in Public Interest. Simply on the allegation that he is a Lawyer and a person involved in social work without disclosing his credentials and in the absence of the fact that the petition has been preferred in the interest of justice for large number of downtrodden persons who are unable to approach the Courts of Law, the petitioner is not entitled to maintain this petition in public interest that too in a matter which does not involve basic human rights.

17. The firm, i.e., M/s Rashmi Metaliks Ltd., Kolkata in question was earlier inspected and was declared in Category 'C'.

18. The letter dated 28.08.2020 (Annexure - 3) of the Chief Engineer (Purchase), U.P. Jal Nigam, Lucknow on record clearly stated that the inspecting agency, i.e., M/s Crown Agents (India) Pvt. Ltd., New Delhi may inspect the aforesaid firm and it is only on its certification that the firm meets the standards provided the supply from the firm-M/s Rashmi Metaliks Ltd., would be taken.

19. It is pertinent to mention here that U.P. Jal Nigam is not directly involved in the purchase of any material from any firm, rather it awards contracts on turn-key basis and it is the contractor who makes purchases of the material from amongst firms prescribed by the U. P. Jal Nigam, provided there is otherwise no legal impediment.

20. In view of the aforesaid facts and circumstances and the letter of the Chief Engineer (Purchase) on record, since the purchases from the aforesaid firm would be taken subsequent to its certification by the inspecting agency, we do not find that this matter requires interference by us in exercise of extraordinary jurisdiction.

21. Moreover, the controversy sought to be raised is one relating to award of contracts and the possibility of the petitioner being set-up by the rival groups cannot be ruled out. It is certainly not a petition on behalf of any disadvantageous

group of persons rather and one on behalf of a competitor.

22. It is trite to mention here that a dispute between two warring groups is in the realm of a private dispute and is not allowed to be agitated as a Public Interest Litigation vide ***Ramsharan Autyanuprasi and another v. Union of India and others [AIR 1989 SC 549].***

23. Accordingly, in the facts and circumstances of the case, as narrated above, the petition is ***dismissed*** as not maintainable in public interest at the behest of the petitioner.

(2020)11ILR A13
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2020

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ Tax No. 573 of 2020

Jaymatajee Enterprises (Seller), Ashutosh Pally, Jalpaiguri, W.B. & Anr. ...Petitioners
Versus
The Commissioner of Customs (Preventive), Sector H, Kendriya Bhawan, Lucknow & Ors. ...Respondents

Counsel for the Petitioners:
Shubham Agrawal

Counsel for the Respondent:
Sri Ramesh Chandra Shukla

A. Tax Law —- Foreign Trade Regulation Act; Customs Act, 1962:-Section 14(2), 110, 111, 123, 144, 151-A;- Customs Valuation (Determination of the Value of Imported Goods) Rules, 2007: Rule 3, 4 to 9, 12; Instruction No. 01/2017-Cus. (F. No. 591/04/2016-Cus. (AS)) dated 08.02.2017. -Seizure of goods

Section 110, Customs Act, 1962 – "reasons to believe" - The power of seizure of goods can be resorted to only when the Officer exercising the said power has "reasons to believe" that the goods are liable to confiscation. In the present case, the goods were admittedly at Gorakhpur and not seized from any port or any custom area to form a belief that the goods were being imported into India. There was evidence in the form of transport documents to show that the goods were being transported within India. (Para 30, 32)

It is well-settled that the 'reasons to believe must be based upon acceptable materials, which have to be more than a moon shine. The material on record overwhelming suggests that the 'reasons to believe' were based upon the opinion of the local dealers, prima facie examination of the goods by naked eye and inscriptions in foreign language on some bags. The reasons given for forming a belief for exercise of power of seizure are invalid. The said reasons even fail the test of 'wednesbury principles' as no reasonable person can reach to conclusion of the country of origin of 'Areca Nuts' by mere perusal from naked eye as well as the opinion of the traders, as the ICAR-National Bureau of Plant Genetic Resources (Independent Council of Agricultural Research) as well as the Ministry of Agriculture and Farmer Welfare have firmly opined that the country of origin cannot be traced by any laboratory method also. (Para 31, 33, 36)

B. Alternative remedy - **No appeal lies against a seizure order.** The goods detained are perishable in nature and considering the fact that relegating the petitioners to the appellate remedy would render the entire exercise futile as by then the goods itself will be of no value. (Para 24, 26)

C. Section 123, 144 - It is a common ground that 'Areca Nuts' is neither prohibited nor notified goods. (Para 6, 34)

D. Section 125, 151-A, 110-A; Circular dated 16th August, 2017 - The seizure memo as well as the provisional release order are contrary to the Act and the

departmental instructions contained in Instruction No. 1/2017, which are binding on the respondent authorities. The order of provisional release has been passed even contrary to terms of the circular issued and there is no independent exercise of discretion by the Adjudicating authority while passing the provisional release order. (Para 18, 26, 35)

E. Violation of principles of natural justice - Order has been passed in violation of principles of natural justice inasmuch as neither in the provisional release order has the contention of the petitioners being addressed nor has any opportunity of hearing accorded before passing the provisional release order. (Para 26)

Writ Petition allowed. (E-4)

Precedent followed:-

1. Commissioner of Customs Vs M/s Maa Gauri Traders, Customs Appeal No. 03 of 2019 (Para 20)

2. Union of India Vs Salsar Transport Company (Para 20)

3. M/s Ayesha Exports Vs U.O.I., CWJC No. 7589 of 2018 (Para 20)

4. M/s Ramesh Kumar Bind Vs U.O.I. (Para 20)

5. Writ Tax No. 589 of 2017 (Para 21)

6. Creative Media Vs St.of U.P. & 2 ors., Writ Tax No. 469 of 2019 (Para 22)

Precedent distinguished:-

1. Authorized Officer, State Bank of Tranvacore Vs Mathew K.C., Civil Appeal No. 1282 of 2018 (Para 22)

2. St. of U.P. & ors. Vs M/s Kay Pan Fragrance Pvt. Ltd., Civil Appeal No. 891 of 2019, 2019 (31) G.S.T.L. 385 (SC) (Para 22)

Present petition challenges seizure order dated 17.08.2020 and the order of provisional release dated 01.09.2020.

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

1. The amendment application filed by the petitioners is allowed.

2. The above referred writ petition has been filed challenging the seizure of goods of petitioner no. 1 and vehicle of petitioner no. 2 vide Panchnama dated 17.8.2020 and the order of provisional release dated 1.9.2020, whereby an order has been passed releasing the goods provisionally in respect of petitioner no. 1 on the following terms and conditions:-

"i. Execution of Bond for the value/estimated value of the seized goods i.e. Rs. 53,76,000.00;

ii. Furnishing Bank Guarantee or Security Deposit of Rs. 13440000.00;

iii. Statement of goods owner under Section 108 of the Customs Act, 1962 before provisional release of the seized betel nuts & Compliance of other applicable laws (any other conditions, as prescribed by adjudicating authority)."

3. And in respect of petitioner no. 2 as follows:-

"i. Execution of Bond for the value/estimated value of the seized truck i.e. 700000.00;

ii. Furnishing Bank Guarantee or Security Deposit of Rs. 70000.00;

iii. Statement of the truck owner under Section 108 of the Customs Act, 1962 before provisional release of the seized truck & Compliance of other applicable laws (any other conditions, as prescribed by adjudicating authority)."

4. The contention of the counsel for the petitioners, in brief, is that the petitioners received an order from one M/s

Jagdamba Enterprises for supplying 17920 K.G. of betel nuts and the petitioner purchased 24,000 K.G. of betel nuts from one Neelkamal Saha, West Bengal by means of two tax invoices dated 14.8.2020 each for 12,000 K.G. It is also stated that said Neelkamal Saha had purchased 19,884 K.G. of betel nuts in an E-auction held by the Customs Department. It is further stated that the petitioners and the purchaser Jagdamba Enterprises both are registered under the G.S.T. Act. After purchasing the said betel nuts from the said Neelkamal Saha, the petitioners transported the said goods to the consignee M/s Jagdamba Enterprises through Truck No. DL01 GC-1731 owned by the petitioner no. 2 and the goods were sent alongwith requisite E-Way Bill Invoices etc. It is further stated that the goods were valued for the total consignment value of Rs. 29,56,800/-. As soon as the Truck carrying the betel nuts entered the State of Uttar Pradesh, the respondent no. 3 intercepted the said Truck and vide Panchnama dated 17.8.2020, seized the goods as well as the vehicle i.e. Truck No. DL01 GC-1731. A copy of the Panchnama is on record as Annexure-3 to the writ petition.

5. In the Panchnama on record, the Panches made a statement that on the request of the Excise Authorities, they agreed to act as Panch and after the interception of the Truck, the driver disclosed his name as Satendra Kumar, the Officers informed the Truck driver that they have received specific information that "Areca Nuts' of foreign origin was being transported. On opening of the material being transported it transpired that some bags had inscriptions in foreign language which led to a belief that the arcenuts were of foreign origin,it is also recorded that the officers informed the panches that on the basis of information prima facie the goods appeared to be of foreign origin and also that as per the opinion of the local dealers the supari appeared to be illegally imported from bangladesh in violation of Section 11read with the provisions of Foreign Trade Regulation Act on the said basis he proceeded to seize the goods by means of the Panchnama dated 17.8.2020.

6. Counsel for the petitioners argues that as no bonafide ***''reasons to believe'*** existed, the seizure of the goods was wholly arbitrary and illegal. He further argues that the goods were purchased in an E-auction held by the Customs Department itself and as such there was no question of the goods being imported. It is further stated that on 18.8.2020 and 20th August, 2020, the petitioner wrote a letter to the respondents for release of the goods and the vehicle and requested as the goods were of perishable nature, the same may be released. Counsel for the petitioners Shri Shubham Agarwal further argues that even the manner of taking sample was contrary to the provisions of Section 144. He thus argues that as the goods i.e. 'Areca Nuts 'were not 'notified goods' under Section 123 of the Act and do not fall in the category of prohibited/notified goods, the seizure order is liable to be quashed and goods were liable to be released.

7. Counsel for the petitioners argues that Section 110 of the Customs Act confers powers on the proper Officer for seizure of goods, documents and things if the proper Officers has ***''reasons to believe'*** that the goods are liable to confiscation under this Act. Section 110 (1) is being quoted hereinunder:-

"SECTION 110. Seizure of goods, documents and things.-(1) *If the*

proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with goods except with the previous permission of such officer."

8. He further argues that only the goods which are liable to confiscation can be seized and Section 111 of the Customs Act provides for the goods which can be confiscated under Section 111 of the Customs Act. Section 111 of the Customs Act is quoted hereinunder:-

***"111. Confiscation of improperly imported goods, etc.**--The following goods brought from a place outside India shall be liable to confiscation:--*

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded form a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(m) [any goods which do not correspond in respect of value or in any other particular] with the entry made under this Act or in the case of baggage with the declaration made under section 77 3[in

respect thereof or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54];

(n) any dutiable or prohibited goods transisted with or without transhipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

[(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]"

9. He thus argues that for confiscation of goods it is essential to establish that:-

(i) the goods were imported into India, and;

(ii) the goods should be dutiable and that the imported duty has not been paid.

10. He further argues that even assuming without accepting the contentions of the respondents, none of the conditions specified in Clause (a) to Clause (p) of Section 111 are made out in respect of goods brought by the petitioners within the territorial limits of India and being transported within the territorial limits of India and he further argues that there is no whisper or reason recorded by the respondents to come to a conclusion that the goods were being imported without payment of any duty. He thus argues that the goods could not be seized at the first instance itself in exercise of powers under Section 110 of the Customs Act.

11. The next argument of counsel for the petitioners is that Section 110-A provides for provisional release of goods, documents and things seized pending adjudication. Section 110-A is quoted hereinbelow:-

*"**[SECTION 110A. Provisional release of goods, documents and things seized pending adjudication.**--Any goods, documents or things seized under section 110, may, pending the order of the 20[adjudicating authority], be released to the owner on taking a bond from him in the proper form with such security and conditions as the 19[adjudicating authority] may require.]"*

12. He thus argues that in terms of the powers conferred on the Adjudicating Authority, the goods are liable to be released provisionally to the owner on taking bond from him in the proper form with such security and conditions as may be required.

13. The next argument of Shri Agarwal is that the valuation of the goods imported is to be determined in terms of the specific Rules known as the Customs Valuation (Determination of the Value of Imported Goods) Rules 2007. He particularly relies on Rule 3, which states that subject to Rule 12, the transaction value of the imported goods should be accepted as the value. He further states that Rule 3 (4) provides that in the event the goods cannot be valued in terms of the provisions of Rule 3 (1), the value shall be determined through Rule 4 to 9 of the Valuation Rules, 2007.

14. On the basis of Rule 3, counsel for the petitioners argues that exercise for determining the Rules either in terms of Rule 3 or in terms of Rules 4 to 9 was carried out by the respondents while passing the impugned order and the goods were arbitrarily valued by the respondents as is clear from the order dated 1.9.2020. However as the counsel for respondent has placed reliance on the Notification No 36/2001-Customs (NT) dated 3.8.2001as amended vide Notification No 84/2019-Customs (NT) dated 15.11.2019 issued under Section 14(2) of The Customs Act wherein the valuation of Arecanuts is notified, the contention of the counsel for the petitioner on the manner of valuation does not merit acceptance.

15. Attacking the provisional release order dated 1.9.2020, counsel for the petitioners argues that although a discretion is vested in the Adjudicating Authority in terms of the powers conferred under Section 110-A, the discretion has to be exercised in accordance with law and in good faith and cannot be the pretence for confiscating the goods. He has further argued that the condition of furnishing bank guarantee or security deposit of Rs. 7,00,000/- for the release of the Truck seized is also bad in law.

16. Shri Agarwal then proceeded to argue on the provisions of law to stress that the Ministry of Finance has issued specific **Instruction No. 01/2017-Cus. (F. No. 591/04/2016-Cus. (AS)) dated 8.2.2017** stating that the Delhi High Court in a reasoned order has held that the Panch and statement by Panches (witness) cannot be taken to be an order passed by the proper Officer under Section 110 of the Customs Act and in terms of the said position in all the future cases following may be adhered to. The relevant part of the said Instruction No. 01/2017-Cus. (F. No. 591/04/2016-Cus. (AS)) dated 8.2.2017 is quoted hereinbelow:-

- "Whenever goods are being seized, in addition to panchnama, the proper officer must also pass an appropriate order (seizure memo/order/etc.) clearly mentioning the reasons to believe that the goods are liable for confiscation.

- Where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. In such cases, investigations should be fast-tracked to expeditiously decide whether to place the goods under seizure or to release the same to their owner."

17. In view of the said circular, Shri Agrawal submits that the same is binding on the Department, however, has not been followed for the reasons best known by the respondents and the Panchnama is the only document of seizure on record.

18. He further placed on record the circular dated 16th August, 2017 (based upon which the order dated 1.9.2020 is passed), which provide for guidelines for provisional release of the seized imported goods, pending adjudication wherein instructions have been issued that for the provisional release besides executing a bond for the full value/estimated value of the seized goods, competent authority ***shall*** take a bank guarantee or security deposit to cover the entire amount of duty/differential duty, the amount of fine that may be levied in lieu of confiscation under Section 125 of the Customs Act and the amount of

penalties that may be levied under the Customs Act. Attacking the said circular, Shri Agarwal argues that the said circular in fact guides the Adjudicating Authority for passing a particular order in a particular manner. He submits that Section 151-A of the Customs Act confers the power on the Board to issue instructions to the Officers of the Customs for uniformity in the classification or with respect to the levy of duty thereon, however, even the Board is prohibited from issuing any directions so as to require any Officer of the Customs to make a particular assessment or to dispose of a particular case in a particular manner or to interfere with the discretion of the Commissioners of Customs (Appeals) in the exercise of its appellate function. Section 151-A is being quoted hereinbelow:-

*"**SECTION [151A. Instructions to officers of customs.**--The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, 3[or for the implementation of any other provision of this Act or of any other law for the time being in force, in so far as they relate to any prohibition, restriction or procedure for import or export of goods] issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all the other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:*

***Provided** that no such orders, instructions or directions shall be issued--*

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the 4[Commissioner of customs ((Appeals)] in the exercise of his appellate functions.]"

19. Counsel for the petitioners further argues that along with request for provisional release, the petitioners had placed on record the letter dated 4th January, 2018 issued by the Department of Agriculture, Co-operation and Farmers Welfare, Government of India to the effect that the betel nuts cannot be conclusively determined upon examination of the naked eye with regard to its origin further It cannot be determined even through laboratory test whether the betel nuts are indiginous or are of a foreign origin and also to the effect that there is no mechanism available to test the country of origin of "Areca Nuts'. He has also placed reliance on the letter issued by ICAR-National Bureau of Plant Genetic Resources (Independent Council of Agricultural Research) to the effect that it is not possible to determine the country of origin of betel nuts.

20. Shri Shubham Agarwal has also placed reliance on the judgment passed by this Court in the case of ***Commissioner of Customs Vs. M/s Maa Gauri Traders, Customs Appeal No. 3 of 2019,*** the judgment of the Patna High Court in the case of ***Union of India Vs. Salsar Transport Company,*** the judgment of the Patna High Court in the case of ***M/s Ayesha Exports Vs. The Union of India (CWJC No. 7589 of 2018),*** where in it was recorded that there was no standardise laboratory test for determining the country of origin and that ARDF is not a credited laboratory. He has also placed reliance on the judgment of the Patna High Court in the case of ***M/s Ramesh Kumar Baid Vs.***

Union of India, wherein it was recorded that when the goods were seized within territory of India and not of any land custom station or any port, a mere seizure on the basis of specific information received cannot be said to be justified.

21. Thus in sum and substance on the basis of the arguments made above, the counsel for the petitioners argues that the seizure of goods vide panchnama dated 17.8.20 and the order dated 1.9.2020 are liable to be set aside. He has also placed reliance on a judgment of this Court, whereby this Court had directed in ***Writ Tax No. 589 of 2017*** that the goods be released on furnishing security other than cash and bank guarantee in respect of the total amount of value of the goods.

22. A counter affidavit has been filed on behalf of the respondents by one Shri Rakesh Srivastava posted as Deputy Commissioner of Customs, Lucknow. In the counter affidavit, it has been stressed that the writ petition is not maintainable in view of the judgment of this Court in the case of ***Creative Media Vs. State of U.P. and 2 others (Writ Tax No. 469 of 2019).*** Counsel for the respondents has further argued that an alternative remedy of appeal lies before the Commissioner (Appeals) against the order of provisional release and as such the writ petition is liable to be dismissed on the ground of alternative remedy. For the said proposition, the counsel for the respondents has relied upon the judgments in the case of ***Authorized Officer, State Bank of Tranvacore Vs. Mathew K.C. (Civil Appeal No. 1282 of 2018)*** and the judgment of the Supreme Court of India in the case of ***State of Utttar Pradesh & Others Vs. M/s Kay Pan Fragrance Pvt. Ltd in (Civil Appeal No. 8941 of 2019), 2019 (31) G.S.T.L. 385 (SC).***

23. Thus, in sum and substance, the counsel for the respondents has argued that in view of the availability of alternative remedy of appeal against the order of provisional release, the writ petition is liable to be dismissed.

24. Counsel for the petitioners in rejoinder states that the order of provisional release is liable to be interfered for the reason that the goods in question are "Areca Nuts' and they have a limited shelf life and the appeal would take a long time to be decided and the goods being a perishable nature, the entire purpose is liable to be defeated. He further argues that when the basic conditions of seizure are non-existent and no Appeal lies against a seizure order, this Court should not hesitate in exercising its jurisdiction under Article 226 of the Constitution of India and thus, the argument of the counsel for the respondents that the writ petition is not maintainable in view of the alternative remedy, is liable to be rejected. He further argues that the order impugned has been passed contrary to mandate of Section 110-A and solely on the on the dictation of the Board through its circular, which itself is bad in law and violative of the powers conferred upon the Board under Section 151-A of the Customs Act. He further states that the valuation of the goods in the provisional release order is contrary to the specific valuation rules and no reasons have been disclosed for valuing the goods in such a hefty manner and there being prima facie illegalities in the discretion exercised by the Adjudicating Authority, this Court should not hesitate in exercising its powers under Article 226 of the Constitution of India. He further argues that the mandate of the circular no. 1/2017 is binding on the respondents but has been conveniently not followed and thus not

only the provisional release order is liable to be quashed even the seizure by means of a Panchnama is also liable to be set aside.

25. On the basis of the arguments advanced at the bar, the first question to be considered is whether the alternative remedy of appeal before the Commissioner (Appeals) is an efficacious remedy and in view of the said remedy, the writ petition cannot be entertained.

26. We are in complete disagreement with the counsel for the respondents for the following reasons:-

(i) No appeal lies against a seizure order;

(ii) the goods detained are perishable in nature and considering the fact that relegating the petitioners to the appellate remedy would render the entire exercise futile as by then the goods itself will be of no value;

(iii) the seizure memo as well as the provisional release order are contrary to the Act and the departmental instructions;

(iv) order has been passed in violation of principles of natural justice inasmuch as neither in the provisional release order has the contention of the petitioners being addressed nor has any oppertunity of hearing accorded before passing the provisional release order, and ;

(v) the order of provisional release has been passed even contrary to terms of the circular issued and there is no independent exercise of discretion by the Adjudicating Authority while passing the provisional release order.

27. Thus, on all the above grounds, which are all well carved out exceptions for exercise of jurisdiction under Article 226 of the Constitution, we reject the preliminary objection of the counsel for the respondents that in view of the remedy of appeal writ petition is not maintainable.

28. Reverting to the judgments relied upon by the counsel for the respondents on the grounds of alternative remedy. The Supreme Court while deciding the matter in ***Authorized Officer, State Bank of Tranvacore (supra)*** held that writ jurisdiction should normally not be entertained without assigning any special reasons and that too without even granting opportunity to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The Court was dealing with the exercise of powers under Article 226 of the Constitution by the High Court against the proceedings initiated under Section 13 of the SARFAESI Act and relating to an interim order, the Court had also observed that there was no assertion that the grievance fell within the well defined exceptions to the exercise of jurisdiction under Section 226. The said judgment would not benefit the respondents solely for the reasons that in the present case, specific averments have been raised and argued which carved out the well known exceptions as recorded abovefor exercise of powers under Article 226 of the Constitution.

29. The next judgment of the Supreme Court in the case of ***The State of Uttar Pradesh 7 Ors. v. M/s Kay Pan Fragrance Pvt. Ltd. (supra),*** the Supreme Court was seized of a matter whereby the High Court had entertained the writ petitions at the first instance itself without the petitioner taking any recourse whatsoever, as provided under the statute and in view of the said facts, the Supreme Court held that recourse firstly to be taken

to the remedy provided under the Act and entertaining the writ petition directly is an improper exercise of powers. The said judgment may not benefit the argument of the respondents for the sole reason that in the present case, the petitioners have approached the statutory authority for release of goods and the statutory authority has, in fact, passed an order and the validity of the said order is under challenge and the petitioners have not approached this Court at the first instance. Furthermore, the petitioners have carved out a case for exercise of powers under Article 226 under the well known exceptions. Thus, the objections of the counsel for the respondents is liable to be rejected.

30. Reverting to the validity of seizure order, it is clear from the statute that the power of seizure of goods under Section 110 of the Customs Act can be resorted to only when the Officer exercising the said power has ***''reasons to believe'*** that the goods are liable to confiscation. In the present case, admittedly the goods were at Gorakhpur and not seized from any port or any custom area to form a belief that the goods were being imported into India. In the Panchnama, which the counsel for the respondents submits is a seizure memo, the only reasons recorded are that on a prima facie examination, the "Areca Nuts' loaded in the Truck and as on some of the bags inscriptions in foreign language was written as well as that the "Areca Nuts' on being taken out from the bags appeared to be of a foreign origin. The "Areca Nuts' were shown to the local businessman and on the basis of their experience, they said that the "Areca Nuts' appears to be of foreign origin. Thus, on these three grounds, the action for seizure was initiated.

31. It is on record in the form of certificates issued by the Ministry of Agriculture and Farmer Welfare as well as by ICAR to the effect that there is no mechanism available to trace the country of origin of "Areca Nuts' and there is no laboratory test available for the same and further on the basis of examination by naked eye it cannot be conclusively determined with regard to origin of the "Areca Nuts'. The ICAR has also opined that without there being samples available from the country of origin, it was not possible to determine the country of origin of the seized "Areca Nuts'. That being the definite opinion of the Deparment of Agriculture and Farmers Welfare as well as the ICAR, it is difficult to comprehend as to how on the basis of exmination by naked eye and the opinion of the traders can lead to forming an opinion that the goods in question namely "Areca Nuts' are imported. Even otherwise there is nothing on record to form a belief that the goods in question were imported without payment of import duty (even if it is assumed for the sake of argument that the goods were of foreign origin).

32. On the contrary, in the present case as demonstrated by the petitioner prima facie that the goods in question were purchased in an E-auction held by the Customs Authorities themselves within the territory of India, the fact that there was evidence in the form of transport documents to show that the goods were being transported within India, the prima facie "reason to believe' recorded are unsustainable.

33. It is well settled that the ***''reasons to believe'*** must be based upon acceptable materials, which have to be more than a moon shine. The material on record overwhelming suggests that the ***''reasons to believe'*** were based upon the opinion of

the local dealers, prima facie examination of the goods by naked eye and inscriptions in foreign language on some bags. We are not inclined to accept the reasons given for forming a belief for exercise of power of seizure are valid in law. The said reasons even fail the test of "wednesbury principles' as no reasonable person can reach to conclusion of the country of origin of "Areca Nuts' by mere perusal from naked eye as well as the opinion of the traders, as the Institutes as well as the Ministry have firmly opined that the country of origin cannot be traced by any laboratory method also.

34. It is also common ground that 'Areca Nuts' is neither prohibited nor notified goods.

35. The order of the seizure is further bad in law as it has failed to follow the specific instructions contained in Instruction No. 1/2017, which are binding on the respondent authorities.

36. Thus, the basis for forming ***''reasons to believe'*** as recorded in the Panchnama are wholly without any acceptable material and there being no prima facie material to suggest that the goods in questions were of foreign origin or were smuggled into India from any Customs Station or that the goods were imported without payment of import duty, we have no hesitation in holding that no valid ***''reasons to believe'*** existed for exercising the powers of seizure as was done by means of Panchnama dated 17.8.2020. Consequently, the seizure order dated 17.8.2020 is quashed.

37. Once we have quashed the seizure order dated 17.8.2020, we do not deem it fit to address on the question of validity and legality of the provisional release order inasmuch as once the seizure is held to be bad in law, no confiscation can take place, however, we leave the other arguments raised by the counsel for the petitioners while attacking the provisional release order open.

38. In view of the findings recorded above, we direct that the respondent authorities shall forthwith release the goods i.e. "Areca Nuts' as well as the vehicle in question in favour of the petitioner nos. 1 and 2 respectively on the petitioners filing a copy of this order before the authority concerned.

39. The writ petition is **allowed** in terms of the said order passed.

40. Copy of the judgment downloaded from the official website of this Court shall be treated/accepted as certified copy of the judgment.

(2020)11ILR A23
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2020

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/S 482 No. 4300 of 2020

Girish ...Applicant(In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Prabhat Kumar Srivastava, Sri Brajesh Kumar

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 311 - Recall of witness u/s 311 - when not permissible - mere incompetence / change of counsel cannot be ground to recall witness - Engagement of new counsel and dawn of fresh wisdom cannot be allowed to delay matter (Para 6)

Accused through subsequent engaged counsel sought permission for re-examination of P.W.1 - On the ground that previously engaged counsel engaged - had not asked relevant questions to witness - Application for summoning of witness for cross examination rejected. (Para 6)

Dismissed (E-5)

Listed of Cases cited:-

AG Vs Shiv Kumar Yadav & anr. (2016) 2 SCC 402

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the applicant, learned A.G.A. and perused the record.

2. This application under section 482 Cr.P.C. has been filed with a prayer to allow the application and quash the impugned order dated 12.12.2019 passed by the learned Addl. Sessions Judge/ FTC No.1 , Gautam Budh Nagar in Sessions Trial No. 700 of 2017 (State Vs. Brahmpali and others) arising out of case crime no. 423 of 2017, under sections 498-A, 323, 304-B IPC and section 4 D.P. Act, Police Station Jewar, District Gautam Budh Nagar with a further prayer to stay the proceedings of above mentioned case.

3. The submissions advanced by learned counsel for the revisionist that the previous counsel engaged in this case had not asked the relevant questions from the P.W. 1. and therefore subsequent counsel seeks permission for re-examination of P.W.1. Further submission is that the application filed on 24.09.2019 under section 311 Cr.P.C. by the accused before the learned Trial Court, the same has been dismissed without applying the judicial application of mind by the learned Trial Court.

4. Per contra, learned A.G.A. has advanced the argument that the relief as sought by the revisionist's counsel cannot be granted under section 311 Cr.P.C. by this Court at this stage only on the basis that the applicant has engaged a subsequent counsel for re-examination of P.W.1. Further learned A.G.A. pointed out all the relevant paras of the impugned order passed by the Additional Sessions Judge/FTC-I, Gautambudh Nagar in the impugned order dated 12.12.2019 raised by counsel for the accused, which are as under:-

"पी0 डब्लू0 1 से कई महत्वपूर्ण बिन्दुओं पर अभियुक्त गिरीश के पूर्व अधिवक्ता द्वारा जिरह नहीं की गयी है। पी0 डब्लू0 1 से अभियुक्त गिरीश एवं ब्रहमपाली के संबंध में निम्नलिखित महत्वपूर्ण बिन्दुओं पर जिरह करना आवश्यक है। 1– वादी की हैसियत के संबंध में। 2– एन्जी टाईम प्रथम सूचना रिपोर्ट पुलिस के सलाह मशवरे के संबंध में। 3– चिट्ठी एवं पत्रों के बारे में। 4– वादी से गिरीश के संबंधों के बारे में। 5– सोनू द्वारा कितने बजे सूचना दी गयी के बारे में। 6– वादी के गांव से अभियुक्तगणों के घर की दूरी। 7– घटनास्थल एवं नक्शानजरी के बारे में। 8– मेडिकल एवं पोस्टमार्टम रिपोर्ट के संबंध में। 9– मृतका द्वारा की गयी आत्महत्या या एक्सीडेन्टल मृत्यु के बारे में। 10– सून बीफोर हर डैथ सब्जैक्टिड टू करूएल्टी बाई हस्बैंड ऑर बाई रिलेटिव ऑफ हर हस्बैंड। 11– सैपरेट लिविंग। 12– डिफेन्स वरजन। 13– अन्य प्रश्न माननीय न्यायालय की अनुमति से। 14– कन्ट्राडिक्सन 161 दं0नप्र0सं0 व ऑमीसियन।"

5. Learned A.G.A. has also relied upon the judgment of Hon'ble Apex Court

in AG Vs. Shiv Kumar Yadav and another (2016) 2 SCC 402. The relevant paragraphs of the aforesaid judgment are quoted below:

"27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court[47]. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.*

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iiii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted."

6. Considering the facts and circumstances of the case, arguments advanced and after going through the entire judgment, this court is of the view that the arguments advanced by the counsel is not sustainable and that the plea can not be taken by the revisionist's counsel that he has been subsequently engaged, therefore, one more opportunity may be given to him. It is within the rights of the litigant to engage any counsel at any stage but the engagement of the new counsel and the dawn of fresh wisdom upon the first informant cannot be allowed to further delay the matter. The circumstances under which the application was rejected out are sufficiently shown in the impugned order. The impugned order does not reflect any element of inconsistency or any abuse of court's process which may persuade this Court to interfere in the same.

7. The prayer for summoning the P.W. 1 for cross examination is therefore refused.

8. Accordingly, this application lacks merit and is hereby dismissed.

(2020)11ILR A26
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 6411 of 2020

Syed Nadeem Tariq ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Amit Kumar Srivastava

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

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Order passed by a coordinate Bench of this Court-It is apparent that the proceeding, arising out of this very case crime number, was challenged in that very Application, with a prayer for quashing of chargesheet and cognizance taking order, passed therein, and this Court, while entertaining that Application, has held that it cannot be said that there is no ground for proceeding or taking of cognizance.

Once a co-ordinate declines to quash the criminal proceedings, the same cannot be re-agitated through a subsequent criminal application.

Code of Criminal Procedure, 1973- Section 482- Section 227- At this juncture, this Court may not analyse factual aspect because the same falls within the domain of the Trial court, concerned, but, prima facie, there is sufficient evidence for framing of charge, , because as per the law laid down by the Apex Court, in the case of Palwinder Singh vs. Malwinder Singh, reported in (2008) 14 Supreme Court Cases 504, for framing of charge even a strong suspicion may be sufficient ground.

In the exercise of its inherent jurisdiction, the high court cannot analyse the factual aspects of the case as the same are to be decided by the trial court. It is settled law that Charge can be framed even on the basis of strong suspicion.

Criminal Application rejected.(Para 5, 6) (E-3)

Case law/ Judgements relied upon:-

Palwinder Singh Vs Malwinder Singh, (2008) 14 SCC 504

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

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicant, Syed Nadeem Tariq, with a prayer for setting aside impugned order, dated 22.1.2020, passed by the Additional Sessions Judge (Offences Against Women), Rampur, in Session Trial No.106 of 2019, State vs. Nadeem Tariq, arising out of Case Crime No.49 2014, under Sections 498A, 323, 315, 504 and 506 of IPC, read with Sections 3/4 of Dowry Prohibition Act, Police Station-Ganj, District-Rampur.

2. Learned counsel for applicant argued that a Discharge Application was moved before the Trial court, under Section 227 of Cr.P.C., wherein, it was specifically mentioned that there is no medical report, annexed with the case diary, nor any evidence of offence, punishable, under Section 315 of IPC, was there, except statement of the Medical Officer, alleged to have been recorded, under Section 161 of Cr.P.C., which, too, was much delayed, whereas, concerned Medical Officer was not competent to make mechanical termination of pregnancy because as per the Act, related with Mechanical Termination of Pregnancy Act, 1971 (Act No.34 of 1971) and the Rules framed thereunder, mechanical termination of pregnancy is to be conducted by a Panel of two Doctors. Hence, the statement of concerned Doctor was of no concern and this fact was not considered by the Trial court, while rejecting Application, under Section 227 of Cr.P.C. The grievance is not related with other offences, i.e., offences, punishable under Sections 498A, 323, 504 and 506 of IPC, read with Sections 3/4 of Dowry Prohibition Act, except framing of charge, for offence, punishable, under Section 315 of IPC, which is an abuse of process of law. Hence, this Application, under Section 482 of Cr.P.C, with above prayer, for avoiding abuse of process of law and for securing ends of justice, has been filed before this Court.

3. Learned counsel, appearing for other side, while vehemently opposing this Application, has contended that there was evidence, constituting offence, punishable, under Section 315 of IPC, and this Court is not to analyse fact, in exercise of jurisdiction, under Section 482 of Cr.P.C., particularly, when offences, punishable, under other Sections of IPC and Dowry Prohibition Act, were admitted to be there for framing of charges and the grievance of applicant is confined with offence, punishable, under Section 315 of IPC only.

4. Learned AGA, representing State of U.P., has also vehemently opposed this Application.

5. From very perusal of the order passed by a coordinate Bench of this Court, in Application U/S 482 No.39235 of 2016, Nadeem Tarik and 2 others vs. State of U.P. and another, it is apparent that the proceeding, arising out of this very case crime number, was challenged in that very Application, with a prayer for quashing of chargesheet and cognizance taking order, passed therein, and this Court, while entertaining that Application, vide order, dated 19.12.2016, has held that it cannot be said that there is no ground for proceeding or taking of cognizance. Meaning thereby, grounds were held to be present, prima facie, at that juncture, though an opportunity for moving a Discharge Application, at appropriate stage was given and, in exercise of that very option, an application was moved.

6. The statement of victim and other witnesses of fact are there, wherein, it has been specifically alleged that owing to injury caused by the present applicant to the victim-applicant, who was pregnant, she suffered death of her ovum, wherefor, she has to seek medical assistance for termination of fetus. This fact has been corroborated by the Medical Officer, who had conducted above surgery. Hence, at this juncture, this Court may not analyse above factual aspect because the same falls within the domain of the Trial court, concerned, but, prima facie, there is sufficient evidence for framing of charge, for offence, punishable, under Section 315 of IPC, because as per the law laid down by the Apex Court, in the case of **Palwinder Singh vs. Malwinder Singh,** reported in **(2008) 14 Supreme Court Cases 504,** for framing of charge even a strong suspicion may be sufficient ground.

7. Competence of Medical Officer for conducting mechanical termination of pregnancy etc. etc. are to be seen by the Trial court, but apparently, the fetus was dead, and thenafter, it was terminated, by way of getting it out by the concerned Medical Officer. It was not an mechanical termination of pregnancy, rather, it was conducted after death of fetus because of alleged injury, caused by the husband, applicant herein.

8. Hence, under all above facts and circumstances, there appears to be no abuse of process of law. Accordingly, in view of what has been discussed, hereinabove, this Application, under Section 482 of Cr.P.C., merits its dismissal and it stands **dismissed** as such. However, the Trial court, is not to be influenced by any of the finding or observations, made hereinabove, in this order, rather, it ha to make judicial making decision on the basis of evidence and materials available before it.

(2020)11ILR A29
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2020

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 7478 of 2020

Brijesh Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Nipun Singh, Sri Upendra Kumar

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

Criminal law - Code of Criminal Procedure, 1973- Section 227- Section 228- Discharge- Stage of framing the Charge- Considerations- The object of Sections 227 and 228 of Cr.P.C. is to ensure that, the Court is satisfied that the accusation made against the accused are not frivolous and that there are some material for proceeding against them. The following principles emerge that (i) the Judge while considering the question of framing the charges under Section 228 of the Code, has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out, (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial, (iii) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused, (iv) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he is conducting a trial.

At the stage of framing the charge, after sifting and weighing the evidence, the court has only to see whether there is some material making out a prima facie case or the same discloses grave suspicion for proceeding against the accused, the court will proceed with the framing of the Charge but where the said material raises only some suspicion instead of grave suspicion then the accused may be entitled to be discharged.

Code of Criminal Procedure, 1973- Section 91- Summons to produce a document or a thing- If the investigator is not fair and the material of "sterling quality" are left out from the records of the case, the law courts are not powerless to summon those material/documents which touches the core issue in exercise of power under section 91 of Cr.P.C. To exercise power under section 91 of Cr.P.C., the Court is to be satisfied that the material available were either accidentally or mischievously are not made part of the case diary or charge sheet by the Investigator but have a crucial bearing on the issue while framing the 'charge'.

If the court is satisfied that material of sterling quality which has a crucial bearing on the core issue has been omitted during the course of the investigation, then the court can summon the same at the stage of framing the Charge u/s 91 of the Cr.Pc.

The documents if placed on record and taken into consideration, clearly reject and overrule the veracity of the

allegations contained in the accusation levelled by the prosecution/complainant. It must be taken into account at this stage. The reason is quite simple that if these materials are taken on record they would change the entire tone, texture and tenor of the accusation made in the FIR and completely blast the prosecution story and save the accused/applicants from the wrath, undue and unwarranted criminal case against them.

In the present case the documents relied upon by the accused are of a sterling quality and must be taken into account by the court as the same negate the case of the prosecution against them in entirety.

Applicants to submit the relevant documents before the court concerned which shall direct further investigation for the purpose of verifying their authenticity and thereafter the learned court below to decide the discharge application again.

Criminal Application allowed.

(Para 20, 22, 23, 25, 28) (E-3)

Judgements relied upon/ Discussed:-

1. C.B.I, Hyderabad Vs K. Narayan Rao (2012) 9 SCC 512

2. M.E. Shivaling Murthy Vs. C.B.I. Bengluru (2020) 1 SCC (Crl) 811

3. St. of Orissa Vs Debendra Nath Padhi (2005) 1 SCC 568

4. Hardeep Singh Etc. Vs St. of Punj. & ors. Etc. (2014) 3 SCC 92

5. Nitya Dharmananda @ K. Lenin & anr. Vs Gopal Sheelum Reddy (2018) 1 SCC(Cri) 458

6. Rajiv Thapar & ors. Vs Madan Lal Kapoor (2013) 3 SCC(Crl) 158

7. Rukmini Navekar Vs Vijaya Satardekar & ors. (2008) 14 SCC 1

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

[1] Heard Sri Nipun Singh, learned counsel for the applicants, learned A.G.A. for the State and perused the record.

[2] The problematic and fluid question of law, involved in the present criminal application is, as to whether evidence/material of impeccable and sterling quality, if, left unattended during the investigation by the investigator or by the prosecutor, could they be produced by the accused while seeking 'DISCHARGE' and court can take judicial notice of those facts/documents material ?

[3] After appreciating the gravity of this legal question involved, this Court is of the view to decide this application at the threshold/admission stage with the aid and help of learned counsel for the rival parties and learned A.G.A and perused the records/materials of the case.

[4] The prayer sought in the instant 482 Cr.P.C application while invoking the extraordinary jurisdiction of this Court is, to quash the order dated 31.01.2020 passed by the learned Additional Sessions Judge, Court No.3, Mainpuri in S.T. No.216 of 2018(State Vs. Brijesh Kumar and others) relating to case crime no.107 of 2018 under section 304 IPC, Police Station-Bewar, District-Mainpuri whereby learned Additional Sessions Judge has rejected the "Application no.9-B" moved on behalf of applicants under section 227 Cr.P.C., seeking their discharge from the offence mentioned above.

[5] The distilled facts of the case in hand, the applicants, though they are charge-sheeted accused of abovementioned case crime for alleged act of manslayer of one Kiran Devi(55). The applicant nos. 1, 2 and 3 are real brothers whereas the

applicant no.4 is the father of above mentioned three applicants. As gathered from the FIR, there was a long drawn serious animosity and bad breath between the applicants and opposite party no.2 on account of local body elections of the year 2017 which is point of genesis in present criminal case.

[6] Submission made by learned counsel for the applicants, that highly belated FIR was lodged by one Anuj Kumar-opposite party no.2(son of the deceased) against five named accused persons which includes the applicants for the incident said to have been taken place on 25.02.2018 and its report under section 154 Cr.P.C i.e. F.I.R. was registered on 01.03.2018. Thus, there is substantial and unexplained delay in lodging of the FIR about eight good days.

[7] Prosecution story as mentioned in the FIR, the informant Anuj Kumar though the resident of Village-Madhukarpur, Mainpuri but at present he is gainfully employed at Delhi in some private concern. On 25.02.2018 around three in the evening with regard to trivial and insignificant issue i.e. drainage from the bathroom, the named accused persons assaulted his mother by lathi and dandas causing severe and grievous injuries to her which resulted into her sad and untimely demise though during her treatment in private nursing home at Agra. The co-villagers extended help and taken her to Saifai Medical College, Saifai, Etawah for her treatment and lastly she was shifted to Maa Bhagwati Hospital, Agra but unfortunately on 01.03.2018 around one in the night, she took her last breath. It is borne out from the FIR itself that soon after her demise at nursing home, Agra, first of all her inquest was prepared in the nursing home itself and thereafter dead body was transmitted to the mortuary at Agra for her Autopsy report and lastly, the informant managed to lodge the FIR against named accused persons in consonance with the post mortem report of the deceased after coming back to Mainpuri at Police Station-Bewar Mainpuri.

[8] Learned counsel for the applicants has drawn the attention of the Court to the post mortem report dated 01.03.2018 (Annexure-5) conducted by Dr. Sudhir Kumar. A perusal of the post mortem report indicates that the deceased has sustained following two injuries over her person :-

(i) 5 X 4 c.m. Multiple contusion on left upper arm.

(ii) 6 X 6 c.m. Color on bluish color on Rt. Upper of thigh laterally.

Besides above, the doctor also observed clotted blood in both the chambers of her heart and as such on this account, he opined that deceased died on account of shock as a result of **M.I(Mayocardial Infarction)** commonly known as heart attack. It was argued by learned counsel for the applicants that even in the wildest dream, the injuries mentioned in the post mortem report be said to be a fatal or deadly one, either by their dimension wise or by its seat-wise.

[9] It is further contended by learned counsel for the applicants, that true and correct facts lies somewhere else, but on account of handy work of informant, it has been given colour of 'homicide not amounting to murder' after cooking up an imaginary story. Learned counsel for the applicants has drawn the attention of the Court to the various submissions made in the petition itself and its supporting documents as well as apparent

contradictory statements of witnesses which touches the core issue annexed with discharge application or with this petition. From the averments in the petition or in the discharge application, it is not clear that these documents(medical prescriptions of the deceased) are part and parcel of case diary or not? Assuming for the sake of arguments, that these supporting documents/medical prescriptions of the deceased are not the part of the case diary then, it is incumbent upon the learned Trial Judge to direct further investigation into the matter especially to ensure the authenticity of those medical prescriptions of the deceased. This fact and documents(medical prescriptions) assumes greater importance and significance if she died on account of cardiac arrest, as opined by the doctor in his post mortem report.

[10] Learned counsel for the applicants has emphatically relied upon those medical prescriptions in the shape of supporting documents of the deceased in support of their discharge application.

[11] Sri Nipun Singh, learned counsel for the applicants has strenuously argued that, the prosecution case is an eye wash and a cock and bull story whereby, the informant of the case has tried to raise the castle after exploiting deceased's untimely death of his mother Ms. Kiran Devi. According to learned counsel for the applicants, in fact, deceased-Kiran Devi died on account of heart attack as a result of Hyper Tension. It is contended that the deceased was an old patient of hyper tension for the last several years, which has led to her unfortunate demise on 01.03.2018. But on the contrary, as mentioned in the FIR, that on account of certain drainage issue, the applicants assaulted upon the deceased by lathi danda and make her injured. She sustained several injuries/bruises over her person and soon after the incident, she was brought to some private clinic at Mainpuri itself. The attending doctor administered certain medicines to her but despite of the fact that, her condition got deteriorated and on the very next day i.e. 26.02.2018, she was admitted in local medical college at Saifai, Etawah. The out patient slip (annexure-1) shows that at the time of her admission at medical college, her blood pressure was 160/100 mmhg and she was unconscious when brought to the hospital. Immediately, attending Dr. R.K. Yadav administered injunction of LAXIS and he was at the advice of E.C.G. The other documents annexed in support thereof clearly shows that she was observing major fluctuation in her blood pressure and has shown the poor progress despite of medication. At last, Kiran Devi (the deceased) was forceably got discharge from the local medical college, Saifai Etawah by her attendants and they got her admitted in a local nursing home for a short span at Mainpuri in a precarious stage. The doctors at local nursing home too explained the condition of the patient to her attendants and advised them to take her to the higher, specialized centre for better treatment at Agra. The attendants of the patient-Kiran Devi decided to carry her to Agra and got her admitted in a private nursing home, namely, Maa Bhagwati Hospital, Agra on 27.02.2018 at 6:15 p.m. But the doctors could not save her despite of their efforts, and treatment. On 01.03.2018, patient-Kiran devi died in nursing home during her treatment. At the cost of repetition, it was argued by learned counsel for the applicants, that medical prescriptions of deceased shows that during all these period, she was either unconscious or semi-conscious on account of her fluctuating and

unstable blood pressure which has given rise to number of other internal complications.

[12] Learned counsel for the applicants has emphatically shown that there was not even a reference in the various medical prescriptions, that she has received any visible bodily injuries over her person, as alleged in the FIR. If there is an assault by lathi and danda by the applicants, she must have sustained certain visible injuries over her person.

[13] From the aforesaid, learned counsel for the applicants has tried to impress upon the Court, that since she was chronic patient of hyper tension and was undergoing treatment for the same at different centres/nursing homes and at last she could not be saved from the cruel hands of providence. Though, she died untimely but in a natural circumstances during her treatment. The opposite party no.2, who is her son, has exploited of this unfortunate incident to level the score by giving a colour to the entire incident as culpable homicide not amounting to murder for the reasons best known to him. In addition to above, learned counsel for the applicants has shown the self-contradictory 161 Cr.P.C. statements of various witnesses of facts and the attending doctors.

[14] First and foremost statement of Anuj Kumar-informant and his father Surendra Babu who have broadly supported the prosecution case as mentioned in the FIR, it is stated that the applicants have assaulted the injured-Kiran Devi by lathi and danda but Smt. Raj Kumari, jethani of the deceased who accompanied her all the hospitals and nursing home in her 161 Cr.P.C statement states that though there was a scuffle but there was no assault by lathi and danda upon her as alleged in the FIR. In her 161 Cr.P.C. statement, Smt. Raj Kumari states that on account of "rough push" made by applicant no.4, deceased has fallen down and probably could it be the reason behind shooting up of her blood pressure which has eventually taken her life ?

[15] The Court has an occasion to peruse the 161 Cr.P.C. statement of Dr. Santosh Kumar Yadav(Annexure-10), who is the attending doctor and the doctor in his statement on 04.04.2018 states that he has treated the deceased on 25.02.2018 but he has not observed any visible injury over her person. She was conscious, speaking and has not sustained any injury over her body which could be termed as serious or grievous injury. Dr. Rama Kant Yadav, Neurologist, P.G.I. Saifai in 161 Cr.P.C. statement on 28.05.2018, states that though he admitted her and he has treated the deceased but has not divulge anything in his 161 Cr.P.C. statement. Similarly, Dr. R.S. Yadav, M.B.B.S. Mainpuri Nursing Home in 161 Cr.P.C. statement(annexure-12) dated 18.04.2018 states that when the deceased was brought to his nursing home on 27.02.2018, she was unconscious having pressure of 150/90 mmhg. She was patient of hyper tension but there was no visible injury over her person and lastly 161 Cr.P.C. statement of Dr. Sudhir Kumar, District Hospital Agra who prepared the autopsy report of the deceased(Annexure-16) shows that he has prepared post mortem report at district mortuary Agra on 01.03.2018 at 1:20 p.m. and the cause of death mentioned is **M.I**. which stands for **Mayocardial Infarction** commonly known as cardiac arrest. Besides this, clotted blood was observed by the doctor in both the chambers of her heart. This is the reason by which she died untimely. In no uncertain

terms, Dr. Sudhir Kumar states that those two injuries mentioned by him in her post mortem report is having no direct bearing or nexus with her death as they are simple in nature on the non-vital part of her body.

[16] Learned counsel for the applicants submits that after holding lopsided investigation, recording the statements of the witnesses, investigation as per prevailing circumstances in most casual and cursory manner, submitted the report under section 173(2) Cr.P.C. i.e. charge sheet allegedly arriving to a conclusion that the applicants are prima facie involved in the offence under section 304 IPC and submitted its report on 20.07.2018 and learned Magistrate has taken cognizance of these offences in a mechanical and routine way.

[17] Left with no option, applicants have to surrender before the court and got themselves bailed out. After being bailed out, the applicants moved an "application no.9-B" before learned trial Judge on 13.12.2018 raising certain vital issues, especially the medical prescriptions of the deceased.

[18] After hearing the counsels, learned Sessions Judge has laid over emphasis that since the police has submitted the charge sheet under section 304 IPC and the learned C.J.M. has taken cognizance on 13.08.2018 of the offence and there is nothing on record to uproot or dislodge the cognizance order. It has been mentioned in the impugned order that there is nothing on record to establish that no prima facie case is made out against the applicants. Learned trial Judge has relied upon the two judgments of Hon'ble the Apex Court while deciding the application under section 227 Cr.P.C. and ultimately rejected the same by passing the impugned order dated 31.01.2020(Annexure-15). It has been mentioned in the impugned order that the points raised in the discharge application and the supporting documents are related to and matter of evidence and cannot be adjudicated at this stage and thus, the said discharge application stands rejected.

[19] I have keenly perused the order impugned and has given my thoughtful consideration to the entire canvas of factual narration of the case. Present application was moved by the applicants under section 482 of Cr.P.C seeking the judicial scrutiny of the order impugned dated 31.01.2020(Annexure-15). Before scrutinizing the legal aspect of the issue, it would be relevant to spell out the bare provisions of Section 227 of Cr.P.C. which reads thus :-

227. Discharge. If : upon consideration of the 'record of the case' and the 'documents submitted therewith', and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

[20] The object of Sections 227 and 228 of Cr.P.C. is to ensure that, the Court is satisfied that the accusation made against the accused are not frivolous and that there are some material for proceeding against them. This consistent stand of the Apex Court and various decisions of this Court, that the Judge exercising its powers under section 227 and 228 of the Code, while framing the charge, is required to evaluate the material and documents made available

on record/case diary of the police with the object of find out, if the facts emerging therefrom, taking at their face value, discloses the existence of all the ingredients constituting the alleged offence. The Judge may sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution material as gospel truth even if it is opposed to common sense or the broad probabilities of the case. The probe of the entire case record and the material relied as on by the prosecution case is to find out the existence of any material available against the accused towards the projection of alleged offences were or not in existence. If the judge considers that there is no sufficient ground or proceeding against accused, he shall discharge the accused and shall record his decision for doing so but "what is not sufficient ground is a matter of consideration by the Judge who is exercising its powers under section 227 of Cr.P.C. with the guidance laid down by the Apex Court in the various case laws. At the stage of framing of the charge, the Court is to consider the material with a view to find out if there is a ground of proceedings against the accused. In the case of **Union of India Vs. Prafulla Kumar Samal & Another, (1979) 3 SCC 4,** Hon'ble the Apex Court had occasion to consider the scope and ambit of Section 227 Cr.P.C., which is Special Judge's power to pass order of discharge. After noticing Section 227 Cr.P.C. in paragraph no.7, the Court opined that :-

"7. XXXXXXXXXX The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

[21] The Hon'ble Apex Court in the case of ***C.B.I, Hyderabad Vs. K. Narayan Rao 2012 9 SCC 512*** has got an occasion to formulate the points which are guiding factor for deciding the application under section 227 and 228 of Cr.P.C. which are as follows :-

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

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the

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

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

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

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

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

[22] Thus, on a consideration of the authorities mentioned above, the following principles emerge that (i) the Judge while considering the question of framing the charges under Section 228 of the Code, has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out, (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial, (iii) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused, (iv) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he is conducting a trial. This broad principles were adhered by Hon'ble the Apex Court consistently, till date. In the latest reported judgment of Hon'ble Supreme Court in the case of ***M.E. Shivaling Murthy Vs. C.B.I. Bengluru (2020) 1 SCC (Crl) 811,*** Apex Court opined that :-

"While deciding a discharge application/petition, only material brought on record by the prosecution (both in form of oral or documentary) have to be considered. Accused is entitled to discharge if evidence recorded by the police, which the prosecution proposes to adduce the guilt of accused, even if fully accepted before it is challenged in cross-examination or rebutted by defence evidence, cannot show that the accused committed the offence. Further where two views are possible and one of them give rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused.

Though, it is open to the accused to explain away the materials giving rise to grave suspicion, but his submission must be confined only to materials produced by the prosecution. Defence of accused cannot be looked at the stage of discharge. Accused has no right to produce any document at that stage."

[23] Indeed, these are the established and golden principles for deciding the application under section 227 and 228 of Cr.P.C. but there are occasions where parties or the investigator got dishonest or the accused or the private prosecutor prevail upon the investigation to hold lopsided investigation of the case or even otherwise, certain vital areas are missed by the investigators to be probed which touches the core issue and if these material are brought on record, the entire texture and tenor of the case might have changed. Taking the eventuality into account, if the investigator is not fair and the material of "sterling quality" are left out from the records of the case, the law courts are not powerless to summon those material/documents which touches the core issue in exercise of power under section 91 of Cr.P.C. The Court is under the obligation to impart justice and to uphold the rule of law. They are not debarred from exercising its power. To exercise power under section 91 of Cr.P.C., the Court is to be satisfied that the material available were either accidentally or mischievously are not made part of the case diary or charge sheet by the Investigator but have a crucial bearing on the issue while framing the 'charge'. In the case of **State of Orissa versus Debendra Nath Padhi (2005) 1 SCC 568** the Hon'ble Apex Court observed that :-

"25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code". The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being

necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof."

[24] However, in the case of **Hardeep Singh Etc. versus State of Punjab and ors. Etc. (2014) 3 SCC 92**, a Bench of Hon'ble the Apex Court observed :-

"19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

[25] Thus, Hon'ble the Apex Court in the case of ***Nitya Dharmananda alias K. Lenin and another vs. Gopal Sheelum Reddy also known as Nithya Bhaktananda and another (2018) 1 SCC(Cri) 458*** summarise by mentioning that while the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of "sterling quality" which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet.

[26] In the instant case, the applicants have invoked the extraordinary powers of this Court under section 482 Cr.P.C. by canvassing the fact that the investigator/police after holding lopsided/coloured investigation either deliberately or unintentionally have skipped over to examine/investigate another facet of the coin i.e. the deceased was suffering from hyper tension and which resulted heavy upon her life but opposite party no.2 exploited this situation to secure his ultimate object to level his score with the applicants. It is contended by the counsel that this Court, in extraordinary power vested in it by way of 482 Cr.P.C. application, should take a judicial note of the fact and direct the court below to either direct for further investigation so that these medical prescriptions may be taken on record and in the light of the same, the discharge application may be decided. Since, the Court is deciding the matter at the admission stage itself, the Court is at loss, as to whether the document relied by or canvassed by the applicants is a part of case diary or not. But none the less, the Court is of the considered opinion that if these documents are taken on record, the

entire texture of the case would have changed and the accused applicants may be saved from undue harassment to face the trial. In this connection, learned counsel for the applicants thrive upon two judgments of Hon'ble the Supreme Cout viz :-

[27] This Court has occasion to visit the case of ***Rajiv Thapar and others Vs. Madan Lal Kapoor (2013) 3 SCC(Crl) 158*** in this prospective :-

"The High Court in exercise of its jurisdiction under section 482 Cr.P.C. must make just and rightful choice. This is not the stage of evaluating truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not the stage for determining how weighty the defence raised on behalf of the accused. Even if the accused is successful in showing some suspicion or doubt or creating some seepage in prosecution story in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving the finality in the accusation levelled by the prosecution without allowing the prosecution/complainant to adduce the evidence to substantiate the same. The jurisdiction of the High Court under section 482 Cr.P.c, 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 of the Cr.P.C., 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 of the Cr.P.C. 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 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

23. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for

quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.

[28] In the year 2008, Hon'ble the Apex Court had occasioned to examine the ambit and scope of Section 482 Cr.P.C. in ***Rukmini Navekar Vs. Vijaya Satardekar and others (2008) 14 SCC 1*** wherein the main order, it was observed, that the width of the powers width of the powers of the High Court under Section 482of Cr.P.C andArticle 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of the court or otherwise to secure the ends of justice. In concurring but separate order passed in the Rukmini's case (supra), it was additionally observed that under section 482 Cr.P.C. the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained? The aforesaid parameters shall be kept in mind while we examine whether the High Court ought to have exercise its inherent jurisdiction under section 482 Cr.P.C. in the facts and circumstances of this case.

Now reverting back to the fact and controversy involved in the present case, where the FIR itself was lodged by deceased's own son after inordinate and unexplained delay of almost eight days that too after having assess over her inquest and postmortem report, the informant tailored a story of scuffle over minor issue of drainage, implicating the applicants for assault by lathi and danda in consonance with post mortem report of the deceased. After the incident, the deceased was taken to various private nursing home and medical college, Saifai and took her last breath on 01.03.2018. None of the attending doctors have observed any injuries over her person during her treatment or even witnesses of fact has attributed that these so called injuries are responsible for her untimely demise. She died during her treatment at Agra and the

attending doctor in her post mortem report clearly and unambiguously mentioned the cause of her death is on account of **M.I.(Mayocardial Infarction i.e. heart attack)** as he observed clotted blood in both the chambers of her heart. All the doctors have reiterated the same line. Not only this, her own family member Ms. Raj Kumari too have given severe dent to the prosecution story denying the aspect of assault by lathi and danda. In the totality of circumstances, the Court wonders, how the Investigating Officer of the case has submitted its report under section 173(2) Cr.P.C. under section 304 IPC. On a plain reading and perusing the post mortem report which is self-explicit. Thus, if we evaluate the entire picture of the prosecution story from FIR, till charge sheet, the Court finds that at every stage, there are different colour and shades in the prosecution case itself.

Thus, after distilling above facts and circumstances of the case, one thing established beyond iota of doubt that neither the dimension nor the seat of injuries are such, which could take away anybody's life. The post mortem report of the deceased too, do not support the prosecution case. In the post mortem report, clotted blood was detected by the doctor, suggestive of the fact that heart attack is more probable cause of her untimely demise. On the other hand, the applicants have filed number of medical prescriptions of the deceased, buttressing the fact that she was old patient of hypertension. Thus, taking the help of these documents, various medical prescriptions of Ms. Kiran Devi, deceased and the guidelines rendered by Hon'ble the Apex Court in the case of **Rajiv Thapar and others(supra)** whereby it has been mentioned that material produced by the accused/applicants are such that it would rule out and displace the accusations levelled against them. These material if place on record and taken into consideration, clearly reject and over rule the veracity of the allegations contained in the accusation levelled by the prosecution/complainant. It must be taken into account at this stage. The reason is quite simple that if these materials are taken on record they would change the entire tone, texture and tenor of the accusation made in the FIR and completely blast the prosecution story and save the accused/applicants from the wrath, undue and unwarranted criminal case against them.

[29] Under the circumstances, the Court is quite satisfied that the material produced by the defence in their discharge application should be taken into account while deciding the discharge application. Thus, where two divergent views are in existence, which are equally probable, in that event, applying the principles of **CBI, Hyderabad vs. K. Narayan Rao(supra)** which speaks :-

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

This Court is persuaded by the guidelines. Learned Trial Judge shall decide the discharge application afresh in the light of the observation made in the case of **CBI, Hyderabad case(supra).**

[30] As mentioned above, the Court is at loss at this juncture to give any view point about the veracity of these documents i.e. medical prescriptions of the deceased

annexed as annexures to the petition thus, it is hereby directed that the applicants would submit all these documents/prescriptions before the court concern and any other document relating to her ailments i.e. deceased was suffering from hyper tension and the court concern shall direct the investigator to conduct further investigation about the authenticity of those medical prescriptions as well as record 161 statement of the concern doctor who conduct the post mortem within a period of six weeks from the date of filing of this order before the Trial Court. Thereafter, the court again would decide the discharge application taking into account the holistic and peneromic view of all the material on record and decide the same with good reasons by 31.12.2020 positively. There shall not be any laxity on the part of the trial court in deciding the discharge application by that date.

[31] With the aforesaid observations, the present 482 Cr.P.C application stands allowed and the order impugned dated 31.01.2020 is hereby quashed.

(2020)11ILR A42
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 8781 of 2020

Sanjay Kumar Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vinod Kumar Singh, Sri Indra Sen Singh

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

Criminal Law - Code of Criminal Procedure, 1973- Section 82 - Section 83- Section 482- Non Bailable Warrant, coupled with proclamation, under Section 82 of Cr.P.C., followed by attachment, under Section 83 of Cr.P.C., is being said to be issued against applicant- Application for grant of anticipatory bail was rejected- By means of present proceeding, under Section 482 of Cr.P.C., prayer for a direction that the applicant be not arrested, in execution of those processes. Meaning thereby, same relief, which was claimed by way of above Criminal Misc. Bail Application, has been again prayed for by circumventing proceedings, in present proceeding, under Section 482 of Cr.P.C.

Once a relief has been refused by the Court in earlier proceedings, then the same issue cannot be re-agitated through a subsequent Criminal Application as the same would amount to circumventing the law and misuse of the process of the Court.

Code of Criminal Procedure, 1973 - Section 482- This Court may not give any opinion about fact or involvement of accused-applicant- Exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded by the Hon'ble Supreme Court.

It is settled law that in the exercise of its inherent jurisdiction the Court cannot conduct a factual analysis as the same being a question of evidence can only be considered by the trial court.

Criminal Application accordingly rejected. (Para 4, 5, 7) (E-3)

Case law/ Judgements relied upon:-

1. Lavesh Vs State (NCT of Delhi), (2012) 8 SCC 730

2. Dhanlakshmi Vs R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494

3. St. of Bih. Vs Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1

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

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicant, Sanjay Kumar Yadav, with a prayer for restraining Station Officer, Police Station-Baharia, District-Allahabad, from arresting applicant, in execution of warrant of court or otherwise and from executing the process, under Sections 82 and 83 of Code of Criminal Procedure, 1973, against applicant, in Case Crime No.45 of 2019, under Sections 147, 149, 201, 34, 498A, 306 and 302 of Indian Penal Code, Police Station-Baharia, District-Allahabad.

2. Learned counsel for applicant argued that the applicant has been falsely implicated in Case Crime No.45 of 2019, under Sections 147, 149, 201, 34, 498A, 306 and 302 of Indian Penal Code, Police Station-Baharia, District-Allahabad. Applicant, being elder brother of husband of the deceased, was having separate living and was having no concern with the alleged demand of dowry and cruelty, with regard to it or committing of suicide by the deceased. Chargesheet has been filed against rest of the accused persons and investigation against applicant is said to be pending, wherein, proclamation, under Sections 82 and 83 of Cr.P.C., is being said to be issued. An application, for grant of anticipatory bail, being Criminal Misc. Bail Application No.58000 of 2019, Sanjay Kumar Yadav vs. State of U.P., has been rejected by this Court. He applied for having copy of the order of warrant, issued against him, alongwith order of proclamation and attachment, being said to be issued, under Sections 82 and 83 of Cr.P.C., but, he could not have copies of those orders. Statements of two daughters of the deceased is there in the case diary, wherein, they have specifically said that Sanjay Kumar Yadav, present applicant herein, was having a separate living, by constructing house of his own. Chargesheet, against applicant, can be filed if his involvement is there and thereafter the same can be challenged before the appropriate court, but, the Investigating Officer is adamant to arrest applicant. Hence, this all was under abuse of process of law Therefore, for avoiding abuse of process of law, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of Criminal Misc. Bail Application No.58000 of 2019 and the order passed over it, annexed herewith at page 70 of the Paper Book, it is apparent that Non Bailable Warrants have been issued against the applicants and his application for grant of anticipatory bail was rejected, meaning thereby, Non Bailable Warrant, coupled with proclamation, under Section 82 of Cr.P.C., followed by attachment, under Section 83 of Cr.P.C., is being said to be issued against applicant, in Case Crime No.45 of 2019, and applicant, by means of present proceeding, under Section 482 of Cr.P.C., has prayed for a direction that the applicant be not arrested, in execution of those processes. Meaning thereby, same relief, which was claimed by way of above Criminal Misc. Bail Application, has been again prayed for by circumventing proceedings, in present proceeding, under Section 482 of Cr.P.C..

5. This Court may not give any opinion about fact or involvement of accused-applicant in above case crime number, but, under all above facts and

circumstances and looking to the verdict of the Apex Court in the case of **Lavesh vs State (NCT of Delhi), reported in (2012) 8 SCC 730,** this Court finds no ground for any indulgence to be granted to the applicant.

6. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in the case of* **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** *Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

7. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

(2020)11ILR A44
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 8803 of 2020

Vinod Rawat ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ram Krishna Yadav

Counsel for the Opposite Parties:
A.G.A., Sri Sushil Kumar Pandey

Criminal Law - Code of Criminal Procedure, 1973- Section 227- Section 228- Rejection of application for discharge- At the stage of framing of charge, all that is required is to see whether a prima face case has been made out. The question whether the charge framed will eventually stand proved or not can be determined only after evidence is recorded. Pre trial acquittal, at the stage of charge framing, is not permissible. Even on the basis of strong suspicion, charge can be framed.

At the stage of framing of Charge it has to be seen only whether a prima facie case is made out or not and even on the basis of strong suspicion the court can frame the Charge.

Code of Criminal Procedure, 1973- Section 482- Cognizance - Challenged in a previously instituted proceeding wherein, it was held by this Court itself that it cannot be said that there is no ground for making out offence against applicant herein. Hence, impugned order was well within provisions of law, which does not call for any interference by this Court, in exercise of jurisdiction, conferred by Section 482 of Cr.P.C.

Criminal proceedings having been already challenged through a prior criminal Application and the same having been rejected, the Court in the exercise of its inherent jurisdiction may not reconsider the same proceedings in a subsequent application.

Criminal Application rejected. (Para 6, 7, 8) (E-3)

Case law/ Judgements relied:-

1. St. of H.P Vs Kishan Lal & ors., AIR 1987 Supreme Court 773

2. Palwinder Singh Vs Balwinder Singh, (2008) 14 Supreme Court Cases 508

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

1. This Application, under Section 482 of Code of Criminal Procedure, 1973, has been filed by the Applicant, Vinod Rawat, with a prayer for setting aside impugned order, dated 6.1.2020, passed by the court of Judicial Magistrate, Mathura, in Case No.1243 of 2017 (State vs. Vinod Rawat), arising out of Case Crime No.109 of 2016, under Sections 494, 323, 498 and 506 of Indian Penal Code, 1860, read with 3/4 of Dowry Prohibition Act, Police Station Mahila Thana, District Mathura, pending in the court of Judicial Magistrate, Mathura.

2. Learned counsel for applicant argued that a Discharge Application was moved before the Trial court, which was rejected by the impugned order, whereas, there was no evidence for levelling charges against the applicant. Informant has left nuptial house on his own will. There was no demand of dowry or cruelty with regard to it. Marriage was of old standing, having good understanding. False accusation was levelled, wherein, above Discharge Application has been rejected. It was an abuse of process of law. Hence, for avoiding abuse of process of law and securing ends of justice, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

3. Learned counsel for Opposite party no.2 as well as learned AGA, representing State of U.P., have vehemently opposed this Application.

4. Heard learned counsel for the parties and perused materials on record.

5. An Application, being *Application U/S 482 No.23876 of 2018, Vinod Rawat and 3 others vs. State of U.P. and another*, was filed before this Court and this Court, while passing order, dated 20.7.2018, has rejected contention of Vinod Rawat, applicant herein, that there is no accusation against him, rather, it was held that perusal of materials on record, and looking into the facts of the case, at this stage, it cannot be said that no offence has been made out against applicant no.1, therein.

6. Meaning thereby, contention raised, herein, in present proceeding, under Section 482 of Cr.P.C., was considered by this Court in above proceeding and it was held that there was no ground for not making out of offence at this stage. Subsequently, Discharge Application was filed, which was objected, heard and decided.

7. Apex Court, in the case of **State of Himanchal Pradesh vs. Kishan Lal and other, reported in AIR 1987 Supreme Court 773,** has propounded that at the stage of framing of charge, all that is required is to see whether a prima face case has been made out. The question whether the charge framed will eventually stand proved or not can be determined only after evidence is recorded. Deciding a case on merit at charge framing stage when the prosecution has got no opportunity to adduce evidence is deprecated. Further, Apex Court, in the case of **Palwinder Singh vs. Balwinder Singh, reported in (2008) 14 Supreme Court Cases 508,** has held that pre trial acquittal, at the stage of charge framing, is not permissible. Even on the basis of strong suspicion, charge can be framed.

8. In present case, informant, right from the stage of registration of first information report till recording of statement, under Section 161 of Cr.P.C., reiterated accusation made in the first information report, which was supported by other witnesses, too, on the basis of which cognizance was taken. This was challenged in a previously instituted proceeding, being Application U/S 482 No.23876 of 2018 **(Supra),** wherein, it was held by this Court itself that it cannot be said that there is no ground for making out offence against Vinod Rawat, applicant herein. Hence, impugned order was well within provisions of law, which does not call for any interference by this Court, in exercise of jurisdiction, conferred by Section 482 of Cr.P.C.

9. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

(2020)11ILR A46
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 11017 of 2006

Kamlesh Kumar Dwivedi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri J.P. Mishra, Sri Ashish Nigam

Counsel for the Opposite Parties:
A.G.A., Sri K.C. Saxena

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Nature and scope- The power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice - The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection- High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge- If basic ingredients of offfences alleged are altogether absent, criminal proceedings can be quashed under Section 482 CrPC.

It is settled law that the inherent power u/s 482 of the Cr.Pc should be exercised sparingly, with caution and circumspection and without entering into the factual aspects of the case. Only where either the failure to interfere would lead to miscarriage of justice or where the basic ingredients of the alleged offences are wholly missing, that the Court should exercise its inherent power.

Criminal Application rejected. (Para 12, 16, 17, 21) (E-3)

Case law/ Judgements relied upon:-

1. St. of Har. Vs Bhajan Lal & ors., 1992 Supp (1) SCC 335

2. Google India Pvt. Ltd. Vs Visakha Industries & ors., AIR 2020 SC 350

3. Jeffrey J. Diermeier & ors.Vs St. of W.B & ors., (2010) 6 SCC 243

4. Som Mittal Vs St. of Kar., (2008) 3 SCC 753

5. Lakshman Vs St. of Kar. & ors., (2019) 9 SCC 677

6. Chilakamarthi Venkateswarlu & ors. Vs St. of A.P & ors., AIR 2019 SC 3913

7. Zandu Pharmaceuticals Works Ltd. & ors Vs Mohd. Sharaful Haque & ors, (2005) 1 SCC 122

8. Rakhi Mishra Vs St. of Bih. & ors., (2017) 16 SCC 772

9. Sonu Gupta Vs Deepak Gupta & ors. , (2015) 3 SC 424

10. Roshni Chopra & ors. Vs St. of U.P. & ors., 2019 (7) Scale 152

11. Dy. Chief Controller of Imports & Exports Vs Roshanlal Agarwal & ors., (2003) 4 SCC 139

12. U. P. Pollution Control Board Vs Mohan Meaking Limited & ors., (2000) 3 SCC 745

13. Nupur Talwar Vs CBI & ors., (2012) 11 SCC 465.

14. Parbatbhai Aahir & ors. Vs St. of Guj. & Ors, (2017) 9 SCC 641

15. Arun Singh & ors.Vs St. of U.P. ,Criminal Appeal no.250 of 2020 (SLP (Crl.) No. 5224 of 2017), decided by Supreme Court on 10.02.2020

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

1. Heard Sri J.P. Mishra, learned counsel for applicant and learned AGA for State. None has appeared on behalf of respondent-2, though called twice. Hence I proceed to decide this application after having heard learned counsel for applicant and learned AGA.

2. This application under Section 482 Cr.P.C. has been filed by Kamlesh Kumar Dwivedi-sole applicant with a prayer to quash Charge Sheet No. 27 of 2006 dated 11.04.2006 filed in Case Crime No.1164 of 2006, under Sections 306 IPC, Police Station Kotwali Mahoba, District Mahoba.

3. Facts, in brief, in the present case are that Opposite Party-2 Ram Narayan Prajapati, father of Dhirendra Pratap Singh lodged First Information Report (*hereinafter referred to as "F.I.R."*) at Police Station-Kotwali Mahoba, District Mahoba stating that his son was a student of Class-XII. After Deepawali vacation, he had come to school from his house and was residing in hostel. On 20.11.2004, Principal, K.C. Pandey from Jawahar Novoday Vidyalaya, Mahoba suddenly informed on telephone at around 02:30 A.M. that his son is missing from hostel and Informant was required to reach Mahoba to search him out. Informant was working in a Development Block, Sumerpur, Hameerpur and he was employed in National Pulse Polio Project. He could not come immediately. His younger brother Haldhar Prasad reached school at 10:00 A.M. and on enquiry, Principal told him that dead body of Informant's son Dhirendra Pratap Singh was lying at Railway Gate, Kidari. Informant further alleged that whenever his son used to come at his residence, he complained that his Principal K.C. Pandey and House Master Mr. Dubey beat him badly and also treated him with abusive language and used to cause to him mental torture. Therefore, he had doubt that both i.e. K.C. Pandey and House Master, Mr. Dubey are responsible to force his son to commit suicide due to excessive beating and torture.

. Police made investigation and claimed to have found suicide note which reads as under:

"नक़ल सुसाइड नोट "प्रिंसिपल" मैं चोर नहीं हूँ आप को गलत फहमी हुई है जिन्होनें

मेरी शिकायत की उन्होंने अपने बारे में कुछ नहीं बताया होगाA सर मेरे भी केला बिस्कुट कभी कभी गायब हुए हैं लेकिन मैंने कभी शिकायत नहीं की और आज मैंने कर दिया तो एक चोर बन गयाA आपने ५० रूपया कहे थे ५० क्या बल्कि एक लाख कहते तो भी कहीं न कहीं से लाता अगर नहीं ला पाता तो मर जाताA सर अगर मेरी माँ नहीं है तो क्या मैं एक अच्छा लड़का नहीं बन सकता वैसे आपने ठीक कहा सर मैं एक अच्छा लड़का नहीं हूँ लेकिन अगले जन्म में जरूर एक अच्छा लड़का बनने की कोशिश करूँगा मैं बहुत बुरा हूँ सर मैंने आपका और अपने पापा का दिल दुखाया है हो सके तो पापा यह बात बताना जिंदगी में पहली बार इतना बेइज्जती महसूस कर रहा हूँ शायद इसलिए मैं ऐसा कर रहा हूँ आप का शिष्य- धीरेन्द्रA"

5. After recording statements of Informant, his brother, son and some other students of school, Investigating Officer (*hereinafter referred to as "I.O."*), submitted charge sheet, which is impugned in present application stating that charge sheet has been submitted without examining that there is no connection between the complaint of deceased so as to attract Section 306 IPC. In the case in hand, there is no nexus between so called suicide as alleged on the part of applicant. There is no proximity and there is no material, therefore, entire prosecution is vitiated in law. Reliance is placed by learned counsel for applicant on Supreme Court's judgments in **Madan Mohan Singh vs. State of Gujarat and Anr., 2010 (6) SCC 376, Gangula Mohan Reddy vs. State of Andhra Pradesh, 2010 (1) SCC 750, State of Kerala and others vs. S Unnikrishanan Nair and others, 2015 (9) SCC 639 and S.S. Chheena vs. Vijay Kumar Mahajan & another, 2010 (12) SCC 190.**

6. Learned counsel for applicant also stated that in the FIR names of Principal, K.C. Pandey and one Mr. Dubey have been taken while charge sheet has been submitted against applicant-Kamlesh Kumar Dwivedi without there being any material to show that the person named in FIR is applicant himself, particularly when in suicide note there is nothing which may suggest that anything was said by the deceased-student against the applicant.

7. From perusal of alleged suicide note, it appears that there was some complaint made with respect of missing of bananas which was complained by somebody and thereafter something happened in the school, but who made complaint and who scolded, nothing is not very clear from the alleged suicide note. From the students' statements, it appears that teachers used to scold the deceased-student time to time but only for his betterment and not either to punish him or with any malice. Assuming the facts as stated in FIR correct and having gone through evidence collected by I.O., the only scope under Section 482 Cr.P.C., at this stage, is whether any offence under Section 306 IPC is made out or not. In order to attract Section 306 IPC, one has to find out existence of something which may amount to abetment of committing suicide by the deceased.

8. In **Madan Mohan Singh (supra),** Supreme Court said that in such matters there must be an allegation that the accused has instigated the deceased to commit suicide or secondly engages with one or more other persons in any conspiracy and lastly that the accused had in any way aided in the act or illegal omission to bring out the suicide. Section 306 IPC reads as under:

"306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

9. The abetment is defined in Section 107 IPC which reads as under:

"Abetment of a thing

A person abets the doing of a thing, who:

1. Instigates any person to do that thing; or

2. Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

3. Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanations

1. A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.Illustration: A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

2.Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

10. Allegation that somebody has done something wrong which he should not have done, all explanations given by such person with respect to allegation that he had done something wrong per se, cannot be said to be a material or fact which can be constituted as if abetment to commit crime in my view are within ambit of Section 306 IPC read with Section 107 IPC. If a person is hypersensitive to ordinary petulance, discord and difference which happen in our day to day life the charge of abetment to suicide cannot be leveled against another person, who has to perform his duty in ordinary course of business. Job of a Teacher is always supposed to teach his students and tell them what is good for them. If instructions given by a Teacher or behaviour by a Teacher is treated to be a torture or an abetment to commit suicide, things will be very different and serious enough and may create chaos for the entire community of Teachers as well. In ***State of Bengal vs. Orilal Jaiswal and another, (1994) 1 SCC 73,*** it was held that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence to find out whether the same can be brought within the ambit of abetment to commit suicide. If it appears to the Court that a victim committed suicide was hyper sensitive to ordinary petulance, discord and difference in domestic life quite common to society to which victim belong and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide. The conscience of the Court should not be satisfied for basing a finding that accused charged of abetment to commit offence of suicide should be found guilty.

11. Principle of law laid down in aforesaid judgments also as relied by learned counsel for applicant are not acceptable as not otherwise binding upon

this Court but question as to whether at this stage when charge sheet has been submitted such defence of applicant can be examined or whether the Court can examine the evidence collected by Investigating Officer or let the Trial Court record finding of fact.

12. In my view, here is some difficulty and this Court cannot go to this extent of enquiry on an application under Section 482 Cr.P.C. at this stage.

13. The principles which justify interference under Section 482 Cr.P.C. by Court have been laid down in various authorities in which Supreme Court's judgment in ***State of Haryana vs. Bhajan Lal and others, 1992 Supp (1) SCC 335*** was leading precedent and thereafter matter has also been examined by even Larger Benches.

14. In **State of Haryana vs. Bhajan Lal and others (supra)** issue of jurisdiction of this Court under Section 482 Cr.P.C. has been considered and what has been laid down therein in paragraph 102, has been repeatedly followed and reiterated consistently. In very recent judgment in **Google India Private Limited Vs. Visakha Industries and Ors. , AIR 2020 SC 350,** guidelines laid down in paragraph 102 in **Bhajal Lal's case (supra)** have been reproduced as under :

*"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."*** *(emphasis added)*

15. Court has also reproduced note of caution given in paragraph 103 in **Bhajan Lal's case (supra)** which reads as under :

"103. We also give a note of caution to the effect that the ***power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases;*** *that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." (emphasis added)*

16. What would be the scope of expression "rarest of rare cases" referred to in para 103 in **State of Haryana vs. Bhajan Lal (supra)** has been considered in **Jeffrey J. Diermeier and Ors. Vs. State of West Bengal and Ors. , 2010 (6) SCC 243,** Court has said that words "rarest of rare cases" are used after the words 'sparingly and with circumspection' while describing scope of Section 482 CrPC. Those words merely emphasize and reiterate what is intended to be conveyed by the words 'sparingly and with circumspection'. They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasize that the power under Section 482 Cr.P.C. to quash FIR or criminal proceedings should be used sparingly and with circumspection.

17. Supreme Court in **Jeffrey J. Diermeier (supra)** infact referred to an earlier Three Judges' Bench judgment in **Som Mittal Vs. State of Karnataka, 2008 (3) SCC 753,** to explain phrase "rarest of rare cases". In **Som Mittal (supra),** Court also said that exercise of inherent power under Section 482 CrPC is not a rule but exception. Exception is applied only when it is brought to notice of Court that grave miscarriage of justice would be added if trial is allowed to proceed where accused would be harassed unnecessarily or if trial is allowed to linger when prima facie it appears to Court that trial would likely to be ended in acquittal. Whenever question of fact is raised which requires evidence, Courts always said that at pre trial stage i.e. at the stage of cognizance taken by Magistrate power under Section 482 CrPC would not be appropriate to be utilized, since, question of fact has to be decided in the light of evidence which are yet to be adduced by parties.

18. In **Lakshman vs. State of Karnataka and others, 2019 (9) SCC 677**

Court said that it is not permissible for High Court in application under Section 482 CrPC to record any finding wherever there are factual disputes. Court also held that even in dispute of civil nature where there is allegation of breach of contract, if there is any element of breach of trust with mens rea, it gives rise to criminal prosecution as well and merely on the ground that there was civil dispute, criminality involved in the matter cannot be ignored. Further whether there is any mens rea on part of accused or not, is a matter required to be considered having regard to facts and circumstances and contents of complaint and evidence etc, therefore, it cannot be said pre judged in a petition under Section 482 CrPC.

19. In **Chilakamarthi Venkateswarlu and Ors. Vs. State of Andhra Pradesh and Ors., AIR 2019 SC 3913,** Court reiterated that inherent jurisdiction though wide and expansive has to be exercised sparingly, carefully and with caution and only when such exercise would justify by tests specifically laid down in Section itself. In paragraph 14 of judgment, Court said :

"14. For interference Under Section 482, three conditions are to be fulfilled. The ***injustice which comes to light should be of a grave, and not of a trivial character; it should be palpable and clear and not doubtful and there should exist no other provision of law by which the party aggrieved could have sought relief."***
(emphasis added)

20. Court also said that in exercise of jurisdiction under Section 482 CrPC it is not permissible for the Court to act as if it were Trial Court. Court has only to be prima facie satisfied about existence of sufficient ground for proceeding against accused. For that limited purpose, Court can evaluate material and documents on record but it cannot appreciate evidence to conclude whether materials produced are sufficient or not for convicting accused. High Court should not exercise jurisdiction under Section 482 CrPC embarking upon an enquiry into whether evidence is reliable or not or whether on reasonable apprehension of evidence, allegations are not sustainable, or decide function of Trial Judge. For the above proposition, Court relied on its earlier authority in **Zandu Pharmaceuticals Works Limited and others vs Mohd. Sharaful Haque and others, 2005 (1) SCC 122.**

21. Power under section 482 CrPC should not be exercised to stifle legitimate prosecution. At the same time, if basic ingredients of offfences alleged are altogether absent, criminal proceedings can be quashed under Section 482 CrPC. Relying on **M.A.A. Annamalai Vs. State of Karnataka and Ors. , 2010 (8) SCC 524, Sharda Prasad Sinha Vs. State of Bihar, AIR 1977 SC 1754** and **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors., 1976 AIR 1976 SC 1947, Court in Chilakamarthi Venkateswarlu and Ors. (supra)** said that where allegations set out in complaint or charge sheet do not constitute any offence, it is open to High Court exercising its inherent jurisdiction under Section 482 CrPC to quash order passed by Magistrate taking cognizance of offence. Inherent power under Section 482 CrPC is intended to prevent abuse of process of Court and to clear ends of justice. Such power cannot be exercised to do something which is expressly barred under CrPC. Magistrate also has to take cognizance applying judicial mind only to see whether prima facie case is made out

for summoning accused persons or not. At this stage, Magistrate is neither required to consider FIR version nor he is required to evaluate value of materials or evidence of complainant find out at this stage whether evidence would lead to conviction or not.

22. It has also been so observed in **Rakhi Mishra Vs. State of Bihar and Ors., 2017 (16) SCC 772** and **Sonu Gupta Vs. Deepak Gupta and Ors. , 2015 (3) SC 424** and followed recently in **Roshni Chopra and others vs. State of U.P. and others, 2019 (7) Scale 152.** Here Court also referred to judgment in **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal and Ors., (2003) 4 SCC 139,** wherein paragraph 9, Court said that in determining the question whether any process has to be issued or not, Magistrate has to be satisfied whether there is sufficient ground for proceeding or not and whether there is sufficient ground for conviction; whether the evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of inquiry.

23. However, it is also true that at the stage of issuing process to the accused, Magistrate is not required to record detailed reasons. In **U. P. Pollution Control Board vs. Mohan Meaking Limited and others, 2000 (3) SCC 745,** after referring to a decision in **Kanti Bhadra Shah Vs State of West Bengal 2001 SCC 722,** Court said :

"Legislature has stressed the need to record reasons in certain situations such as dismissal of complaint without issuing process. There is ***no such requirement imposed on a Magistrate for passed detailed order while issuing summons. Process issued to accused cannot be quashed merely on the ground that Magistrate had not passed a speaking order." (emphasis added)***

24. Same proposition was reiterated in **Nupur Talwar Vs Central Bureau of Investigation and others, 2012 (11) SCC 465.**

25. In a Three Judges' Bench in **Parbatbhai Aahir and Ors. Vs State of Gujarat and Ors, 2017 (9) SCC 641,** Court has observed that Section 482 CrPC is prefaced with an overriding provision. It saves inherent power of High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any court; or (ii) otherwise to secure the ends of justice. In Paragraph 15 of the judgment Court summarized as under :

"(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The ***provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;***

(ii) The ***invocation of the jurisdiction of the High Court to quash a First Information Report or*** *a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973.* ***The power to quash Under Section 482 is attracted even if the offence is non-compoundable.***

(iii) In forming an opinion whether a criminal proceeding or

complaint should be quashed in exercise of its jurisdiction Under Section 482, the ***High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;***

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The ***decision*** *as to* ***whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case*** *and no exhaustive elaboration of principles can be formulated;*

(vi) In the exercise of the power Under Section 482 and ***while dealing with a plea that the dispute has been settled,*** *the* ***High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute.*** *Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;*

(vii) As distinguished from serious offences, ***there may be criminal cases which have an overwhelming or predominant element of a civil dispute.*** *They stand on* ***a distinct footing in so far as the exercise of the inherent power to quash is concerned;***

(viii) ***Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;***

(ix) In such a case, the High Court may quash the criminal proceeding ***if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice;*** *and*

(x) There is ***yet an exception*** *to the* ***principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants.*** *The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance." (emphasis added)*

26. Above observations have been reiterated in **Arun Singh and other Vs State of U.P.** passed in **Criminal Appeal no.250 of 2020 (arising out of Special Leave Petition (Crl.) No. 5224 of 2017),** decided by Supreme Court on 10.02.2020.

27. It is open to the applicant to raise all the pleas when the evidence is adduced before the Court below but at this stage when the evidence is yet to be adduced/placed before Court below, this Court cannot act like a Trial Court to examine the material to find out whether evidence collected by Police satisfies ingredients of abetment to commit suicide or not. Hence, I do not find any reason to interfere at this stage.

28. The application lacks merit and is accordingly dismissed. Interim order, if any, stands vacated.

(2020)11ILR A55
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12606 of 2020

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

Counsel for the Applicant:
Sri Anand Kumar Singh

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Sections 202, 204, 200 - Issuance of process - summoning - Prima-facie case is only to be seen by Magistrate on the basis of evidence collected by him under his enquiry u/s 200 & 202 Cr.P.C. - Accused evidence/defence - not to be seen at that stage - evidence placed by accused is to be seen after recording of statement u/s 244 Cr.P.C. or in any discharge application moved by accused (Para 5)

Dismissed (E-5)

Listed of Cases cited:-

1. St. of A.P. Vs Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs State Represented by Inspector of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R.Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. State of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

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

1. Heard learned counsel for the applicant and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicant Raghav against State of U.P. and Smt. Geeta with prayer to quash summoning order dated 05.11.2019 passed by C.J.M., Mainpuri, in Complaint Case No. 231 of 2017, Smt. Geeta Devi Vs. Raghav and others, under Sections 304B I.P.C., P.S. Bichawa, district Mainpuri, as well as the order dated 24.2.2020 passed by Sessions Judge, Mainpuri, in Criminal Revision No. 03 of 2020, Raghav Vs. State of U.P. and another.

3. Learned counsel for the applicant argued that an application u/s 156(3) Cr.P.C. was filed by complainant and it was treated to be complaint case. Against this order dated 30.1.2017 the complaint filed Application u/s 482 No. 5870 of 2017, Smt. Geeta Devi Vs. State of U.P. and others, wherein proceeding was dismissed vide order dated 21.2.2017. Against this order dated 21.2.2017 the complainant filed and S.L.P. before the Hon'ble Supreme Court of India as Special Leave to Appeal (Crl.) No. 7381 of 2017, which was dismissed vide order dated 16.5.2018 with direction for dismissal of all pending applications. This

order of Apex Court was concealed and impugned summoning order was got obtained. This was a proceeding initiated after three and half months of occurrence and it was not an unnatural death. Rather it was a death during treatment, wherein the deceased had delivered a child and then after some complications were developed for which she was referred to higher centre and while being taken to higher centre at Agra, she succumbed on the way, for which there is a certificate of Medical Officer concerned, wherein above medical complication has been mentioned. Complainant and her family members were present during last rituals that is why no report was ever made and after three months, this false complaint was filed by complainant. It is an abuse of process of law. Hence this application with above prayer.

4. Learned A.G.A. has vehemently opposed the above argument.

5. From the very perusal of order of Apex Court passed in Special Leave to Appeal (Crl.) No. 7381 of 2017 arising out of final judgment and order dated 21.2.2017 passed in Criminal Misc. Application No. 5870 of 2017 passed by the High Court of Judicature at Allahabad, Smt. Geeta Devi Vs. State of U.P. and others, dated 16.5.2018 it is apparent that S.L.P. was dismissed and pending applications, if any, shall also stand disposed of has been passed i.e. nowhere this order is there that all proceedings pending with regard to complaint stand disposed of. Hence apparently inference argued by learned counsel for applicant is erroneous. Nowhere the Apex Court has directed for disposal of proceeding, as has been argued by learned counsel for applicant. In the proceeding u/s 482 Cr.P.C. No. 5870 of 2017, Smt. Geeta Vs. State of U.P. and 6 others, this court vide order dated 21.2.2017 has upheld the order of Magistrate dated 30.1.2017 with regard to registration of complaint case. Meaning thereby registration of complaint case, of which cognizance was taken by Magistrate for initiating enquiry u/s 200 and 202 Cr.P.C. in alleged occurrence of dowry death, was upheld by this court. Now in the enquiry made by Magistrate, the statement of complainant is there that the deceased Sapna was married two years before with Raghav and since marriage she was subjected to cruelty with regard to demand of dowry of Rs. Two lacs cash and a car by her in-laws. This was complained by Sapna to her mother i.e. the complainant Smt. Geeta. The names of accused were disclosed by Sapna as Raghav, Brahmanand, Sharda, Sandeep, Anuradha and Dilip. There was a contention that Sapna was throttled and committed murder on 14.8.2016 by those in-laws. A telephonic call was received in the morning at 7 to 8 A.M. wherein they were apprised the occurrence and when the complainant rushed to the nuptial home of Sapna, last rituals of Sapna was done. When asked about, a threat was extended. This contention of complainant has been corroborated in the statements of witnesses recorded u/s 202 Cr.P.C. The Magistrate in its enquiry examined Ashok Kumar and Trilok u/s 202 Cr.P.C., wherein also corroboration is there. On the basis of those evidence impugned summoning order dated 5.11.2019 was made wherein accused Raghav was summoned for the offence punishable u/s 304B I.P.C. Marriage within two years with Raghav is an admitted fact. Death at nuptial house while deceased was with her in-law is also an undisputed fact. Death under unnatural circumstances is said by complainant and her witnesses.

Though certificate of Medical Officer has been filed by accused persons. Prima-facie case for summoning was seen by Magistrate on the basis of evidence collected by him under his enquiry u/s 200 and 202 Cr.P.C. Now the evidence being placed by accused is to be seen at appropriate stage after recording of statement u/s 244 Cr.P.C. or in any discharge application moved by accused. Till this juncture there is no abuse of process of law.

6. This court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. is not expected to meticulously analyse the facts and evidence as it is within the domain of trial court.

7. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474,*** *hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** *the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in* ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

8. Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for*

interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,*** *Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. Accordingly, there remains nothing for any indulgence in this proceeding. The prayer for quashing summoning order as well as proceeding of the aforesaid complaint case is refused and the application u/s 482 Cr.P.C. is hereby dismissed.

(2020)11ILR A58
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12608 of 2020

Sri Rudra Prakash Tiwari & Anr.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Shivakant

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 420, 504, 506 - Negotiable Instrument Act, 1881-Sections 138-quashing of summoning order refused- complainant and witnesses were examined-they were in corroboration with complaint and on the basis of evidence collected summoning order was passed by the magistrate-while exercising jurisdiction u/s 482 CrPC the High Court would not embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained-that is the function of the trial court.(Para 5 to 8)

B. To prevent abuse of process of law, High Court in exercise of its inherent powers 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 8)

In the instant case, complainant and the applicants agreed on the basis of shared commission for getting land and installation of solar plant on the land. After execution of sale deed of 60 Acres of land, a fraud was committed with the complainant with regard the payment of commission. On demand, promised was made to be paid through cheque but the cheque was dishonoured for which separate proceeding u/s 138 N.I. Act was pending but for offences of fraud, abuse and extension of threat, complaint was filed.(Para 5)

The application is dismissed. (E-6)

List of Cases Cited:-

1. St. of A.P. Vs Gaurishetty Mahesh, JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. L J 3844

2. Hamida Vs Rashid, (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P.,(2008) 8 SCC 781

4. Popular Muthiah Vs St. Reprtd. by Inspector of Police , (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar,(1990) Cr L J 320 (DB): (1990) AIR SC 494

6. St. of Bih. Vs Murad Ali Khan, (1989) Cr L J 1005: AIR (1989) SC 1

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

1. Heard learned counsel for the applicants and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicants Rudra Prakash Tiwari @ Raju Tiwari and Ashish Tiwari against State of U.P. and Sushil Kumar @ S.K. Singh with prayer to quash summoning order dated 19.01.2019 as well as entire proceedings of Complaint Case No. 1123 of 2018, Sushil Kumar @ S.K. Singh Vs. Rudra Prakash Tiwari @ Raju Tiwari and others, under Sections 420, 504, 506 I.P.C., P.S. Barra, district Kanpur Nagar, pending in court of Special C.J.M., Kanpur Nagar.

3. Learned counsel for the applicants argued that for the same sequence of occurrence, wherein a cheque was given and the same was dishonoured, a complaint u/s 138 of N.I. Act had been filed and therein applicant no. 1 is on bail. Subsequently, for the same set of circumstances this complaint has been filed. Even though the offence punishable u/s 420 I.P.C. is not made out, but for which there is summoning. In Complaint Case u/s 138 of N.I. Act only son was implicated, whereas in subsequent case father was also implicated. There was some dispute in regard to commission for which cheque was given and the cheque was dishonoured, hence the subsequent case i.e. the present case, is an abuse of process of law. Hence this application with above prayer.

4. Learned A.G.A. has vehemently opposed the above argument.

5. From the very perusal of complaint, it is apparent that Complaint No. 1123 of 2018 was filed by Sushil Kumar @ S.K. Singh against Rudra Prakash Tiwari @ Raju Tiwari and Ashish Tiwari for the offences punishable u/s 406, 420, 504, 506 I.P.C. with contention that the complainant used to search unusable land of farmers for sale on some commission basis for installation of Solar Power Plant for Solar Power Company in the year 2016 and 2017. During this exercise the opposite parties (present applicants) met to the complainant and assured him for getting some land in village Raniganj, Tehsil Hamirpur Sadar, for sale for installation of Solar Power Plant. This was agreed to be on the basis of shared commission. This was agreed, wherein Rs. 30,000/- cash was paid to opposite parties (applicants) for getting those land and revenue documents verified from revenue department. But after execution of sale deed of 60 Acres of land, as above, in favour of Ajyor Power Jupiter Pvt. Ltd., New Delhi, a fraud was committed with complainant with regard to payment of commission. The same was got transferred through RTGS in favour of Rudra Prakash Tiwari and Ashish Tiwari and when demand was made, it was promised to be paid through cheque, it was got issued and subsequently payment was stopped. Hence when asked for, on 25.4.2018 a threat with abuse was extended. Hence this complaint was filed and for dishonour of cheque a separate proceeding u/s 138 of N.I. Act is being said

to be pending. For offence of fraud and abuse with extension of threat punishable u/s 420, 504, 506 I.P.C., a separate complaint was filed, as in the trial u/s 138 of N.I. Act, which is for specific proceeding under special procedure given in above Act, may not be properly redressed. Hence for offences of fraud, abuse and extension of threat, this criminal case was filed, wherein the complainant was examined u/s 200 Cr.P.C. and his witnesses Chandrapal Yadav and Manoj Gupta were examined u/s 202 Cr.P.C. They are in corroboration with complaint and on the basis of these evidence collected during enquiry by Magistrate, the impugned summoning order was passed against applicants Rudra Prakash Tiwari @ Raju Tiwari and Ashish Tiwari.

6. This court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. is not expected to meticulously analyse the facts and evidence as it is within the domain of trial court.

7. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474,*** *hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** *the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself."* While interpreting this jurisdiction of High Court Apex Court in ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

8. Regarding prevention of abuse of process of Court, Apex Court in

Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494 has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in* ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1****, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. Accordingly, there remains nothing for any indulgence in this proceeding. The prayer for quashing summoning order as well as proceeding of the aforesaid complaint case is refused and the application u/s 482 Cr.P.C. is hereby dismissed.

(2020)11ILR A61
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 12997 of 2020

Kamal Chand Patel ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ravindra Kumar, Sri Arun Kumar Goyal

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 482 - Negotiable Instrument Act, 1881-Sections 138-quashing of entire proceeding-admitted fact of issuance of cheque is there, dishonour of it by bank concerned, dishonour memo and receipt of issuance of notice to accused/applicant by complainant by registered post is there and non-payment of amount is also undisputed- Hence, prima facie case for issuance of process for offence punishable u/s 138 N.I. Act, but those facts were to be decided by trial court after getting evidence-quashing of complaint case is refused.(Para 2 to 11)

B. In exercising jurisdiction u/s 482 CrPC High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not.it 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.(Para 9,10)

The application is dismissed. (E-6)

List of Cases Cited:-

1. Fiona Shri khande Vs St. of Mah. & anr., (2014) AIR SC 957,

2. St. of A.P. Vs Gaurishetty Mahesh, JT (2010) 6 SC 588: (2010) 6 SCALE 767: (2010) Cr L J 3844

3. Hamida Vs Rashid, (2008) 1 SCC 474

4. Monica Kumar Vs St. of U.P. ,(2008) 8 SCC 781

5. Popular Muthiah Vs St. Reprtd. by Inspector of Police , (2006) 7 SCC 296

6. Dhanlakshmi Vs R. Prasana kumar, (1990) Cr L J 320 (DB): (1990) AIR SC 494

7. St. of Bih. Vs Murad Ali khan , (1989) Cr L J 1005: AIR (1989) SC 1

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

1. Heard learned counsel for the applicants and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicant Kamal Chand Patel against State of U.P. and another with prayer to quash impugned order dated 21.1.2020 as well as entire proceedings of Complaint Case No. 1850 of 2017, under Section 138 of N. I. Act, Mohd. Habib Vs. Kamal Chand Patel, P.S. Soraon, district Allahabad, pending in court of Special Judge N.I. Act, Allahabad.

3. Learned counsel for the applicants argued that entire proceeding of complaint case is an abuse of process of law. It was a pre-matured complaint because there is no mention of date of service of legal notice, whereas it was served upon applicant on 01.12.2017 and without expiry of 15 days period, this complaint has been filed. The cheque was dishonoured for the first time on 13.9.2017 and there is endorsement of above dishonour, but for creating a cause of action for limitation, it was falsely stated that it was subsequently presented for encashment, but it was again dishonoured, whereas no such presentation was there. This cheque was in lieu of security and it was not on account of any liability. It was misused for which an F.I.R. has been lodged by way of an application u/s 156(3) Cr.P.C. against complainant. Besides those legal defects, this summoning order was there. Hence an application for discharge was moved and it too was rejected vide order dated 21.1.2020, without considering the facts written therein. Those contents were not written in the impugned order. Thus, entire proceeding of complaint case as well as impugned order passed on discharge application is under abuse of process of law. Hence this application with above prayer.

4. Learned counsel for applicant has cited order of learned Single Bench of this court passed in Criminal Misc. Application No. 27216 of 2010 decided on 01.10.2012, Vijay Kumar Upadhyay Vs. State of U.P. and another, wherein it has been held that cheque issued as security and towards payment of amount and if it was dishonoured, it is an offence in view of provisions of Section 138 of N.I. Act. But cheque given in security is not covered u/s 138 of N. I. Act.

5. Learned A.G.A. has vehemently opposed the above argument.

6. From the very perusal of complaint, annexed at page no. 58 of paper book, it is apparent that it was filed by Mohd. Habib against accused-applicant Kamal Chand Patel with this contention that the complainant was owner in possession of agricultural land of plot no. 70 situate in Mauza Saraibrisingh alias Sarai Bahar, Tehsil Soraon, District Allahabad. A portion of aforesaid plot measuring 30 Ft x 60 Ft. was alienated for an amount of Rs. 12 lacs by way of registered sale deed dated 28.8.2017 and consideration of Rs. 12 lacs was paid by way of cheques, two cheques for Rs. Three lacs and Rs. Two lacs were issued in favour of Rizwan Ahmad, another cheque for Rs. Three lacs was issued in favour of Faizan Ahmad and yet another cheque for Rs. Two lacs Ninety thousand

was issued in favour of complainant against above sale consideration. When this cheque was presented by the complainant before bank for encashment, it was dishonoured. This was complained to the drawer, who assured for its payment on subsequent presentation. This cheque was presented. Subsequently, it was dishonoured on 01.11.2017. A legal notice by way of registered post dated 10.11.2017 was issued to the applicant, receipt of this registered post was annexed with the complaint and after receipt of above notice, payment was not made, then after this complaint was filed before above court on 11.12.2017 i.e. after lapse of 30 days from the date of issuance of notice by registered post. Now it is being stated that notice was received by accused-applicant on 01.12.2017 and complaint was pre-marute. Now it is a question of fact to be seen by the trial court by way of evidence, as to whether the notice was served on 01.12.2017 or it was delivered within three days of its posting by registered post. The issuance of cheque is an undisputed fact. Now whether it was against security or against consideration for execution of above sale deed is again a question of fact to be seen by trial court after evidence. The Apex Court in ***Fiona Shri Khande vs. State of Maharashtra and another, AIR 2014, Supreme Court 957,*** has held that the Magistrate is not expected to analytically analyze all facts and evidence at the stage of issuing process u/s 204 Cr.P.C. Rather at that time, only prima-facie case for issuance of process is to be seen. In the present case, admitted fact of issuance of cheque is there, dishonour of it by bank concerned, dishonour memo and receipt of issuance of notice to accused-applicant by complainant by registered post is there and non-payment of above amount is also undisputed. Hence on the basis of above facts, prima-facie case for issuance of process for offence punishable u/s 138 Act of N.I. Act was there and accordingly, it was done so.

7. The accused appeared with making contentions, as above, but those facts were to be decided by trial court after getting evidence and till disposal of application 9B moved for discharge, there was no fact at all except the grounds for summoning. Hence pre trial acquittal or without giving evidence to make decision making disposal of complaint was not made by trial court and there was no abuse of process in both of above proceedings. The fact involved in above proceeding, cited by learned counsel for applicant, is entirely different than the fact in hand. In above precedent, the money was held to be advanced as a security cheque, but in the present case the complaint version is that cheque was issued against payment of consideration for alienating landed property by way of registered sale deed. Hence, above procedent is of no effect to the accused at this juncture. Accordingly, the points raised relate to facts, as per law.

8. This court in exercise of its inherent jurisdiction u/s 482 Cr.P.C. is not expected to meticulously analyse the facts and evidence as it is matter of trial to be seen during trial.

9. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as

may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474,*** *hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,*** *the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in* ***Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

10. Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** has propounded *"To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in ***State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,*** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

11. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above. This court is not to make any comment on factual matrix because the same remains within the domain of trial court.

12. Accordingly, there remains nothing for any indulgence in this proceeding. The prayer for quashing the impugned order as well as proceeding of the aforesaid complaint case is refused

and the application u/s 482 Cr.P.C. is hereby dismissed.

(2020)11ILR A65
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Application U/S 482 No. 13698 of 2005

Daroga & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Neeraj Singh

Counsel for the Opposite Parties:
A.G.A., Sri K.N. Mishra, Sri R.K. Sahi

(A) Criminal law - Indian Penal Code, 1860 - Sections 147, 149, 323, 452, 435, 504 and 506 - Police has power to make further investigation under Section 173(8) Cr.P.C. - normally permission of Magistrate should be obtained when seized with the matter and charge-sheet submitted - mere non obtaining of permission from Magistrate further investigation, if any, made by Police would not be per se vitiated - Charge-sheet including summoning order quashed. Para - 8,12

Applicants challenged subsequent investigation and second charge-sheet - ground - re-investigation is not permissible - without permission of Magistrate, Police could not have proceeded for further investigation at all - order of transfer of investigation obtained/ passed without considering the fact that investigation was already complete and charge-sheet was submitted before Magistrate.Para - 6,13

HELD:- The material fact that the order of transfer of investigation obtained/ passed without considering the fact that investigation was already complete and charge-sheet was submitted before Magistrate has not been considered by Superintendent of Police and further investigation has been made at P.S. Salempur Deoria, in my view, it amounts to gross abuse of process of law and second charge-sheet for offences which included the offences which were not inflicted in earlier charge-sheet is vitiated in law.Para – 13

Application u/s 482 Cr.P.C. allowed. (E -7)

List of Cases Cited:-

1. Hasanbhai Valibhai Qureshi Vs St. of Guj. , 2004 AIR SCW 2063

2. K. Chandra Sekhar Vs St. of Ker. , 1998 (37) ACC 136.

3. Awdhesh Kumar Jha @ Akhilesh Kumar Jha & anr. Vs St. of Bih. , (2016) 3 SCC 8

4. Rama Chaudhary Vs St. of Bih. , (2009) 6 SCC 346

5. Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs St. of A.P. & ors. , 1999 Cri.L.J. 3661 (SC)

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

1. Heard Sri Neeraj Singh, Advocate, for applicants and learned A.G.A. for State.

2. This is an application under Section 482 Cr.P.C. filed by five applicants, Daroga, Rakesh, Chandrika, Pramod and Manoj, with a prayer to quash Case No. 1278 of 2005 under Sections 147, 149, 323, 452, 435, 504 and 506 I.P.C. P.S. Bankata, District Deoria arising from Case Crime No. 3 of 2005 and pending in the Court of Judicial Magistrate, Court-11, Deoria.

3. Facts in brief giving rise to present application are that Uma Shankar Kushwaha, opposite party-2, (hereinafter referred to as informant-complainant) filed

a First Information Report being Case Crime No. 3 of 2005, under Sections 147, 148, 323, 504, 506, 452, 435 I.P.C., P.S. Bankata, District Deoria against eight accused including five applicants alleging that applicants and others, with a common object, formed unlawful assembly with an intention to take possession of Sehan by opening door of their houses and threw domestic goods of informant-complainant kept near the door and abused him. When he stopped them, they abusing him, threatened of life and exhorted to set his house on fire. Informant-Complainant somehow escaped to save him whereafter accused-applicants and others entered Informant-Complainant's house and beat his wife and two daughters with *Bhala*, *Lathi*, *Danda* and *Farsa* and injured them badly and also put his *Chappar* on fire.

4. During investigation Police recorded Statement of Subhash Yadav, Jai Prakash Chaurasia, Ramcheej Prasad and Srikrishna Bhagat who were eye witness and stated that it is the Informant-Complainant himself who put his *Jhopari* on fire just to falsely implicate applicants and others. Police falsely implicated applicants. Later Police submitted charge-sheet under Sections 147, 323, 504, 506 I.P.C. on 13.01.2005.

5. Magistrate taking cognizance summoned applicants in Case No. 846 of 2005, under Sections 147, 323, 504, 506 I.P.C. vide order dated 29.03.2005. Applicants appeared and released on bail. Thereafter the Informant-Complainant submitted an application before Superintendent of Police, Deoria on 22.01.2005 for transfer of his case from Police Station Bankata to Police Station Kotwali Salempur for re-investigation. Superintendent of Police, Deoria passed order transferring the case, as requested, by order dated 10.02.2005 and directed for re-investigation without seeking formal permission of Trial Court. No reason was given by Superintendent of Police for transferring the case. Thereafter, matter was re-investigated by Ramashrya Yadav, Sub-Inspector of Police Station Kotwali Salempur, District Deoria and he submitted charge-sheet against applicants under Sections 147, 149, 452, 435, 323, 504, 506 I.P.C. on 14.04.2005. The aforesaid charge-sheet is illegal inasmuch applicants were already absolved of offences under Sections 149, 452, 435 I.P.C. but second Investigating Officer (hereinafter referred to as "I.O.") implicated applicant for the offence under the aforesaid sections. On the second charge-sheet submitted by I.O., Judicial Magistrate registered Case No. 1278 of 2004 and summoned applicants under Section 147, 149, 452, 435, 504, 506 I.P.C. vide order dated 15.06.2005. Before passing the order, Superintendent of Police has not taken permission of Court;. Applicants are already facing trial pursuant to first charge-sheet dated 13.01.2005 and therefore second charge sheet dated 14.04.2005 is nothing but an abuse of process of law. Relying on Supreme Court's decision in **Hasanbhai Valibhai Qureshi Vs. State of Gujarat 2004 AIR SCW 2063,** learned counsel for applicants submitted that without permission of Court, further investigation could not have been conducted by Police, therefore, second charge-sheet is illegal.

6. Learned counsel for applicants has challenged subsequent investigation and second charge-sheet on the ground, firstly that re-investigation is not permissible and secondly without permission of Magistrate, Police could not have proceeded for further investigation at all. In support thereof,

besides relying on Supreme Court's judgment in **Hasanbhai Valibhai Qureshi Vs. State of Gujarat (supra)** reliance is also placed on **K. Chandra Sekhar Vs. State of Kerala 1998 (37) ACC 136.**

7. From the record, I find that Informant-Complainant, in his application dated 22.01.2005, submitted before Superintendent of Police, stated that I.O. P.S. Bankata is not making proper inquiry but trying to save applicants under their influence and other co-accused, therefore in the interest of justice investigation should be transferred to P.S. Kotwali Salempur. At that time, charge-sheet dated 13.01.2005 under Section 147, 323, 504, 506 I.P.C. was already submitted in the Court but this fact was not disclosed by Informant-Complainant in his application dated 22.01.2005. Superintendent of Police also did not try to make any efforts to know status of investigation and simply transferred the same from P.S. Bankata to P.S. Kotwalai Salempur by order dated 10.02.2005. There is nothing on record to show that either Informant-Complainant requested for re-investigation and that was directed by Superintendent of Police and Police made re-investigation or fresh investigation but the fact remains that when application was filed by Informant-Complainant to Superintendent of Police and order was passed by him transferring investigation, this fact was never disclosed that investigation has already completed and charge-sheet has been submitted by Police and Magistrate was seized with the matter.

8. It cannot be doubted that Police has power to make further investigation under Section 173(8) Cr.P.C.

9. In **Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of A.P. and others, 1999 Cri.L.J. 3661 (SC)** Court said:

"10. Power of the police to conduct further investigation, after laying final report, is recognised under Section 173(8) of the Code of Criminal Procedure. ***Even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation.*** *This has been so stated by this Court in* ***Ram Lal Narang v. State (Delhi Admn.), AIR 1979 SC 1791 : (1979 Cri LJ 1346)."*** *(emphasis added)*

10. In **Rama Chaudhary vs. State of Bihar, 2009(6) SCC 346** Court said:

"From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that ***even after submission of police report under sub-section (2) on completion of investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 ... The meaning of "Further"*** *is additional; more; or supplemental.* ***"Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether."*** *(emphasis added)*

11. It has been followed in **Awdhesh Kumar Jha @ Akhilesh Kumar Jha & another vs. State of Bihar, 2016(3) SCC 8.**

12. It is well settled that normally permission of Magistrate when he is seized with the matter and charge-sheet has been submitted should have been obtained which has not been done in the case in hand, but it

is also well settled that mere non obtaining of permission from Magistrate further investigation, if any, made by Police would not be per se vitiated.

13. However, in the present case, order of transfer of investigation has been obtained/ passed without considering the fact that investigation was already complete and charge-sheet was submitted before Magistrate. Since this material fact has not been considered by Superintendent of Police and further investigation has been made at P.S. Salempur Deoria, in my view, it amounts to gross abuse of process of law and second charge-sheet for offences which included the offences which were not inflicted in earlier charge-sheet is vitiated in law.

14. In view of above, the application allowed. Charge-sheet dated 14.04.2005 including summoning order dated 15.06.2005 are hereby quashed. This order, however, shall not affect the proceedings pursuant to charge sheet dated 13.01.2005 wherein summoning order was passed by Magistrate on 29.03.2005. I also make it clear that in case Police finds any reason to conduct further investigation, such power will not be construed to be restricted or prohibited by this order and it is free to proceed in accordance with law.

15. The application is allowed in the manner as aforesaid.

(2020)11ILR A68
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE

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

Application U/S 482 No. 14068 of 2020

Ravi Dixit ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajay Dubey

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

(A) Civil law - Negotiable Instrument Act, 1881 - Section 138 - Dishonour of cheque , Section 142 - Cognizance of offences - provision of Section 138 of the Act, 1881 - cannot be interpreted to mean - even if the accused refuses to make payment, the complainant cannot file complaint - Proviso (c) of the said Act - to see the bona fide of the drawer of the cheque and is with a view to grant him a chance to make the payment - does not constitute ingredients of offence punishable under Section 138 - Offence is completed the moment the cheque is dishonoured. Para - 8,10

Cheque drawn by the accused - Period of 15 days is for making payment - accused did not make the payment and did not even appear before the Court below for a year petitioner replied to the notice - which goes to show that the intention of the drawer is clear that he did not wish to make the payment.Para - 9,12

HELD:- In this case it appears that notice was deemed to have been served to the petitioner and he was under an obligation to discharge his liability which he has not done. The only object of proviso (c) to Section 138 of the Act, 1881 is to avoid unnecessary hardship if the drawer wants to make payment. Hence, this Court does not find any reason to interfere with the well reasoned summoning order passed by the learned Magistrate.Para – 13

Application u/s 482 Cr.P.C. dismissed.
(E -7)

List of Cases Cited:-

1. N. Parameswaram Unni Vs G. Kannan , (2017) 5 SCC 737

2. Shakti Travel and Tours Vs St. of Bih. , (2002) 9 SCC 415

3. Dashrath Rupsingh Rathod Vs St. of Mah. , (2014) 9 SCC 129

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

1. Heard Sri Ajay Dubey, learned learned counsel for the petitioner and learned A.G.A. for the State.

2. By way of this petition, the petitioner has challenged the summoning order dated 3.9.2019. He was supposed to present himself on 30.11.2019.

3. The brief facts as can be culled out from the petition are that a cheque of Rs.5,00,000/- issued on 1.3.2019 and one another cheque of Rs.5,98,000/- issued on 2.3.2019 were dishonoured on 28.5.2019. The complainant sent a notice on 11.6.2019. He did not received any money and, therefore, on 29.6.2019 he filed the compliant under Section 138 of Negotiable Instrument Act, 1881 which was numbered as Complaint Case No. 441 of 2019. The learned Judge after discussing the dates was satisfied that prima facie case is made out for issuance of notice and likewise on 3.9.2019 passed the summoning order.

4. Learned counsel for the petitioner was put to a question as to how the summoning order passed by the Court below is bad. According to his understanding, he conveys to this Court that there is some judgment of Damodar without citing the same. He states that as per the provisions of Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as 'Act, 1881') the petitioner cannot be asked to answer the summons as he had already filed reply and the complaint could have been filed only after 15 days of his reply and it was filed before the said date.

5. Learned counsel for the petitioner has submitted that the summoning order is without compliance of provisions of Section 138 of the Act, 1881; the application has been falsely implicated due to enmity and financial dispute with the complainant and that cheques were dishonoured as he had directed stop of payment. It is submitted that respondent No.2 sent notice to the applicant on 11.6.2019 but no date of service of notice have been mentioned in the complaint. The petitioner has submitted that on 25.6.2019 he had replied. The complainant, according to the petitioner, should have waited for a period of 15 days and should not have filed the complaint on 29.6.2019. The petitioner was not in know how of the summon issued. It is submitted that complaint is a premature complaint. If the notice was sent on 11.6.2019 and no date of service has been mentioned, as per general clause Act, 30 days time time would have been presumed for service of notice and 15 days thereafter for waiting period of payment and, then only the complaint should have been filed is the submission of the learned counsel for the petitioner.

6. Once the intention of the party is clear that he does not wish to make payment, should the complainant wait for 15 days is the question.

7. Section 138 read with Section 142 of the Act, 1881 reads as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.

--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

142 Cognizance of offences. *-- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--*

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: 24 [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

8. The provision of Section 138 of the Act, 1881 cannot be interpreted to mean that even if the accused refuses to make payment, the complainant cannot file a complaint. Proviso (c) of the said Act is to see the bona fide of the drawer of the cheque and is with a view to grant him a chance to make the payment.

9. In this case, the cheque was drawn by the accused on an account maintained by him with the bank. The period of 15 days is for making payment. In this case the accused did not make the payment and did not even appear before the Court below for a year. It is in the month of August, 2020 that he has approached this Court.

10. Proviso to Section 138 of the Act, 1881 does not constitute ingredients of offence punishable under Section 138. Proviso to Section 138 simply postpones

the actual prosecution of the offender till such time he fails to pay the amount, then the statutory period prescribed begins for lodgement of complaint. The Parliament has granted just and proper time to give to the drawer the opportunity to pay the amount before he could be prosecuted. The offence is completed the moment the cheque is dishonoured. Refer to **Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) 9 SCC 129.**

11. The judgment in **Shakti Travel and Tours Vs. State of Bihar, (2002) 9 SCC 415,** will not apply to the facts of this case as it is averred in the complaint that the notice was served which was replied by the accused and, therefore, it cannot be said that the issuance of summons is bad in the eye of law.

12. In the case in hand, the petitioner herein replied to the notice which goes to show that the intention of the drawer is clear that he did not wish to make the payment. Once this is clarified, should the complainant wait for the minimum period of 15 days, the answer would be 'no'.

13. In this case, judgment in **N. Parameswaram Unni Vs. G. Kannan, (2017) 5 SCC 737** can be relied upon as in this case it appears that notice was deemed to have been served to the petitioner and he was under an obligation to discharge his liability which he has not done. The only object of proviso (c) to Section 138 of the Act, 1881 is to avoid unnecessary hardship if the drawer wants to make payment. Hence, this Court does not find any reason to interfere with the well reasoned summoning order passed by the learned Magistrate.

14. Reason given by the learned Magistrate is very clear. It is well reasoned order which was passed on 30.11.2019. For a period of one year, the petitioner has chosen not to appear before the learned Magistrate and has moved this Court now.

15. In view of the above, this petition is dismissed with cost of Rs.15,000/- to be deposited before the Court below. The petitioner is aware that summons has already been issued against him and, therefore, he may choose to appear before the Court below on or before 15.10.2020 failing which the Court shall be free to take steps as provided by law.

(2020)11ILR A71
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2020

BEFORE

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

Application U/S 482 No. 14261 of 2020

Sachin Kumar Srivastava ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kamlesh Kumar Singh

Counsel for the Opposite Parties:
G.A., Sri Shailendra Kumar Singh

(A) Criminal law - Indian Penal Code, 1860 - Section 406 - Punishment for criminal breach of trust , Section 506 - Punishment for criminal intimidation , Section 420 - Cheating and dishonestly inducing delivery of property - no intention of applicant to cheat at the inception of the transaction - would ideally and eminently give rise to a cause of action for a suit of dissolution of partnership and rendition of account - Instead of adopting that course - second opposite party approached the police -

investigated unscrupulously - filed a chargesheet - presents no criminal angle to it.Para – 12

Applicant running printing press - allegation in the FIR - asked the informant, opposite party no.2 to invest in business which would yield good profit - at some stage, the applicant turned dishonest - did not refund her money - applicant said that their partnership cannot continue and it is better that they part ways - settlement outside Court. Para -2

HELD:- Settlement arrived at outside Court reaffirms this Court's faith in the perversion of the process of Court that has become rampant - Agreement dated 14.07.2020 is nothing but the result of an abuse of process of the criminal court under which one of the parties have buckled to settle the matter for the fear of the criminal process . There cannot be a more brazen abuse of process of the criminal court than the one presented here.This Court is of opinion that the impugned proceedings cannot be permitted to continue.Para - 12

Application u/s 482 Cr.P.C. allowed. (E -7)

List of Cases Cited:-

1. Rashmi Jain Vs St. of U.P. & anr., (2014) 13 SCC 533

2. M/s. Indian Oil Corpn. Vs NEPC India Ltd. & ors., (2006) 6 SCC 736

3. Kapur Chand Gupta Vs St. of U.P. & ors., 2014 (3) ACR 2797

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

1. Heard Sri Kamlesh Kumar Singh, learned counsel for the applicant, Sri Shailendra Kumar Singh appearing on behalf of opposite party no.2 and Sri S.K. Pal, learned Government Advocate assisted by Sri Indrajeet Singh Yadav, learned A.G.A. appearing on behalf of the State.

2. Admit.

3. Sri S.K. Pal, learned Government Advocate assisted by Sri Indrajeet Singh Yadav, learned A.G.A. waives his right to file a counter affidavit, looking to the nature of the controversy involved.

4. The submission of the learned counsel for the applicant is that a compromise has been arrived at between parties and recorded on 14.07.2020, engrossed on a general stamp worth Rs. 100/-. It has been notarized. In furtherance of the said compromise, a compromise affidavit has been filed before this Court today, which is unsigned and unsworn. It is supported by a declaration. A declaration instead of a sworn affidavit was permitted when there was a nationwide lockdown. Now, the nation is abuzz with life but in the Registry of the Court it appears that it is not business as usual. The Registrar General is directed to examine the feasibility of restoring a suitably modified requirement of filing sworn affidavits by parties. Nevertheless, in the interest of justice, the present matter is being heard on the status of papers filed in Court as per practice current at this time.

5. A perusal of the first information report, which after some investigation has culminated into a chargesheet, shows that the applicant, Sachin Kumar Srivastava is a businessman engaged in the business of running a printing press. It is alleged in the FIR that he asked the informant, opposite party no.2 to invest in business which would yield good profit. It is also alleged that it was represented to complainant-opposite party no.2 that the sum of Rs. 22,00,000/- that she was invited to invest would be returned to her, and in the profit of 40% that the parties would earn, there would be sharing on the basis of 50% each. It is alleged in the FIR that at some stage,

the applicant turned dishonest and did not refund her money. It is also alleged that when the informant demanded her money, the applicant said that their partnership cannot continue and it is better that they part ways. It was also represented to the informant, as part of this dissolution, that the applicant would pay the informant-opposite party no.2, a sum of Rs. 19,000/- *per mensem* and in that manner would repay the principal sum of money within a period of three years. It is alleged that two cheques, mentioned in the FIR, when presented on 10.05.2018 and 07.06.2018, were dishonored: one on account of signatures of the account holder not tallying, and the other, due to the account being closed. It is alleged that the informant contacted the applicant about the dishonored cheques whereupon the applicant promised that he would arrange and pay the money due. It is said that a period of four months elapsed but to no avail. There are then certain allegations of a sharp exchange of words and a threat extended.

6. It is argued by learned counsel for the applicant that the FIR and the criminal prosecution based on it discloses no offence whatsoever. Still, he submits in *tandem* with the learned counsel appearing for the second opposite party that the parties have compromised the matter privately, which they have reduced to writing. It is on that basis that an affidavit of compromise (with all its infirmities) above described, has been brought on record before this Court. The terms of the compromise recorded between parties, as these appear from a perusal of a photostat copy of the compromise dated 14.07.2020, are as follows:

<u>सुलहनामा</u>

रंजू श्रीवास्तव पत्नी सुशील कुमार श्रीवास्तव, निवासी- बसंत बिहार कालोनी, 10 नम्बर बोरिंग थाना-गोरखनाथ, जनपद गोरखपुर।

..... प्रथम पक्ष

व

सचिन श्रीवास्तव पुत्र रघुनाथ लाल प्रो०दृष्टिप्रेस शाप नं०-16 एम०पी० बिल्डिंग गोलघर, थाना कैण्ट, जनपद-गोरखपुर निवासी ग्राम- भम्भौर नरकटवा बाजार थाना कैम्पियरगंज, जनपद गोरखपुर हाल मुकाम-राजेन्द्र नगर कालोनी, कूरावारी राजेन्द्र नगर पश्चिमी म०न०-178-जे, थाना गोरखनाथ, जनपद-गोरखपुर।

.....द्वितीय पक्ष

1. यह कि हम प्रथम पक्ष व द्वितीय पक्ष ने आपस मे मिलकर एक संयुक्त व्यापार शुरू किया था और उसी उद्देश्य से हम दोनो पक्षों के मध्य लेन-देन हुआ था और उसी सम्बन्ध में प्रथम पक्ष द्वारा कुछ की पूंजी द्वितीय पक्ष के माध्यम से व्यापार में लगाई गई थी परन्तु किन्ही कारणों की वजह से संयुक्त व्यवसाय आगे नही बढ़ सका और द्वितीय पक्ष के उपर प्रथम पक्ष की कुछ देनदारी शेष रह गई।

2. यह कि उसी संयुक्त व्यवसाय में जो देनदारी द्वितीय पक्ष की थी उसी के लिए द्वितीय पक्ष ने प्रथम पक्ष को चेक संख्या- 152931 से लगायत चेक संख्या- 152940 तक व 474698 से लगायत 474700 तक कुल 13 चेक दिया था जिसमें से कुछ चेक आपसी सामन्जस्य न होने के कारण प्रयाप्त धनराशि न होने के कारण अनादत हो गया था।

3. यह कि चेक अनादत होने के कारण प्रथम पक्ष ने द्वितिय पक्ष के विरूद्ध परक्राम्य लिखत अधिनियम की धारा- 138 के तहत कुल चार परिवाद दाखिल किया है जिसमें परिवाद संख्या 4452/18, 1443/19,231/19, व

2449/19 है जो न्यायालय श्रीमान् ए०सी०जे०एम०- प्रथम के न्यायालय में लम्बित है।

4. यह कि प्रथम पक्ष द्वारा द्वितीय पक्ष के विरूद्ध एक आपराधिक मुकदमा अपराध संख्या- 370/19 अ०धारा-406,506,420 भा०द०वि० थाना- गोरखनाथ, जनपद- गोरखपुर में दर्ज कराया गाय था जिसमें आरोप- पत्र न्यायालय में दाखिल हो चुका है तथा पत्रावली न्यायालय ए०सी०जे०एम०-प्रथम के न्यायालय में विचाराधीन है।

5. यह कि हम दोनों पक्षों ने मित्रों, रिश्तेदारों एवं बुजुर्गों के समझाने के उपरान्त अपनी स्वतंत्र इच्छा व सहमति से आपस में यह निर्णय लिया है कि आपसी सहमति द्वारा आपसी लेन-देन को समाप्त कर लिया जाये तथा उसी आधार पर समस्त मुकदमों को भी समाप्त करा दिया जाये।

6. यह की समझौते के अनुरूप यह तय हुआ है कि द्वितीय पक्ष, प्रथम पक्ष को कुल मु०-13,00,000/- (तेरह लाख रूपये) देंगे। इसके अलावा अन्य कोई धनराशि या मशीनरी द्वितीय पक्ष द्वारा प्रथम पक्ष को देय नही होगी।

7. यह कि समझौते की शर्त के अनुसार द्वितीय पक्ष प्रथम् पक्ष को तत्काल मु०-5,00,000/- (पांच लाख रूपये) डी०डी०- द्वारा देंगे तथा शेष धनराशि मु०-8,00,000/- (आठ लाख रूपये) जब प्रथम पक्ष आपराधिक मुकदमा मु०अ०सं०-370/19, थाना गोरखनाथ को समाप्त करायेंगे तो उसी दिन द्वितीय पक्ष द्वारा प्रथम पक्ष को भुगतान किया जायेगा।

8. यह कि चूंकि आपराधिक मु० 370/19 में पत्रावली में द्वितीय पक्ष के विरूद्ध एन०बी०डब्लू० की कार्यवाही चल रही है। इसलिए दोनो पक्षों में यह तय हुआ है कि प्रथम पक्ष द्वारा मु०- 5,00,000/- (पांच लाख रूपये) प्राप्त करने के उपरान्त द्वितीय पक्ष द्वारा उपरोक्त मुकदमें को सुलह के आधार पर समाप्त करने हेतु माननीय उच्च न्यायालय, इलाहाबाद में याचिका दायर की जायेगी तथा पत्रावली मध्यस्थता में जब रहती है। उसी दौरान शेष धनराशि मु०- 8,00,000/- रूपये का भुगतान द्वितीय पक्ष द्वारा प्रथम पक्ष को कर दिया जायेगा और प्रथम पक्ष द्वारा मुकदमा समाप्त करने की सहमति मध्यस्थता केन्द्र उच्च न्यायालय इलाहाबाद में कर दी जायेगी जिससे की उपरोक्त आपराधिक मुकदमा समाप्त हो जाये तथा उसी समय सारे चेक भी प्रथम पक्ष द्वारा द्वितीय पक्ष को वापस कर दिये जायेंगे और उसके उपरान्त सम्बन्धित अदालत में लम्बित चारों परिवाद को भी प्रथम पक्ष द्वारा वापस ले लिया जायेगा।

9. यह कि समझौते की शर्तों के अनुसार समझौते की प्रक्रिया के दौरान होने वाले सभी प्रकार के खर्चे की जिम्मेदारी द्वितीय पक्ष की होगी।

10. यह कि हम प्रथम पक्ष ने द्वितीय पक्ष से मु०-5,00,000/- का डी०डी० जो इलाहाबाद बैंक सेन्ट एण्ड्रयूज शाखा द्वारा जारी है। तथा जिस पर दिनांक 07.07.2020 की तिथि अंकित है। तथा जिसका नम्बर- 163458 है। प्राप्त कर लिया है। डी०डी० की छाया प्रति संलग्नक-1 है तथा उसकी छाया प्रति पर दोनों पक्षों ने हस्ताक्षर बना दिये है।

11. यह कि उपरोक्त सुलहनामा हम दोनों पक्षों द्वारा अपनी स्वतंत्र इच्छा व सहमति से बिना किसी जब्र व दबाव के समक्ष गवाहान लिख कर तसदीक करा दिया ताकि वक्त जरूरत पर काम आवे।

दिनांक-14/7/2020
हस्ताक्षर प्रथम पक्ष
हस्ताक्षर द्वितीय पक्ष
गवाहान: Sd. Illegible

7. Though, the learned counsel for the applicant submitted that coercive processes before the Magistrate may be ordered to

stay for some time till the terms of compromise embodied, are implemented and liabilities of the parties discharged, this Court is not minded to lend the process of criminal court to abuse by parties out to recover claims that are essentially based on business transactions, giving rise to civil liabilities. This Court cannot help but notice the ravaging trend of abuse of process of criminal law to recover essentially civil claims and to settle disputes, that rightfully ought to go to the Civil Court. Much of this practice is contributed to by the time consuming process involved in the Civil Courts deciding actions.

8. This Court must also remark that the delays in Civil Courts are largely on account of persistent strikes by Members of the Civil Bar that are succumbed to by the Presiding Officers, leading to frequent adjournments of civil causes. This Court is aware of the fact that the processes of the Civil Court do take time, which they ought not. The civil process is designed to move at a fast pace, which unfortunately for the present remains unrealized. This, however, does not mean that civil claims can be permitted to be converted into criminal complaints and prosecutions, which they are not.

9. In this connection, reference may be made to the decision of the Supreme Court in **Rashmi Jain vs. State of Uttar Pradesh and another, (2014) 13 SCC 533.** It has been held in **Rashmi Jain**:

"6. ..... In our opinion, the aforesaid averment has been made only to foist criminal liability on the appellant by converting a purely civil dispute into criminal act, alleged to have been committed by the appellant. The allegations are *absurd* and *outlandish* on the face of it; firstly, the appellant is a lady, a widow, who was not accompanied by anybody else at the time of the alleged occurrence; secondly, she, though being a resident of Delhi, misbehaved with number of *high* and *mighty* parties with whom she had earlier transacted business at Moradabad. In our opinion, these are allegations which on the face of it, cannot be taken seriously by any reasonable person. The High Court, in our opinion, has committed jurisdictional error in dismissing the criminal petition filed by the appellant on the ground that it involves disputed questions of fact, which can only be gone into by the trial court."

10. Again in **M/s. Indian Oil Corpn. v. NEPC India Ltd. And others, (2006) 6 SCC 736,** their Lordships of the Supreme Court frowned upon civil causes being converted into cases alleging criminal liability and held:

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed: (SCC p. 643, para 8)

"It is to be seen if a matter, which is essentially of a civil nature, has been

given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

11. Reliance may also be placed on a decision of this Court in **Kapur Chand Gupta vs. State of U.P. and others, 2014 (3) ACR 2797,** where with reference to a prosecution under Section 406 IPC in the background of an issue between parties about a part of the price of goods supplied, that remain unpaid by the accused to the complainant, it was held by Vinod Prasad, J.:

"10. On an over all analysis it emerges that the complaint does not discloses commission of any offence whatsoever against the applicant and whatever has been alleged discloses only a civil liability and applicant's prosecution is wholly undesirable and illegal and it is nothing but his harassment and, therefore, is liable to be quashed."

12. The present case is undisputedly a commercial transaction between parties, involving partnership and its dissolution under the law. There is nothing on record to suggest that the applicant had an intention to cheat at the inception of the transaction. It is just that the venture contemplated by parties did not take off and turn profitable as envisaged. *Ex facie* there is nothing shown by the police that may indicate that the applicant ever intended to cheat opposite party no.2. It would ideally and eminently give rise to a cause of action for a suit of dissolution of partnership and rendition of accounts. Instead of adopting that course, the second opposite party has approached the police, who again very unscrupulously have investigated and filed a chargesheet in the matter, which indeed presents no criminal angle to it. The settlement that has been arrived at outside Court reaffirms this Court's faith in the perversion of the process of Court that has become rampant. The agreement dated 14.07.2020 is nothing but the result of an abuse of process of the criminal court under which one of the parties have buckled to settle the matter for the fear of the criminal process. There cannot be a more brazen abuse of process of the criminal court than the one presented here. This Court is of opinion that the impugned proceedings cannot be permitted to continue.

13. In the result this application succeeds and is **allowed**. The impugned charge sheet No. 357 of 2018, dated 08.12.2018 and the entire proceedings of

Case No. 370 of 2019, State vs. Sachin Kumar Srivastava (arising out of Case Crime No. 412 of 2018) under Section 406,506,420 I.P.C., P.S. Gorakhnath, District Gorakhpur pending before the Additional Chief Judicial Magistrate-I, Gorakhpur are hereby **quashed.** The Additional Chief Judicial Magistrate-I, Gorakhpur shall ensure that an endorsement is made in the G.D. of the police station concerned that the proceedings of this case have been **quashed** under orders of this Court.

14. It will be open to the second Opposite Party to recover her dues in accordance with law, in the manner she may be advised.

15. Let a copy of this order be forwarded to the Registrar General for necessary action.

16. Let a copy of this order be forwarded to the Additional Chief Judicial Magistrate-I, Gorakhpur through the District & Sessions Judge, Gorakhpur for compliance by the Office.

(2020)11ILR A77
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 14600 of 2020

Smt. Sarvesh Verma & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anil Kumar Pandey

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

(A) Criminal law - The Indian Penal Code - Section 498A - Protection of Women from Domestic Violence Act, 2005 - Section 12 - Husband or relative of husband of a women subjecting her to cruelty - - Application of magistrate , Section18 - Protection orders, Section 23 - power to grant interim and ex parte orders - U.P. Government Servant Conduct Rules, 1956 - Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) - domestic violence is undoubtedly a human rights issue - State parties should act to protect women against violence of any kind, especially that occurring within the family .Para – 7

Accusation is of domestic violence by mother-in-law and father-in-law - against widowed lady with her two minor daughters - Contention said in the application is to be adjudged by the Magistrate and for that an opportunity of adducing evidence is always needed. Para - 8

HELD:- This court may never give direction for a decision without giving opportunity of hearing or having evidence. Hence there is no abuse of process of law.Para - 8

Application u/s 482 Cr.P.C. dismissed.
(E -7)

List of Cases Cited:-

1. Ram Singh Tomar & ors. Vs Smt. Bhoori Bai and others, 2017 Cr.L.J. 3455,

2. S. R. Batra & ors. Vs Taruna Batra, (2007) 3 SCC 169,

3. Vimlaben Ajeet Bhai Patel Vs Vatsalben Ashok Bhai Patel, (2004) SCC 469

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

1. Heard learned counsel for the applicants and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicants Smt. Sarvesh Verma (mother-in-law) and Vishambhar Dayal Verma (father-in-law) with a prayer for setting aside order dated 17.10.2019 passed in Complaint Case No. 533 of 2016, Smt. Rakhi Verma Vs. Smt. Sarvesh Verma and others, u/s 12 of the Protection of Women from Domestic Violence Act, 2005, pending in the court Special C.J.M., Agra, with a further prayer of staying further proceeding of above mentioned complaint case.

3. Learned counsel for the applicants argued that a preliminary objection was filed in the trial court with specific mention that husband of O.P. No. 2 has died and there was no joint property or Hindu Undivided Family Property entitling the deceased husband to inherit the same. Rather the alleged house was exclusively owned by applicant no. 1, Smt. Sarvesh Verma, as she purchased the same vide registered sale deed in her name and mother-in-law may not be entitled to maintain widowed daughter-in-law nor husband of O.P. No. 2 was entitled for any share in above house. Moreso, O.P. No. 2 and her two daughters are not residing in above house and they are having no interest in it. Nothing was there as property of Hindu Undivided Family for which deceased husband of O.P. No. 2 was having any share for inheritance. Hence neither the application u/s 12 of the Protection of Women from Domestic Violence Act, 2005, was maintainable nor interim award application u/s 23 of the aforesaid Act, which was heard and was rejected. There was a finding of non-entitlement of maintenance by O.P. No. 2. There were precedents of Apex Court passed in ***Ram Singh Tomar and others Vs. Smt. Bhoori Bai and others, 2017 Cr.L.J. 3455, S. R. Batra and others Vs. Taruna Batra, (2007)3 SCC 169, and Vimlaben Ajeet Bhai Patel Vs. Vatsalben Ashok Bhai Patel, (2004) SCC 469***, wherein the Apex Court has held that right to maintain the wife is the liability of the husband and father-in-law and mother-in-law are not personally liable but for limited extent to the property, which was under joint ownership and capability of inheritance by the deceased husband. In view of above cited laws, there was no right to O.P. No. 2 and this preliminary objection was not decided by the trial court. Hence a proceeding u/s 482 Cr.P.C. No. 30320 of 2019, Smt. Sarvesh Verma and another Vs. State of U.P. and three others, was filed, wherein direction by a coordinate Bench dated 06.08.2019 was there for disposal of preliminary objection preferably within three months. In compliance of the above order, impugned order dated 17.10.2019 has been passed by the Special C.J.M., Agra, but no finding about maintainability was given and it was again kept pending to be decided after evidence. Hence this application with above prayer for setting aside the impugned order, which has been passed under abuse of process of law.

4. Learned AGA has vehemently opposed.

5. From the very perusal of the impugned order passed by the Magistrate dated 17.10.2019 it is very well there that all the citations pressed by learned counsel for applicants were written in it. But the factual matrix, as to whether the applicants were entitled to have their protections enumerated u/s 18 of the aforesaid Act or not, can be decided only by way of evidence. Hence one opportunity for giving evidence by applicants was there. Meaning thereby the trial court has decided the

preliminary objections raised by applicants with regard to maintainability of the complaint, which has already been decided by his predecessor while rejecting the application u/s 23 of the Act. But for claim for protection u/s 18 of the Act is different. Protection under several clauses of Act for widow of deceased son of the applicants as well as for her two daughters has been claimed. It has specifically been written in the application moved u/s 12 of the Act that since marriage the complainant Rakhi Verma along with her husband was residing in the house as a property of Hindu Undivided Family headed by applicant no. 2 Vishambhar Dayal Verma, father-in-law, wherein Smt. Sarvesh Verma is mother-in-law, and she was with her belongings in above house, where her two daughters were born and they all are residing in the first floor of above house. Her Stridhan has been usurped by her in-laws. These factual contentions are to be decided only on the basis of factual evidence.

6. In matrix that house was owned by Smt. Sarvesh Verma, got purchased by way of said deed, is being said by applicants, but the nucleus for purchase of above house by Smt. Sarvesh Verma has not been said before the trial court as well as before this Court in the present case. It is a question of fact, as to whether Smt. Sarvesh Verma was having her own earnings and was capable to make purchase of the house by her own support and property or it has been purchased in her name by her husband Vishambhar Dayal Verma, who was in U.P. Police Service and under love and affection or by way to evade liability under U.P. Government Servant Conduct Rules, 1956, in the name of his wife. The very fact, as to what was the matrix, the grand sum from which this property was purchased and from where it came as an output was personal or it was from Hindu Undivided Family property is to be seen by the trial court. Hence, as residence of complainant in above house along with her minor daughters has been said by complainant and it has been denied by applicants. This is also a question of fact to be seen by the trial court. Accordingly, the trial court vide an elaborate order has fixed a date for adducing evidence by applicants for making judicial decision about facts stated and to be decided in between parties.

7. The very object of legislation of The Protection of Women from Domestic Violence Act, 2005, has been given by legislature is the implementation of the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women in its General Recommendations has recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family. The phenomenon of domestic violence in India is widely prevalent but has remained invisible in the public domain. The civil law does not address the phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society the Protection of Women from Domestic Violence Bill was introduced in the Parliament. Meaning thereby the preamble of this is *an Act to provide for more effective protection of*

rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. Hence under this Act purpose is to protect women from violence of any kind either direct or incidental therewith. Hence the very purpose of this Act is to protect women from domestic violence. Hence the whole act is to be seen under the present scenario.

8. The accusation is of domestic violence by mother-in-law and father-in-law and that is against widowed lady with her two minor daughters. Hence the very contention said in the application is to be adjudged by the Magistrate and for that an opportunity of adducing evidence is always needed. This court may never give direction for a decision without giving opportunity of hearing or having evidence. Hence there is no abuse of process of law. Accordingly, this application merits its dismissal.

9. Dismissed as such.

(2020)11ILR A80
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 14988 of 2020

Desh Deepak Dwivedi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anand Prakash Yadav, Kavita Yadav, Sri Krishna Nand Yadav

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

(A) Criminal law - Indian Penal Code, 1860 - Sections 498A, 323, 504, 506 - 3/4 Dowry prohibition Act,1961 - demand of dowry, cruelty with regard to it and assault with abuse of criminal intimidation - Code of criminal procedure, 1973 - Section 156 - investigation in to cognizable cases - Section 200 - Examination of complainant , Section 202 - Postponment of issue of process , Section 203 - Dismissal of complaint - Section 204 - issue of process - order passed by the Magistrate was against the proposition of law on the point of summoning u/s 204 Cr.P.C. while deciding the Criminal Revision - impugned order of the learned Sessions Judge, is well in accordance with law - C.J.M. rightly set aside the order.

Divorce petition filed by applicant - allegations - complaint has been filed with contention of demand of dowry, cruelty with regard to it, ill-treatment as well as assault, abuse and intimidation - contention of complainant very well reiterated in the statement u/s 200 Cr.P.C. - further corroborated by two witnesses in their statements recorded u/s 202 Cr.P.C. - enquiry u/s 202(1) Cr.P.C. by a Gazetted Police Officer was got conducted by Magistrate and report of Gazetted Police Officer i.e. Dy. S.P. - attempt for its disposal by way of mediation by District Probation Officer made - unsuccessful .Para – 8

HELD:- The Officer, presiding as C. J. M., who has passed the order dated 17.3.2020 in Complaint Case is either not in a position to appreciate law or visualize the observations made by learned Sessions Judge, or is with some extraneous influence. Hence the learned Sessions Judge, is being expected to make file to some other Court of Magistrate for disposal.Para - 10

Application u/s 482 Cr.P.C. dismissed.
(E -7)

List of Cases Cited:-

Kooli Saseendran & ors. Vs St. of Ker. Etc. , Criminal Appellate Jurisdiction in Criminal Appeal No.(s) 1874-1875 of 2010

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

1. The applicants Desh Deepak Dwivedi and three others, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash order dated 28.7.2020 passed by the Sessions Judge, Maharajganj, in Criminal Revision No. 44 of 2020, Kumkum Dwivedi Vs. Desh Deepak Dwivedi and others, arising out of order dated 17.3.2020 passed by C.J.M., Maharajganj, in Criminal Complaint Case No. 379 of 2019, Kumkum Dwivedi Vs. Desh Deepak Dwivedi and others, under Sections 498A, 323, 504, 506 I.P.C. and 3/4 D. P. Act, P.S. Paniyara, district Maharajganj.

2. Heard learned counsel for the applicants and learned AGA. Perused the record.

3. Learned counsel for applicants argued that Criminal Complaint Case No. 379 of 2019, Kumkum Dwivedi Vs. Desh Deepak Dwivedi and others, under Sections 498A, 323, 504, 506 I.P.C. and 3/4 D. P. Act, P.S. Paniyara, district Maharajganj, was filed by O.P. No. 2 against applicants Desh Deepak Dwivedi and three others with contention of demand of dowry, cruelty with regard to it and assault with abuse of criminal intimidation on 31.10.2019. This was by way of an application u/s 156(3) Cr.P.C. The Magistrate took cognizance over it and registered it as a complaint case. An enquiry u/s 200 and 202 Cr.P.C. was made by C.J.M., Maharajganj, and then after complaint was dismissed u/s 203 Cr.P.C. with finding that there was no prima-facie case for summoning. Rather this complaint was with a view to harass the husband and in-laws by complainant. This order was challenged before revisional court of learned Sessions Judge, Maharajganj, wherein the then learned Sessions Judge allowed the revision, thereby quashed the order of Magistrate and remanded the file back for fresh consideration of same. Learned C.J.M., in compliance of order of learned revisional court, decided to have an enquiry by a Gazetted Officer of Police u/s 202(1) Cr.P.C. and it was directed to Superintendent of Police, Maharajganj, for getting enquiry by a Gazetted Police Officer of the occurrence. Deputy Superintendent of Police, Maharajganj, submitted his report in compliance of order of Court of C.J.M. with finding of undue harassment by complainant to her in-laws and contradictions in the date of alleged assault. On the basis of evidence on record, learned C.J.M. again dismissed the complaint u/s 203 Cr.P.C. Complainant filed subsequent Revision No. 44 of 2020 before learned revisional court of District & Sessions Judge, Maharajganj, wherein again revision was allowed and order of learned C.J.M. was set aside with a direction for re-hearing and decision. Meaning thereby once learned C.J.M. has made compliance of direction of learned revisional court and found no ground for passing a summoning order u/s 204 Cr.P.C., again this revision was allowed with the same direction. This remand order was passed under abuse of process of law and was not to be made by learned revisional court in view of law laid down by Apex Court in ***Criminal Appellate Jurisdiction in Criminal Appeal No.(s) 1874-1875 of 2010, Kooli Saseendran & others Vs. State of Kerala Etc.,*** wherein the Apex Court has

held that remand in criminal case should not be usual but sparingly exercised in cases where it is utmost necessary. Hence this application with above prayer.

4. Learned AGA has vehemently opposed the application.

5. Having heard learned counsel for both sides and gone through the material placed on record, it is apparent that the learned C.J.M. has not exercised his judicial mind in passing impugned order. Rather the report of Dy. S.P. has been taken as basis and finding is on above report with a categorical mention that in the opinion of the learned Magistrate, no ground is there for passing summoning order, whereas this court as well as Apex Court in several decisions have held that wherever there is judicial discretion or satisfaction of a Court for passing a judicial order, this discretion or satisfaction should be of objective satisfaction i.e. apparent and coming out from the record i.e. it should not be subjective satisfaction of Presiding Judge. Hence opinion of a Magistrate is not a governing statute. Rather the opinion of a court should be based on the evidence before it and analytical analysis under judicial canon is the deciding factor.

6. The Magistrate was expected to make analysis of evidence collected by him u/s 200 and 202 Cr.P.C. in which enquiry report made by police or any other authority u/s 202(1) of Cr.P.C. is included and on the whole evidence, the appreciation is to be made as to whether a prima-facie case is made out or not.

7. Learned Sessions Judge, by way of writing many citations in its decision, has decided criminal revision no. 92 of 2019 with specific proposition of law that there is no need of analytical analysis of evidence at the time of passing order u/s 204 Cr.P.C. Rather a prima-facie case is to be seen as to whether a case is to be proceeded with or not. At that juncture meticulous analysis with a view that evidence is sufficient for basing conviction or not, is not to be made. But this legal proposition and observation of learned Sessions Judge was not taken into consideration by learned C.J.M., Maharajganj, in the impugned order, which was challenged in subsequent Criminal Revision No. 44 of 2020 and learned Sessions Judge has set aside the order of the learned C.J.M.

8. From the very perusal of factual matrix, it is undisputed that complainant Smt. Kumkum Dwivedi is legally married wife of Desh Deepak Dwivedi. There are strained relations in between. Desh Deepak Dwivedi has filed a suit for dissolution of marriage before Family Court and the same is pending. Allegations are there. A previous complaint to District Magistrate, Gorakhpur, was made by Kumkum Dwivedi regarding ill-treatment and demand of dowry coupled with cruelty by her husband and in-laws prior to filing of this complaint and the District Magistrate has taken cognizance over it, wherein District Probation Officer was deputed to look into the matter and an attempt for family settlement was made at that stage. But it could not be successful. Then after this complaint was filed. Meaning thereby the complainant being legally wedded wife of Desh Deepak Dwivedi is an undisputed fact. Subhash Chandra Dwivedi, Shashi Kala Dwivedi and Neha Dwivedi are the closed blood relatives of Desh Deepak Dwivedi is also not disputed. Demand of dowry coupled with cruelty is very well there against these in-laws. A complaint

was earlier made and an attempt for family settlement was there, but it could not be successful. Divorce petition has been filed by Desh Deepak Dwivedi with allegations and this complaint has been filed with above contention of demand of dowry, cruelty with regard to it, ill-treatment as well as assault, abuse and intimidation. This contention of complainant was very well reiterated in the statement u/s 200 Cr.P.C. and this was further corroborated by two witnesses in their statements recorded u/s 202 Cr.P.C. Moreso, an enquiry u/s 202(1) Cr.P.C. by a Gazetted Police Officer was got conducted by Magistrate and report of Gazetted Police Officer i.e. Dy. S.P. is also of fact that there had been a complaint regarding demand of dowry, cruelty with regard to it and ill-treatment of Kumkum Dwivedi by her husband and in-laws was filed before District Magistrate, Gorakhpur, it was taken under consideration and an attempt for its disposal by way of mediation by District Probation Officer was made, but was unsuccessful. There was complaint of above demand of dowry and cruelty with regard to it. What else was required by the Magistrate for making a prima-facie case for passing summoning order u/s 204 Cr.P.C. Hence the order passed by the Magistrate was against the proposition of law on the point of summoning u/s 204 Cr.P.C., as written by the learned Sessions Judge, Maharajganj, while deciding the Criminal Revision. Hence the impugned order of the learned Sessions Judge, Maharajganj, is well in accordance with law and has rightly set aside the order of C.J.M., Maharajganj.

9. Accordingly, this application merits its dismissal. Dismissed as such.

10. However, from all those facts and circumstances, it is apparent that the Officer, presiding as C. J. M., Maharajganj, who has passed the order dated 17.3.2020 in Complaint Case No. 379 of 2019, Kumkum Vs. Desh Deepak, u/s 498A, 323, 504, 506 I.P.C. and 3/4 D. P. Act, P. S. Paniyara, District Maharajganj, is either not in a position to appreciate law or visualize the observations made by learned Sessions Judge, Maharajganj, or is with some extraneous influence. Hence the learned Sessions Judge, Maharajganj, is being expected to make file to some other Court of Magistrate for disposal.

(2020)11ILR A83
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.10.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Application U/S 482 No. 15070 of 2020

Om Narayan Tiwari ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vikas Budhwar, Sri Shrawan Kumar Ojha, Vinay Saran(Senior Adv.)

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

(A) Criminal law - Code of Criminal Procedure, 1973 - Section 161 - Prevention of Corruption Act, 1988 - Section 13(1)(e) - Criminal misconduct by a public servant - standard of proof in department proceeding is lower than that of criminal prosecution - departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein - Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the

criminal case cannot be rejected on the basis of the evidence in the departmental proceeding or the report of the Enquiry Officer based on those evidence . Para – 22

Applicant, a senior clerk, in the office of Chief Medical Officer - upon enquiry was found having assets beyond his known and legal source of income - The applicant seeks quashing of the charge sheet and consequential proceedings - ground - applicant came to be exonerated in disciplinary proceedings on an identical charge. **Para – 4**

HELD:- In the given facts to contend that exoneration in disciplinary proceedings would tantamount to quashing of criminal proceedings would be travesty of justice.**Para- 35**

Application u/s 482 Cr.P.C. dismissed.
(E -7)

List of Cases Cited:-

1. Ashoo Surendranath Tewari Vs The Deputy Superintendent of Police, EOW, CBI , Criminal Appeal No. 575 of 2020(arising out of SLP (Crl.)

2. St. of N.C.T. of Delhi Vs Ajay Kumar Tyagi , (2012) 9 SCC 685

3. P.S. Rajya Vs St. of Bih.,(1996) 9 SCC 1

4. State Vs M. Krishna Mohan, (2007) 14 SCC 667

5. Central Bureau of Investigation Vs V.K. Bhutiani's, (2009) 10 SCC 674

6. Radheyshyam Kejriwal Vs St. W.B. & anr.(2011) 3 SCC 581

7. Avinash Sadashiv Bhosale (D) through legal heirs Vs U.O.I.,(2012) 13 SCC 142

8. G.M. Tank Vs St. of Guj. & ors. (2006) 5 SCC 446

9. Depot Manager, A.P. State Road Transport Gorakhpur Vs Mohd. Yusuf Miya, (1997) 2 SCC 699

(Delivered by Hon'ble Suneet Kumar, J.)

1. Heard Sri Vinay Saran, Senior Advocate, assisted by Sri Vikash Budhwar and Shrawan Kumar Ojha, learned counsel for the applicant and learned A.G.A. for the State.

2. The petition is being decided without calling for counter affidavit on consent of the parties.

3. By the instant petition filed under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."). the applicant seeks the following relief:

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application, and further be pleased to quash the impugned charge-sheet dated 17.12.2019 alongwith cognizance dated 05.08.2020 passed by learned Special Judge (Prevention of Corruption Act) Special Court No. 1, Varanasi in Special case No. 517 of 2020, State Vs. Om Narayan Tiwari arising out of Case Crime No. 867 of 2012, under section 13(1)(E) read with section 13(2) of Prevention of Corruption Act, 1988, Police Station Kotwali, District Ballia pending in the court of Special Judge (Prevention of Corruption Act), Special Court No. 1, Varanasi."

4. The applicant, a senior clerk, in the office of Chief Medical Officer, District Ballia, upon enquiry was found having assets beyond his known and legal source of income. The applicant seeks quashing of the charge sheet and consequential proceedings on the ground that applicant came to be exonerated in disciplinary proceedings on an identical charge. It is

submitted that prosecution of the applicant on the charge that was the basis of the disciplinary proceedings is abuse of the process of the Court.

5. The facts giving rise to the instant petition, briefly stated, is that an F.I.R. came to be lodged on 30 November 2012 by Inspector, Vigilance Department, Gorakhpur, under Section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "P.C. Act").

6. It is alleged that the Vigilance Department vide letter dated 23 November 2010, directed an open enquiry against the applicant. In the enquiry, it was found that applicant being a public servant, during the period of enquiry, had spent Rs. 16,52,742 over and above his known source of income. The applicant was, prima facie, found guilty of having acquired disproportionate assets.

7. The Investigating Officer (for short "I.O.") collected documents, including, declaration filed by the applicant; document of the Sales Tax department; income and bank statements related to the applicant and his family members; financial assitance given by the relatives of the applicant in purchasing the property and construction of the house; the documents relating to expenses incurred by the applicant and the family. The statement under Section 161 Cr.P.C. was recorded of the family members; executive engineer of the electricity department; bank official; wife of the applicant and official of the insurance company. I.O. upon investigation, prima facie, was of the opinion that the applicant had amassed assets disproportionate to his known source of income. The check period is from the date of appointment (28.04.1987) to 31 December 2012. (Parcha No. 2 at page 45 of the petition)

8. Sanction of the competent authority for prosecution was granted on 4 January 2019 which is part of the case diary. Charge sheet was filed on 17 December 2019, cognizance by the competent court was taken on 5 August 2020 summoning the applicant to face trial.

9. Earlier a complaint came to be filed against the applicant before the Lokayukta, Uttar Pradesh, on 15 September 2006 in terms of the Uttar Pradesh Lokayukta and Up-Lokayuktas Act, 1975. Applicant was subjected to notice to show cause. Pursuant thereof, the applicant replied and recorded his statement before the Lokayukta. The report dated 20 August 2010 came to be submitted holding the applicant, prima facie, guilty of acquiring disproportionate assets, thereby, directing the Government to take necessary action against the applicant for misconduct and prosecute the applicant for the offence under the P.C. Act.

10. It appears, thereafter, on the report of the Lokayukta, applicant came to be charge sheeted (12 October 2010) in disciplinary proceedings initiated by the Disciplinary Authority. The charge against the applicant, inter-alia, was that being a clerk he had amassed property of several crores; purchased a residential plot in the name of his wife; the market value as on date was valued approximately at Rs. 50 lakh. The imputation of misconduct, thus, was that applicant being a clerk, had acquired assets beyond his known legal means. The applicant denied the allegation and submitted his reply, inter alia, contending that the parcel of land was purchased on 5 June 1992 for Rs. 95,200/-

by his wife, Rs. 13,850/- was spent on Stamp and Rs. 700 towards expenses for registration i.e. total 1,09,750,00/- was incurred. Subsequently, a house was constructed thereon valued at Rs. 1,20,000/-. It was further stated that the wife of the applicant is an income tax assessee engaged in purchase and sale of agricultural products (vegetables, potatoes, grains etc.). Further, the applicant had borrowed money from his family members and other relatives. Enquiry Officer/Additional Director, Medical Health Family Welfare, Azamgarh Division, Azamgarh, on considering the evidence did not find the charge of disproportionate assets proved against the applicant. The applicant, however, was held guilty for not taking prior permission nor informing the Government before purchasing the property and building a house. Applicant came to be punished, withholding one increment temporartily.

11. It is, in this backdrop, the learned Senior counsel appearing for the applicant submits that the applicant came to be exonerated in disciplinary proceedings on the charge of disproportionate assets. The prosecution of the applicant under the P.C. Act for the same charge based on the same material is unsustainable and abuse of the process of the Court. In support of his submission, reliance has been placed on the decision rendered by the Supreme Court in Ashoo **Surendranath Tewari Versus The Deputy Superintendent of Police, EOW, CBI 1** (for short "Ashoo Tewari case').

12. In rebuttal, learned Additional Government Advocate (A.G.A.) submits that exoneration of the applicant in departmental disciplinary proceeding would not mean exoneration or acquittal in the criminal case. The standard of proof in a departmental proceedings is lower than that of criminal prosecution. It is further urged that the I.O. had not accepted the explanation of the applicant that the alleged income of the wife of the applicant is bonafide/genuine, rather, a sham coverup of illegal earnings of the applicant. She was not registered with the relevant authorities for trade, including, the Sales Tax department. It is further urged that the applicant had siphoned of his ill acquired money through different channels. It is further submitted that Lokayukta on the same materials furnished by the applicant had returned a finding, prima facie, holding the applicant guilty of acquiring disproportionate assets beyond known source of income. The exoneration of the applicant in the disciplinary proceeding would not absolve him of the culpability of the offence.

13. The facts, inter se, parties are not in dispute.

14. The question that arises for determination is whether a person who is exonerated in a departmental disciplinary proceedings no criminal proceedings can be advanced or may continue against him on the same subject matter/or charge.

15. It would be apposite to consider the law on the proposition being pressed by the learned counsel for the applicant.

16. In **State of N.C.T. of Delhi Vs Ajay Kumar Tyagi2** (for short "NCT Delhi case"), a three Judge Bench was called upon to answer a reference referred by a two Judge Bench on having noticed conflicting views. The issue for consideration by the Larger Bench is as follows:

"The facts of the case are that the respondent has been accused of taking

bribe and was caught in a trap case. We are not going into the merits of the dispute. However, it seems that there are two conflicting judgments of two Judge Benches of this Court; (I) P.S. Rajya vs. State of Bihar reported in (1996) 9 SCC 1, in which a two Judge Bench held that if a person is exonerated in a departmental proceeding, no criminal proceedings can be launched or may continue against him on the same subject matter, (ii) Kishan Singh Through Lrs. Vs. Gurpal Singh & Others 2010 (8) SCALE 205, where another two Judge Bench has taken a contrary view."

17. On having considered the decisions, including that rendered by the High Courts, the Supreme Court, answered the reference in the following terms:

"We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution. *We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But* ***that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further they are not in the same hierarchy."***

18. Upon answering the reference the order of the High Court quashing the criminal prosecution was reversed being unsustainable on misreading **P.S. Rajya case.**

19. In **P.S. Rajya v. State of Bihar3,** (for short "PS Rajya' case) the question before the Court was as to whether:-

"3. .....the respondent is justified in pursuing the prosecution against the appellant under Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."

20. The Court clarified in para 23 of the report that *"...We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued..."*

21. In **NCT Delhi,** the Court, therefore, was of the opinion that the prosecution was not terminated on the ground of exoneration in the departmental proceedings but on the peculiar facts. The observation is as follows:

"The decision in the case of ***P.S. Rajya*** *(supra), therefore does not lay down any proposition that on exoneration of an employee in the departmental proceeding, the criminal prosecution on the identical charge or the evidence has to be quashed. It is well settled that the decision is an authority for what it actually decides and not what flows from it. Mere fact that in* ***P.S. Rajya*** *(Supra), the Supreme Court quashed the prosecution when the accused was exonerated in the departmental proceeding would not mean that it was quashed on that ground."*

22. **P.S. Rajya** case came up for consideration before the Supreme Court in **State v. M. Krishna Mohan4,** thereafter, in the case of **Central Bureau of Investigation v. V.K. Bhutiani's5,** the

Supreme Court held that quashing of the prosecution was illegal holding that exoneration in departmental proceedings would not lead to exoneration or acquittal in criminal case. It is well settled that the standard of proof in department proceeding is lower than that of criminal prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the criminal case cannot be rejected on the basis of the evidence in the departmental proceeding or the report of the Enquiry Officer based on those evidence.

23. On having considered the law, reverting to **Ashoo Tiwari** case relied by the learned counsel for the applicant. The Supreme Court relying on **Radheyshyam Kejriwal Vs. State of West Bengal and another6** (for short "Radheyshyam Kejriwal case), set aside the judgment of the High Court and Special Judge and discharged the appellant from the offence under the Penal Code. The facts, therein, was that the employer SIDBI did not consider it a fit case, consequently, declined permission to prosecute the appellant. The Chief Vigilance Commission (CVC) after having gone through the arguments put forth by the CBI and SIDBI during the course of joint meeting was of the opinion that the appellant may have been negligent without any criminal culpability.

24. In **Radhey Shyam Kejriwal,** the adjudicating authority under the provisions of the Foreign Exchange Regulation Act, 1973 was not convinced with the Enforcement Directorate to impose penalty upon the appellant. In other words, if the departmental authorities themselves, in statutory adjudication proceedings recorded a categorical and an unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal prosecution and say that there is sufficient material. It would be unjust and an abuse of the process of the court to permit Enforcement Directorate & Foreign Exchange Regulatory Authority to continue with criminal proceedings on the very same material.

25. After referring to various decisions the Supreme Court culled out the ratio of the decisions as follows:-

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of 8 the person facing trial for identical violation will depend upon the nature of finding. If

the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) ***In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."***

26. The Court finally concluded:

"39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

27. In nutshell, to recapitulate, in **Radhey Shaym Kejriwal,** the statutory adjudicating authority did not find prima facie case to impose penalty for violation of the Act. The prosecution based on the same material was held unjustified and abuse of the process of the Court. In **Ashoo Tiwari**, CVC agreed with the competent authority of SIDBI, after hearing the CBI, that complicity and culpability of the appellant was not found. The Court relying on para 38(vii) of **Radhey Shaym Kejriwal** and having regard to the detail CVC order was of the considered opinion that the *"chances of conviction in a criminal trial involving the same facts appear to be bleak".*

28. Both the decisions were decided on the peculiar facts arising therein, the decisions do not lay down any proposition that exoneration of an employee in departmental disciplinary proceedings, the criminal prosecution on the identical charge or evidence has to be quashed automatically.

29. Even otherwise in a case were acquittal of the employee by the criminal court is concerned it does not preclude the employer from taking disciplinary action if it is otherwise permissible. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. In service jurisprudence, the purpose of enquiry proceeding is to deal with the delinquent employee departmentally and impose penalty in accordance with the service rules. The rule relating to appreciation of evidence and proof in the two proceedings is also not similar. In criminal law burden of proof is on the prosecution to prove the guilt. "without reasonable doubt", on the other hand, penalty can be imposed on the delinquent employee on a finding recorded on the basis of "preponderance of probability" **(Refer-Avinash Sadashiv Bhosale (D) through legal heirs Vs. Union of India7, G.M. Tank Versus State of Gujarat and others8; Depot Manager, A.P. State Road Transport Gorakhpur Vs. Mohd. Yusuf Miya9).**

30. Reverting to the facts of the case in hand, it is not in dispute that the statutory authority Lokayukta held the applicant, prima facie, guilty of disproportionate assets and misconduct, accordingly, recommended criminal prosecution and disciplinary proceedings against the applicant. The

Department/Employer of the applicant in compliance lodged an FIR being Crime Case No. 578 of 2010, under section 13(1)(e) of Prevention of Corruption Act, 1988.

31. At the same time the department initiated disciplinary proceedings. The charge-sheet did not contain any specific charges or imputation of misconduct. The points framed by the Lokayukta for determination of the complaint against the applicant contained in the order of the Lokayukta was taken as the charge against the applicant. The Enquiry Officer on considering the reply of the applicant and the evidence returned a finding that the charge of disproportionate assets is not proved. The Enquiry Officer further records that he is constraint to disagree with the findings recorded by the Lokayukta. The enquiry report came to be accepted by the disciplinary authority i.e. Director (Administration) Family Welfare, U.P. Lucknow, vide order dated 22 March 2017.

32. That what is writ large from the above noted facts is the manner in which the departmental authorities proceeded against the applicant departmentally to scuttle the Lokayukta report and the prosecution against the applicant. Charge was not framed; imputation of misconduct was not reduced nor detailed; disciplinary authority sat in appeal over the reasoned findings of the statutory authority- the Lokayukta. The Act confers powers of court upon the Lokayukta to summon and examine witness or records, such power is lacking in the disciplinary authority. The scope, objective and ambit of enquiry in both the proceedings is distinct and different. In the same breath the complainant/informant (Deputy Chief Medical Officer, NRHM Ballia) vide communication dated 30 December 2020 requested the I.O. not to proceed with the investigation pending disciplinary enquiry. The chain of facts clearly reflects the influence of the applicant, a clerk, upon the officials of the department. The conduct of the disciplinary authority on the face of the material brought on record tantamounts to perpetuating fraud and corruption by conspicuously attempting to shield the applicant under the garb of exoneration in disciplinary proceedings.

33. The subsequent FIR came to be lodged by the Vigilance, upon investigation, charge-sheet was filed, which is under challenge.

34. I have carefully gone through the voluminous material brought on record with the assistance of the learned counsel for the parties. I would restrain from entering into the merit of the evidence. The enquiry/investigation by the Lokayukta/I.O. is in detail, meticulous and supported by cogent evidence. It would suffice to take note of the admitted case setup by the applicant. Applicant came to be appointed on compassionate ground in 1987. He was married in 1988. Applicant and his wife do not have ancestral agricultural land. The plot of land was purchased by his wife in 1992 and the house, thereon, came to be constructed immediately thereafter. The source of income setup by the wife is trade in agricultural produce. The applicant created the asset within 5 years of his service and 4 years of marriage. The trading business of the wife is not registered with any of the statutory authorities, including, Sales Tax Department. The trade transaction is in cash. The documents/accounts pertaining sale/purchase was not maintained.

35. In this backdrop of admitted facts the applicant came to be let off in the departmental disciplinary proceedings on the ground that the wife is an income tax assessee, thus, taking her income to be lawful. On the other hand, the authorities trained in enquiry/investigation, prima facie, found the explanation furnished by the applicant a mere cover up of his unexplained income far beyond his known and legal source. The alleged business and income of the wife, prima facie, was taken to be a sham transaction - the basis for prosecution. In the given facts to contend that exoneration in disciplinary proceedings would tantamount to quashing of criminal proceedings would be travesty of justice.

36. Having regard to the law and reasons hereinabove, the petition lacks merit, accordingly, dismissed on fact and law.

37. The trial court to proceed in accordance with law without being influenced by the observations made in the order and judgment.

(2020)11ILR A91
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Application U/S 482 No. 15217 of 2020

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

Counsel for the Applicants:
Sri Vikas Rana

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

(A) Criminal law - Indian Penal Code, 1860 - Sections 452/323/506 - Code of criminal procedure, 1973 - Section 200 - Examination of complainant - Section 202 Cr.P.C - Postponement of issue of process - Issuance of process should not be mechanical nor should it be made as a instrument of harassment to the accused - Lack of material particulars and non-application of mind as to the materials cannot be brushed aside as a procedural irregularity - inquiry or the investigation as the case may be, by the Magistrate is mandatory where the accused is residing beyond the area of exercise of his jurisdiction - examination of the complainant and the witnesses as envisaged under section 200 Cr.P.C could not be equated or be a substitute for the inquiry/investigation required under section 202 Cr.P.C. Para - 10,17,25

Complaint filed by opposite part no.2 (Husband) - under section 156 (3) Cr.P.C against the applicants -averments - marriage of the applicant no. 1(wife) with opposite party no. 2 was solemnized on 07.06.2017 - later on their relationship became strained - applicant summoned - pending before judicial magistraate - applicant accused persons are the resident at a place out side the territorial jurisdiction of the learned Judicial Magistrate - statements of the witnesses were recorded under section 202 Cr.P.C.Para - 2,5,26

HELD:- Prima facie, the dispute is of matrimonial nature or outcome of matrimonial dispute. Criminal proceedings are malicious and to wreck vengeance cannot be rejected at the out right in the back ground of the facts of the present case. Contradictions in the statements of complainant and the witnesses also appear to have some substance. Fair chances of resolution of matrimonial dispute through the process of mediation, cannot be ruled out.Para -28

Application u/s 482 Cr.P.C. Pending .(E -7)

List of Cases Cited:-

1. National Bank of Oman Vs Barakara Abdul Aziz & anr. , (2013) 2 SCC 488

2. Smt. Parvender Kaur & anr. Vs St. of U.P. & anr. , u/s 482 Cr.P.C. No. 27369 of 2018

3. Arvind Kumar Chaurasiya & anr. Vs St. of U.P. &anr. , u/s 482 Cr.P.C. No. 27788 of 2018

4. Vijay Dhanuka etc. Vs Najima Mamtaj etc , (2014) 14 SCC 638

5. "Birla Corporation Ltd. Vs Adventz Investments and Holdings , (2019) 16 SCC 610

6. National Bank of Oman Vs Barakara Abdul Aziz , (2013) 2 SCC 488

7. Vijay Dhanuka etc. Vs Nazima Mamtaj etc , (2014) 14 SCC 638

8. Birla Corporation limited Vs Adventz Investments and holdings , (2019) 16 SCC 610

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

1. Heard Sri Vikas Rana, learned counsel for the applicants and Sri Pankaj Saxena, learned A.G.A for the State.

2. This application under section 482 Cr.P.C. has been filed by the applicants to quash the entire proceedings along with impugned summoning order dated 02.11.2019 passed by Judicial Magistrate, Bisalpur, District Pilibhit in Complaint Case No. 216 of 2019 (Rahul Vs. Anjana and others), under Sections 452/323/506 IPC, Police Station Bisalpur, District Pilibhit, pending before the Judicial Magistrate Bisalpur, District Pilibhit.

3. The opposite party no. 2, the husband of applicant no. 1 has filed complaint on 20.02.2019 under section 156 (3) Cr.P.C against the applicants on the averments that the marriage of the applicant no. 1 with opposite party no. 2 was solemnized on 07.06.2017, but later on their relationship became strained. On 10.07.2018 the applicant no. 1 with her maternal uncle and aunty i.e. applicant nos. 2 and 3 went out of the matrimonial home and had taken away some other jewelry and never came back. On the date of incident 27.10.2018 the applicants forcibly entered into the house of opposite party no. 2 and beaten him. On the said complaint after recording the statement of opposite party no. 2 under section 200 Cr.P.C and the statement of witnesses PW-1 and PW-2 under section 202 Cr.P.C the learned Magistrate passed the summoning order against the applicants under sections 452/323/506 IPC.

4. Learned counsel for the applicants submits that the applicants have been falsely implicated. The correct facts are that due to matrimonial dispute between the applicant no 1 and opposite party no. 2, the applicant no. 1 lodged an F.I.R. on 05.12.2018 in case crime no. 699 of 2018, under sections 498-A/323/504 IPC and 3/4 D.P. Act, P.S. Prem Nagar, District Bareilly against the opposite party no. 2 and his other family members. The applicant no. 1 also filed Criminal Misc. Case No. 143 of 2019, under section 125 Cr.P.C against the opposite party no. 2 before the Principal Judge Family Court in which by order dated 15.02.2020 the maintenance has been awarded to the applicant no. 1. Learned counsel for the applicants further submits that the applicant nos. 4 and 5 being maternal uncle and aunty and with whom the applicant no. 1 is residing, they have also been falsely implicated.

5. Submission of the learned counsel for the applicant is that the complaint case has been filed to create pressure upon the applicants to compromise, the cases

instituted by the applicant no. 1 as mentioned above. It has further been submitted that, predominately the dispute between the parties is matrimonial dispute. The learned Magistrate failed to consider that the complainant in his statement did not take the name of the applicant no. 1 in the incident dated 27.10.2018 whereas PW-2 in his statement under section 202 Cr.P.C did not take the names of applicant nos. 2 and 3, which made the entire version of complaint doubtful. The requisite inquiry under section 202 Cr.P.C. was not made by the learned Magistrate. The applicant accused persons are the resident at a place out side the territorial jurisdiction of the learned Judicial Magistrate Bisalpur, District Pilibhit and as such inquiry under section 202 Cr.P.C was mandatory. He placed reliance on the judgment of Hon'ble Supreme Court in the Case of ***"National Bank of Oman Vs. Barakara Abdul Aziz & Another reported in (2013) 2 SCC 488"***. He has further placed reliance on the judgments of this Court in case of ***"Smt. Parvender Kaur And Another Vs. State of U.P. and Another passed in Application under section 482 Cr.P.C. No. 27369 of 2018 decided on 12.09.2018", and in the case of "Arvind Kumar Chaurasiya and another Vs. State of U.P. and Another*** passed in ***Application under section 482 Cr.P.C. No. 27788 of 2018 decided on 27.08.2018"***, in support of his contention that a conscious decision has to be taken by the learned Magistrate and specific order is required to be passed regarding postponement of issuing process and for initiation of inquiry either by himself or ordering investigation, as the case may be. He has further placed reliance on judgment of Hon'ble Punjab & Haryana High Court in the case of ***"S.K. Bhowmik Vs. S.K. Arora and Another" decided on 19.09.2007."***

6. Learned counsel for the applicants has further submitted that the dispute being matrimonial/outcome of matrimonial dispute. There are fair chances of settlement through, the process of mediation.

7. Per contra, Sri Pankaj Saxena learned A.G.A has submitted that although, inquiry contemplated by section 202 Cr.P.C. in cases where the accused persons reside beyond the territorial jurisdiction of the concerned Judicial Magistrate, is must, but he submits that in the present case such inquiry was made. The statement of witnesses were recorded under section 202 Cr.P.C. and, therefore, it cannot be said that no such inquiry was held by the learned Magistrate. Sri Pankaj Saxena learned A.G.A has placed reliance upon the judgments of Hon'ble Supreme Court in the case of ***"Vijay Dhanuka etc. Vs. Najima Mamtaj etc reported in (2014) 14 SCC 638",*** and in the case of ***"Birla Corporation Ltd. Vs. Adventz Investments and Holdings reported in (2019) 16 SCC 610".***

8. I have considered the submissions advanced by learned counsel for the applicants and learned A.G.A for the State and perused the material brought on record.

9. So far as, the question of holding of an inquiry by the learned Magistrate under section 202 Cr.P.C. in cases where the accused persons are residing at a place beyond the area of the territorial jurisdiction of the Magistrate, is concerned, it is relevant to reproduce section 202 Cr.P.C. as amended w.e.f 23.06.2006 which reads as under:-

202 . Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant.

10. A bare perusal of section 202 Cr.P.C. shows that in case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, he shall postpone issue of process against the accused and shall hold an inquiry either by himself or direct investigation to be made by a Police Officer or by such other person as the Magistrate thinks it fit, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. The use of expression shall makes it mandatory for the Magistrate to hold the inquiry contemplated by the section where the accused resides beyond his territorial jurisdiction. The expression shall, is some times read as directory but ordinarily it is read as mandatory. The inquiry may be made by the Magistrate himself or he may direct investigation to be made by the police Officer or by such other person as he thinks fit. The scope of inquiry under section 202 Cr.P.C. is limited to ascertain the truth or falsehood of the allegations made in the complaint for limited purpose of finding out whether a prima facie case for issue of process is made out. The issuance of process to the accused calling upon him to appear in the criminal cases is a serious matter. The law imposes a serious responsibility on the Magistrate to decide, if, there is sufficient ground for proceeding against the accused. Issuance of process should not be mechanical nor should it be made as a instrument of harassment to the accused. Lack of material particulars and non-application of mind as to the materials cannot be brushed aside as a procedural irregularity.

11. In ***"National Bank of Oman Vs. Barakara Abdul Aziz reported in 2013 (2) SCC 488"*** the facts were that the accused was residing out side the jurisdiction of the Chief Judicial Magistrate concerned and he failed to carry out any inquiry or order investigation as contemplated under the amended section 202 Cr.P.C. which

amendment was not noticed by the learned Magistrate, and the process was issued on perusal of the complaint and the documents attached thereto, the Hon'ble Supreme Court held that the order passed by the Magistrate was illegal and the High Court acted in accordance with law in setting aside the said order. It is relevant to reproduce the para nos. 8, 9, 10 and 11 of National Bank of Oman **(Supra)** as under:-

8. We find no error in the view taken by the High Court that the CJM, Ahmednagar had not carried out any enquiry or ordered investigation as contemplated under Section 202 CrPC before issuing the process, considering the fact that the respondent is a resident of District Dakshin Kannada, which does not fall within the jurisdiction of the CJM, Ahmednagar. It was, therefore, incumbent upon him to carry out an enquiry or order investigation as contemplated under Section 202 CrPC before issuing the process.

9. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

10. Section 202 CrPC was amended by the Code of Criminal Procedure (Amendment) Act, 2005 and the following words were inserted:

"and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,"

The notes on clauses for the abovementioned amendment read as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The amendment has come into force w.e.f. 23-6-2006 vide Notification No. S.O. 923(E) dated 21-6-2006.

11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of

it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. In ***"Vijay Dhanuka etc Vs. Nazima Mamtaj etc reported in 2014 (14) SCC 638"*** wherein also the residence of the accused was shown at the place beyond the territorial jurisdiction of the learned Magistrate and the Magistrate had issued process after examination of the complainant and two witnesses, questions arose for determination (i) whether it was mandatory to hold inquiry or investigation for the purpose of deciding whether or not there was sufficient ground for proceeding, and (ii) whether the learned Magistrate before issuing summons had held the inquiry as mandated by section 202 Cr.P.C.

13. In Vijay Dhanuka etc. **(Supra)** the Hon'ble Supreme Court held that in case where accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry or investigation as the case may be, by the Magistrate is mandatory, which is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints.

14. On the point, if inquiry as mandated by section 202 Cr.P.C was held by the Magistrate, the Hon'ble Supreme Court in Vijay Dhanuka etc **(Supra)** held that "inquiry" as defined under section 2(g) of the Code of Criminal Procedure means every inquiry other than a trial conducted by the Magistrate or Court. No specific mode or manner of inquiry is provided under section 202 Cr.P.C. In the inquiry envisaged under section 202 Cr.P.C. the witnesses are examined and this exercise by the Magistrate for the purpose of deciding, whether or not there is sufficient ground for proceeding against the accused, was held nothing but an inquiry under section 202 of the Code.

15. It is relevant to reproduce paragraph nos. 11 to 16 of Vijay Dhanuka **(Supra)** as under:-

11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire

into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

13. In view of the decision of this Court in Udai Shankar Awasthi v. State of U.P. [(2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708] , this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment: (SCC p. 449, para 40)

*"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it [**Ed.**: The matter between the two asterisks has been emphasised in original as well.] mandatory to postpone the issue of process [Ed.: The matter between the two asterisks has been emphasised in original as well.] where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."*

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 the 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.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.

16. In view of what we have observed above, we do not find any error in the order impugned [Vijay Dhanuka, In re, Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal)] . In the result, we do not find any merit in the appeals and the same are dismissed accordingly.

16. In the Case of ***"Birla Corporation limited Vs. Adventz Investments and holdings reported in 2019 (16) SCC 610"*** the Hon'ble Supreme Court has reiterated the same preposition of law that at the stage of inquiry under section 202 Cr.P.C the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused.

17. Thus, the law as settled is that the inquiry or the investigation as the case may be, by the Magistrate is mandatory where the accused is residing beyond the area of exercise of his jurisdiction. In the inquiry envisaged under section 202 Cr.P.C the witnesses are examined and this exercise by the Magistrate is an inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. If witnesses have been examined it cannot be said that any inquiry as contemplated by amended section 202 Cr.P.C. was not held.

18. Learned counsel for the applicants has placed reliance on the judgments of this Court in Smt. Parvinder Kaur and another **(Supra)**, Arvind Kumar Chaurasiya **(Supra)** and judgment of Punjab & Haryana High Court in the case of S.K. Bhowmik **(Supra).**

19. In Smt. Parvinder Kaur and another **(Supra)** as well as Arvind Kumar Chaurasiya **(Supra)** this Court held that the Magistrate before issuing process after invoking this provision should satisfy himself that the complaint filed against the person residing outside the jurisdiction of the court is not for his harassment. How the Magistrate has satisfied himself in this regard must be reflected from the proceedings conducted by him. Therefore, a conscious decision has to be taken. Specific order is required to be passed regarding postponement of issuing process and for initiation of inquiry either by himself or ordering investigation, as the case may be. If the Magistrate decides to inquire himself he should put necessary questions with the witnesses and also to the complainant, like, identity of accused, acquaintance of complainant and witness with the accused, relationship in between accused and complainant and in between complainant and witnesses etc. If, the Magistrate decides to order investigation then purpose of investigation and person to whom investigation is entrusted should be clearly mentioned by giving a reasonable time to complete the investigation.

20. In the case Smt. Parvinder Kaur and another **(Supra)** this court has held as under in paragraph nos. 5, 6 and 7 :-

"5. To fulfil the intention of the statue, a Magistrate before issuing process after invoking this provision should satisfy himself that the complaint filed against the person residing outside the jurisdiction of the court is not for his harassment. How the

magistrate has satisfied himself in this regard must be reflected from the proceedings conducted by him. Therefore, a conscious decision has to be taken. Specific order is required to be passed regarding postponement of issuing process and for initiation of enquiry either by himself or ordering investigation, as the case may be. If the Magistrate decides to enquire himself he should put necessary questions with the witnesses and also to the complainant, like; identity of accused, acquaintance of complainant and witness with the accused, relationship in between accused and complainant and in between complaint and witnesses etc.

6. If, however, the Magistrate decides to order investigation then purpose of investigation and person to whom investigation is entrusted should be clearly mentioned by giving a reasonable time to complete the investigation. It is also important to note that this investigation under section 202 Cr.P.C. is different from the investigation under section 156 Cr.P.C. Therefore, the Magistrate before ordering investigation must ensure that the investigating officer or any other person shall not be allowed to arrest the accused in such investigation. The Magistrate should also keep in mind the proviso added to sub-section(1) of section 202, which deals with cases wherein investigation could not be directed.

7. In the present case, it is not reflected from the proceedings that the Magistrate has exercised his jurisdiction after complying with the mandatory provisions of Section 202 Cr.P.C. To the contrary, the Magistrate has summoned accused person, as is evident from the impugned summoning order without complying with the mandatory provisions of Section 202 Cr.P.C."

21. The aforesaid judgments in Smt. Parvinder Kaur and another **(Supra)** and Arvind Kumar Chaurasiya **(Supra)** have considered the Apex Court judgment in National Bank of Oman **(Supra)**, which was a case where any inquiry as mandated by section 202 Cr.P.C. was not held by the learned Magistrate, as the amended section 202 Cr.P.C. was not noticed by the concerned Magistrate. In National Bank of Oman **(Supra)**, learned Magistrate had not examined the witnesses. The process was issued on perusal of the complaint, the statement of the complainant and the documents attached to the complaint. A perusal of the judgments of this Court, aforesaid, shows that in those cases the Magistrate had not exercised the jurisdiction after complying with the the mandatory provisions of section 202 Cr.P.C. In the present case two witnesses were examined under sections 202 Cr.P.C. Therefore, the present case is not a case of no inquiry or no investigation as mandated by section 202 Cr.P.C.

22. The cases of Smt. Parvinder Kaur and another **(Supra)** and Arvind Kumar Chaurasiya **(Supra)** have also not taken into consideration the Apex Court judgment in Vijay Dhanuka etc. **(Supra)** which clearly lays down that in the inquiry envisaged under section 202 Cr.P.C. the witnesses are examined. No specific mode or manner of inquiry is provided by section 202 of the Code.

23. It may be open for the Magistrate to put necessary questions to the witnesses and also to the complainant like identity of accused acquaintance of complainant and witnesses with the accused, their relationship, etc, in holding inquiry under section 202 Cr.P.C., but if he does not hold inquiry in that particular manner it would

not vitiate the order of summoning, in as much as, the object of the inquiry is only for the purpose of deciding whether or not there is a sufficient ground for proceeding against the accused and at this stage the Magistrate is not holding any trial. He is holding an "inquiry" which means an inquiry other than trial. However, the order of the Magistrate must indicate that he has made inquiry and on such inquiry he is prima facie satisfied that a case for summoning is made out.

24. In view of the above, the case of Smt. Parvinder Kaur and another **(Supra)** and Arvind Kumar Chaurasiya **(Supra)** are of no help to the applicants.

25. In the case of S.K. Bhowmik **(Supra)** also no inquiry or investigation was held and the process was issued in violation of the mandatory requirement of section 202 Cr.P.C. In that case the complaint was filed earlier to the amendment made in section 202 Cr.P.C which provision made inquiry or investigation mandatory in a case where the accused resided outside the area of jurisdiction of concerned Magistrate. The evidence was also recorded prior to such amendment, but after the amendment came into effect no inquiry was held by the Magistrate although the amendment had come into force before issuing of process. Hon'ble Punjab & Haryana High Court held that the examination of the complainant and the witnesses as envisaged under section 200 Cr.P.C could not be equated or be a substitute for the inquiry/investigation required under section 202 Cr.P.C. It was held that the process which was issued was on the basis of the examination of the complainant and witnesses CW-2 made under section 200 Cr.P.C., which was done much prior to the date of the amendment of section 202 Cr.P.C. No inquiry/investigation was held as required under section 202 Cr.P.C. Thus, this court finds that in the case of S.K. Bhowmik **(Supra)** any inquiry or investigation as mandated by section 202 Cr.P.C. was not held. The case of S.K. Bhowmik **(Supra)** is also of no help to the applicants.

26. In the present case the statements of the witnesses were recorded under section 202 Cr.P.C. It is also admitted to the applicants vide para no. 6 of the affidavit that the statements of PW-1 Sanjay Jaiswal and PW-2 Santosh Saxena were recorded under section 202 Cr.P.C. by the court concerned. The statement of the complainant was recorded on 27.04.2019 and the statement of PW-2 was recorded on 10.05.2019. Therefore, there is also time gap in recording the statements of the complainant and the witnesses.

27. This Court is therefore, not convinced with the submission of learned counsel for the applicants that any inquiry as contemplated by section 202 Cr.P.C. was not conducted by the learned Magistrate. This ground of challenge to the summoning order therefore, fails.

28. This Court, however, finds that there is a matrimonial dispute between the parties and litigation are also pending between them. Prima facie, the dispute is of matrimonial nature or outcome of matrimonial dispute. The submission of the learned counsel for the applicants that the criminal proceedings are malicious and to wreck vengeance cannot be rejected at the out right in the back ground of the facts of the present case. Prima facie, the submission that there are contradictions in the statements of complainant and the witnesses also appear to have some

substance. The fair chances of resolution of matrimonial dispute through the process of mediation, as has been submitted by the learned counsel for the applicants, cannot be ruled out.

29. Matter requires consideration, after affording opportunity of hearing to opposite party no. 2.

30. Learned A.G.A has already accepted notice on behalf of State-opposite party no. 1.

31. Issue notice to opposite party no. 2. He may file counter affidavit within a period of four weeks.

32. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

33. List this case on 09.12.2020 in the additional cause list.

34. On the next date of listing opposite party no. 2 may also intimate the Court his willingness for mediation proceeding for resolution of the dispute.

35. As an interim measure, it is provided that till the next date of listing no coercive action shall be taken against the applicants in the aforesaid complaint case.

(2020)11ILR A101
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 15900 of 2020

Preeti @ Ranu Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajay Kumar Singh, Sri Anup Kumar Singh

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

(A) Criminal law - Indian Penal Code, 1860 - Sections 323, 504, 506, 498-A - Dowry prohibition Act,1961 - Sections 3/4 at pre-trial stage, the proceedings cannot be quashed by this Court by exercising its power under Section 482 Cr.P.C. - A conduct which abuses and makes a mockery of the judicial process of the court is to be dealt with iron hands and no person can tinker with it to prevent, prejudice, obstruct or interfere with the administration of justice - prima facie case against the accused - sufficient ground for proceeding against the accused. Para-7,10,11

Opposite party no.2 moved an application under Section 156 (3) Cr.P.C. for lodging of the first information report against the accused persons - who are husband, mother-in-law and sister-in-law of opposite party no.2 - allegation - demand of dowry - statutory investigation under Chapter XII Cr.P.C. - submission of chargesheet - summoning of accused persons.Para - 2,4

HELD:- Quashing or setting aside the impugned orders as well as the entire proceedings of the aforesaid criminal case is refused - NO illegality, impropriety and incorrectness in the impugned orders or the proceedings under challenge - absolutely no abuse of court's process. Para - 12

Application u/s 482 Cr.P.C. dismissed.
(E -7)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard the learned counsel for the applicant and Mr. Pankaj Srivastava, learned A.G.A. for the State as well as

perused the entire material available on record.

2. This application under Section 482 Cr.P.C. has been filed for quashing the charge-sheet dated 12th September, 2009, order taking cognizance dated 2nd April, 2010 and order dated 22nd January, 2013 as well as entire proceedings of the Criminal Case No. 1500 of 2010 (State Vs. Gaurav Singh & Others), arising out of Case Crime No. 97 of 2009,, under Sections 323, 504, 506, 498-A I.P.C. as also under Sections 3/4 D.P. Act, Police Station-Naini, District-Prayagraj (Allahabad), pending in the Court of Additional Chief Judicial Magistrate-2, Allahabad.

3. The facts, which are relevant for the purposes of deciding the present application are as follows:

A first information report has been lodged by opposite party no.2, Indu Singh on **17th February, 2009** through an application under Section 156 (3) Cr.P.C., against three named accused persons Gaurav Singh, Kamla Singh and Preeti @ Ranu Singh (applicant herein), who are husband, mother-in-law and sister-in-law of opposite party no.2 respectively, which has been registered as Case Crime No. 97 of 2009,, under Sections 323, 504, 506, 498-A I.P.C. as also under Sections 3/4 D.P. Act, Police Station-Naini, District-Prayagraj (Allahabad). In the said first information report, it has been alleged by opposite party no.2 that the marriage of opposite party no.2 has been solemnized with Gaurav Singh on 6th May, 2007 in accordance with Hindu Rites and Customs. At the wedding, as per his full capacity, the father of opposite party no.2 gave Rs. 3 lac, jewellery for a sum of Rs. 1 lac and utensils for a sum of Rs. 50,000/- to her in-laws as demand of dowry but her husband, mother-in-law and sister-in-law (all the accused persons) were not satisfied. After marriage, they used to harass opposite party no.2 for Rs. 1 lac and one motorcycle as additional demand of dowry. On 8th July, 2007, opposite party no.2 came to her parental house and told her father and mother about the aforesaid demand of dowry. In October, 2007, husband and mother-in-law of opposite party no.2 came to her parental house and demanded the aforesaid additional demand of dowry by threatening that if the aforesaid additional demand of dowry was not fulfilled by the father of opposite party no.2, they would not take opposite party no.2 to their house. On the assurance given by father of opposite party no.2 to her husband and mother-in-law that he would fulfill the said demand of dowry at the earliest, as at that time he had no money, her husband and mother-in-law took her to their house. For few days, the behaviour of the accused persons was normal with opposite party no.2 but thereafter all the accused persons started abusing and beating her and demanded the aforesaid dowry repeatedly. When opposite party no.2 told her father about the said behaviour of all the accused persons with her, her father and brother came to her matrimonial house at Katni. On coming of father and brother of opposite party no.2 at her matrimonial house, all the accused persons threatened them that if they did not fulfill their additional demand of dowry, they would kill her. Then somehow, with the help of Katni Police, father and brother of opposite party no.2 brought her to her parental house. The husband and mother-in-law came to the parental house of opposite party no.2 again and demanded Rs. 1 lac and one motorcycle but her father requested them to take her daughter to their house and he would fulfill their demand

after arranging the money but they did not take his daughter i.e. opposite party no.2 along with them. Ultimately, opposite party no.2 had no other option but to make an application before the Police Station to lodge the first information report against them but the Police did not lodge the first information report. Thereafter opposite party no.2 moved an application under Section 156 (3) Cr.P.C. for lodging of the first information report against the accused persons. On the direction issued by the court below, the first information report has been lodged, which has been registered as Case Crime No. 97 of 2009,, under Sections 323, 504, 506, 498-A I.P.C. as also under Sections 3/4 D.P. Act, Police Station-Naini, District-Prayagraj (Allahabad).

4. Upon completion of the statutory investigation under Chapter XII Cr.P.C., the Investigating Officer has submitted the charge-sheet on **12th Sepember, 2009** against the applicant and her mother and brother, namely, Kamla Singh and Gaurav Singh respectively under Sections 323, 504, 506, 498-A I.P.C. as also under Sections 3/4 D.P. Act on which the court below i.e. Additional Chief Judicial Magistrate, Allahabad had taken cognizance vide order dated **2nd April, 2010** and all the accused persons had also been summoned by the same order dated **2nd April, 2010.**

5. From the perusal of the certified copy of order-sheets of the court below, which is at page 55 onwards of the paper book, it is clear that when the accused persons had not appeared before the Court below, on the application filed by the defence side, the court below wrote a letter to the S.S.P. for summoning of the accused persons on 29th March, 2011. Again when the accused persons did not turn up, on 14th December, 2011 the Court below wrote a letter to the Additional Director General of Police at Katni (Madhya Pradesh) for ensuring the presence of the accused persons before the Court below. **On 16th May, 2012,** bailable warrants were issued against the accused persons. Ultimately, on **22nd January, 2013** the court below issued non-bailable warrants against the accused persons. On 6th August, 2013, the court below again issued non-bailable warrants against the accused persons and also a letter had been written to the Senior Superintendent of Police, Katni (Madhya Pradesh) for ensuring their presence before the court below. On **18th January, 2015,** two accused persons, namely, Gaurav Singh and Kamla Singh surrendered before the court below and applied for bail. Kamla Singh was granted bail but the second accused Gaurav Singh was sent to jail. **On 19th March, 2015**, the accused Gaurav Singh again applied for bail and was granted bail by the court below. However, the third accused i.e. the applicant did not turn up. Ultimately, on **10th September, 2015,** the court below again issued non-bailable warrant against her and a letter had also been written to the Senior Superintendent of Police, Katni (Madhya Pradesh). Through the accused persons, namely, Gaurav Singh and Kamla Singh, who are none other than the brother and mother of the applicant, have been appearing before the court below and facing trial but she did not appear. Now, against the charge-sheet dated 12th September, 2009, order taking cognizance dated 2nd April, 2010, order issuing non-bailable warrant against the applicant dated 22nd January, 2013 as well as entire proceedings of the aforesaid criminal case, the applicant has approached this Court by means of the present application under Section 482 Cr.P.C., which has been reported on **21st October, 2020** and

presented before the Court on **22nd October, 2020.**

6. Learned counsel for the applicant submits that the present first information report lodged by opposite party no.2, namely, Smt. Indu Singh is nothing but a bundle of lie and the same has been lodged only for exploiting the applicant and other accused persons by indulging their names in a fake, false and frivolous case. The entire prosecution story as unfolded in the first information report is absolutely a self-made story projected by opposite party no.2. The applicant being the sister of the husband of opposite party no.2 has been falsely implicated in the present case. It is further submitted that the allegations made by opposite party no.2 are general and vague as also the same have been levelled against her husband and mother-in-law, who had caused alleged incident at her father's house at Naini (Allahabad), therefore, the same are apparently false. It is not possible for husband and mother-in-law of opposite party no.2 to visit her parental house and beat her. It is also submitted that the applicant was married in the year 2005 and lives at Ghaziabad along with her husband since then. Though the applicant is Nanad of opposite party no.2 but she never demanded any dowry nor was involved in the commission of the alleged incident. Learned counsel for the applicant, therefore, submitted that the present criminal proceedings initiated against the applicant is not only malicious but also amounts to an abuse of the process of the Court. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicant that the proceedings of the above mentioned complaint case are liable to be quashed by this Court.

7. Per contra, learned A.G.A. for the State has opposed the submissions made by the learned counsel for the applicant by contending that it is settled law that at pre-trial stage, the proceedings cannot be quashed by this Court by exercising its power under Section 482 Cr.P.C.

8. Apart from the above, learned A.G.A. also submits that despite summoning order dated 2nd April, 2010, order issuing bailable warrant dated 16th May, 2012, order issuing non-bailable warrant dated 22nd January, 2013, such persons like applicant, who has chosen not to appear before the court below are not entitled for any relief. The conduct of the applicant shows total disrespect to the process of the Court.

9. Normally this Court would have not entertain application under Section 482 Cr.P.C. filed by such persons, who have disobeyed the order of the court for more than 10 years, but considering the fact that the applicant is lady, this Court proposed the learned counsel for the applicant that the applicant may appear before the court below and seek recall of the warrant so issued under Section 70 (2) Cr.P.C within 30 days and the Court also suggested that for a period of 30 days she will be granted interim protection. However, learned counsel for the applicant insisted the Court that the proceedings of the aforesaid criminal case may be quashed as his case is of high merit and the applicant has not consciously disobeyed the order of the court below. In support of his plea, he referred to paragraph nos.-17 and 18 of the affidavit accompanying the present application, which is read as follows:

"It is very much clear from the order dated 2nd June, 2015 passed by Additional Chief Judicial Magistrate whereby issued Non-Bailable warrant against the applicant and further be

directed write follow to senior Superintendent of Police Katani even applicant is residing at Ghaziabad along with her husband therefore she could not know about the said case and she could know first time about the said case when her brother has informed on 20.08. 2020 about the said case that local police has informed that Non-Bailable warrant has been issued against the applicant prior to that neither counsel for the brother of the applicant has informed about Non-Bailable Warrant and ensure to her brother that case against the applicant has been quashed.

18.That as soon as applicant could know about the said case immediately engage counsel namely Sri Ajay Kumar Singh and requested to challenged before Hon'ble High Court thereafter paper has been collected by counsel and obtained certified copy from the court concerned and thereafter same is being filed without any further delay therefore there is no any deliberately delay on part of the applicant for filing the instant criminal applicant under section 482 Cr.P.C."

10. So far as the first submissions made by the learned counsel for the applicant that since the criminal case initiated by opposite party no.2 against the accused persons including the applicant are a false and frivolous case, the same may be quashed, is concerned, this Court is of the opinion that 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 F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. This Court does not find any justification to quash the charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

11. The second submission made by the learned counsel for the applicant that the applicant has not deliberately disobeyed the order of the court and the process of law has only been stated to be rejected on the ground that for a common man, it is impossible to believe that a person, who is residing separately at another place from her brother and mother with whom she is in constant contact did not know for more than five years about a criminal case, which has been initiated against herself and her brother and mother in which her brother and mother surrendered before the court below on 18th January, 2015. Thereafter her mother was granted bail on 18th January, 2015 and her brother was granted bail on 19th March, 2015. Since then, they are facing trial. It is only on 20th August, 2020 that the applicant has been informed by her brother Gaurav Singh i.e. co-accused that non-bailable warrant has been issued against her. Such explanation given

by the learned counsel on behalf of his client i.e. the applicant herein cannot be accepted by this Court. A conduct which abuses and makes a mockery of the judicial process of the court is to be dealt with iron hands and no person can tinker with it to prevent, prejudice, obstruct or interfere with the administration of justice.

12. The prayer for quashing or setting aside the impugned orders as well as the entire proceedings of the aforesaid criminal case is refused as I do not see any illegality, impropriety and incorrectness in the impugned orders 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 Supreme Court which might justify interference by this Court in order to upset or quash them.

13. In view of the aforesaid the present application is dismissed with exemplary cost of Rs. 15,000/- (Fifteen thousand rupees only). The said cost shall be deposited by the applicant by way of a bank draft in the name of Registrar General of this Court within one month from today. In case the applicant does not deposit the same within the time provided the same shall be recovered by the District Magistrate, Ghaziabad from her arrears of land revenue. On deposit of Rs. 15,000/- the Registrar General shall transmit to the concerned account for the use of poor clients, who do not bear to file their case before this Court.

(2020)11ILR A106
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.11.2019

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/S 482 No. 38936 of 2019

Shavez S/o Naseemul Hasan & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mehdi Abbas

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

(A) Criminal law - Indian Penal Code, 1860 - Section 147, 148, 149, 308, 323, 325, 336, 452, 504, 506 - Code of criminal procedure, 1973 - Section 155(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 - Conversion of N.C.R. into F.I.R. during investigation after finding the fact that the accused persons had caused serious injuries to victim and had thereby committed cognizable offence, is neither illegal nor impermissible .Para – 11

(B) Law regarding sufficiency of material - justify the summoning of accused - also the court's decision to proceed against him in a given case - court has to eschew itself from embarking upon a roving enquiry into the last details of the case - Not advisable to adjudge whether the case shall ultimately end in conviction or not - Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required.Para – 5

An application under Section 155(2) Cr.P.C. - before the court below for investigation in pursuance of the allegations made in the N.C.R. - allowed by the Magistrate concerned - S.H.O. concerned was directed to investigate the case - present case - neither two FIRs nor different charge-sheets filed against the applicants for the same cause of action - Only one police report report i.e. charge sheet submitted by the

police in the present case upon which the Magistrate had taken cognizance.Para - 9,11

HELD:- The perusal of the F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. No justification to quash the charge sheet or the proceedings against the applicants arising out of them.Para - 12

Application u/s 482 Cr.P.C. dismissed.
(E -7)

List of Cases Cited:-

1. Chandra Deo Singh Vs Prokash Chandra Bose , AIR 1963 SC 1430

2. Vadilal Panchal Vs Dattatraya Dulaji Ghadigaonker , AIR 1960 SC 1113

3. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi , (1976) 3 SCC 736

4. R.P. Kapur Vs St. of Pun., AIR 1960 SC 866

5. St. of Hary. Vs Bhajan Lal , (1992) SCC(Cr.) 426

6. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi , (1976) 3 SCC 736

7. T.T. Antony Vs St. of Ker. , (2001) 6 SCC 181

8. Amit Bhai Anil Chandra Shah Vs C.B.I. & anr., (2013) 6 SCC 348 and 2013 Law Suit (SC) 291

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

1. This application u/s 482 Cr.P.C. has been filed seeking the quashing of charge sheet dated 22.05.2019 as well as the entire proceedings of Case No.1181 of 2019 arising out of Case Crime No. 163 of 2018, u/s 147, 148, 149, 308, 323, 325, 336, 452, 504, 506 I.P.C., P.S.- Jarcha, District-Gautam Budh Nagar, pending in the Court of A.C.J.M., Ist, Gautam Budh Nagar.

2. Heard applicants' counsel and learned AGA.

3. Entire record has been perused.

4. Submission of learned counsel for the applicants is that initially an N.C.R. was lodged by the opposite party no.2 against them in which by virtue of order of Magistrate passed under Section 155(2) Cr.P.C. the investigation had taken place. Thereafter, the first informant had lodged an F.I.R. against them with the same allegation in which investigation again took place which resulted in submission of charge sheet in the present case. Submission is that registration of subsequent F.I.R. for the same occurrence against the same accused persons was not permissible in the eyes of law and if criminal proceedings were allowed to proceed on the basis of charge sheet so submitted, it will amount to abuse of process of law. Further submission is that investigation of F.I.R. which was registered as Case Crime No. 163 of 2008, was in fact re-investigation, which was also not permissible. Other contentions have also been raised by the applicants' counsel but all of them relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

5. So far as the law regarding sufficiency of material which may justify the summoning of accused and also the court's decision to proceed against him in a given case is concerned, the same is well

settled. The court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ground to proceed in the matter is required.

6. Through a catena of decisions given by Hon'ble Apex Court this legal aspect has been expatiated upon at length and the law that has evolved over a period of several decades is too well settled. The cases of (1) ***Chandra Deo Singh Vs. Prokash Chandra Bose AIR 1963 SC 1430*** , (2) ***Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker AIR 1960 SC 1113*** and (3) ***Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736*** may be usefully referred to in this regard.

7. The Apex Court decisions given in the case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and in the case of **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426** have also recognized certain categories by way of illustration which may justify the quashing of a complaint or charge sheet. Some of them are akin to the illustrative examples given in the above referred case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi 1976 3 SCC 736.** The cases where the allegations made against the accused or the evidence collected by the Investigating Officer do not constitute any offence or where the allegations are absurd or extremely improbable impossible to believe or where prosecution is legally barred or where criminal proceeding is malicious and malafide instituted with ulterior motive of grudge and vengeance alone may be the fit cases for the High Court in which the criminal proceedings may be quashed. Hon'ble Apex Court in Bhajan Lal's case has recognized certain categories in which Section-482 of Cr.P.C. or Article-226 of the Constitution may be successfully invoked.

8. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

9. A perusal of the record of the present case shows that on 1.7.2018 an N.C.R. No. 98 of 2018 was lodged by the opposite party no. 2 against the applicants and co-accused Rihan under Sections 323, 504, 506 I.P.C. As per N.C.R. version on 30.6.2018 the accused persons had threatened the first informant and others and had made an assault upon them and had also abused them. As per N.C.R. five persons namely Mahtab Ali, Kamal, Hasin Abbas, Aftab and Kr. Zeba had sustained injuries. It seems that the opposite party no.2 had filed an application under Section 155(2) Cr.P.C. before the court below for investigation in pursuance of the allegations made in the N.C.R. which was allowed by the Magistrate concerned vide order dated 12.7.2018 and the S.H.O. concerned was directed to investigate the case. The investigation commenced and the Investigating Officer had recorded statement of the first informant on 19.7.2018. The applicants and the co-accused Rihan had obtained bail in N.C.R. No. 98 of 2018, under Sections 323, 504, 506 I.P.C. on 19.7.2018. The statement of some of the injured persons were also recorded by the investigating officer on 21.7.2018 and 11.8.2018. On the other hand, the injured persons were medically examined and it was found that the injured Kamal had sustained a fracture of frontal bone in the said assault. There was fracture found on left clavical of injured Hasin Abbas. The injuries of Aftab was also found grievous in nature.

10. A perusal of purcha no. 7 of case diary, photocopy of which has been annexed as annexure no. 10 to the present affidavit, shows that on the basis of medical evidence Sections 325 and 308 I.P.C. were added and N.C.R. No. 98 of 2018, was accordingly converted into Case Crime No. 163 of 2018, under Sections 323/325, 504, 506, 308 I.P.C. It has also been mentioned that further investigation would be conducted for the offences punishable under Sections 323, 325, 504, 506, 308 I.P.C. However, it seems that on the basis of the earlier application which was given by the first informant for lodging of his N.C.R. a fresh Check F.I.R. was again executed by the police at P.S. Jarcha, District Gautam Budh Nagar and a separate crime no./F.I.R. No. 163 of 2018 was assigned to it. In this Check F.I.R. sections were mentioned as 308, 323, 325, 504, 506 I.P.C. Thereafter the investigating officer proceeded with the investigation of the present case and recorded statement of witnesses including that of injured persons as their second statement (Majid Bayan). Ultimately on the basis of material collected during investigation which includes the medical reports, the investigating officer had submitted charge sheet against the applicants and some other co-accused persons for the offence punishable under Sections 147, 148, 149, 308, 323, 325,336, 452, 504, 506 I.P.C. A perusal of F.I.R. No. 163 of 2018 would reveal that it was verbatim the same as the contents of N.C.R. No. 98 of 2018. In fact, it is fallacious to state that investigation with respect to N.C.R. No. 98 of 2018 was dropped and de-novo investigation was started as is clear from annexure no. 10 showing that during investigation upon the N.C.R. the investigating officer had found that the acts of the applicants did constitute some cognizable offences. Therefore, the said N.C.R. was converted into present F.I.R. Investigation thereafter was conducted by the then investigating officer as subsequent investigation. Applicants had not faced two investigations or two different court proceedings for the same cause of action. Preparation of new Check-Report was although not much needed as without it also, a charge sheet for committing cognizable offences could or would have been submitted by the investigating officer. It could also have been just sufficient to alter the case from non-cognizable offence into cognizable offence and make an entry to the same effect in the G.D. of police station. Issuance of or executing a fresh or new or further Check-Report was simply a superfluous exercise. But merely the fact that a new crime number was assigned and a Check F.I.R. was also executed, does not necessarily adversely affect the proceedings in any vital manner nor the applicants can claim that they have been prejudiced by this act. The F.I.R. of case crime no. 163 of 2018, was not a second F.I.R. rather it was a conversion of earlier N.C.R. No. 98 of 2018 into a cognizable report. Even the investigation which was conducted in pursuance of N.C.R. No. 98 of 2018, got merged in the subsequent investigation of the present case and it remained a continued process which is neither illegal nor can be termed as any kind of abuse of process of law.

11. Learned counsel for the applicants had placed reliance upon the judgement of Hon'ble Apex Court given in **T.T. Antony vs. State of Kerala (2001) 6** Supreme Court Cases 181 in support of his contention. In aforesaid case initially two different FIRs were lodged as case crime nos.353 of 1994 and 354 of 1994 at police station Kuthuparamba by different police

authorities regarding the incidents which took place on 25.11.1994 in which some persons had lost their lives while the investigation on the basis of two FIRs were still pending on the basis of a report of an inquiry commission, the superior police authorities had directed to take legal action against those responsible for firing without justification as a result of which people were killed. As were directed, the officer in charge of concerned police station registered another FIR as case crime no.268 of 1997 at police station Kuthuparamba. After registration of this FIR as case crime no.268 of 1997, earlier FIRs i.e. case crime nos.353 and 354 of 1994 were closed sometimes in April, 1999 and June 1999. It is clear from T.T. Antony's case (supra) that different FIRs were lodged by different first informants and the Hon'ble Apex Court was of the opinion that in truth and substance the essence of the two FIRs were same and therefore lodging of the second FIR was unwarranted and illegal. It was found by Hon'ble Apex Court that the FIRs in case crime nos.353 and 354 of 1994 on one hand and the FIR in case crime no.268 of 1997 on the other hand disclosed that the date and place of occurrence were the same, there was alluding reference to the death caused due to firing in the FIRs in case crime no.353 and 354 of 1994. Therefore Hon'ble Apex Court has held that registration of the second FIR i.e. FIR of case crime no.268 of 1997 registered in police station Kuthuparamba was not valid and the investigation consequent to it was of no legal consequence and therefore was accordingly quashed. However, Hon'ble Apex Court had given permission to the investigating agency for seeking leave of the court in case crime nos.353 and 354 of 1994 for making further investigation and filing of further report or reports under section 173(8) Cr.P.C. before the competent Magistrate in the said cases. In the present case at hand admittedly there are no two FIRs. The first information given by the complainant to the concerned police station was treated as N.C.R. as it relates to commission of non-cognizable offences. After getting permission from the Magistrate concerned when the investigating officer started investigation of the present case he found on the basis of material collected during investigation especially medical reports that applicant had committed cognizable offences and therefore the same N.C.R. was virtually converted into FIR. Certainly, conversion of N.C.R. into a cognizable report i.e. FIR, on the basis of material collected during investigation cannot be termed as illegal. At the most it was a superfluous act and only an entry in the G.D. showing conversion of non cognizable offence into cognizable offence would have very well sufficed. Thus then case law relied upon by applicant's counsel does not help him to any great extent. Reliance has also been placed by the counsel for the applicants as well as by the counsel for the first informant/opposite party no. 2 on the judgement of **Amit Bhai Anil Chandra Shah Vs. C.B.I. and another, 2013 (6)SCC 348 and 2013 Law Suit (SC) 291.** In this case an FIR No.RC No.4S2010 was lodged on 1.2.2010 the CBI conducted investigation and submitted charge-sheet on 23.07.2010. Thereafter a supplementary charge-sheet was also submitted by CBI on 12.10.2010. In the aforesaid charge-sheet the investigating agency had reached to a conclusion that conspiracy to kill Sohrabuddin and Kausar Bi and conspiracy to kill Tulsiram Prajapati were part of the same transaction. Later on, the CBI had lodged second FIR being No.RC-3 (S/2011) Mumbai on 29.04.2011 to investigate the death of Tulsiram Prajapati

who was a material witness to the killings of Sohrabuddin and Kausar Bi. After investigation the CBI had submitted charge-sheet in this case also on 4.9.2012. The second/ fresh FIR dated 29.04.2011 and the resultant charge-sheet dated 4.9.2012 was challeged before Hon'ble Apex Court on the ground of it being violative of fundamental rights guaranteed under Articles 14,20 and 21 of the Constitution. Hon'ble Apex Court had held that filing of second FIR and fresh charge-sheet was violative of fundamental rights guaranteed under Articles 14,20 and 21 of the Constitution of India since the same related to alleged offence in respect of which an FIR had already been filed and the court had taken cognizance. Hon'ble Apex Court found that as the killing of Tulsiram Prajapati was the part of same series of cognizable offences forming part of the first FIR. Therefore filing of fresh FIR was unwarranted and bad in the eyes of law, therefore, Hon'ble Apex Court had quashed the second FIR dated 29.4.2011. However, the Apex Court had directed that the charge-sheet filed on 4.9.2012 in pursuance of the second FIR be treated as supplementary charge-sheet in the first FIR. It is clear that in the case of Amit Bhai Anil Chandra Shah (supra) two different FIRs were lodged, each of which resulted in submission of different charge-sheets. In the present case no police report u/s 173(2) Cr.P.C. was filed on the basis of investigation which was carried out in respect of N.C.R. No.98 of 2018. During the course of initial investigation itself the N.C.R. was converted into FIR and eventually only one charge-sheet was submitted against the applicants with regard to same occurrence. Admittedly in the present case there are neither two FIRs nor different charge-sheets filed against the applicants for the same cause of action. The factual circumstances and evocular of events of the present case has no semblance with Amit Shah's case and in the absence of filing of any earlier police report the verdict of Hon'ble Apex Court given in Amit Bhai Anil Chandra Shah (supra) case does not help the contentions raised by applicants counsel at all. Admittedly, charge-sheet was not filed by the police in N.C.R. no.98 of 2018 and therefore no question arises for the Magistrate to take cognizance of the same. Only one police report report i.e. charge sheet of the present case has been submitted by the police in the present case upon which the Magistrate had taken cognizance. Conversion of N.C.R. into F.I.R. during investigation after finding the fact that the accused persons had caused serious injuries to victim and had thereby committed cognizable offence, is neither illegal nor impermissible. Investigation done by the police in pursuance of Case Crime No. 163 of 2018 cannot be termed as illegal as in fact the earlier investigation done by the investigating officer is already part of the present case and in fact it was a merger of two phases of investigation, one that took place in pursuance of N.C.R. with permission of Court and another which took place after alteration of non-cognizable case into a cognizable one.

12. The other submissions made by the applicants' learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A 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 F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

13. The prayer for quashing the same is refused as I do not see any abuse of the court's process either.

14. The application therefore cannot be allowed and stands dismissed.

15. In the last, before closing on, this Court wants to bring on record its unreserved admiration for the brilliant assistance that has been rendered by learned A.G.A. Shri Rupak Chaubey, who during the course of argument has not only displayed complete mastery on facts but has also shown an equally commendable understanding of law. His performance has been exemplary and worth emulation by his fellow peers.

(2020)11ILR A112
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 41617 of 2019

Vishnu Kumar Gupta & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Anshul Kumar Kumar Singhal

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

(A) Criminal law - Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 406 - Code of criminal procedure, 1973 - Section 204 - Issue of process - Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons -- summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial .Para - 4,11

(B) Criminal law - Code of criminal procedure, 1973 - Magistrate not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet - does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma - Court required to apply judicial mind - even the order of taking cognizance cannot be passed in mechanical manner - impugned order liable to be quashed . Para – 18

F.I.R. lodged with false and frivolous allegations by Block Education - Additional District Magistrate submitted enquiry report - applicants were indulged in raising fake bills with regard to the vehicle services - in connivance with the District Basic Education Officer, Hathras - F.I.R. was lodged on the basis of the directions issued by the District Magistrate - applicants summoned through a printed order - without recording any reasons in support of satisfaction for taking cognizance against the applicants and merely the case, Section, date of the order and date of the summon have been filled. Para - 3,4,5

HELD:- The conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated - summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto.Para - 19

Application u/s 482 Cr.P.C. allowed. (E -7)

List of Cases Cited:-

1. Ankit Vs St. of U.P. & anr. , [2009(9) ADJ 778]
2. Shakuntala Devi Vs St. of U.P. & 4 ors. , Application U/s 482 No. 11232 of 2018

3. Avdhesh Vs St. of U.P. & anr., [2019(6) ADJ 667]

4. Dushyant Kumar Vs St. of U.P. & ors. , Application U/s 482 No. 7206 of 2020

5. Ashu Rawat Vs St. of U.P. & anr., Application U/s 482 No. 13883 of 2020

6. Rishipal & ors. Vs State of U.P. & anr., [2019(3)ADJ 699]

7. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr.,AIR 2012 SC 1747

8. Sunil Bharti Mittal Vs C.B.I. ,AIR 2015 SC 923

9. Darshan Singh Ram Kishan Vs St. of Mah. , MANU/SC/0089/1971: (1971) 2 SCC 654

10. R.P. Kapur Vs St. of Punj., AIR 1960 SC 866: (1960) 3 SCR 388: 1960 Cri LJ 1239,

11. St. of Har. v. Bhajan Lal ,1992 Supp (1) SCC 335: 1992 SCC (Cri) 426,

12. Janata Dal Vs H.S. Chowdhary, (1992) 4 SCC 305: 1993 SCC (Cri) 36,

13. Raghubir Saran (Dr.) Vs St. of Bih. ,AIR 1964 SC 1:(1964) 2 SCR 336:(1964) 1 CRi LJ 1,

14. St. of Karn. Vs M Devendrappa ,(2002) 3 SCC 89: 2002 SCC (Cri) 539

15. Zandu Pharmaceutical Works Ltd. Vs Mohd. Sharaful Haque, (2005) 1 SCC 122: 2005 SCC (Cri) 283.

16. Megh Nath Guptas & anr. Vs St. of U.P. & anr., 2008 (62) ACC 826,

17. Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC)

18. UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456

19. Kanti Bhadra Vs St. of W.B., 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Sri Anshul Kumar Singhal, learned counsel for the applicants and Sri Pankaj Srivastava, learned A.G.A. for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed seeking quashing of the charge sheet dated 12.10.2018 and summoning order dated 22.12.2018 as well as the entire proceedings of Case No. 4492 of 2018 (State Vs. Vishnu Gupta), arising out of Case Crime No. 0689 of 2017, under Sections 420, 467, 468, 471, 406 I.P.C., Police Station Hathras Gate, Hathras, pending in the court of Chief Judical Magistrate, Hathras.

3. It has been submitted by learned counsel for the applicants that the F.I.R. has been lodged with false and frivolous allegations on 12.09.2017 by Block Education Officer, Ramanpur, District Hathras, on the basis of the enquiry report submitted by the Additional District Magistrate, (F&R) Hathras that the applicants were indulged in raising fake bills with regard to the vehicle services and

had gained a sum of Rs.3,08,593/- in connivance with the District Basic Education Officer, Hathras and as such, the F.I.R. was lodged on the basis of the directions issued by the District Magistrate.

4. Before arguing the case on merits, learned counsel for the applicants while pressing the present application under Section 482 Cr.P.C. submits that after submission of charge sheet the applicants have been summoned by order dated 22.12.2018 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicants. The court below has summoned the applicants through a printed order, which is wholly illegal.

5. It has been further submitted that the impugned summoning order dated 22.12.2018 is not a judicial order as it has been passed on a printed proforma without recording any reasons in support of satisfaction for taking cognizance against the applicants and merely the case, Section, date of the order and date of the summon have been filled.

6. It is next submitted that no offence as described in the F.I.R. or in the statement of the witnesses recorded during the course of investigation has taken place and the whole story as narrated in the F.I.R. as well as in the statement of the witnesses has been cooked and manufactured, therefore, the court below has materially erred in summoning the applicants, as such the orders are liable to be set aside.

7. In support of his submission, learned counsel for the applicants has relied upon several judgements of this Court.

Ankit Vs. State of U.P. And Another reported in [2009(9) ADJ 778]

Shakuntala Devi Vs. State of U.P. And 4 others passed in Application U/s 482 No. 11232 of 2018

Avdhesh Vs. State of U.P. And Another reported in [2019(6) ADJ 667]

Dushyant Kumar Vs. State of U.P. And Others passed in Application U/s 482 No. 7206 of 2020

Ashu Rawat Vs. State of U.P. And Another passed in Application U/s 482 No. 13883 of 2020

Rishipal & others Vs. State of U.P. And Another [2019(3)ADJ 699]

8. Learned A.G.A., however, opposes the contention of learned counsel for the applicants on the ground that the court below keeping in view the charge sheet and material submitted therewith, after applying judicial mind and finding sufficient material on record, summoned the applicants along with other co-accused persons to face trial and, therefore, there is nothing illegal so far as the order of summoning passed by the court below is concerned.

9. Having heard learned counsel for the parties and perused the record, it is apparent that all submissions put forth by learned counsel for the applicants before this Court are pertaining to factual aspect of

the matter and can only be considered by a criminal court in a full-fledged criminal trial, and it is not a stage where minute scrutiny of the evidence should have been made by the court below.

10. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject.

11. In AIR 2012 SC 1747, **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr.,** the Apex Court has held that Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

12. In AIR 2015 SC 923, **Sunil Bharti Mittal v. Central Bureau of Investigation (Three Judges Bench)** Hon,ble Apex Court held as under:

" 47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

13. The provisions relating to the power of the police to investigate into offences and the procedure to be adopted by them are to be found in Chapter XII which falls under the heading 'Information to the Police and their powers to investigate'. Under Section 156 (1) of the Code an officer-in-charge of a police station may investigate any cognizable offence without any order of the Magistrate, however, this is not a case pertaining to non-cognizable cases, wherein without an order from a Magistrate specified in Section 155(2) no investigation can be made. Any Magistrate empowered under Section 190 may order, under Section 156 (3), before taking cognizance of offence, the police to investigate into a cognizable case. Section 157 prescribes the procedure to be followed by the officer-in-charge of a police-station when he has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate and in such an eventuality he will forthwith send a report of the same to a Magistrate, empowered to

take cognizance of such offence upon a police report and proceed in person, or depute any one of his subordinate officers to investigate the case. No need to say that if there is sufficient material/ evidence against accused person(s) arrest of the offender may be made. Where the S.H.O. of a police station take a decision not to investigate an cognizable offence the Magistrate even then may direct the police to make an investigation under section 156(3) of the Cr.P.C. Above mentioned provisions clearly demonstrate that scheme of the Code is that an investigation should take place into a cognizable offence and the investigation must be carried out and completed without delay. The investigation part is however left in entirety to the police and there is no scope of interference with the same.

14. Now come the next stage where after investigation the officer in charge of the police-station may find sufficient material against accused person(s) or may also not find sufficient material as the case may be. If sufficient evidence or reasonable grounds to justify the forwarding of the accused to a Magistrate have been found in investigation, such officer will forward the accused to a Magistrate empowered to take cognizance of the offence, under Section 170 of the Code. On the other side, if it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground to forward the accused to a Magistrate, he by virtue of Section 169 of the Code will release the accused, if in custody, on his executing a bond, to appear, if and when required, before a Magistrate empowered to take cognizance of the offence. The aforesaid provisions however make it very clear that in either eventuality, after completion of the investigation, the officer in charge of the police station will have to submit a report under Section 173, to the Magistrate. It is worthwhile to recall here that nowhere in the Code expression 'charge-sheet' or 'final report' has been used and Section 173 of the Code talks only about a report to be submitted by the police after completion of the investigation.

15. In **Darshan Singh Ram Kishan v. State of Maharashtra** reported in MANU/SC/0089/1971: (1971) 2 SCC 654, it was held that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

16. In the case of Fakhruddin Ahmad (supra), the Hon'ble Supreme Court has observed that being an expression of indefinite import, it is neither practicable

nor desirable to precisely define as to what is meant by "taking cognizance". Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs title emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender.

17. In the case of Harishchandra Prasad Mani and others (supra), it was held in para 12 that it is well settled by a series of decisions of this Court that cognizance cannot be taken unless there is at least some material indicating the guilt of the accused vide *R.P. Kapur v. State of Punjab AIR 1960 SC 866: (1960) 3 SCR 388: 1960 Cri LJ 1239, State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426, Janata Dal v. H.S. Chowdhary (1992) 4 SCC 305: 1993 SCC (Cri) 36, Raghubir Saran (Dr.) v. State of Bihar AIR 1964 SC 1:(1964) 2 SCR 336:(1964) 1 CRi LJ 1, State of Karnataka v. M Devendrappa (2002) 3 SCC 89: 2002 SCC (Cri) 539 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122: 2005 SCC (Cri) 283.*

18. This type of order has already been held unsustainable by this Court in the case of Ankit (supra) relying on in a number of decisions of the Apex Court. The relevant portion of the said decision, is extracted below:

"Although as held by this Court in the case of **Megh Nath Guptas & Anr V State of U.P. And Anr,** 2008 (62) ACC 826, in which reference has been made to the cases of **Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4^) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),** the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."(Emphasis supplied)

19. In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto.

20. In light of the judgments referred to above, it is explicitly clear that the order

dated 22.12.2018 passed by Chief Judicial Magistrate, Hathras is cryptic and does not stand the test of the law laid down by the Apex Court. Consequently, the order dated 22.12.2018 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him/her resulting in miscarriage of justice.

21. Accordingly, the present criminal misc. application succeeds and is allowed at the admission stage without issuing notice to the prospective opposite parties, as they have no right to be heard at pre-cognizance stage. Order dated 22.12.2018 is, hereby, quashed.

22. The Chief Judicial Magistrate, Hathras is directed to exercise his discretionary power and decide afresh the application for summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a certified copy of this order.

23. With the above direction, the application stands allowed.

(2020)11ILR A118
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ-A No. 5414 of 2020

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

Counsel for the Petitioners:
Sri Rakesh Kumar Verma, Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

A. Service Law– Uttar Pradesh Retirement Benefits Rules, 1961- U.P. Retirement Benefits (Amendment) Rules, 2005 - Pension Any delay in selection for appointment, ipso facto, cannot be a ground to extend benefit of old pension scheme notwithstanding the clear stipulation in the pension rule specifying date of entry in service to be determinative of the pension scheme. (Para 30)

Distinction between Rules of recruitment and conditions of service - Right to receive pension is a statutory right and the pensionary benefits can be claimed or granted only in accordance with the applicable pension Rules.

(a) Rules of recruitment would regulate different stages of recruitment i.e. from the issuance of advertisement till the issuance of appointment letter while conditions of service would come into play after appointment is offered. The expression "conditions of service" is an expression of wide import and means all such conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc. (Para 12, 13, 15)

Terminal benefits as well as pensionary benefits constitute conditions of service. The employer has the undoubted power to revise the salaries and/or the pay-scales as also terminal benefits/pensioners benefits, as the case may be, shall take effect is a concomitant of the said power. So long as such date is specified in a reasonable manner, i.e., without bringing about a discrimination between similarly situated persons, no interference is called for by the Court in that behalf. (Para 14)

(b) The principle that rules of game cannot be changed during the midst of game itself would operate only till the

recruitment gets finalized and cannot be stretched to include an exigency which falls in the realm of conditions of service. The principle would be exhausted as soon as the appointment is made and the stages thereafter, including the stage after retirement like pension etc., would be governed exclusively by the rules regulating conditions of service. (Para 16)

The date on which the petitioners came to be regulated by the service rules is the date of issuance of their appointment letters i.e. 07.03.2006 and 19.04.2006). The old pension scheme, operating on the date of advertisement, would have no relevance for the purposes of applicability of pension scheme qua the petitioners as evidently, prior to their appointment, the rules relating to pension i.e. Rules of 1961 had undergone change on 01.04.2005 and on the date of issuance of their appointment letters, the new pension scheme had come in vogue. (Para 17)

B. No right accrues in favour of an applicant merely on the strength of filing of an application pursuant to advertisement issued for appointment. The advertisement issued for appointment can at best be equated to an invitation to offer; an expression occurring in the realm of contract. Application made against advertisement is akin to an 'offer' which creates no right in favour of the applicant/candidate. (Para 18, 19)

It is only where right to be considered for appointment after selection had crystallized in favour of candidate but the selected candidate was arbitrarily denied appointment during the applicability of previous pension scheme that the Court while granting relief may also extend such service benefits including pension which were available on the date when such right was denied. (Para 20)

In the present case the petitioners have not been able to demonstrate that they have been arbitrarily discriminated or have been denied appointment prior to 31st March, 2005. For any delay in conclusion of selection, the previous pension rules would not get attracted in view of the express stipulation in the statutory rule itself. Date of entry into service would determine the applicability of pension rules by virtue of the U.P. Retirement Benefits (Amendment) Rules, 2005, notified on 7.4.2005. Petitioners have otherwise accepted the terms of new pension scheme ever since their appointment in the year 2006. No protest of any kind was made during the last fourteen years. Petitioners therefore, have acquiesced to the new pension scheme and they cannot be permitted to resile from its applicability particularly when no challenge is laid to the statutory rule itself. (Para 28)

C. No sympathy can be claimed to override express provisions contained in the applicable pension rules. (Para 29)

Writ petition dismissed. (E-4)

Precedent followed:

1. St. of M.P. & ors. Vs Shardul Singh, (1970) 1 SCC 108 (Para 13)

2. St. of W.B. Vs Ratan Bihari Dey, (1993) 4 SCC 62 (Para 14)

3. A.A. Calton Vs Director of Education, AIR 1983 SC 1143 (Para 15)

4. Shankarsan Das Vs U.O.I. & ors., (1991) 3 SCC 47 (Para 18)

5. State of Bihar Vs Secretariat Assistant S.E. Union & ors., (1994) 1 SCC 126 (Para 19)

6. U.O.I. Vs Kali Dass Batish, (2006) 1 SCC 779 (Para 19)

7. Punjab Electricity Board Vs Malkiat Singh, (2005) 9 SCC 22 (Para 19)

8. Rakhi Rai Vs The High Court of Delhi, (2010) 2 SCC 637 (Para 19)

9. Vijoy Kumar Pandey Vs Arvind Kumar Rai & ors., (2013) 11 SCC 611 (Para 19)

10. Naveen Kumar Jha Vs U.O.I. & ors., decided by the Delhi HC on 02.11.2012 (Para 21)

11. Avinash Singh Vs U.O.I., Writ Petition (C) No. 5400 of 2010 (Para 22)

12. Balwant Singh & ors.. Vs St. of Uttarakhand, WP Nos. 16 and 944 of 2011 (Para 25)

13. Sudhir Kumar Consul Vs Allahabad Ban, (2011) 3 SCC 486 (Para 29)

Precedent distinguished:

1. Firangi Prasad Vs St. of U.P. & ors., 2011 (2) UPLBEC 987 (Para 4)

2. Mahesh Narayan & ors. Vs St. of U.P. & ors., Writ Petition No. 55606 of 2008 (Para 4)

3. Ashutosh Joshi & ors.Vs St. of Uttarakhand & ors., Writ Petition (S/S) No. 1170 of 2010 decided on 17.06.2013 (Para 4)

4. Inspector Rajendra Singh & ors. Vs U.O.I., (2017) SCC Online Delhi 7879 (Para 4)

5. NCT Delhi Vs Ajay Kumar & ors. (Para 4)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Whether, delay in selection for appointment, ipso facto, can be a ground to apply pension scheme applicable on the date of issuance of advertisement, for such selection, notwithstanding specific stipulation in the pension rules specifying date of entry in the service to be determinative of its applicability is the question that arises for consideration in this case.

2. Admitted facts in the context of which the above question arises for consideration are that an advertisement came to be issued by the U.P. Public Service Commission on 28th October, 2002 inviting applications for appointment against Combined Subordinate Services (Preliminary) Exam, 2002. Last date for making application as per the advertisement was 28th October, 2002. The recruitment was to be held in three stages i.e. Preliminary test; Main written test and lastly the Interview. All the petitioners applied against the advertisement and cleared the preliminary examination conducted on 30th March, 2003. Main Written Examination followed between 17.8.2004 to 27.8.2004, wherein also the petitioners qualified. Interview was conducted by the Commission between 9.5.2005 to 28.5.2005. The final select list was published on 13.6.2005. After the verification process was completed the petitioners were issued appointment letters on 7.3.2006 and 19.4.2006, pursuant to which they have joined and are working in different districts as Audit Officers. Some of the petitioners are also working as Assistant Accounts and Finance Officer. New Pension Scheme enforced w.e.f. 1.4.2005 has been made applicable upon all the petitioners and contribution from their salary is also being deducted since their initial appointment without any protest.

3. The process of recruitment had commenced in October, 2002 and petitioners contend that if it was concluded within a reasonable period, they could have been appointed before 31st of March, 2005 by when the erstwhile pension scheme was applicable. Submission is that for any delay occasioned in finalizing the recruitment they ought not be put to an disadvantageous position, as the terms of new pension scheme are less favourable in comparison to the terms contained in the old pension scheme.

4. New Pension Scheme has been enforced for government servants in State of Uttar Pradesh vide notification dated 28th March, 2005. Uttar Pradesh Retirement Benefits Rules, 1961 (hereinafter referred to as 'the Rules of 1961'), which regulated the earlier pension

scheme also got amended vide U.P. Retirement Benefits (Amendment) Rules, 2005 vide Notification, dated 7.4.2005. The amended Rules and the Notifications enforcing New Pension Scheme upon the petitioners are not challenged in the writ petition. It is, however, urged that petitioners are entitled to the benefit of provisions under the Old Pension Scheme which remained operative till 31st March, 2005 in view of the law laid down by the Division Bench of this Court in *Firangi Prasad Vs. State of U.P. and others* reported in *2011 (2) UPLBEC 987*, as also a recent judgment of this Court in *Mahesh Narayan and others Vs. State of U.P. and others, Writ Petition No. 55606 of 2008*. Contention is that delay in holding of selection cannot prejudicially effect the rights of the petitioners, inasmuch as, the pension scheme as per the old rules applicable on the date of advertisement would have to be applied. Reliance is also placed upon a judgment of the High Court of Uttarakhand in *Writ Petition (S/S) No. 1170 of 2010 (Ashutosh Joshi and others vs. State of Uttarakhand and others),* decided on 17.6.2013, which has been approved by the Division Bench with dismissal of *Special Appeal No. 330 of 2013 vide judgment dated 26.6.2014.* Reliance is placed upon the observation made by the Uttarakhand High Court in Ashutosh Joshi (supra) that as selection process had already begun during currency of old pension scheme and the advertisement also provided for the posts to be pensionable, therefore, a contrary stand would be impermissible. Petitioners have also placed reliance on the judgment of the Delhi High Court in *Inspector Rajendra Singh Vs. Union of India reported in (2017) SCC Online Delhi 7879* as also the subsequent decision of the same Court in Govt. of NCT Delhi Vs. Ajay Kumar and others against which a SLP filed before the Supreme Court has also been dismissed.

5. Sri Ashok Khare, learned Senior Counsel for the petitioners contends that this Court in the case of Mahesh Narayan (supra) has accepted similar contention of the petitioners and the Old Pension Rules have been made applicable even upon persons appointed to the government service after 1.4.2005 and, therefore, the petitioners' are also entitled to similar benefit.

6. Per-contra, learned State Counsel states that the date of entry into service would be the relevant date for applicability of pension scheme and as the pension rules have not been questioned as such petitioners are not entitled to any relief.

7. It is in the above context that the question formulated requires consideration by this Court.

8. The Rules of 1961 came to be notified on 29.3.1962 under the proviso to Article 309 of the Constitution of India and was to apply upon all officers appointed under the rule making power of the Governor in the State of Uttar Pradesh. The rules of 1961 came into force w.e.f. 1st April, 1961 and provided for payment of pension; death-cum-retirement gratuity; nomination; family pension; commutation, etc. Pension Scheme under the rules of 1961 allegedly contains more favourable terms (hereinafter referred to as the 'old pension scheme') than the Contributory Pension Scheme introduced w.e.f. 1.4.2005 (hereinafter referred to as 'New Pension Scheme'). Rules of 1961 have been amended vide Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005, notified on 7th April, 2005 w.e.f. 1.4.2005.

Clause (3) has been inserted in Rule 2 of the Rules of 1961, which reads as under:-

"[(3) These Rules shall not apply to employees entering services and posts on or after April 1, 2005 in connection with the affairs of the State, borne on pensionable establishment, whether temporary or permanent.]"

9. The provisions of General Provident Fund (Uttar Pradesh) Rules, 1985 have also been amended vide Notification, dated 7th April, 2005 so as to exclude applicability of the Provident Fund Rules of 1985 upon such government servants who enter into service of State after 1.4.2005.

10. Above noted statutory scheme makes it explicit that all government employees entering in the services of State on or after 1.4.2005 on a pensionable post will be governed by the 'New Pension Scheme' and the provisions of 'Old Pension Scheme' will not be applicable upon them. Amendments incorporated in the statutory rules are not under challenge. In addition to the various judgments relied upon, the petitioners also urge that the pension scheme applicable on the date of advertisement of vacancy would be applicable notwithstanding the contrary stipulation in the Rules of 1961.

11. Before adverting to the judgments relied upon on behalf of the petitioners, it would be necessary to examine the legal character of pension and the nature of right that accrues to an employee to receive pension as per the pension scheme applicable on the date of advertisement.

12. Right to receive pension is a statutory right and the pensionary benefits can be claimed or granted only in accordance with the applicable pension Rules. Payment of salary, pension or other benefits of service form part of the conditions of service. Conditions of service and rules of recruitment are two different aspects which are dealt with distinctively in law.

13. A distinction exists in law between Rules of recruitment and conditions of service which needs to be noticed at this stage. Rules of recruitment would regulate different stages of recruitment i.e. from the issuance of advertisement till the issuance of appointment letter while conditions of service would come into play after appointment is offered. It has been observed by the Apex Court in State of Madhya Pradesh and others Vs. Shardul Singh, (1970) 1 SCC 108, that the expression "conditions of service" is an expression of wide import and means all such conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc. *(See: para 9).*

14. Thus, payment of pension being part of the conditions of service would be governed by Rules relating to pension where the post is pensionable. It would be apposite to refer to the observation of the Supreme Court in State of W.B. Vs. Ratan Bihari Dey, (1993) 4 SCC 62, which is reproduced:-

"7. ..... Now, it is open to the State or to the Corporation, as the case may be, to change the conditions of service unilaterally. Terminal benefits as well as pensionary benefits constitute conditions of service. The employer has the undoubted

power to revise the salaries and/or the pay-scales as also terminal benefits/pensioners benefits, as the case may be, shall take effect is a concomitant of the said power. So long as such date is specified in a reasonable manner, i.e., without bringing about a discrimination between similarly situated persons, no interference is called for by the Court in that behalf. ...."

15. As against this (conditions of service) the Rules relating to recruitment would regulate the stages spanning from issuance of advertisement till issuance of appointment letter. The recruitment process has been equated in law with holding of a 'game' to apply the principle that rules of game cannot be changed during its continuance. Doing so would unsettle the recruitment process and would thus become arbitrary. *(See. A.A. Calton Vs. Director of Education, AIR 1983 SC 1143).* The rules applicable on the date of issuance of advertisement would therefore continue to operate so long as the recruitment exercise itself is not concluded.

16. The aforesaid principle that rules of game cannot be changed during the midst of game itself would operate only till the recruitment gets finalized and cannot be stretched to include an exigency which falls in the realm of conditions of service. The principle would be exhausted as soon as the appointment is made and the stages thereafter, including the stage after retirement like pension etc., would be governed exclusively by the rules regulating conditions of service.

17. The date on which the petitioners came to be regulated by the service rules is the date of issuance of their appointment letters which is after 1.4.2005. Prior to this date, there exists nothing in law that can be regulated by the service rules governing the post to which the petitioners had sought appointment. The old pension scheme, operating on the date of advertisement, would therefore have no relevance for the purposes of applicability of pension scheme qua the petitioners as evidently, prior to their appointment, the rules relating to pension i.e. Rules of 1961 had undergone change and on the date of issuance of their appointment letters, which is the relevant date, on which the rules regulating conditions of service became applicable, the new pension scheme had come in vogue.

18. Law is settled that no right accrues in favour of an applicant merely on the strength of filing of an application pursuant to advertisement issued for appointment. The advertisement issued for appointment can at best be equated to an invitation to offer; an expression occurring in the realm of contract. Application made against advertisement is akin to an 'offer' which creates no right in favour of the applicant/candidate. The applicant has to undergo various stages of recruitment in accordance with the provisions contained in the applicable recruitment rules and the advertisement for selection. It is only thereafter that name of the candidate is included in the select list. The nature of right accrued in favour of a selected candidate is also settled. In *Shankarsan Das Vs. Union of India and others (1991) 3 SCC 47* a Constitution Bench of the Apex Court examined whether a selected candidate acquires an indefeasible right to be appointed against available vacancies. The contention advanced in that regard has been specifically repelled in paragraph 7 of the judgment which is reproduced hereinafter:-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, (1974) 1 SCR 165, Neelima Shangla v. State of Haryana, (1986) 4 SCC 268 or Jatendra Kumar v. State of Punjab, (1985) 1 SCR 899."

19. Above view has been consistently followed in *State of Bihar Vs. Secretariat Assistant S.E. Union and others, (1994) 1 SCC 126; Union of India Vs. Kali Dass Batish, (2006) 1 SCC 779; Punjab State Electricity Board Vs. Malkiat Singh, (2005) 9 SCC 22; Rakhi Rai Vs. The High Court of Delhi, (2010) 2 SCC 637 and Vijoy Kumar Pandey Vs. Arvind Kumar Rai and others, (2013) 11 SCC 611*. The law is clear that merely on being selected a candidate does not acquire an indefeasible right to be appointed unless the relevant recruitment rules so provide. State is not under any duty to fill up all or any of the vacancies. The only exception to the proposition is that State cannot act in an arbitrary manner while making appointment. The limited right in the selected candidate, therefore, is of protection against arbitrary action of the State in denying him appointment.

20. It is only where right to be considered for appointment after selection had crystallized in favour of candidate but the selected candidate was arbitrarily denied appointment during the applicability of previous pension scheme that the Court while granting relief may also extend such service benefits including pension which were available on the date when such right was denied.

21. In Inspector Rajendra Singh (supra), the petitioners were selected but were declared medically unfit. Petitioners therein were then examined in other hospitals and were found not to be suffering from any deformity/illness. They applied for review medical board. While matter was pending before the review medical board the Commission declared results of all other selected candidates, except the petitioners. Different paramilitary forces were allocated to them and appointment letters were also issued. Such candidates also joined on or before 31st December, 2003, which was prior to the introduction of the New Pension Scheme. Ultimately the petitioners were also appointed, but their joining was after the New Pension Scheme had been enforced. The Delhi High Court found that denial of appointment to petitioners alongwith other similarly selected candidates was arbitrary. Since other selected candidates including those placed lower in merit than petitioners were offered appointment prior to 31st December, 2003,

while the old pension scheme was applicable, therefore, Old Pension Scheme was extended to petitioners also. Similar were the facts in the case of Naveen Kumar Jha Vs. Union of India and others, decided by Delhi High Court on 2.11.2012.

22. In paragraph 17 of the judgment in Avinash Singh Vs. Union of India, Writ Petition (C) No. 5400 of 2010, the Court observed that if appointment is by selection, seniority of the entire batch has to be reckoned with respect to the merit position obtained in the selection and not on the fortuitous circumstance of the date on which a person is made to join. All other judgments of the Delhi High Court, which have been relied upon by the petitioners, therefore, are on the facts of its own, inasmuch as, the Court found that petitioner's right to appointment got crystallized during the old pension rules and while similarly placed persons were appointed and extended the benefit of old pension scheme, as such, the petitioners cannot be discriminated. These judgments clearly are covered by the exception carved out in the case of Shankarsan Das (supra). None of the judgments of the Delhi High Court relied upon by the petitioners lay down any proposition that merely on account of delay in holding of selection the pension rules applicable on the date of advertisement would become applicable upon the employee notwithstanding the fact that new pension scheme had come into play.

23. The Division Bench Judgment of this Court in the case of Firangi Prasad (supra) also dealt with a different exigency. In Firangi Prasad (supra) the appellant was appointed on adhoc basis in a selection held by District Inspector of Schools on 5.1.1993 who was the competent authority. Appointment, however, was to be offered by the private management within ten days as per the scheme. However, for no obvious reason the private management denied issuance of appointment letter within ten days and ultimately the appointment was offered on 25.8.1993. The applicable U.P. Secondary Education Service Selection Boards Act, 1982 got amended on 20.4.1998 and adhoc appointments made till 6.8.1993 were to be regularized. The question before the Division Bench was as to whether benefit of regularization could be denied to the appellants. The Division Bench held that the appellant since was arbitrarily denied appointment by the private management, though the appellant stood selected, therefore, his appointment would be treated in law to have been made prior to 6.8.1993. This case would also be covered within the exception carved out in Shankarsan Das (supra) as appointment had been arbitrarily denied to the selected candidate.

24. Facts occurring before the Uttarakhand High Court in Ashutosh Joshi (supra) also are distinct. Vacancy was advertised on 5.10.2003 for appointment to be made in different Intermediate Colleges. Vacancies for men were 1120 while for women it was 99. Both male and female candidates applied and while women candidates were appointed during old pension rule the male candidates got appointed after the new pension scheme was introduced. Court found that both men and women candidates were evenly placed and any delay in offering appointment to male candidates would not disentitle them from the benefit of old pension scheme as similarly placed women candidate were covered by the old pension scheme. Although a passing observation is made that selection having commenced during

old pension scheme would be applicable upon male candidates appointed later, yet, this observation has to be read in the context of the fact that similarly placed women candidate were covered by the old pension rule. The Court apparently was protecting the petitioners against an arbitrary scenario and thus this case also falls in the excepted category in Shankarsan Das (supra).

25. The Judgment of Uttarakhand High Court in Balwant Singh and others Vs. State of Uttarakhand (Writ Petition No. 16 and 944 of 2011) was also a case where persons selected together were being subjected to different pension scheme based upon the fortuitous circumstance i.e. delay in appointment to some. The Division Bench, however, has observed that service conditions prevailing on the commencement of recruitment process cannot be altered to the detriment of recruitees. This observation of the Division Bench, with utmost respect, does not correctly lay down the law as the distinction between rules of recruitment and conditions of service have been ignored. The principle that rules of recruitment cannot be changed can have no applicability in a scenario where conditions of service is changed on account of change in the service rules.

26. In Mahesh Narayan and others (supra) a co-ordinate bench of this Court had the occasion to consider a case where recruitment commenced vide notification dated 20.10.1999 in respect of a pensionable post. The recruitment got delayed on account of a dispute raised before this Court. Although by virtue of the order passed in Special Appeal No. 485 (S/B) of 2001, dated 29.12.2001, there was no impediment in completion of recruitment but the selection got completed only after dismissal of writ petition on 5.7.2005. In between, a subsequent advertisement was issued and the selected candidates were appointed prior to 1.4.2005 i.e. during the Old Pension Scheme. The notifications dated 28.3.2005, 7.4.2005 and the amended rules of 2005 were challenged as not being applicable upon the petitioners. The writ petition has been partly allowed in view of the observations extracted hereinafter:-

"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'. "

27. The judgment in the case of Mahesh Narayan (supra) is again on the facts of its own, inasmuch as, the recruitment process was delayed for no obvious reason and persons appointed pursuant to a subsequent notification were appointed earlier and were granted the benefit of old pension rules. Persons appointed against a previous advertisement

cannot be denied benefits which have already been extended to the appointees of a later recruitment exercise. The protection in the form of benefit under old pension rules has been extended only to protect against an arbitrary act. This judgment also does not lay down any proposition that delay in concluding selection would ipso facto result in applicability of old pension scheme.

28. The petitioners have not been able to demonstrate that they have been arbitrarily discriminated or have been denied appointment prior to 31st March, 2005. For any delay in conclusion of selection the previous pension rules would not get attracted in view of the express stipulation in the statutory rule itself. Date of entry into service would otherwise determine the applicability of pension rules by virtue of the U.P. Retirement Benefits (Amendment) Rules, 2005, notified on 7.4.2005. Petitioners have otherwise accepted the terms of new pension scheme ever since their appointment in the year 2006. No protest of any kind was made during the last fourteen years. Petitioners therefore, have acquiesced to the new pension scheme and they cannot be permitted to resile from its applicability particularly when no challenge is laid to the statutory rule itself.

29. It is otherwise settled that no sympathy can be claimed to override express provisions contained in the applicable pension rules. In a matter arising out of claim of pension the Supreme Court in Sudhir Kumar Consul Vs. Allahabad Bank, (2011) 3 SCC 486, observed as under:-

"31. We have sympathies for the appellant but, in a society governed by Rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service.

32. In Life Insurance Corporation of India v. Asha Ramachhandra Ambekar and Anr. (1994) 2 SCC 718, wherein the Court observed:

"The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration.... Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all wisdom". Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be."

30. In view of the discussions aforesaid, this Court is of the considered opinion that any delay in selection for appointment, *ipso facto*, cannot be a ground to extend benefit of old pension scheme notwithstanding the clear stipulation in the pension rule specifying date of entry in service to be determinative of the pension scheme.

31. Writ petition lacks merit and is dismissed.

(2020)11ILR A127
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.11.2020

BEFORE

THE HON'BLE MANISH KUMAR, J.

Service Single No. 5511 of 2015

Dineshe Chandra Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Devki Nandan Srivatava, Abhishek Srivastava

Counsel for the Respondents:
C.S.C., Jyotika Sikka

A. Service Law —— U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978: Rule 7 – Challenge to Appointment/Selection - A person who applies for appointment on a post in response to an advertisement is precluded from challenging the selection on the ground of defect in the advertisement. (Para 7, 9)

B. In case a candidate after having applied for appointment for a post later voluntarily chooses not to appear in the interview i.e. the selection process has no locus to challenge the appointments of selected candidates. (Para 7, 10)

Writ petition dismissed. (E-4)

(Delivered by Hon'ble Manish Kumar, J.)

1. Heard learned counsel for the petitioner, learned State Counsel for the respondent and Smt. Jyoti Sikka, learned counsel appearing for the respondent no. 2.

2. The notice was issued to the respondent nos. 4 and 5, whose appointments are under challenge and as per the office report dated 25.01.2016, the notice is sufficient but no one has filed vakalatnama on behalf of the respondent nos. 4 and 5.

3. The petitioner has submitted that the Manager Shivraji Janta Laghu Madhyamik Vidyalaya, Lalpur, Ayodhya, Shrawasti had published an advertisement for appointment on the post of Assistant Teachers in daily news paper Aaj on 14.05.2015 and on 10.05.2015 in Bhinga Times.

4. It is submitted that as per Rule 7 of the U.P Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as, the Rules, 1978) the advertisement has to be published in two daily news papers, whereas it was published in two news papers i.e. daily news paper Aaj and weekly newspaper Bhinga Times. It is further submitted that the last date of submitting the application provided in the advertisement was 25.05.2015. The petitioner had duly applied within time on 21.05.2015. The interviews were held on 31.05.2015 as per schedule provided in the advertisement.

5. It is further submitted that the application forms of respondent nos. 4 and 5 were received on 26.05.2015 i.e. after the last date provided for submitting the application form, the committee of management of the institution has appointed the respondent nos. 4 and 5. In view of the aforesaid, the selection of the respondent nos. 4 and 5 is bad and is liable to be quashed.

6. On the other hand, learned Counsel for the B.S.A. has submitted that petitioner in pursuance of the advertisement dated 10.05.2015 and 14.05.2015 had submitted his application for appointment on the post of Assistant Teachers. The petitioner had not participated in the interview and once the petitioner had chosen not to turn up for the interview, he had given up his right to challenge the appointment of respondent nos. 4 and 5.

7. After hearing learned counsel for the parties, it is found that the petitioner, in place of challenging the advertisements on the ground that it was not published in two daily news paper as provided under Rule 7 of the Rules, 1978, he had applied for the post of Assistant Teachers in response to

the advertisements dated 10.05.2015 and 14.05.2015. The petitioner had chosen not to participate in the interview, which was held on 31.05.2015, as per schedule advertise in the advertisement dated 10.05.2015 & 15.05.2015. Once the petitioner had chosen not to participate in the interview, he is neither a person aggrieved nor an affected party. The petitioner has no right to challenge the selection of respondent nos. 4 and 5 after having acted upon in pursuance of the advertisement, now the petitioner can not challenge the same.

8. The petitioner, in writ petition has no where pleaded that he had gone to participate in the interview but he was not permitted to participate in the same. Even in the para 26 of the counter affidavit, it has specifically been pleaded that petitioner was absent at the time of interview. This fact has not been rebutted on the other hand the statement was made on 20.07.2020 in the Court that no rejoinder affidavit is required to be filed in this regard.

9. A person who applies for appointment on a post in response to an advertisement is precluded from challenging the selection on the ground of defect in the advertisement. He acquiesces to the advertisement made and having taken advantage of the same in response thereto cannot turn around to point out in the manner of publication of the advertisement.

10. Yet again, it may be observed that in case a candidate after having applied for appointment for a post later voluntarily chooses not to appear in the interview i.e. the selection process has no locus to challenge the appointments of selected candidates.

11. In view of the aforesaid, the writ petition is devoid of any merit, accordingly, it is dismissed.

(2020)11ILR A129
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 5540 of 2020
Connected with
Writ-A No. 5795 of 2020 & other connected cases

The C.O.M., Sri Durga Ji Purva Madhyamik Balika Jamin Rasulpur, Azamgarh & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Kunwar Bhaskar Parihar, Sri R.K. Ojha

Counsel for the Respondents:
C.S.C., Sri Bhanu Pratap Singh, Sri Lal Ji Yadav

A. Service Law - U.P. Basic Education Act, 1972: Section 3, 4, 13, 19-U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978:- Rules 4, 5, 7, 10, 15, 16, 26- U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978 - Disciplinary Enquiry -Once the Commissioner did not have any authority under the scheme of the Act, the initiation of the enquiry by constituting a four member Committee was wholly unwarranted and was a clear interference in the functioning of the statutory authorities conferred with the powers under the Act and thus wholly without jurisdiction. (Para 29, 30)

A perusal of the two Acts and the Rules, mentioned above, shows that no powers have

been conferred upon the Commissioner or the District Administration to interfere in the functioning of the Schools and statutory authorities have been created for regulating the functioning of the Schools, the recruitment and removal of Teachers and other employees and payment of their salaries. The entire control over the Basic Education is conferred upon the statutory authorities created under the Act with a limited supervisory control of the Board and also with a very limited supervisory role of the State Government confined only for proper and efficient administration of the scheme of the Act. (Para 20, 28)

B. It is well settled that 'rule of law' is fundamental and the essence of a democratic set up and the enactment of various acts and the rules are aimed at strengthening the 'rule of law'. A society based upon the 'rule of law' also negates the role of executive authorities other than those specified under the Act and are vital for vibrant democracy. (Para 31)

C. The directions of the Secretary Education based upon the said recommendations of the enquiry Committee do not demonstrate any independent application of mind and has also transgressed the statutory limits conferred upon the State in directing initiations of FIRs and termination of the Teachers. The Secretary Education has clearly erred in issuing the directions for lodging of the FIRs and for termination of the Teachers without there being any powers conferred upon him under the Act and that too based upon an enquiry which has already been held to be illegal. (Para 32)

Writ Petitions allowed. (E-4)

Precedent followed:

1. Madan Kumar & ors. Vs D.M., Auraiya & ors., [2013 (10) ADJ 606] (Para 13)

2. Manish Kumar Rai Vs St. of U.P. & ors., Judgment dated 09.09.2019 passed in WP No. 48256 of 2009 (Para 13)

3. Chhote Lal Singh Vs St. of U.P. & 5 ors., Judgment dated 22.03.2018 passed in WP No. 38429 of 2017 (Para 13)

4. V.N. Daipuria Vs St. of U.P. & 3 ors., Judgment dated 27.10.2015 passed in WP No. 58619 of 2015 (Para 13)

5. Surya Prakash Rai Vs St. of U.P. & ors, Judgment dated 29.05.2018 passed in Writ Petition No. 73647 of 2010 (Para 13)

6. Anirudhsinhji Karansinhji Jadeja Vs St. of Guj., (1995) 5 SCC 302 (Para 20)

7. Tarlochan Dev Sharma Vs St. of Punj., (2001) 6 SCC 260 (Para 20)

8. Purtabpore Co. Ltd. Vs Cane Commissioner of Bihar, (1969) 1 SCC 308 (Para 20)

9. Manohar Lal (Dead) By Lrs. Vs Ugrasen (Dead) By Lrs. & ors., (2010) 11 SCC 557 (Para 27)

Precedent distinguished:

1. Dr. Arvind Kumar Ram Vs St. of U.P., 2007 (4) AWC 4163 (Par 24)

2. Managing Director ECIL Hyderabad Etc. Vs Karunakar Etc., passed in Civil Appeal No. 3056 of 1991, Judgment dated 01.10.1993 (Para 25)

Present petitions challenge the enquiry report dated 28.01.2020, the notices issued in pursuance to the enquiry report as well as the order dated 17.02.2020, issued by Special Secretary (Basic Education) U.P. Shashan, Lucknow.

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

1. The present petitions have been filed by the Committee of Management as well as the Teachers challenging the enquiry report dated 28.1.2020, the notices issued in pursuance to the enquiry report dated 25.6.2020 as well as the order dated 17.2.2020 issued by the respondent no. 1 dated 17th February, 2020 directing the respondent no. 2 and respondent no. 5 to take requisite action in pursuance to the enquiry report dated 28.1.2020.

2. The present judgment decides all the above writ petitions filed by the Committee of Managements and individual Teachers.

3. Heard Sri R.K. Ojha, learned Senior Advocate assisted by Sri K.B. Parihar, counsel for the petitioners and Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Apoorva Hajela, counsel for the respondents.

4. The present petitions raises a very important question with regard to the role of the District Authorities in the working of the Authorities created under a statute and conferred powers by virtue of the said specific statutes.

Facts in brief

5. The facts in brief are that the petitioners were appointed Assistant Teachers/Head Masters in the Junior High School in the Institutions which are duly recognized under the U.P. Basic Eduction Act, 1972. It is stated that the appointment of the Assistant Teacher/Head Master was made under the U.P. Basic Education Act and the service conditions are governed by the U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Condition of Service of Teachers) Rules, 1978 and the payment to the said Teachers is made under the U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978. The petitioners claim that they were appointed by following the procedure prescribed in the Acts and the Rules referred above. It is also stated that the appointment of the petitioners was in consonance with the permission given by the Zila Basic Shiksha Adhikari, which was done after following the procedure prescribed with regard to the advertisements and in the presence of the nominee of Zila Basic Shiksha Adhikari in the Selection Committee duly constituted with the approval of the Zila Basic Shiksha Adhikari. It is claimed that the petitioners in terms of their appointment were working against the posts against which they were appointed and were being regularly paid their salaries without any objection with regard to either the working of the petitioners or any other misconduct being alleged against them.

6. It is alleged that the Commissioner of Azamgarh, who was due to retire on 30th June, 2020 passed an order dated 6th December, 2019 and thereby constituted a four member Enquiry Committee to conduct enquiry over the approvals granted to the appointment of Teachers and Head Masters by the then Zila Basic Shiksha Adhikari in the District of Azamgarh during his tenure. The four member Enquiry Committee comprised of the Additional Commissioner (Administration) as Chairman, the Assistant Account Officer, Azamgarh, Assistant Director of Education, Azamgarh and the Joint Director of Education, Azamgarh as its members. The said four member Committee never gave any information to the petitioners nor was any notice served to either the petitioners or the Committee of Management and a report dated 29.1.2020 was submitted by the said four member Committee. The said report is on record as Annexure-3 to the writ petition.

7. A perusal of the enquiry report dated 28.1.2020 reveals that the said Enquiry Committee called for the records

from the Office of Zila Basic Shiksha Adhikari and found minor discrepancies as under:-

(a) A permission for publication was referred as sought by the Manager on 26.9.2018, however, the same was not found on record.

(b) The interview for the selection on one post for Science was fixed on 28.10.2018, however, as the interview could not be held on the said date, the same was adjourned to 3.11.2018 and the said adjournment was published in only one newspaper.

(c) The same also records that in the interview out of eight persons, five persons had appeared.

(d) It was also recorded that in the School in question, there was no Teacher for Mathematics, however, the Basic Shiksha Adhikari assigned them for teaching Science alone, which was irregular.

8. After observing the said irregularities, the report dated 28.1.2020 was forwarded along with a covering letter dated 29th January, 2020 by the Enquiry Committee to the said Commissioner. The Commissioner in turn forwarded the said report to the Education Secretary, State of U.P. for further action on the matter. The Education Secretary based upon the said recommendation dated 29th January, 2020 and the report dated 28.1.2020 passed an order on 17th February, 2020 directing the respondent no. 5 to lodge FIRs against the officials and the respective Committee of Managements. Simultaneously on the same day i.e. 17.2.2020, the Secretary respondent no. 1 passed an order directing the respondent no. 2 to immediately dismiss the services of the appointed Teachers in accordance with law.

9. In pursuance to the directions given on 17th February, 2020, the respondent no. 5 issued a notice dated 25.6.2020 calling upon the petitioners to show cause as to why their services may not be terminated. The said notice is on record as Annexure No. 6. A perusal of the said notice shows that the sole ground for issuance of the show cause notice was the enquiry report of the four member Committee. It is also on record that simultaneously another order was passed stopping the salaries of the petitioners pending the adjudication of the show cause notice. The petitioners have thus approached this Court seeking quashing of the enquiry report as well as the show cause notice and the consequential action of stopping the salaries of the petitioners.

Submissions of the Counsels

10. Shri R.K. Ojha, learned Senior Advocate has extensively argued that the appointment of the Assistant Teacher/Head Master in the Junior High School which are duly recognized under the U.P. Basic Education Act, are governed by the U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Condition of Service of Teachers) Rules 1978 and the payment of the salary to Teachers and the other staff is governed under the provisions of U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978. He argues that the recruitment and the conditions of service are governed by statutory rules which provide for manner of recruitment and the conditions of service. He further argues that all the requirements for recruitment were scrupulously followed while making the recruitment and there was no complaint whatsoever with regard to either the appointments or the working of the

petitioners Teacher. He further argues that the constitution of four member Committee by the Commissioner was wholly arbitrary and contrary to the scheme of the Act inasmuch as under the Acts specific powers are conferred upon the specific Authorities and the Commissioner or the persons appointed in the Enquiry Committee do not have any role to play in the scheme of the statute covering the recruitment or the dismissal of the Teachers/Head Masters. Shri R.K. Ojha further argues that on the bare perusal of the scheme of the Acts, it is clear that it lays down a complete code and confers specific powers on various Authorities.

11. He has further highlighted that Rule 15 of the 1978 Rules prohibits the termination/removal/dismissal or discharge of the services without serving a notice to be given after approval from the District Basic Education Officer. Similarly, Rule 16 provides for the manner of disciplinary proceedings.

12. Thus, in sum and substance, the argument of Shri R.K. Ojha, Senior Advocate is that the Commissioner has no jurisdiction to initiate the enquiry as has been done by the Commissioner. The Enquiry Committee did not have the jurisdiction in the scheme of the Act to initiate and complete the enquiry as has been done by the Enquiry Committee. The Enquiry Committee has erred in not even seeking a response from the petitioners before concluding the enquiry and the Authorities entrusted with the exercise of the powers under the Act are acting under dictation without application of their own mind, which is contrary to the statutory scheme and thus the entire proceedings initiated and pending against the petitioners are nothing but an outcome of colourable exercise of powers and exercise of power without jurisdiction and thus liable to be quashed.

13. Shri R.K. Ojha, Senior Advocate has placed reliance on the judgment of this Court dated 13.3.2003 in the case of ***Madan Kumar and Others Vs. District Magistrate, Auraiya and Others*** reported in ***[2013 (10) ADJ 606]***, judgment dated 9.9.2019 passed in ***Writ Petition No. 48256 of 2009, Manish Kumar Rai Vs. State of U.P. and Others,*** judgment dated 22.3.2018 passed in ***Writ Petition No. 38429 of 2017, Chhote Lal Singh Vs. State of U.P. and 5 Others,*** judgment dated 27.10.2015 passed in ***Writ Petition No. 58619 of 2015, V.N. Daipuria Vs. State of U.P. and 3 Others*** and Judgment dated 29.5.2018 passed in ***Writ Petition No. 73647 of 2010, Surya Prakash Rai Vs. State of U.P. and Others.***

14. Shri M.C. Chaturvedi, learned Additional Advocate General was specifically asked to address this Court as to how and under what powers has the Commissioner constituted an Enquiry to which Shri M.C. Chaturvedi argued that the Commissioner merely acted as a Whistle Blower and he did not pass any orders as a disciplinary authority, however exercised his jurisdiction being the supervisory authority. He thus argued that no fault could be found with the bona fides of the Commissioner. He has further argued that mere show cause notices have been issued and thus the petitioners have approached this Court immaturely and thus the writ petitions are liable to be dismissed.

15. The written submissions filed by the learned counsel for the petitioners as well as the State are on record and reiterated their arguments as recorded above.

Discussion

16. In view of the specific submissions raised by Shri R.K. Ojha that in terms of the scheme of the Act, the Commissioner has no role to play, it is essential to see the scheme of the Act namely The Uttar Pradesh Basic Education Act, 1972 (hereinafter referred to as the "1972 Act'. The said Act was enacted to provide for establishment of a Board of Basic Education with a view to regulate the Basic Education in the State of Uttar Pradesh. The constitution of the Board is defined under Section 3 and Section 3(2) provides that the Board shall be a body corporate and Section 3(3) provides for Officers, who shall be the member of the said Board. Section 3(3) is being quoted hereinbelow:-

"(3) The Board shall consist of the following members, namely -

(a) the Director, ex officio, who shall be the chairman;

(b) two persons to be nominated by the State Government from amongst the Adhyakshas, if any, of [Zila Panchayats established under Section 17 of the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961];

(c) one person to be nominated by the State Government from amongst the Nagar Pramukhs, if any, of the [Corporations constituted under Section 9 of the Uttar Pradesh Municipal Corporation Act, 1959];

(d) one person to be nominated by the State Government from amongst the Presidents, if any, of the [Municipal Council and Nagar Panchayats established under the Uttar Pradesh Municipalities Act, 1916];

(e) the Secretary to the State Government in the Finance Department, ex officio;

(f) the Principal, State Institute of Education, ex officio;

[(f1) the Secretary, Board of High School and Intermediate Education, Allahabad, ex officio;

(f2) the President of the Uttar Pradesh Prathamik Shikshak Sangh, ex officio;]

(g) two educationists to be nominated by the State Government;

(h) an officer not below the rank of Deputy Director of Education, to be nominated by the State Government, who shall be the Member Secretary."

17. Section 4 of the said Act provides for the functions of the Board. Section 4(2) (h) confers the ancillary powers on the Board. Section 4(2)(h) is quoted herein below:-

"(h) to take all such steps as may be necessary or convenient for, or may be incidental to the exercise of any power, or the discharge of any function or duty conferred or imposed on it by this Act :

[Provided that the courses of instruction and books prescribed and institutions recognised before the commencement of this Act shall be deemed to be prescribed or recognised by the Board under this Act.]"

18. Section 13 of the said Act confers the control of the State Government over the functioning of the Board. In pursuance to the powers conferred under Section 19 of the said Act for framing the rules, the State Government has framed the Rules with regard to the recruitment and condition of service of the Teachers known as the Uttar Pradesh Recognized Basic Schools (Junior

High Schools) (Recruitment and Condition of Service of Teachers) Rules 1978. Rule 4 of the said Rules of 1978 provide for minimum qualification for appointment of Assistant Teachers and Rule 5 of the said Rules provides for the eligibility to be appointed as Head Master. Rule 7 of the said Rules provides for advertisement of vacancies and Rule 10 provides for procedure in selections. Rule 15 of the said Rules provides for disciplinary proceedings and rule 26 provides for power to inspect. The said power to inspect has been conferred upon the Education Officer for inspecting the records of the management with regard to the payment of salaries to its Teachers and employee and he is further empowered to give directions to the management to observe financial propriety as he may deem fit.

19. The salaries and other benefits payable to the Teachers and other employees are governed under the provisions of Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and Other Employees) Act, 1978. The said Act has been framed to regulate the payment of salaries to Teachers.

20. Thus, a perusal of the two Acts and the Rules, as referred above, show that no powers have been conferred upon the Commissioner or the District Administration to interfere in the functioning of the Schools and statutory authorities have been created for regulating the functioning of the Schools, the recruitment and removal of Teachers and other employees and payment of their salaries. Under the scheme of the Acts, it is a Board which exercises the controls over the affairs with regard to the Basic Education in the State of Uttar Pradesh and the Commissioner or any Officer of the District Administration is neither a member of the Board nor does he have any supervisory control over the Board. The supervisory control of the States over the Boards is also very limited in nature and is confined to issuing the directions to the Board for efficient administration of the Act. The State is also an arbitrator in the event of dispute arising between the Board and the State Government. Thus, the entire control over the Basic Education is conferred upon the statutory authorities created under the Act with a limited supervisory control of the Board and also with a very limited supervisory role of the State Government confined only for proper and efficient administration of the scheme of the Act. This Court in its judgment dated 13.3.2013 in the case of ***Madan Kumar (supra)*** was confronted with question of the role of the District Magistrate in issuing directions to the educational authorities under the statutes, which are self contained and this Court held that from the perusal of the scheme of the Act, it is clear that District Magistrate is a foreign authority and has no role to play in the scheme of the Act. This Court relied upon the judgment of the Apex Court in the case of ***Anirudhsinhji Karansinhji Jadeja v. State of Gujarat, (1995) 5 SCC 302*** and the judgment of the Apex Court in the case of ***Tarlochan Dev Sharma v. State of Punjab, (2001) 6 SCC 260*** as well as the judgment in the case of ***Purtabpore Co. Ltd. v. Cane Commissioner of Bihar, (1969) 1 SCC 308.***

21. The order dated 9.9.2009 passed in Writ-A No. 48256 of 2009 cited by Shri R.K. Ojha is only an interim order and has no precedential value. Similarly, the order dated 22.3.2018 passed in Writ-A No. 38429 of 2017 also is based upon an agreement and has no precedential value.

22. The other judgment cited by Shri R.K. Ojha being judgment dated 27.10.2015 passed in Writ-A No. 58619 of 2015 is an authority on the question whether the discretion can be exercised on dictation and this court held that the discretion has to be exercised after exercise of independent mind and not on recommendation. The said judgment is relevant only for adjudicating of the order dated 17.2.2020 in the present case.

23. The next judgment cited by Shri R.K. Ojha is the judgment dated 29.5.2018 passed in Writ-A No. 73647 of 2010, wherein this court was confronted with conclusion as to whether the Additional Commissioner and the Joint Commissioner are vested with any power under the Intermediate Education Act. This Court concluded that the Divisional Commissioner could not have directed an enquiry.

24. The next judgment cited by Sri R.K. Ojha is the judgment of this Court in the case of ***Dr. Arvind Kumar Ram Vs. State of U.P., 2007 (4) AWC 4163,*** which relates to the exercise of discretion to suspend a person and has no relevance to the facts of the present case.

25. The next judgment cited by Shri R.K. Ojha is the judgment of Apex Court in the case of ***Managing Director ECIL Hyderabad Etc. Etc. v. Karunakar Etc. Etc.,*** passed in ***Civil Appeal No. 3056 of 1991, judgment dated 1st October, 1993,*** which categorically lays down that the termination without following the due procedure is bad in law. The said case has no applicability to the facts of the present case as only a show cause notice has been issued purporting to terminate the services of the petitioner and cannot be considered to be an authority on the proposition as to whether the power exercised by an authority which is violative to the scheme of the Act can be subjected to judicial review or not.

26. The learned Additional Advocate General has not cited any case laws in support of the contentions.

27. The Supreme Court in the case of ***Manohar Lal (Dead) By Lrs. v. Ugrasen (Dead) By Lrs. and Others, (2010) 11 SCC 557,*** while considering the power of the State Government as a revisional authority under Section 41(3) and Section 18 of the U.P. Urban Planning and Development Act, 1973 and interpreting the role of administrative and regulatory bodies in respect of the statutory powers, recorded and held as under:-

"12. In Rakesh Ranjan Verma v. State of Bihar [1992 Supp (2) SCC 343 : 1992 SCC (L&S) 866 : (1992) 21 ATC 521 : AIR 1992 SC 1348] the question arose as to whether the State Government, in exercise of its statutory powers could issue any direction to the Electricity Board in respect of appointment of its officers and employees. After examining the statutory provisions, the Court came to the conclusion that the State Government could only take the policy decisions as to how the Board will carry out its functions under the Act. So far as the directions issued in respect of appointment of its officers was concerned, it fell within the exclusive domain of the Board and the State Government had no competence to issue any such direction. The said judgment has been approved and followed by this Court in U.P. SEB v. Ram Autar [(1996) 8 SCC 506 : 1996 SCC (L&S) 1023] .

13. In Bangalore Development Authority v. R. Hanumaiah [(2005) 12 SCC 508] this Court held that the power of the

Government under Section 65 of the Bangalore Development Authority Act, 1976 was not unrestricted and the directions which could be issued were those which were to carry out the objective of the Act and not those which are contrary to the Act and further held that the directions issued by the Chief Minister to release the lands were destructive of the purposes of the Act and the purposes for which BDA was created.

14. In Bangalore Medical Trust v. B.S. Muddappa [(1991) 4 SCC 54 : AIR 1991 SC 1902] this Court considered the provisions of a similar Act, namely, the Bangalore Development Authority Act, 1976 containing a similar provision and held that the Government was competent only to give such directions to the Authority as were in its opinion necessary or expedient and for carrying out the purposes of the Act. The Government could not have issued any other direction for the reason that the Government had not been conferred upon unfettered powers in this regard. The object of the direction must be only to carry out the object of the Act and only such directions as were reasonably necessary or expedient for carrying out the object of the enactment were contemplated under the Act. Any other direction not covered by such powers was illegal.

15. In Poonam Verma v. DDA [(2007) 13 SCC 154 : AIR 2008 SC 870] a similar view has been reiterated by this Court dealing with the provisions of the Delhi Development Authority Act, 1957. In the said case, the Central Government had issued a direction to make allotment of flat out of turn. The Court held as under: (SCC pp. 160-61, paras 13 & 15)

"13. ... Section 41 of the Act, only envisages that the respondent would carry out such directions that may be issued by the Central Government from time to time for the efficient administration of the Act. The same does not take within its fold an order which can be passed by the Central Government in the matter of allotment of flats by the Authority. Section 41 speaks about policy decision. Any direction issued must have a nexus with the efficient administration of the Act. It has nothing to do with carrying out of the plans of the authority in respect of a particular scheme.

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15. Evidently, the Central Government had no say in the matter either on its own or under the Act. In terms of the brochure, Section 41 of the Act does not clothe any jurisdiction upon the Central Government to issue such a direction."

16. In State of U.P. v. Neeraj Awasthi [(2006) 1 SCC 667 : 2006 SCC (L&S) 190] this Court held as follows in the context of government directions: (SCC p. 683, para 41)

"41. Such a decision on the part of the State Government must be taken in terms of the constitutional scheme i.e. upon compliance with the requirement of Article 162 read with Article 166 of the Constitution of India. In the instant case, the directions were purported to have been issued by an officer of the State. Such directions were not shown to have been issued pursuant to any decision taken by a competent authority in terms of the Rules of Executive Business of the State framed under Article 166 of the Constitution of India." 17. In Purtabpore Co. Ltd. v. Cane Commr. of Bihar [(1969) 1 SCC 308 : AIR 1970 SC 1896] this Court has observed: (SCC p. 315, paras 11-12)

"11. ... The power exercisable by the Cane Commissioner under Clause 6(1) is a statutory power. He alone could have exercised that power. While exercising that power he cannot abdicate his responsibility in favour of anyone--not even in favour of

the State Government or the Chief Minister. It was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner. In this case what has happened is that the power of the Cane Commissioner has been exercised by the Chief Minister, an authority not recognised by Clause 6 read with Clause 11 but the responsibility for making those orders was asked to be taken by the Cane Commissioner.

12. The executive officers entrusted with statutory discretions may in some cases be obliged to take into account considerations of public policy and in some context the policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but this will not absolve them from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for them to be given binding instructions by a superior."

18. In Chandrika Jha v.State of Bihar [(1984) 2 SCC 41 : AIR 1984 SC 322] this Court while dealing with the provisions of the Bihar and Orissa Cooperative Societies Act, 1935, held as under: (SCC p. 48, para 13)

"13. The action of the then Chief Minister cannot also be supported by the terms of Section 65-A of the Act which essentially confers revisional power on the State Government. There was no proceeding pending before the Registrar in relation to any of the matters specified in Section 65-A of the Act nor had the Registrar passed any order in respect thereto. In the absence of any such proceeding or such order, there was no occasion for the State Government to invoke its powers under Section 65-A of the Act. In our opinion, the State Government cannot for itself exercise the statutory functions of the Registrar under the Act or the Rules."

19. In Anirudhsinhji Karansinhji Jadeja v. State of Gujarat [(1995) 5 SCC 302 : 1995 SCC (Cri) 902 : AIR 1995 SC 2390] it was observed: (SCC p. 307, para 11)

"11. ... This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether."

20. In K.K. Bhalla v. State of M.P. [(2006) 3 SCC 581 : AIR 2006 SC 898] this Court has delineated the functions of the State Government and the Development Authority, observing that: (SCC pp. 596-97, paras 59-60 & 62-63)

"59. Both the State and JDA have been assigned specific functions under the statute. JDA was constituted for a specific purpose. It could not take action contrary to the scheme framed by it nor take any action which could defeat such purpose. The State could not have interfered with the day-to-day functioning of a statutory authority. Section 72 of the 1973 Act authorises the State to exercise superintendence and control over the acts and proceedings of the officers appointed under Section 3 and the authorities constituted under the Act but thereby the State cannot usurp the jurisdiction of the Board itself. The Act does not contemplate any independent function by the State except as specifically provided therein.

60. ... the State in exercise of its executive power could not have directed that lands meant for use for commercial

purposes may be used for industrial purposes.

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62. ... the power of the State Government to issue direction to the officers appointed under Section 3 and the authorities constituted under the Act is confined only to matters of policy and not any other. Such matters of policy yet again must be in relation to discharge of duties by the officers of the authority and not in derogation thereof.

63. ... The direction of the Chief Minister being dehors the provisions of the Act is void and of no effect."

21. In Municipal Corpn. v. Niyamatullah [(1969) 2 SCC 551 : AIR 1971 SC 97] this Court considered a case of dismissal of an employee by an authority other than the authority competent to pass such an order i.e. the Municipal Commissioner, the order was held to be without jurisdiction and thus could be termed to have been passed under the relevant Act. This Court held that: (SCC p. 554, para 12)

"12. ... To such a case, the statute under which action was purported to be taken could afford no protection."

22. In Tarlochan Dev Sharma v. State of Punjab [(2001) 6 SCC 260] this Court, after placing reliance upon a large number of its earlier judgments, observed as under: (SCC p. 273, para 16)

"16. In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior."

23. Therefore, the law on the question can be summarised to the effect that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor can the superior authority mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act."

Conclusion

28. The scheme of the Act, as extracted and referred to above, makes it clear that the Basic Education Act was enacted as a complete code for governing the Basic Education in the State of Uttar Pradesh and conferred the powers on separate authorities under the Act without conferring any authority whatsoever on the Commissioner or the Administrative Authorities other than those specified under the Acts and the Rules.

29. It is well settled that the creation of statutory bodies by various Acts and the Rules for discharging specific functions is aimed at development of systems of checks and balances and aims at reducing the overlapping executive interferences and thus try to overcome the malady of

overlapping executive functions. I have no hesitation in holding that once the Commissioner did not have any authority under the scheme of the Act, the initiation of the enquiry by constituting a four member Committee was wholly unwarranted and was a clear interference in the functioning of the statutory authorities conferred with the powers under the Act and thus wholly without jurisdiction.

30. The law laid down by the Supreme Court in ***Manohar Lal (supra)*** clearly covers the controversy in the present case. I am in complete agreement with the judgment of this Court in the case of ***Madan Kumar (Supra)*** and have no hesitation in holding that the initiation of enquiry and the enquiry were wholly without jurisdiction.

31. It is well settled that "rule of law' is fundamental and the essence of a democratic set up and the enactment of various acts and the rules are aimed as strengthening the "rule of law'. A society based upon the "rule of law' also negates the role of executive authorities other than those specified under the Act and are vital for vibrant democracy. The Commissioner clearly exceeded its jurisdiction and powers in directing an enquiry and the submissions of the State that he merely acted as a whistle blower cannot be accepted and is liable to be rejected.

32. Similarly, the directions of the Secretary Education based upon the said recommendations of the enquiry Committee also do not demonstrate any independent application of mind and has also transgressed the statutory limits conferred upon the State in directing initiations of FIRs and termination of the Teachers. The Secretary Education has clearly erred in issuing the directions for lodging of the FIRs and for termination of the Teachers without there being any powers conferred upon him under the Act and that too based upon an enquiry which has already been held to be illegal and thus I have no hesitation in quashing the directions issued by the Secretary and as contained in the orders dated 17.2.2020. I have also no hesitation in holding that the show cause notices have been issued without any application of mind by the respondent no. 5 and only on the dictation of the respondent no. 1 and thus are liable to be dismissed on that ground alone.

33. In view of the finding recorded above, the writ petitions are **allowed.** The enquiry report dated 28.1.2020 (Annexure 3 to the writ petition) is quashed, the orders dated 17.2.2020 (Annexure-4 to the writ petition) directing lodging of the FIR is quashed insofar as it relates to petitioners in Writ Petition No. 5540 of 2020 and 5795 of 2020, the order dated 17.2.2020 (Annexure-5 to the writ petition) containing the directions in initiating proceedings for removal of Teachers in accordance with law are set aside and consequently, the show cause notice as contained in Annexure-6 to the writ petition is quashed insofar as it relates to the petitioners herein alone. The orders stopping the payment of salaries is also set aside in respect of the petitioners herein.

34. Copy of the order downloaded from the official website of this Court shall be treated as certified copy of this judgment.

(2020)11ILR A141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-A No. 5720 of 2019

Kailash Chaudhary ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ishan Deo Giri

Counsel for the Respondents:
C.S.C.

A. Service Law – Appointment – Suppression of material information - The information sought by the employer if not disclosed as required, would definitely amount to suppression of material information - The pendency of a criminal case/proceeding is different from suppressing the information of such pendency. The case pending against a person might not involve moral turpitude but suppressing of this information itself amounts to moral turpitude. (Para 16)

The petitioner was fully aware of the pendency of the multiple criminal cases against him. It was observed that the declaration was false and made with the deliberate intention to mislead the authority and to secure employment in the police. The suppression of the fact of pendency of multiple criminal cases thus assumed significance, and became a material consideration for invalidation of his candidature. The candidature of the petitioner was liable to invalidated, and was rightly cancelled by the competent authority. (Para 14)

Personnel in uniform belonging to disciplined forces, are expected to bear impeccable character and to possess unimpeachable integrity. No relaxation or compromise with the highest standards of character and integrity can be permitted. (Para 15)

Writ Petition dismissed. (E-4)

Precedent followed:

1. Avtar Singh Vs U.O.I. & ors., (2016) 8 SCC 471 (Para 5, 6, 13)

2. Devendra Kumar Vs. St. of Uttaranchal, (2013) 9 SCC 363 (Para 16)

Present petition challenges order dated 28.01.2019, by which the petitioner's candidature for appointment on the post of Constable in the U.P. Police, has been invalidated.

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the order dated 28.01.2019, the candidature of the petitioner for appointment on the post of Constable in the U.P. Police, has been invalidated.

2. The impugned order dated 28.01.2019 records that the petitioner had tendered a declaration on oath in the form of an affidavit sworn on 11.06.2018, wherein he categorically asserted that (i) no criminal cases were pending against him, (ii) no criminal case was registered against him in his knowledge (iii) no police investigation was pending against him (iv) the petitioner has never been arrested in any criminal case. The said declaration in the form of an affidavit also asserts that in future if any of the aforesaid facts are found to be false or it is found that the petitioner had suppressed any material facts, the petitioner shall not be permitted to join training course and his candidature shall be invalidated.

3. The petitioner suppressed the details of three criminal cases pending

against him in the aforesaid declaration on oath regarding the pendency of the criminal cases. The impugned order dated 28.01.2019 cancelled the candidature of the petitioner on the foot of suppression of material facts and assertion of false facts.

4. Shri Ishan Deo Giri, learned counsel for the petitioner fairly contends that the petitioner admittedly did not disclose the pendency of the three criminal cases, while filing the declaration on oath in the form of an affidavit. He, however submits that the aforesaid facts were not relevant at the time of passing of the impugned order dated 28.01.2019 due to following reasons:

"I. The petitioner was acquitted in Case Crime No. 801/2012, under Sections 147/148/452/323/504 and 506 I.P.C, registered at Police Station Sadabad, District Hathras.

II. The investigation of the Case Crime No. 849/2012, under Sections 110G UP Goondas Act, at Police Station Sadabad, District Hathras, had been concluded.

III. The Case Crime No. 1020/2017, under Sections 147/148/149/307/354/325/504 and 506 I.P.C. at Police Station Sadabad, District Hathras, was compromised between the parties and the proceedings were quashed by orders of this Court."

5. These facts were overlooked by the respondents while passing the impugned order. Learned counsel for the petitioner further contends that the case of the petitioner may be considered in light of the law laid down by the Hon'ble Supreme Court in ***Avtar Singh Vs. Union of India and Ors.*** reported at ***2016 (8) SCC 471.***

6. Per contra, Shri Birendra Pratap Singh, learned Standing Counsel submits that the suppression of the facts of criminal cases was wilful. The petitioner was being tried for commission of grave offences in the three criminal cases. The petitioner was never acquitted honourably and the fact of the prosecution was never wiped out. Learned Standing Counsel also placed reliance on the case of **Avtar Singh (supra)** to contend that this writ petition is liable to be dismissed.

7. Heard learned counsel for the parties.

8. After the selection of the petitioner for appointment on the post of Constable in the U.P. Police, the verification of character and antecedents of the petitioner was made by the State authorities. At the stage of verification the petitioner was required to submit a declaration on oath in an affidavit. The petitioner made the required declaration in an affidavit which was sworn on 11.06.2018. The relevant parts of the said declaration made on affidavit are extracted hereinunder:

"2- यह कि मेरे विरूद्ध कोई अपराधिक मुकदमा / मामला मेरी जानकारी में कभी पंजीकृत नही हुआ है। और न ही कोई पुलिस विवेचना (INVESTIGATION) लम्बित है ।

3- यह कि मैं किसी राष्ट्र विरोधी राजनैतिक पार्टी की कभी भी सदस्य नही रहा हूँ।

4- यह कि मुझे कभी भी किसी अपराधिक मामले में गिरफ्तार नही किया गया है।"

9. The impugned order dated 28.01.2019 notices the following criminal

cases against the petitioner were pending when the said declaration was made:

"I. Case Crime No. 801/2012, under Sections 147/148/452/323/504 and 506 I.P.C, at Police Station Sadabad, District Hathras.

II. Case Crime No. 849/2012, under Sections 110G UP Goondas Act, at Police Station Sadabad, District Hathras.

III. Case Crime No. 1020/2017, under Sections 147/148/149/307/354/325/504 and 506 I.P.C. at Police Station Sadabad, District Hathras."

10. The order impugned lastly records that a criminal case has already been registered against the petitioner as Case Crime No. 26 of 2019, under Sections 420 and 465 I.P.C. at Police Station Civil Lines, District Etawah, on 21.01.2019, for giving false declaration on oath in an affidavit.

11. It is admitted that three criminal cases were pending against the petitioner on the date of swearing of the aforesaid affidavit, i.e. on 11.06.2018, which were not disclosed in the affidavit.

Case Crime No. 801 of 2012, under Sections 147/148/452/323/504 and 506 I.P.C, at Police Station Sadabad, District Hathras, against the petitioner went to trial. The pendency of the case under the Goonda Act is also undisputed. Third case i.e. Case Crime No. 1020 of 2017, pending against the petitioner was under Sections 147, 148, 307, 323, 354, 325, 504 and 506 I.P.C. These are grave offences. The petitioner had approached this Court with an Application under Section 482 Cr.P.C., registered as Application U/S 482 No. 24525 of 2018, Girraj Singh and Others Vs. State of UP and another. The said Application under Section 482 Cr.P.C. was decided by the judgment and order rendered by this Court on 23.07.2018. The same is extracted below:

"Heard learned counsel for the applicants, learned A.G.A. for the State and Sri O.B. Mishra, learned counsel for the opposite party no.2.

The present application under Section 482 Cr.P.C. has been filed for quashing the cognizance order dated 30.1.2018 as well as charge sheet dated 7.1.2018 alongwith entire Criminal Case No. 736 of 2018 (State vs. Girraj and others), arising out of Case Crime No. 1020 of 2017, under Sections 147,148,149,307,323,354,325,504,506 I.P.C. P.S. Sadabad Kotwali, District Hathras pending in the court of Chief Judicial Magistrate, Hathras.

Learned counsel for the applicants submitted that compromise has been entered into between the applicants and the respondent no.2, Indra Devi on 27.6.2018 which is authenticated by Annexure no.11 to the affidavit accompanying this application.

Learned counsel for the applicants states that the matter has been compromised and the respondent no. 2 does not want to pursue the matter any further as the matter has been amicably settled between the parties, therefore, the present case be finally decided.

In view of the above, the applicants and respondent no. 2 do not want to pursue the case any further as stated by them. The matter has been mutually settled between the parties, therefore, no useful purpose would be served in proceeding with the matter further.

Thus, in view of the well settled principles of law as laid down by the Hon'ble Apex Court reported in 2003(4)

SCC 675 (B.S. Joshi Vs. State of Haryana) as well as the Judgment of the Apex Court reported in J.T., 2008(9) SC 192 (Nikhil Merchant Vs. Central Bureau of investigation and another), the proceedings of the Criminal Case No. 736 of 2018, arising out of Case Crime No. 1020 of 2017, under Sections 147,148,149,307,323,354,325,504,506 I.P.C., P.S.- Sadabad Kotwali, District-Hathras and the impugned charge sheet as well as cognizance order are hereby quashed.

The present application is accordingly allowed."

12. The criminal proceedings were quashed on the most grave charges on the foot of a mutual agreement between two private parties. Such compromise between private parties and consequent quashment of criminal proceedings by this Court, does not amount to an honourable acquittal by a court of law. The criminal proceedings of Case Crime No. 1020 of 2017, under Sections 147/148/149/307/354/325/504 and 506 I.P.C. at Police Station Sadabad, District Hathras, on the contrary are relevant material which were liable to be considered while forming an opinion about the criminal antecedents of the petitioner and his suitability for employment in the police force. The aforesaid material was considered in the correct perspective while passing the impugned order. In the facts of this case, the aforesaid conduct is not mitigating factor but has an aggravated consequence on the antecedents of the petitioner.

13. Further, I see merit in the submission of the learned Standing Counsel that the case of the petitioner is liable to be dismissed in light of the law laid down by the Hon'ble Supreme Court in **Avtar Singh (supra)**. The relevant part of the judgement in **Avtar Singh (supra)** is extracted hereinunder:

"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."

14. The petitioner was fully aware of the pendency of the multiple criminal cases against him. I find that the declaration was false and made with the deliberate intention to mislead the authority and to secure employment in the police. The suppression of the fact of pendency of multiple criminal cases thus assumed significance, and became a material consideration for invalidation of his candidature. The candidature of the petitioner was liable to invalidated, and was rightly cancelled by the competent authority.

15. The police is a disciplined force. The police force is charged with the duty to uphold the law and order in the State. Personnel is uniform belonging to disciplined forces, are expected to bear impeccable character and possess unimpeachable integrity. Adherence to these standards is required to enable them to discharge their duties effectively and retain the confidence of the public at large. No relaxation or compromise with the highest standards of character and integrity can be permitted.

16. The Hon'ble Supreme Court in ***Devendra Kumar Vs. State of Uttaranchal,*** reported at ***2013 (9) SCC 363***, emphasized

the importance of utmost rectitude in candidates applying for appointment in the police force by holding as under:

"12. So far as the issue of obtaining the appointment by misrepresentation is concerned, it is no more res integra. The question is not whether the applicant is suitable for the post. The pendency of a criminal case/proceeding is different from suppressing the information of such pendency. The case pending against a person might not involve moral turpitude but ***suppressing of this information itself amounts to moral turpitude.*** *In fact, the information sought by the employer if not disclosed as required, would definitely amount to suppression of material information. In that eventuality, the service becomes liable to be terminated, even if there had been no further trial or the person concerned stood acquitted/discharged. (emphasis supplied)"*

17. Judged in light of such requirements of the police force, the candidature of the petitioner was found to be unsuitable for appointment in the police force. The impugned order is not liable to be interfered with.

18. In the wake of the preceding discussion, I am not persuaded to exercise the discretionary jurisdiction vested under Article 226 of the Constitution of India to interfere with the impugned order dated 28.01.2019. The impugned order dated 28.01.2019 is upheld.

19. The writ petition is liable to be dismissed and is, accordingly, dismissed.

(2020)11ILR A145
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 22.09.2020

BEFORE

THE HON'BLE VIVEK AGARWAL, J.

Writ-A No. 6711 of 2020
And
Writ-A No. 6713 of 2020
And
Writ-A No. 6715 of 2020

Shaharoz Alam & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hritudhwaj Pratap Sahi, Sri Samarath Singh, Sri Sankalp Narain

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension - Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005; Uttar Pradesh Retirement Benefits Rules, 1961; General Provident Fund (Uttar Pradesh) Rules, 1985; U.P. Secondary Education Services Selection Board Act, 1982: Section 33(c) - A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. (Para 33, 34)

B. In a society which is governed by rule of law, sympathies cannot override the rules and regulations. (Para 32)

C. The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases. (Para 39, 40, 41, 42, 46)

D. While exercising the authority under Articles 309, 310 and 311 of the

Constitution of India, the terms of service can be altered unilaterally by Government, there is no vested contractual right for the servant - In the present case, as has been discussed above, recruitment was initiated on 06.01.2005, results were declared on 23.04.2005 followed by the medical examination and document verification from 24.04.2005 and therefore, definitely appointment orders were issued after 24.04.2005 whereas the Rules of 2005 had become effective w.e.f. 01.04.2005 i.e., much before the date of declaration of even the results of the petitioner. (Para 43)

E. Prospectivity of the Rules - It is settled principle of law that a person attains rights in the matter of service from the date of appointment and not from the date of initiation of the recruitment process. (Para 44, 48, 49, 52)

F. Power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or patently arbitrary or is vitiated by mala fides - Petitioners neither have been able to establish any mala fide, arbitrariness or deliberate delay in the process of recruitment. Petitioners have failed to make out the case that the legislative and executive action has failed to satisfy the twin test of reasonable classification and the rational principal co-related to the object sought to be achieved. In absence of such pleadings and submissions even on this ground petition is not maintainable. Petitioners contention that due to pendency of similar litigation delay has been caused in issuance of appointment order is not made out from record. (Para 45, 46, 47, 50, 51)

G. Dismissal of SLP does not mean that the judgment of High Court has attained a binding nature with the seal of approval of the Supreme Court - Once leave is granted but SLP converted into appeal is dismissed with or without reasons, merger results and law is declared. It is no longer permissible to move the High Court by review and no Court, Tribunal or Authority can express any opinion contrary to the view taken by Supreme Court. Order appealed against can be reversed, modified or affirmed by the Supreme Court in exercise of appellate jurisdiction at the second stage only and not at the discretionary first stage of special leave under Article 136 of the Constitution of India. (Para 54, 55)

Writ petitions dismissed.

Precedent followed:

1. Satyesh Kumar Mishra and others Vs. State of U.P. and others, 2016 (6) ADJ 808 (LB) (Para 31)

2. Sudhir Kumar Kansal Vs. Allahabad Bank, 2011 (2) ESC 243 (Para 31)

3. Smt. Rakhi Ray and others Vs. High Court of Delhi and others, 2010 (2) SCC 637 (Para 31)

4. Vijoy Kumar Pandey Vs. Arvind Kumar Rai and others, 2013 (11) SCC 611 (Para 31)

5. Bhavnagar University Vs. Palitana Sugar Mills, (2003) 2 SCC 111 (Para 39)

6. Bharat Petroleum Corporation Ltd. and another Vs. N.R. Vairamani and another, AIR 2004 SC 778 (Para 40)

7. P.S. Rao Vs. State, JT 2002 (SC) 1 (Para 41)

8. Rafiq Vs. State, 1980 SCC (CRL) 946 (Para 42)

9. Roshan Lal Tandon Vs. Union of India and others, AIR 1967 SC 1889 (Para 43)

10. Tagin Litin Vs. State of Arunachal Pradesh and others, (1996) 5 SCC 83 (Para 44)

11. Divisional Manager, Aravali Golf Club and another Vs. Chander Hass and another, (2008) 1 SCC 683 (Para 45)

12. Ashwani Kumar Singh Vs. U.P. Public Service Commission and others, (2003) 11 SCC 584 (Para 46)

13. Official Liquidity Vs. Dayanand and others, (2008) 10 SCC 1 (Para 47)

14. Odisha through Secretary, Commerce and Transport Department, Bhubaneswar Vs. Hare Prasad Das and other, (1998) I SCC 487 (Para 48)

15. General Manager Uttaranchal Jal Sansthan Vs. Laxmi Devi and others, (2009) 7 SCC 205 (Para 49)

16. Kunhayammed & Others Vs. State of Kerala & Another, 2000 (6) SCC 359 (Para 54)

Precedent distinguished:

1. Mahesh Narayan and others Vs. State of U.P. and others, 2020 (2) ALJ 518 (Para 11)

2. Ashutosh Joshi & others Vs. State of Uttrakhand and others, WP (S/S) No. 1170 of 2010 (Para 23)

3. Balwant Singh and Others. Vs. State of Uttarakhand and Others., WP Nos. 16 and 944 of 2011 (S/S) (Para 24)

4. Inspector Rajendra Singh and others Vs. Union of India 2017 SCC Online Del 7879 (Para 26)

5. Parmanand Yadav and Others Vs. Union of India and others {WP(C) No. 3834/2013} (Para 27)

6. Naveen Kumar Jha Vs. Union of India and others, 2012 SCC Online Delhi 5606 (Para 28)

7. Amrendra Kumar Vs. Union of India and others, {WP(C) No. 10028 of 2009} decided on 02.08.2010 (Para 29)

8. Shoorvir Singh Negi Vs. Union of India and others, {WP(C) No. 5830 of 2015} decided on 17.09.2015 (Para 29)

9. Government of National Capital Territory of Delhi & others etc. Vs. Ajay Kumar & others etc. (Para 30)

10. Firangi Prasad Vs. State of U.P. & Others, 2010 (10) ADJ 1659 (Para 35)

11. Ashok Kumar Singh and another Vs. UPPCL and three others, Writ-A No. 50301 of 2014 delivered on 03.03.2020 (Para 38)

12. Kamlesh Kumar Sonkar Vs. State of U.P. and others, Writ-A No. 55607 of 2008 (Para 38)

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

1. Heard Sri Sankalp Narain, learned counsel for the petitioners and Sri Ashish Kumar Nagar, learned Standing Counsel for the State.

2. Petitioners' learned counsel has raise an issue that petitioners, who are working on the post of constable, were subjected to the recruitment process prior to the cut off date i.e. 01.04.2005, when new pension Rules came into vogue. Petitioners contention is that admittedly appointment order to the petitioners were issued after the cut-off date, but that was due to the fact that similar litigation was pending in the High Court which was initiated at the instance of unsuccessful candidates and on account of stay granted by the High Court, appointment orders could not be issued in favour of the petitioners.

3. Therefore, the whole controversy is to be addressed within the narrow compass i.e. whether petitioners who were appointed after the cut off date i.e. 31.03.2005, are entitled to benefit of old pension Rules which were in vogue up to 31.03.2005 or will be governed by new pension Rule.

4. These three petitions since raise common legal issues and the factual back drop under which this legal issue has been raised being same, all the three petitions are being disposed of simultaneously.

5. The brief facts as extracted from writ petition no.6711 of 2020 are that on 06.01.2005, 4364 (Four thousand three hundred and sixty four) posts of Constable in Civil Police and PAC were advertised by the State of Uttar Pradesh.

6. Petitioners were since eligible, had applied for the post of Constable. In the advertisement, it is mentioned that eligible candidates may appear in the office of the Senior Superintendent of Police/Superintendent of Police between 10.01.2005 and 10.02.2005 on any working day between 10.00 a.m. and 5.00 p.m. where applications be examined and physical measurements will be carried out. It is mentioned that no application shall be entertained after the cut-off date. It is also mentioned that persons who qualify the preliminary eligibility parameters during scrutiny of their candidature and subject to fulfilment of physical parameters, alone shall be eligible for other stages of selection. It is also mentioned in the advertisement that physical efficiency test will commence on 17.02.2005 at 8.00 a.m. and a candidate will be required to appear on the same centre where he had deposited his application form.

7. Learned counsel for the petitioners submits that since petitioners' recruitment was initiated before coming into force of notification dated 28.03.2005 and 07.04.2005 so also before coming into force of the Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005 (hereinafter referred to as Rules, 2005) whereby it is provided that Uttar Pradesh Retirement Benefits Rules, 1961 (hereinafter referred to as Rules, 1961) and General Provident Fund (Uttar Pradesh) Rules, 1985 (hereinafter referred to as Rules, 1985) will not apply to employees entering in service on or after 01.04.2005, these Rules will not be applicable from a retrospective date.

8. Petitioners' submission is that at the time of initiation of the recruitment when advertisement dated 06.01.2005 was issued, provisions of the Rules, 1961 were invogue and therefore, there was a legitimate expectation that their service conditions will be governed by Rules, 1961 and they will be getting remuneration on the post of constable in terms of the Rules, 1961.

9. Learned counsel for the petitioners also submits that the advertisement did not disclose the fact that petitioners will be subjected to new contributory pension system, which was introduced for the first time vide notification dated 28.03.2005 followed by subsequent amendment in the Rules notified on 07.04.2005 made effective from 01.04.2005.

10. Petitioners' contention is that ex-servicemen, who have been recruited, have been excluded from the ambit of new pension scheme and they are being governed in accordance with earlier rules, which is violative of Article 16 and 14 of the Constitution of India. In this back drop, a prayer has been made in the petition to issue a writ, order or direction in the nature of mandamus commanding the respondent authorities to enforce the provisions of the earlier pension scheme and not to enforce the new pension scheme upon the petitioners which was notified vide notification dated 28.03.2005.

11. Learned counsel for petitioners submits that their case is squarely covered by the judgment of this Court passed in case of ***Mahesh Narayan and others vs. State of U.P. and others*** as reported in ***2020 (2) ALJ 518*** wherein the co-ordinate Bench of this Court partly allowed the writ petition and under the facts and circumstances of the case held that petitioners in that case are excluded from the effect and operation of notifications dated 28.03.2005 and 07.04.2005 holding it

to be in violation of Article 14 of the Constitution of India as also the law laid down by different High Courts. Consequently, respondents were directed to include the petitioners in that case under old pension scheme as provided in Rules, 1961 before amendment and be given all other consequential benefits.

12. Learned counsel for the State in his turn submits that this petition is highly belated. Admittedly, petitioners were appointed in May/June, 2005 and this petition has been filed after 15 years claiming a relief after being a member of new contributory pension scheme for about 15 years and therefore, if their plea is to be accepted then it is barred by the principle of estopple so also that of acquiescence.

13. It is also submitted that petitioners have an alternative remedy of approaching the Uttar Pradesh Public Services Tribunal, established under the Uttar Pradesh Public Services (Tribunal) Act, 1976 and therefore, in view of alternative statutory remedy, petition is not maintainable. It is also submitted that petitioners' recruitment process was initiated on 06.01.2005 and as per the terms and conditions of the advertisement after formal scrutiny of the documents and physical parameters, physical efficiency test, consisting of throw ball, long jump, chinning up, sit ups followed by running etc., was to be conducted and those candidates who would have cleared the eligibility criteria were required to appear in a written test, consisting of 50 marks in which questions relating to general knowledge, mental aptitude and Hindi essay were to be attempted. It was mandatory to obtain 33% marks in the written examination which was followed by interview of 20 marks and thereafter selected candidates were to be sent for training.

14. It is also submitted that petitioners cannot claim parity with the ex-servicemen for which there is a separate quota and in any case petitioners have not enclosed any documentary evidence to substantiate that ex-servicemen Satish Kumar was also appointed along with them and therefore, case of Satish Kumar is similar to that of petitioners. It is also submitted that plea of pendency of litigation is also not made out from record inasmuch as petitioners have neither given any case number nor enclosed copy of any order from the Court to show that procedure of selection was delayed. It is submitted, in any case that too will not have any bearing as benefits are admissible as are permissible under law on the date of appointment. He submits that the petition is bereft of merits and deserves to be dismissed.

15. After hearing learned counsel for petitioners and going through the records, it is necessary to first refer to the notifications and the amendment in the Rules, 1961, language of which reads that :-

"from 01.04.2005, the new defined contribution pension system would mandatorily apply to all new recruits to the service of the State Government and of all State controlled autonomous/State aided private educational institutions referred to above".

16. It provides for two accounts viz., pension Tier-I account in which employee is required to make a monthly contribution equal to 10% of the salary and Dearness Allowance. A matching contribution is to be made by the employer. No withdrawal is

allowed from this account during the service period. There is a provision of voluntary Tier-II account, keeping in mind the fact that new recruits would not be able to subscribe to G.P.F. and this is in addition to the pension Tier-I account. In Tier-II account, employer would not make any contribution. However, employee has been given a liberty of withdrawal in part or all of the proceeds from Tier-II account. Thus it is apparent that Tier-I account is with a view to protect post-retiral interests of the employee whereas Tier-II account is like G.P.F. providing flexibility to an employee to withdraw sums out of his own savings as per the exigencies of life.

17. Thus, submission of the petitioners that this scheme is flawed is not made out.

18. Learned counsel for the petitioners has not been able to demonstrate any arbitrariness in the scheme and moreover petitioners have not challenged the validity of the scheme or of notification dated 28.03.2005 or of the Rules of 2005. Therefore, in absence of any challenge to the said provisions, this Court is not required to advert to and address them.

19. As far as the decision in case of Mahesh Narayan (supra) is concerned, before appreciating the applicability of the said judgment and the principles of law applied, it is necessary to appreciate the facts of that case.

20. In case of Mahesh Narayan and others (supra), requisition for appointment to 954 posts of Junior Engineer (Civil) in the irrigation department of State of U.P. was sent on 20.10.1999 to the U.P. Public Service Commission. **In the notification itself it was clearly mentioned that posts are pensionable** and after receiving requisition, Commission issued an advertisement no. A-3/E-1/2000 dated 22.12.2000. The last date of submission of form was 27.01.2001. Originally the scheme as was advertised provided for a preliminary screening test, followed by a written test but subsequently preliminary screening test was done away and all applicants were permitted to appear straightway in the mains written examination which was held on 22.12.2001.

21. It is mentioned in para 2 of the judgment itself that prior to holding of written examination writ petition no.7062 (S/S) of 2001 was filed by some candidates possessing degree in Civil Engineering to claim permission to participate in the said examination. In the said petition, stay was granted by learned single judge restraining the holding of examination vide order dated 18.12.2001. Against this, Special Appeal was filed by the Commission and vide order dated 19.12.2001 interim order was modified, that persons challenging the exam were permitted to appear in the said examination. However, Commission was directed not to declare the results of such candidates, who were allowed to appear on the strength of the intervention of the Court. It is mentioned that there was no restrain order with regard to declaration of result of remaining candidates but there was only observation that declaration of result of remaining candidates shall be provisional, subject to final decision of writ petition. In this back drop, result of the said examination was not declared. Subsequently, vide order dated 05.07.2005, writ petition no.7062 (S/S) of 2001 and connected petitions were dismissed. After dismissal of these petitions, result of written examination was declared on

05.10.2005. Reasons shown as having qualified were called for interview. Interviews were held between November, 2005 and January, 2006 and thereafter vide office order dated 14.06.2006, appointment was granted. Consequent to such appointment, joining was given to different candidates in June and July, 2006.

22. In the above back drop, petitioners raised their grievance in regard to their exclusion from the benefit of pension payable under the provisions of U.P. Retirement Benefit Rules, 1961 and from Provident Fund under the Rules, 1985. The notifications dated 28.03.2005 and 07.04.2005 so also the amended Rules, 2005 were assailed by the petitioners on the ground that in the notification dated 20.10.1999, it was clearly mentioned that posts are pensionable and due to certain litigations if selection process could not be finalised then petitioners cannot be put to a disadvantage.

23. In case of Mahesh Narayan and others (supra) co-ordinate Bench of this Court has placed reliance on the judgment in case of ***Ashutosh Joshi & others Vs. State of Uttrakhand and others in Writ Petition (S/S) No. 1170 of 2010*** wherein the facts were that against the same advertisement, appointments were made creating two categories i.e, one for female candidates who were given appointment prior to cut-off date from which "new pension scheme" was implemented whereas the male candidates were given appointment after the cut-off date. Therefore, this act of the employer was held to be violative of Article 14 of the Constitution of India.

24. Another judgment relied on is that of ***Balwant Singh and Others. Vs. State of Uttarakhand and Others. Writ Petition Nos.16 and 944 of 2011 (S/S)***. Against the very same advertisement, there was two sets of selected candidates one submitting their joining prior to the cut-off date and the other after the cut-off date. These petitions were allowed. Special Appeal nos.330 of 2013 and 520 of 2013 filed by the State of Uttrakhand were dismissed by the Division Bench of Uttrakhand High Court vide order dated 26.06.2014.

25. The ratio of the judgment of the Division Bench in Special Appeal is that service conditions prevailing on the date of recruitment process commenced cannot be permitted to be altered to disadvantage of the recruitees. Further observed that the Government order dated 25.10.2005 is prospective in nature and cannot be made applicable retrospectively for the persons who had applied for the post prior to 25.10.2005.

26. Co-ordinate Bench in case of Mahesh Narayan & others (supra) also placed reliance on the judgment of Delhi High Court in the matter of ***Inspector Rajendra Singh and others vs. Union of India*** as reported in ***2017 SCC Online Del 7879*** where facts of the case are that petitioners were declared medically unfit. Thereafter, petitioners got themselves medically examined in other reputed medical institutions, where they were declared medically fit. Thereafter the petitioners applied for medical re-examination by a Review Medical Board. In the meanwhile, appointment orders in relation to other candidates who participated in the same recruitment process were issued and they all joined the respective forces on or before 31.12.2003 but due to delay in the review medical examination, petitioners who were

eventually found successful, joined subsequent to the cut-off date and in this back drop the Delhi High Court held that :-

"it would be grossly unjust and arbitrary to deny the petitioners, the benefit of old pension scheme, applicable at the time when the posts were advertised, only because of the fortuitous considerations of their joining service after the enforcement of the new pension scheme for reasons not attributable to them."

27. Reliance is also placed on the judgment of Delhi High Court in case of ***Parmanand Yadav and Others Vs. Union of India and others {WP(C) No.3834/2013}*** decided on 12.02.2015 wherein the appointment letters were delayed by three months, the fact which was admitted by the Director General of BSF in his counter affidavit and thus for the reasons of parity, relief was granted to Paramanand Yadav treating his case to be at par with Navin Kumar Jha and Avinash Singh.

28. In case of ***Naveen Kumar Jha vs. Union of India and others,*** as reported in ***2012 SCC Online Delhi 5606*** wherein noting a fact that Staff Selection Commission had invited applications to fill up posts of Sub-Inspector in Central Para Military Force. They were declared unfit by the medical board which conducted medical examination on 04.02.2002. Petitioner had applied for re-examination before a Review Medical Board as per the scheme of the recruitment within 30 days of unfitness being intimated but Review Medical Board was not convened and in the meanwhile by March, 2003 others who were successful were allowed to join the respective Para Military Force to which their allocation was made. Petitioner was called for interview in July, 2003 and after clearing the same, was offered appointment in April, 2004. Thus finding that the delay in conducting the Review Medical Board being a fortuitous circumstance, petitioner was allowed to be a member of pension scheme which remained in vogue till 31.12.2003. Thus apparently case of Naveen Kumar Jha and Avinash Singh is on the same footing as that of Inspector Rajendra Singh (supra).

29. Co-ordinate Bench also relied on the judgment of Amrendra Kumar vs. UOI & Others., passed by High Court of Delhi in {WP(C) No.10028 of 2009} decided on 02.08.2010 which is again on the same lines as that of Inspector Rajendra Singh (supra), similarly, case of Shoorvir Singh Negi Vs. Union of India and others again originating from the High Court of Delhi in {WP(C) No.5830 of 2015} decided on 17.09.2015 has been relied facts of which are similar to that of Naveen Kumar Jha.

30. Reliance is also placed on the judgment of Delhi High Court passed in case of ***Government of National Capital Territory of Delhi & others. etc. Vs. Ajay Kumar & others etc.*** so also other connected matters where the facts were similar to Naveen Kumar Jha. It is noted that this judgment of Delhi High Court was challenged before the Supreme Court by filing Diary No.15658 of 2019 which has been dismissed by Supreme Court vide order dated 10.07.2019. In fact a perusal of order on the website of Supreme Court reveals that delay was condoned and matter dismissed.

31. Similarly, there is mention of judgment of Allahabad High Court in case of ***Satyesh Kumar Mishra and others vs. State of U.P. and others,*** as reported in

2016(6) ADJ 808 (LB) where Lucknow Bench of Allahabad High Court referring to the judgment of Supreme Court in case of ***Sudhir Kumar Kansal Vs. Allahabad Bank*** as reported in ***2011 (2) ESC 243*** and also on case of ***Smt. Rakhi Ray and others Vs. High Court of Delhi and others as*** reported in ***2010 (2) SCC 637*** so also on case of Vijoy Kumar Pandey Vs. Arvind Kumar Rai and others as reported in 2013 (11) SCC 611 dismissed the petition filed by Satyesh Kumar Mishra and others wherein petitioners had sought direction to respondents to make necessary deduction towards G.P.F. etc. in view of old pension scheme, which was in existence at the time of notification dated 27.09.2002 issued by Secondary Education Service Selection Board, oblivious of the fact that petitioners had entered into service on 16.04.2005 after coming in effect of the new pension scheme.

32. Hon'ble Co-ordinate Bench recorded a finding in case of Sudhir Kumar Kansal (supra), to the effect that :-

"in a society governed by rule of law, sympathies cannot override the rules and regulations".

33. Similarly, in case of Rakhi Ray and others (supra) the Supreme Court in para 24 observed that :-

"a person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed."

34. In case of Vijoy Kumar Pandey (supra), the Supreme Court held that :-

"preparation of select list or panel does not by itself entitle the candidate whose name figures in such a list/panel to seek appointment or claim mandamus"

35. Learned Co-ordinate Bench in case of *Mahesh Narayan and others (supra)* placing reliance on the judgment of Allahabad High Court in case of ***Firangi Prasad Vs. State of U.P. & Others as*** reported in ***2010 (10) ADJ 1659*** wherein facts of the case are that in a matter of consideration of scheme of regularisation of ad-hoc appointees, cut-off date of 06.08.1993 was prescribed whereas Firangi Prasad who was selected for appointment as Assistant Teacher on 05.01.1993 by the District Inspector of Schools was not given appointment by the management of the school and ultimately management after initially refusing to perform the ministerial act of issuing the letter of appointment to appellant issued appointment letter on 25.08.1993. In this back drop, it is held that the appointment of the petitioner shall relate back to the date of the letter of the District Inspector of Schools, communicating the order of selection to the management and therefore, appellant will be entitled to benefit of Section 33 (c) of the U.P. Secondary Education Services Selection Board Act, 1982 certain provisions of which were amended w.e.f. 20.04.1998.

36. In the above back drop, petition in case of Mahesh Narayan was allowed and relief has been granted.

37. Now the fact of the matter is that there exists two judgments of two different Benches of equal strength of the same High Court viz., one in case of Mahesh Narayan and others vs. State of U.P. and others and

another in case of Satyesh Kumar Mishra and others and therefore, matter should be referred to a larger Bench for its decision.

38. The fact of the matter is that another Co-ordinate Bench in case of ***Ashok Kumar Singh and another vs. UPPCL and three others*** passed in ***Writ-A No.50301 of 2014*** delivered on ***03.03.2020*** has dealt with similar issue and in the light of the decision in case of Firangi Prasad, it held that since petitioners were not at fault, and placing reliance on the judgment of ***Kamlesh Kumar Sonkar vs. State of U.P. and others*** rendered in ***Writ-A No.55607 of 2008*** dealing with recruitment of Junior Engineer (Civil), Irrigation Department pursuant to an advertisement published in 2002 allowed the petition. However, fact of the matter in the present case are distinguishable.

39. Admittedly, advertisement was issued on 06.01.2005. There is no condition in the advertisement that the posts are pensionable unlike in case of Mahesh Narayan and others (supra), therefore, in the light of the law laid down by Hon'ble Supreme Court in case of ***Bhavnagar University vs. Palitana Sugar Mills*** as reported in ***(2003) 2 SCC 111*** wherein in para 59, the Supreme Court observed :-

"It is also well-settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

40. So, also in the light of the judgment of Supreme Court in **Bharat Petroleum Corporation Ltd., and another vs N.R. Vairamani And Another** as reported in **AIR 2004 SC 778** that a decision cannot by relied on without considering the factual situation. The Supreme Court observed :-

"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."

41. Similarly, in case of ***P.S. Rao vs. State*** as reported in ***JT 2002 (SC) 1***, the Supreme Court held as under :-

"There is always a peril in treating the words of judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

42. In case of ***Rafiq vs. State,*** as reported in ***1980 SCC (CRL) 946*** it is observed as under :-

"The ratio of one case cannot be mechanically applied to another case

without having regard to the fact situation and circumstances obtaining in two cases."

43. In the light of decisions of Hon'ble Supreme Court starting from Rafiq (supra), P.S. Rao (supra) Bharat Petroleum Corporation Ltd., (supra) and Bhavnagar University (supra), I find myself sufficiently equipped to hold that under the facts and circumstances of the case, since facts of the present case are different from that of Mahesh Narayan (supra), Firangi Prasad (supra) and Ashok Kumar Singh and another (supra), this Court is of the opinion that in the light of law laid down by Supreme Court in case of Rakhee Ray and others (supra), Vijoy Kumar Pandey (supra) and Sudhir Kumar Kansal (supra) the facts of the judgments referred to in case of Ashutosh Joshi and others, Balwant Singh and others, Inspector Rajendra Singh, Government of National Capital Territory of Delhi, and also that from the cases of Naveen Kumar Jha, Paramanand Yadav, Avinash Singh, Amrendra Kumar, Shoorvir Singh Negi are distinguishable from the facts of the present case. In the present case, as has been discussed above, recruitment was initiated on 06.01.2005, results were declared on 23.04.2005 followed by the medical examination and document verification from 24.04.2005 and therefore, definitely appointment orders were issued after 24.04.2005 whereas the Rules of 2005 had become effective w.e.f. 01.04.2005 i.e., much before the date of declaration of even the results of the petitioner and therefore, there being no parity in case of the petitioners and also in the light of the settled law laid down in case of ***Roshan Lal Tandon vs. Union of India and others*** as reported in ***AIR 1967 SC 1889*** wherein it has been held that while exercising the authority under Articles 309, 310 and 311 of the Constitution of India, the terms of service can be altered unilaterally by Government, there is no vested contractual right for the servant.

44. Similarly, in case of ***Tagin Litin vs. State of Arunachal Pradesh and others as*** reported in ***(1996) 5 SCC 83*** it has been held that appointment order will become effective from the date of communication. Un-communicated order of appointment is held to be ineffective.

45. In case of ***Divisional Manager, Aravali Golf Club and another vs. Chander Hass and another*** as reported in ***(2008) 1 SCC 683*** the Supreme Court has dealt with the issue of separation of powers and the limits of powers of judiciary, it has deprecated the attempt on the part of judges to perform executive or legislative functions.

46. In case of ***Ashwani Kumar Singh vs. U.P. Public Service Commission and others*** as reported in ***(2003) 11 SCC 584*** it is held that policy decision of the employer to appoint a particular number of candidates cannot be interfered with unless it is irrational or mala fide. It has also been held that judgments are not to be construed as statutes. Blind reliance on judgment without considering the fact situation has been held to be improper.

47. In case of ***Official Liquidity vs. Dayanand and others*** as reported in ***(2008) 10 SCC 1*** it has been held that :-

"in the matter of different employment, scope of judicial review of power of employer to create or abolish posts or cadres or to prescribe source or mode of recruitment etc. is not immune from judicial review, but power of judicial

review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or patently arbitrary or is vitiated by mala fides."

48. In case of Government of ***Odisha through Secretary, Commerce and Transport Department, Bhubaneswar vs. Hare Prasad Das and other*** as ported in ***(1998) 1 SCC 487*** it has been held that recruitment process of preparation of a panel does not confer any right on the candidates included therein. Where Government decides for a valid reason not to make further appointments, such decision cannot be termed arbitrary. Meaning thereby that there is no vested right to be appointed in a service merely with the commencement of the recruitment process or declaration of a panel.

49. In case of ***General Manager Uttaranchal Jal Sansthan vs. Laxmi Devi and others as*** reported in ***(2009) 7 SCC 205*** Supreme Court held that :-

"an employee can claim status as government servant only if his appointment has been made in terms of recruitment rules and he fulfils criteria for appointment."

50. In view of such facts and the law on the subject, I am of the opinion that petitioners have failed to make out a case either of parity with that of Mahesh Narayan or Firangi Prasad or the judgements cited therein, neither have been able to establish any mala fide, arbitrariness or deliberate delay in the process of recruitment. Petitioners have failed to make out the case that the legislative and executive action has failed to satisfy the twin test of reasonable classification and the rational principal co-related to the object sought to be achieved. In absence of such pleadings and submissions even on this ground petition is not maintainable.

51. Petitioners contention that due to pendency of similar litigation delay has been caused in issuance of appointment order is not made out from record. No proof in regard to this averment has been furnished by the petitioners.

52. Issue of prospectivity of the Rules is also discussed above. It is settled principle of law that a person attains rights in the matter of service from the date of appointment and not from the date of initiation of the recruitment process. Therefore, this arguments of the petitioners that recruitment was initiated prior to coming into force of the amended Pension Rules has no force.

53. As far as plea of the Co-ordinate Bench in regard to dismissal of SLP is concerned, the impact of such dismissal has been discussed by Hon'ble Supreme Court. It does not mean that issue has been settled.

54. Supreme Court in the case of ***Kunhayammed & Others vs State of Kerala & Another*** as reported in ***2000 (6) SCC 359***, has dealt with the issue of effect of "in limine' dismissal of Special Leave Petition (SLP) by the Supreme Court and has held that :-

"....as to when a decision of the Court in a SLP would be binding and when not. The Supreme Court observed that there are two distinct stages: (a) Granting of special leave to appeal; and (b) Hearing the appeal. If the SLP is dismissed at the stage of special leave without a speaking or reasoned order, there is no res judicata, no merger of the lower order and the

petitioner retains the statutory right, if available of seeking relief in review jurisdiction of the High Court. If the SLP is dismissed at the first stage by speaking a reasoned order, there is still no merger but rule of judicial discipline and declaration of law under Article 141 of the Constitution will apply. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. Once leave is granted but SLP converted into appeal is dismissed with or without reasons, merger results and law is declared. It is no longer permissible to move the High Court by review and no Court, Tribunal or Authority can express any opinion contrary to the view taken by Supreme Court. Order appealed against can be reversed, modified or affirmed by the Supreme Court in exercise of appellate jurisdiction at the second stage only and not at the discretionary first stage of special leave under Article 136 of the Constitution of India."

55. Thus dismissal of SLP does not mean that the judgement of High Court has attained a binding nature with the seal of approval of the Suprme Court.

56. Therefore, the judgment of Mahesh Narayan being distinguishable on facts and petitioners have failed to make out a case of parity or on its own merits, petitions are liable to be dismissed and are dismissed.

57. Parties bear their own costs.

(2020)11ILR A157

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 60198 of 2015

Smt. Asha Rai, Officiating Principal, Rashtriya Inter College, Tahbarpur, Azamgarh ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Bhawesh Pratap Singh, Sri Irshad Ali

Counsel for the Respondents:
C.S.C., Sri Ankur Tandon

A. Service Law —- Societies Registration Act, 1860; U.P. Secondary Education Services Selection Board Act, 1982: Section 18; U.P. Intermediate Education Act, 1921: Regulation 2(3); Payment of salary -Government Order dated 18.01.1974: Para 5(2) - A teacher while officiating on the post carrying higher grade is entitled to officiating salary in the higher grade and it further prescribes for determining the salary of the officiating teacher in the higher grade. (Para 9 to 14)

Petitioner's claim for payment of salary on the post of Officiating Principal was rejected by the District Inspector of Schools, Azamgarh/respondent No. 3 on the grounds that the provisions of S. 18 of the U.P. Secondary Education Services Selection Board Act, 1982 as well as the provisions contained under Regulation 2(3) of the U.P. Intermediate Education Act, 1921 will not apply. (Para 4)

The stand of the respondent No. 3 that the petitioner was not appointed as an ad hoc Principal, therefore, she is not entitled for the salary of Principal, is unacceptable. Court observed that the District Inspector of Schools, Azamgarh himself has attested the signatures of the petitioner as Officiating Principal on 11.12.2014. (Para 7)

B. Court followed the view taken by the Full Bench that even after the omission of a reference to the provisions of S.18 in S.16 following U.P. Act 1 of 1993, since

S.16 was still subject to S.33, ad hoc appointments could be made both under the First and Second Removal of Difficulties Orders that had been issued under Section 33. (Para 15)

The Director of Education (Secondary), U.P., Lucknow has issued an order dated 25.08.2015 to all the District Inspector of Schools of the State directing them to appoint the senior-most Assistant Teacher/Lecturer as officiating Principal of the institutions, where the office of the Principal is vacant, and to grant them the salary of the Principal. Thus, the stand taken by the District Inspector of Schools that the petitioner was not appointed as an ad hoc Principal in terms of S. 18 of the U.P. Secondary Education Services Selection Board Act, 1982 and Regulation 2(3) of the U.P. Intermediate Education Act, 1921 is completely misconceived and misleading. (Para 16, 17)

Writ petition allowed. (E-4)

Precedent followed:

1. Dhaneshwar Singh Chauhan Vs The District Inspector of Schools, Budaun & ors., 1980 UPLBEC 286 (Para 10)

2. Narbdeshwar Mishra Vs The District Inspector of Schools, Deoria & ors., 1982 UPLBEC 171 (Para 11)

3. Soloman Morar Jha Vs District Inspector of Schools, Deoria & ors., 1985 UPLBEC 113 (Para 11)

4. Dr. Jai Prakash Narayan Singh Vs St. of U.P. & ors., 2014 (8) ADJ 617 (Para 13)

Present petition challenges order dated 01.08.2015, passed by District Inspector of Schools, Azamgarh, by which petitioner's claim for salary as Officiating Principal has been rejected.

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Bhawesh Pratap Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner has preferred the present writ petition with the following prayers:-

"A. to issue a writ, order or direction in the nature of certiorari calling for record of the case and to quash the impugned order dated 01.08.2015 passed by District Inspector of Schools, Azamgarh.

B. to issue a writ, order or direction in the nature of mandamus directing the respondent District Inspector of Schools, Azamgarh to ensure payment of salary to the petitioner for the post of Officiating Principal in Rashtriya Inter College, Tahbarpur, District Azamgarh within the period specified by this Hon'ble Court."

3. Facts in brief as contained in the writ petition are that in Tahbarpur in District Azamgarh, there is a registered society under the Societies Registration Act 1860. The aforesaid society runs and manage an educational institution namely Rashtriya Inter College, Tahbarpur, Azamgarh. The aforesaid Committee of Management passed resolution on 25.05.2014 to suspend Sri Arvind Kumar Rai who is working as Principal of the College for charges of embezzlement, insubordination and indiscipline and passed suspension order on 31.05.2014. The aforesaid suspension order was required approval from District Inspector of Schools, Azamgarh therefore, the aforesaid suspension order was sent for approval but the District Inspector of Schools vide order dated 07.06.2014 disapproved the suspension order of Arvind Kumar Rai on the ground that charges are not serious. Against the aforesaid order, the Committee

of Management filed Writ Petition No.36233 of 2014 and this Court vide judgement and order dated 16.072014 allowed the writ petition and set aside the order dated 07.06.2014 passed by the District Inspector of Schools, Azamgarh (in short "D.I.O.S."). In compliance of order of this Court, the District Inspector of Schools, Azamgarh again consider the case and disapproved the proposal of the committee of management to suspend Arvind Kumar Rai vide order dated 04.10.2014. Against the order dated 04.10.2014, Committee of Management again approached this court by filing writ petition No.60045 of 2014. The aforesaid writ petition was disposed of vide order dated 12.11.2014 by which Arvind Kumar Rai was directed to work as Principal. Against the aforesaid order, a Special Appeal was filed by the Committee of Management before this Court. The said Special Appeal was allowed and the order dated 12.11.2014 was set aside. In the circumstances, the Committee of Management did not permit Arvind Kumar Rai to join the college and appointed Sri Chandra Shekhar Rai being senior most teacher as Officiating Principal. Sri Chandra Shekhar Rai was superannuated on 30.06.2014. Thereafter the petitioner being senior most teacher was appointed as officiating principal. The Management sent the papers for attestation and the D.I.O.S. vide order dated 11.12.2014 attested the signature of the petitioner as officiating principal. The petitioner discharged her duties as Officiating Principal from 05.08.2014. On 09.11.2020, a supplementary affidavit has been filed by the petitioner stating therein that the petitioner is continuously discharging her duties as officiating principal and the fact that he is superannuated on 30.06.2014 is wrong and incorrect due to mistake. It is stated in paragraph 27 of the writ petition that the D.I.O.S. vide order dated 01.08.2015 rejected the claim of the petitioner for salary as Officiating Principal. Hence the present writ petition.

4. The claim set up for payment of salary by the petitioner on the post of Officiating Principal was rejected by the District Inspector of Schools, Azamgarh/respondent No.3 on two grounds. Firstly, the provisions of Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 will not apply and secondly, the provisions contained under Regulation 2(3) of the U.P. Intermediate Education Act, 1921 will also not apply. It is stated in paragraph 24 of the writ petition that the petitioner is working on the post of Officiating Principal and her signatures for the aforesaid post was duly attested by respondent No.3 vide order dated 11.12.2014.

5. A counter affidavit has been filed by the learned Standing Counsel on behalf of the respondents including District Inspector of Schools, Azamgarh. There is no denial in the entire counter affidavit regarding working of the petitioner on the post of Officiating Principal. In paragraph 16 of the counter affidavit, the contents of paragraph 24 of the writ petition were dealt with. It is stated in paragraph 16 of the counter affidavit that since the suspension of Arvind Kumar Rai continued, as such for urgent work of the Institution, the petitioner was appointed as Officiating Principal but there is no order with regard to payment of salary of the Principal to the petitioner.

6. I have heard the learned counsel for the parties and perused the record.

7. The stand of the respondent No.3 that the petitioner was not appointed as an

ad hoc Principal, therefore, she is not entitled for the salary of Principal, is unacceptable. As noted above, the District Inspector of Schools, Azamgarh himself has attested the signatures of the petitioner as Officiating Principal on 11.12.2014. From the pleadings made in the writ petition as well as in the counter affidavit, it is established that the signatures of the petitioner as Officiating/Ad hoc Principal have been attested by respondent No.3 on 11.12.2014. It is also clear from perusal of the record that the petitioner is still discharging her duties on the post of Officiating Principal.

8. Regulation 2(3) of Chapter II of Part II-A of the Regulations framed under the Act, 1921 deals with the temporary vacancy in the post of Head of the institution, which reads as under:-

"(3) Where the temporary vacancy in the post of head of institution is, for a period not exceeding thirty days, the senior-most teacher in the highest grade may be allowed to work as acting head of institution, but he shall not be entitled to pay in a scale higher than the scale of pay in which he is drawing salary as such teacher."

Section 18 of the Act, 1982 reads as under:

"18. Ad hoc Principals or Headmasters.--(1) Where the management has notified a vacancy to the Board in accordance with sub-section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the Management shall fill such vacancy on purely ad hoc basis by promoting the senior most teacher,--

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal;

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the senior most teacher under sub-section (1), the Inspector shall himself issue the order of promotion of such teacher and the teacher concerned shall be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he joins such post in pursuance of such order of promotion.

(3) Where the teacher to whom the order of promotion is issued under sub-section (2) is unable to join the post of Principal or the Headmaster, as the case may be, due to any act or omission on the part of the Management, such teacher may submit his joining report to the Inspector, and shall thereupon be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he submits the said report.

(4) Every appointment of an ad hoc Principal or Headmaster under sub-section (1) shall cease to have effect from the date when the candidate recommended by the Board joins the post."

9. The State Government has also issued a Government Order dated 18th January, 1974 accepting the recommendations of the U.P. Pay Commission prescribing the scales of pay for the teachers. Paragraph-5(2) of the Government Order provides that a teacher while officiating on the post carrying higher grade is entitled to officiating salary in the higher grade and it further prescribes for determining the salary of the officiating teacher in the higher grade.

10. The aforesaid Government order came to be considered by a Division Bench of this Court in the case of Dhaneshwar Singh Chauhan v. The District Inspector of Schools, Budaun and others. 1980 UPLBEC 286. The Division Bench held as under:

"2. The petitioner is a teacher in aided and recognised institution and the

liability for the pre-joint his salary is on the State Government under the U.P. High School and Intermediate College (Payment of Salary of Teacher and other Employees) Act, 1971. The salary of a teacher in aided and recognized institution is regulated by the regulation framed under the U.P. Intermediate Education Act and the order issued by the State Government from time to time. Regulation 46 in Chapter III lays down that employees of an aided and recognized institution shall be given the pay scale sanctioned by the State Government from time to time. The State Government has prescribed the scales of pay for teachers. The State Government issued an order on 18th January, 1974 accepting the recommendations of the U.P. Pay Commission prescribing scales of pay for teachers. Paragraph 5(2) of the Government order lays down that a teacher while officiating on the post carrying higher grade is entitled to officiating salary in the higher grade and it further prescribed procedure for determining the salary of officiating teacher in the higher grade. A copy of the Government order was before us by the petitioner. Respondents do not deny the petitioner's averment that the State Government issued orders sanctioning officiating pay to a teacher in the higher grade. The petitioner's claim for salary in Principal's grade was sanctioned by the District Inspector of Schools in pursuance of the aforesaid Government order. Respondents have failed to show any subsequent Government order or rule superceding the direction contained in Government order dated 24-1-74. The respondents have further failed to place any material before the court showing that the petitioner was not entitled to the salary in the Principal's grade while officiating on the post of Principal. The order of the District Inspector of Schools dated 31-8-77 is therefore not sustainable in law.

3. In the result we allow the petition and quash the order of the District Inspector of Schools and direct the respondents to pay salary to the petitioner in the Principal's grade for the period during which he has been officiating as Principal in accordance with the orders contained in the letter of the District Inspector of Schools dated 14-4-79. The petitioner is entitled to his cost."

11. In ***Narbdeshwar Mishra v. The District Inspector of Schools, Deoria and others, 1982 UPLBEC 171,*** another Division Bench of this Court again reiterated the same principle and held that the officiating Principal will be entitled to receive salary admissible to Principal. Another Division Bench of this Court in the case of ***Soloman Morar Jha v. District Inspector of Schools, Deoria and others, 1985 UPLBEC 113,*** while considering the aforesaid issue held as under:

"3. There is no dispute that a permanent vacancy arose in the post of principal in the institution. There is, further, no dispute that the petitioner, being a senior most teacher, was appointed to officiate on the post of Principal. Admittedly, the petitioner has been functioning as the acting Principal since 1-7-1981 and in that capacity, he has been discharging the functions of the Principal. Since the petitioner has been performing the duties and functions of the Principal, he is entitled to salary in the Principal's grade, for the period during which he continues to work as the Principal. In Dhaneshwar Singh Chauhan v. D.I.O.S. Budaun 1980 UPLBEC 286 as well as in Narvadeshwar Misra v. D.I.O.S. Deoria, 1982 UPLBEC 171, two Division Benches of this Court held that a lecturer officiating in the post of Principal is entitled to salary

in the Principal's grade. The D.I.O.S. is under a legal obligation to pay the salary to a person for the period during which he acts as a Principal. The law is very well settled in this respect. The D.I.O.S. has refused to pay the salary to the petitioner in an unjustified manner."

12. The aforesaid decisions have consistently been followed and this Court in a long line of decisions considering the provisions of Section 18 of the Act, 1982 also has followed the aforementioned law.

13. Learned counsel for the petitioner also placed reliance upon Full Bench judgement of this court in the Case of ***Dr. Jai Prakash Narayan Singh Vs. State of U.P. and others 2014 (8) ADJ 617.*** The aforesaid case is in respect of the provisions contained in U.P. State Universities Act, 1973 and the First Statutes of various universities. The matter was referred before the Full Bench due to conflict between the ration of the decision in the case of ***Daljeet Singh v. State of U.P., 2007 (7) ADJ 117 (DB)*** and ***Om Saran Tripathi Vs. State of U.P., 2009 (8) ADJ 322 (DB).*** The Division Bench has referred the following questions for consideration by the Full Bench:

1. Whether there is a conflict between the ratio of the decisions in the cases of Daljeet Singh Vs State of U P, 2007 (7) ADJ 117 and Om Saran Tripathi Vs State of U P , 2009 (8) ADJ 322 and if so, which of the views lays down the law correctly; and

2. Whether an officiating Principal appointed under Statute 10.20 of Purvanchal University, is entitled to claim payment of salary in the regular grade of the Principal or not.

14. After considering all the relevant case laws with regard to the provisions of U.P. Intermediate Education Act, 1921, State Universities Act and U.P. Secondary Education Services Selection Board Act, the Full Bench has referred the following decisions in paragraph 4 of its judgement which reads as under:-

"4. For the completeness of the record, we note that Division Benches of this Court in the following decisions directed the payment of salary drawn by a principal to an officiating principal of a secondary school:

(1) Dhaneshwar Singh Chauhan v. District Inspector of Schools, Budaun, 1980 UPLBEC 286;

(2) Narbdeshwar Misra v. District Inspector of Schools, Deoria, 1982 UPLBEC 171; and

(3) Soloman Morar Jha v. District Inspector of Schools, Deoria, 1985 UPLBEC 113."

15. The Full Bench has also considered the provisions of the U.P. Secondary Education Services Selection Board Act in the following terms:

"29. A somewhat similar situation had arisen under the provisions of the U.P. Secondary Education Service Selection Board Act, 1982. That Act was enacted to establish a Secondary Education Service Commission for the selection of teachers in institutions recognized under the Intermediate Education Act, 1921. The expression 'teacher' was defined to include a principal. Section 16 provided that subject to the provisions of Sections 18 and 33 and certain other sections, every appointment of a teacher upon the commencement of the Act would be made by the management only on the recommendation of the Commission and an appointment made in contravention of the provisions would be void. Section 18 dealt with ad hoc appointments of teachers.

Since the provisions of Section 16 were made subject to Section 18, ad hoc appointments could be validly made under Section 18. However, after the enactment of U.P. Act 1 of 1993, Section 16 was substituted and Section 18 of the Principal Act was sought to be deleted. Section 33 empowered the State Government to issue and notify Orders for removing any difficulty, during such period as may be specified in the Order, whereupon the provisions of the Act would have effect subject to adaptations whether by way of modification, addition or omission. Two notified Orders were issued under Section 33 (1). Neither of the two Orders provided for any time limit during which the orders would remain effective.

30. These provisions came up for consideration before a Full Bench of this Court in Radha Raizada v. Committee of Management, Vidyawati Darbari Girls Inter College, 1994 (2) ESC 345 (All)(FB). Dealing with the situation, the Full Bench held as follows:

"...After enforcement of U.P. Act No.1 of 1993 except Section 13 thereof the situation that emerges is that by new Section 11 of Amendment Act which has substituted Section 16 of the Principal Act, has come into force whereas the omission of Section 18 from the principal Act by Section 13 of this amending Act has not been enforced which means Section 18 still continues in the Principal Act. In view of this legislative development a peculiar situation has arisen that new Section 16 which has come into force is no longer subject to Section 18 of the Act which means that no appointment on ad hoc basis can be made under Section 18 of the Act. New Section 16 begins with a non-obstante clause which means in spite of other provision, no appointment shall be made except on the recommendation of the Board. Where a section begins with a non-obstante clause, it indicates that the provision should prevail despite anything to the contrary in the provisions in the Act. Thus after omission of Section 18 from Section 16 no ad hoc appointment is permissible under Section 18 and if made, would be void under sub-section (2) of Section 16 of the Act. It has not been brought to my notice that First Removal of Difficulties Order 1981 issued by the State Government has either been revoked or rescinded. On the contrary, it was asserted that the said Removal of Difficulties Order is continuing.

49. Now the question for consideration is that if no ad hoc appointment of teacher or Principal can be made under Section 18 of the Act, whether it is permissible to appoint a teacher or Principal on ad hoc basis under the First Removal of Difficulties Order? A perusal of Section 16 would show that Section 16 is still subject to Section 33 of the Act which empowers the State Government to issue Removal of Difficulties Order. Since Removal of Difficulties Orders have been issued under Section 33 of the Act, an ad hoc appointment either by direct recruitment or by promotion under the Removal of Difficulties Order would be a valid appointment."

31. Hence, the Full Bench took the view that even after the omission of a reference to the provisions of Section 18 in Section 16 following U.P. Act 1 of 1993, since Section 16 was still subject to Section 33, ad hoc appointments could be made both under the First and Second Removal of Difficulties Orders that had been issued under Section 33."

The answer of the Full Bench to the reference is in the following terms:

"57. We, accordingly, dispose of the reference in the following terms:

(i) The decision in Daljeet Singh (supra) does not lay down the correct position in law; and

(ii) An officiating principal appointed under the Statutes of the University, which are pari materia to the provisions of Statute 10-B of the First Statutes would be entitled to claim the payment of salary in the regular grade of principal for the period during which he or she has worked until a regularly selected candidate has been appointed and has assumed charge of the office.

58. The reference before the Full Bench is accordingly disposed of. The proceedings shall now be placed before the regular Bench in accordance with the roster of work for disposal in the light of this judgment."

16. The Director of Education (Secondary), U.P., Lucknow has issued an order dated 25th August, 2015 to all the District Inspector of Schools of the State directing them to appoint the senior-most Assistant Teacher/ Lecturer as officiating Principal of the institutions, where the office of the Principal is vacant, and to grant them the salary of the Principal. The order dated 25th August, 2015 reads as under:

"सूच्च है कि जनप्रतिनिधियों एवं माध्यमिक विद्यालयों के सेवा संघों के प्रतिनिधियों द्वारा यह संज्ञान में लाया गया है कि अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में मौलिक रूप से रिक्त प्रधानाध्यापक/प्रधानाचार्य के पद पर संस्था के ज्येष्ठतम स.अ./ज्येष्ठतम प्रवक्ता के स्थान पर कनिष्ठ स.अ./कनिष्ठ प्रवक्ता के हस्ताक्षर प्रमाणित किये जाते हैं।

2. आप अवगत ही हैं कि उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड अधिनियम, 1982 (यथासंशोधित) की धारा–18 में प्रावधान किया गया है कि धारा 10 की उपधारा–1 में किये गये प्रावधानुसार बोर्ड को रिक्ति की सूचना दिये जाने एवं प्रधानाध्यापक/प्रधानाचार्य का पद वास्तव में 02 माह से अधिक रिक्त होने की स्थिति में संस्था के प्रधानाध्यापक/प्रधानाचार्य के पद पर संस्था के ज्येष्ठतम स.अ. /ज्येष्ठतम प्रवक्ता की तदर्थ पदोन्नति संस्था प्रबन्धतंत्र द्वारा की जायेगी। उपरोक्त धारा में यह भी प्रावधान किया गया है कि जहा प्रबन्धतंत्र ज्येष्ठतम स.अ./ज्येष्ठतम प्रवक्ता को तदर्थ रूप से पदोन्नति करने में विफल रहे वहां निरीक्षक ऐसे अ.अ./प्रवक्ता की पदोन्नति आदेश स्वयं जारी करेगा एवं सम्बन्धित स.अ./प्रवक्ता जब पदोन्नति के ऐसे आदेश के अनुसरण में पद का कार्यभार ग्रहण करें, प्रधानाध्यापक/प्रधानाचार्य के रूप में अपने वेतन का हकदार होगा।

3. उपरोक्त प्रावधानों के आलोक में शिक्षण संस्था म ं प्रधानाध्यापक/प्रधानाचार्य का पद मौलिक रूप से रिक्त होने की स्थिति में संस्था के कनिष्ठ स.अ./कनिष्ठ प्रवक्ता के हस्ताक्षर कार्यवाहक प्रधानाध्यापक/ कार्यवाहक के रूप में प्रमाणित किया जाना सन्दर्भित अधिनियम के सर्वथा विपरीत है।

4. अतः आपको निदेशित किया जाता है कि अधिनियम व्यवस्थानुसार कार्यवाही किया जाना सुनिश्चित करें। अधिनियम के प्रावधानों के विपरीत कार्यवाही हेतु आप स्वयं उत्तरदायी होगें एवं आपका उक्त आचरण उत्तर प्रदेश राजकीय कर्मचारी नियमावली, 1956 के आचरण नियम–3 के विपरीत होने के आधार पर आपके विरूद्ध अनुशासनिक कार्यवाही संस्थित किये जाने हेतु शासन से अनुरोध करने की प्रशासकीय बाध्यता होगी। आशा है कि आप ऐसी अरूचिकर स्थिति उत्पन्न नहीं होने देंगे। "

17. Thus, the stand taken by the District Inspector of Schools that the petitioner was not appointed as an ad hoc Principal in terms of Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 and Regulation 2(3) of the U.P. Intermediate Education Act, 1921 is completely misconceived and misleading.

18. On the basis of analysis of the above principle, the stand taken by the respondent No.3 in the order is absolutely illegal. It further appears from perusal of

the record that taking into consideration the provisions of the Act, 1982, Government Order dated 25th August, 2015 has already been issued by the Director of Education (Secondary), U.P., Lucknow to all the District Inspector of Schools of the State directing them to appoint the senior-most Assistant Teacher/ Lecturer as officiating Principal of the institutions, where the office of the Principal is vacant, and to grant them the salary of the Principal.

19. It is unfortunate that in spite of the fact that clear provisions which are contained in the Act and Government Order in this regard has already been issued by the Director of Education (Secondary), U.P., Lucknow on 25th August, 2015, the stand taken by the respondent No.3 in the present case refusing payment of salary to the petitioner on the same ground which were earlier dealt with by different Division Benches as well as Full Bench of this Court could not be justified.

20. After careful consideration of the matter, I am of the view that the ends of justice would be subserved by setting aside impugned order 01.08.2015 passed by District Inspector of Schools, Azamgarh/respondent No.3 and by issuing a direction upon the Regional Joint Director of Education, Azamgarh/respondent No.2 to consider the grievance of the petitioner about her salary of the officiating Principal in the principal's grade. The petitioner is at liberty to file a fresh representation before the Joint Director of Education, Azamgarh Region, Azamgarh who shall pass the order in the light of the observations made herein-above within two months from the date of communication of this order.

21. With the aforesaid observations, the writ petition is allowed. No order as to costs.

(2020)11ILR A165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2020

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-B No. 853 of 2020

Om Prakash Rai & Ors. ...Petitioners
Versus
Board of Revenue, Allahabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri Virendra Singh, Sri Shyam Singh

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Tripathi, Sri Bhupendra Kumar Tripathi, Sri Himansu Pandey, Sri Pradeep Kumar Dwivedi, Sri K.K. Pandey

A. Civil Law - Code of Civil Procedure: Order XXIII, Rule 3, 3-A - Practice & Procedure - The Court relied upon the decision of the Supreme Court wherein it was held in case on the basis of compromise any order was passed, the same could only be examined by the same court and not by the other court under the provisions to Rule 3 and 3-A of Order XXIII of the CPC. The Court should never be a party to imposition of a compromise upon an unwilling party. It is always open for an unwilling party to question on the same by moving an appropriate application under proviso of Rule 3 of Order XXIII before the same court. (Para 11) (E-10)

List of Cases cited:-

1. Banwari Lal Vs Chando Devi (1993) 1 SCC 581

2. Pushpa Devi Bhagat (Dead) through LR Sadhna Rai (Smt) Vs Rajinder Singh & ors. (2005) 5 SCC 566

3. R. Rahanna Vs S.R. Venkataswamy & ors. (2014) 15 SCC 471

4. Triloki Nath Singh Vs Anirudh Singh (D) thr. LRS & ors. (2020) Law Suit (SC) 391 *(followed)*

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioners, learned Standing Counsel for the respondent nos.1 to 3, Sri K. K. Pandey, Advocate, holding brief of Sri Himanshu Pandey, learned counsel for the respondent no.4, Sri P. K. Dwivedi, learned counsel for the respondent no.7 and Sri Bhupendra Kumar Tripathi, learned counsel for the respondent no.9.

2. The petitioners have preferred the present writ petition inter-alia with the prayer to quash the order dated 18.2.2020 passed by the Board of Revenue, U.P. at Allahabad/respondent no.1 in Second Appeal No.25 of 1995-96 (Gaurishankar Vs. Manna Devi) as well as compromise dated 28.8.2019.

3. The facts in brief as contained in the writ petition are that a revision was preferred by one Gaurishankar against Manna Devi before the Board of Revenue/respondent no.1. During the pendency of the aforesaid revision a compromise was taken place between Smt. Amla Devi/respondent no.4 and Pradeep Kumary Pandey, Ajeet Kumar Pandey and Avinash Kumar Pandey and Smt. Parwati Devi, respondents no.5 to 8 on 15.7.2019. The same compromise was duly verified by the competent court and thereafter the same was forwarded before the respondent no.1. Taking into consideration the aforesaid compromise application, the second Appeal in question was decided by the respondent no.1 on 18.2.2020. Aggrieved against the aforesaid decision, the petitioners have preferred the present writ petition.

4. It is argued by learned counsel for the petitioners that the compromise application was submitted by the parties by way of collusion. It is further argued that on account of decision taken by the respondent no.1, the plot of the petitioners were altered and the order impugned has been passed without providing any opportunity of hearing to the petitioners.

5. On the other hand it is argued by learned counsel for the private respondents that in case any compromise was taken place and on the basis of the same an order has been passed by the court of law, then only remedy lies with the petitioners to move an appropriate application before the court who recorded the compromise. The question whether the compromise was valid or not could not be looked by the higher courts. It is argued that the remedy is provided to the petitioners to file the appropriate application. Learned counsel for the respondents also relied the provisions contained in Order XXIII, Rule 3 and 3-A of the Code of Civil Procedure.

6. It is true that a compromise forming the basis of the decree can only be questioned before the same court that recorded the compromise and a fresh suit for setting aside a compromise decree is expressly barred under Order 23 Rule 3-A. It is equally true that the expression "not lawful" used in Order 23 Rule 3-A also covers a decree based on a fraudulent compromise hence, a challenge to a compromise decree on the ground that it was obtained by fraudulent means would also fall under the provisions of Order 23 Rule 3-A.

7. In case of **Banwari lal v. Chando Devi** reported in (1993) 1 SCC 581 the Supreme Court examined the provisions of Order 23 Rule 3-A in some detail and in the light of the amendments introduced in the Code and in para 7 of the judgment came to hold as follows:

"7. By adding the proviso along with an Explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The Explanation made it clear that an agreement or a compromise which is void or voidable under the Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the Explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on the basis of a compromise.

8. The question that falls for determination is as to whether the writ petition filed by the petitioners seeking a writ in the nature of certiorari against the order of of compromise dated 18.02.2020 passed by the respondent no. 1, Board of Revenue is maintainable, in view of the proviso of order 23 Rule 3 and 3-A of the Code of Civil Procedure or not. The provisions of Rule 3 and 3-A of order XXIII of the Code of Civil Procedure is extracted herein-below:-

"3. Compromise of suit.--Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise, or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation.--An agreement or compromise which is void or voidable under the Indian Contract Act 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule.

3A. Bar to suit - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

9. Legislative intent has been considered in extenso by the Supreme Court in the case of ***Pushpa Devi Bhagat(Dead) Through LR Sadhna Rai(Smt) Vs. Rajinder Singh and Others,*** *reported in* ***(2005) 5 SCC 566***, after taking note of the scheme of Order XXIII Rule 3 and Rule 3A added with effect from 1st February, 1977. The relevant paragraphs are as under:-

"17. The position that emerges from the amended provisions of Order 23 can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code."

10. Further in the case of ***R. Rajanna Vs. S.R. Venkataswamy and Others*** reported in ***(2014) 15 SCC 471*** it was held that :-

"11. It is manifest from a plain reading of the above that in terms of the proviso to Order 23 Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order 23 Rule 3, the agreement or compromise shall not be deemed to be lawful within the meaning of the said Rule if the same is void or voidable under the Contract Act 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order 23 Rule 3-A clearly bars a suit to set aside a decree on the ground that the compromise on 2 2014(15) SCC 471 which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or

compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone who can examine and determine that question. The court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order 23 Rule 3-A CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No. 5326 of 2005 to challenge the validity of the compromise decree, the court before whom the suit came up rejected the plaint under Order 7 Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order 23 Rule 3-A CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No. 5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher court."

11. Counsel for the respondents relied upon a very recent decision given by the Supreme Court on May 6, 2020 in ***Civil Appeal No.3961 of 2010 (Triloki Nath Singh Vs. Anirudh Singh (D) thr. LRS & Ors (2020) Law Suit (SC) 391.*** It was held in the aforesaid case that in case on the basis of compromise any order was passed, the same could only be examined by the same court and not by the other court under the provisions to Rule 3 and 3-A of Order XXIII of the Code of Civil Procedure. The Court should never be a party to imposition of a compromise upon an unwilling party. It is always open for an unwilling party to question on the same by moving an appropriate application under the proviso of Rule 3 of order XXIII before the same Court.

12. Heard learned counsel for the parties and perused the record.

13. From perusal of the record, the Court is of the opinion that in view of the provisions contained in Rule 3 of Order XXIII of the Code of Civil Procedure as well as in view of the law laid down by the Supreme Court as narrated above, the present writ petition filed by the petitioners is not at all maintainable. The only remedy lies with the petitioners to file the appropriate application, if so advised, before the respondent no.1.

14. Accordingly, present writ petition is dismissed.

(2020)11ILR A169
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2020

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-B No. 42060 of 2015

Shashi Prabha ...Petitioner
Versus
The Deputy Director of Consolidation, District Badaun & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rama Shankar Mishra

Counsel for the Respondents:
C.S.C., Sri K.K. Chaurasia, Sri S.M. Pandey, Sri Yogesh Kumar

A. Civil Law -U.P. Consolidation of Holdings Act, 1953 - Section 12, 48, 52 - Indian Limitation Act, 1963- Section 5 - Consolidation Proceedings - Fraud - Fraud vitiates every solemn proceedings and no right can be claimed by a fraudster on the ground of technicalities. (Para 15)

The petitioner set up the claim before the Consolidation Officer on the basis of forged unregistered Will deed dated 04.03.2003. It further appears that the executor of the Will died on the next day of the execution of the Will. No proceedings were initiated by the petitioner for mutation of her name in the revenue records for more than ten years. For the first time two applications were submitted by the petitioner before the Consolidation Officer in the year 2013. The manipulation was done only in order to get the advantage of limitation mentioning the year 2003 in place of 2013. (Para 13)

Writ Petition Rejected. (E-10)

List of Cases cited:-

1. S.P. Chengalvaray Naidu Vs Jagannath (1994) 1 SCC 1

2. Ram Chandra Singh Vs Savitri Devi (2003) 8 SCC 319

3. St. of A.P. Vs T.Suryachandra Rao (2005) 6 SCC 149

4. Jai Narain Parasrampuria Vs Pushpa Devi Saraf (2006) 7 SCC 756

5. A.V. Papyya Sastry Vs Govt. of A.P. (2007) 4 SCC 221

6. Madhukar Sadbha Shivarkar Vs St. of Mah. (2015) 6 SCC 557

(Delivered by Hon'ble Prakash Padia, J.)

1. The petitioner has preferred the present writ petition with the prayer to quash the order dated 19.5.2015 passed by the respondent no.1/Deputy Director of Consolidation, District Budaun, copy of which is appended as annexure 1 to the writ petition.

2. Since counter and rejoinder affidavits have been exchanged between the parties hence with the consent of learned counsel for the parties, present writ petition is being disposed of finally at the admission stage itself.

3. The facts in brief as contained in the writ petition are that the petitioner is daughter of late Rameshwar Dayal Mishra resident of Village-Khurampur Bhamauri, Pargana Satasi, Tehsil Visauli, District Budaun. The respondents no.3 and 4 are the real brothers of the petitioner and Smt. Satto Devi is the mother of the petitioner. The respondent no.2 namely Omwati is not the mother of the petitioner as well as respondent nos.3 and 4. It is further stated in the writ petition that the respondent no.2 is not the widow of Rameshwar Dayal Mishra and she is a widow of one Tota Ram resident of Village Khandua Pargana Kot Tehsil Sahaswan, District Budaun.

4. In paragraph 5 of the writ petition it is stated that the Rameshwar Dayal Mishra has executed a Will on 4.3.2003 in favour of the petitioner. He died on the next day of the execution of Will, i.e., 05.03.2003. It appears from perusal of the record that the respondent no.3 namely Yogesh Kumar filed a case under Section 12 of the U.P. Consolidation of Holdings Act, 1953 being Case No.79 of 2013-14 against Omwati before the Consolidation Officer, Budaun. In the said case an application/objection was filed by the petitioner for mutation of her name. Further prayer was made in the aforesaid application that the petitioner should be arrayed as one of the necessary party in the aforesaid case. It is stated in paragraph 7 of the writ petition that the petitioner has given another application in this regard before the Consolidation Officer, Budaun on 3.1.2013. The Consolidation Officer, Budaun, rejected the aforesaid application of the petitioner vide order dated 3.5.2014, copy of the order

dated 3.5.2014 is appended as annexure 1 to the supplementary counter affidavit filed by the respondent no.2.

5. Against the aforesaid order an appeal was preferred by the petitioner before the Settlement Officer of the Consolidation, Budaun. The aforesaid appeal was allowed by him vide its judgement and order dated 18.9.2014. By the aforesaid order Settlement Officer of Consolidation, Budaun, remanded the matter before the Consolidation Officer with the directions to implead the petitioner as one of the necessary party and to provide the opportunity of hearing to the petitioner and thereafter decide the matter on merits. The aforesaid order dated 18.9.2014 passed by the Settlement Officer of Consolidation, District Budaun, was challenged before the respondent no.1 namely Deputy Director of Consolidation, District Budaun by filing a revision as provided under Section 48 of the Act, 1953. The aforesaid revision filed by the respondent no.2 was allowed by the respondent no.1 vide its order dated 19.5.2015. The petitioner has preferred the present writ petition challenging the aforesaid order passed by the respondent no.1.

6. It is argued by learned counsel for the petitioner that the respondent no.1 has not applied its judicial mind while passing the order impugned. The findings recorded by the respondent no.1 is absolutely perverse and against the record. It is further argued that the petitioner is a necessary party in the aforesaid case since her interest is involved in the matter but respondent no.1 has not considered the grievance of the petitioner.

7. A counter affidavit has been filed in the matter on behalf of the respondent no.2. It is stated in the counter affidavit that the so called Will is a forged document and the respondent no.2 is getting family pension and all other retiral benefits since 5.3.2004. It is further stated in the counter affidavit that no Will deed whatsoever has been executed by the husband of the respondent no.2. A fake and false story has been developed by the petitioner while filing her objection on 30.1.2013 before the Consolidation Officer, Budaun, in Case No.10/77/2014-15 under Section 12 of the Act, 1953. It is further stated in the counter affidavit that in fact the impleadment application was filed by the petitioner after the expiry of more than 10 years.

8. Rejoinder affidavit was filed in response to the counter affidavit filed by the respondent no.2. In the rejoinder affidavit contents made in the counter affidavit were denied. It is reiterated in the rejoinder affidavit that the petitioner has filed objections in the aforesaid case before the Assistant Consolidation Officer, Sadar, District Budaun on 30.9.2003 on the basis of the Will deed dated 4.3.2003, certified copy of the application dated 30.9.2003 is appended along-with the rejoinder affidavit. The Consolidation Officer, Budaun, rejected the application filed by the petitioner for mutation of her name in the revenue record vide order dated 3.5.2014.

9. Heard learned counsel for the parties and perused the record.

10. I have perused the order dated 3.5.2014 passed by the Consolidation Officer. A specific finding has been recorded in the aforesaid order that the counsel appearing on behalf of petitioner submitted his vakalatnama before the Assistant Consolidation Officer on

30.9.2003. Subsequently a vakalatnama was also filed by the same counsel before the Consolidation Officer on behalf of the petitioner on 3.10.2013. The welfare stamp was appended along-with the vakalatnama dated 30.9.2003. The welfare stamp which was appended was issued from book No.147 Serial No.26 Welfare Stamp Serial No.C-0888655 and the Welfare Stamp appended along-with the vakalatnama dated 3.10.2013 was issued from Book No.147 Serial No.27 Welfare Stamp Serial No.C-0888695. Further findings were recorded that from perusal of the aforesaid it is clear that both the vakalatnamas were obtained by the petitioner on the same day namely in the month of October, 2013. The aforesaid manipulation was made by her in order to prove that the objections were filed by her before publication of Section 52 of the Act, 1953. Further findings were recorded that though the application was filed after more than ten years along-with application under Section 5 of the Indian Limitation Act no affidavit was submitted. It is further clear from perusal of the application that no reasons were given in the same for condonation of delay.

11. In the circumstances, the claim set up by the petitioner for mutation of her name in the revenue records was rejected by the Consolidation Officer vide its order dated 3.5.2014. Against the aforesaid order an appeal was preferred by the petitioner before the Settlement Officer of Consolidation. Without considering the relevant aspect of the matter, the same was allowed by him vide its order dated 18.09.2014 and without giving any cogent reasons the order passed by the Consolidation Officer dated 3.5.2014 was set aside and the matter was remanded before the Consolidation Officer, Budaun, to provide the opportunity of hearing to the petitioner.

12. Against the aforesaid order dated 18.9.2014 passed by the Settlement Officer of Consolidation, a revision was preferred by the respondent no.2. Respondent no.1 allowed the revision preferred by the respondent no.2 vide its order dated 19.5.2015. Findings have been duly recorded by him in the order that the alleged unregistered Will deed dated 4.3.2003 was placed by the petitioner before the Consolidation Officer for the first time in the year 2013 and the aforesaid Will deed is absolutely forged. It is further stated that writer of the Will deed has refused the execution of the aforesaid Will. The findings were further recorded that the Consolidation Officer, Budaun, rejected the claim set up by the petitioner by giving cogent reasons but thereafter wholly illegally the appeal preferred by the petitioner was allowed without recording any reasons.

13. From perusal of the facts as narrated above, it is clear that the claim was set up by the petitioner before the Consolidation Officer, Budaun, on the basis of forged unregistered Will deed dated 4.3.2003. It further appears that the executor of the Will died on the next day of the execution of the Will namely dated 5.3.2003. Further no proceedings were initiated by the petitioner for mutation of her name in the revenue records for more than ten years. For the first time two applications were submitted by the petitioner before the Consolidation Officer in the year 2013. The manipulation was done only in order to get the advantage of limitation mentioning the year 2003 in place of 2013. The application submitted by the petitioner before the Assistant Consolidation Officer in the year 2003 in fact was submitted for first time in the year 2013. It is further clear from perusal of the counter affidavit filed by the respondent no.2 that she is getting

the pension of her husband namely Sri Rameshwar Dayal Mishra after his death.

14. Nothing has been stated in the entire writ petition nor any arguments have been made by the counsel for the petitioner that how and in what manner the reasons given by the Consolidation Officer as well as by the Deputy Director of Consolidation, Budaun are perverse, illegal or wrong.

15. From perusal of the facts as narrated above it is clear that deliberately a fraud has been committed by the petitioner in order to get the advantage of limitation. Fraud vitiated every solemn proceedings and no right can be claimed by a fraudster on the ground of technicalities. The definition of the word "fraud" has been defined in Black's Law Dictionary, which is as under :-

"Fraud means: (1) A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (esp. when the conduct is willful) it may be a crime. (2) A misrepresentation made recklessly without belief in its truth to induce another person to act. (3) A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. (4) Unconscionable dealing; esp., in contract law, the unconscientious use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."

16. Halsbury's Law of England has defined fraud as follows:

"Whenever a person makes a false statement which he does not actually and honestly believe to be true, for purpose of civil liability, the statement is as fraudulent as if he had stated that which he did know to be true, or know or believed to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirement of the law, whether the representation has been made recklessly or deliberately, indifference or reckless on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief."

17. In KERR on the Law of Fraud and Mistake, fraud has been defined thus:

"It is not easy to give a definition of what constitutes fraud in the extensive significance in which that term is understood by Civil Courts of Justice. The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety...Courts have always declined to define it, ...reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud...may be said to include property all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a willful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled too."

18. In ***S.P. Chengalvaray Naidu v. Jagannath,*** reported in ***(1994) 1 SCC 1***, the Supreme Court noted that the issue of fraud goes to the root of the matter and it exercised powers under Article 136 to cure the defect. The Supreme Court observed:

"5. The High Court, in our view, fell into patent error. The short question before the High Court was whether, in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigant. The courts of law are meant for imparting justice between the parties. One who comes to the court must come with clean hands. We are constrained to say that more often than not, the process of the court is being abused. Property- grabbers, tax-evaders, bank-loandodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-1 S) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non production and even non mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants defendants could have easily produced the certified registered copy of Exhibit B-15 and non suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

19. In the case of ***Ram Chandra Singh v. Savitri Devi,*** reported in ***(2003) 8 SCC 319,*** it was held by the Supreme Court that fraud vitiates every solemn act. Fraud and justice never dwell together and it cannot be perpetuated or saved by the petitioner on any equitable doctrine including resjudicata. The relevant paragraphs of the aforesaid judgement are as follows :-

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters.

Fraud, as is well known, vitiates every solemn act. Fraud and justice never dwell together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

*** *** ***

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

*** *** ***

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata."

(emphasis supplied)

20. In the case of ***State of A.P. v. T. Suryachandra Rao***, reported in ***(2005) 6 SCC 149,*** it was observed by the Supreme Court that where land which was offered for surrender had already been acquired by the State and the same had vested in it. It was held that merely because an enquiry was made, the Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud. Following observations were made:

"7. The order of the High Court is clearly erroneous. There is no dispute that the land which was offered for surrender by the respondent had already been acquired by the State and the same had vested in it. This was clearly a case of fraud. Merely because an enquiry was made, Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud.

8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit, and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [See Dr. Vimla v. Delhi Administration, 1963 Supp (2) SCR 585 and Indian Bank v. Satyam Febres (India) Pvt. Ltd., (1996) 5 SCC 550]

9. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by

another's loss. It is a cheating intended to get an advantage. (See S.P. Changalvaraya Naidu v. Jagannath, (1994)1 SCC 1.

10. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including resjudicata. (See Ram Chandra Singh v. Savitri Devi and Ors., (2003) 8 SCC 319.) *** *** ***

13. This aspect of the matter has been considered recently by this Court in Roshan Deen v. Preeti Lal, (2002)1 SCC 100, Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education, (2003) 8 SCC 311, Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319 and Ashok Leyland Ltd. v. State of T.N. And Anr., (2004) 3 SCC 1.

14. Suppression of a material document would also amount to a fraud on the court, (see Gowrishankar v. Joshi Amba Shankar Family Trust,(1996) 3 SCC 310 and S.P. Chengalvaraya Naidu v. Jagannath, (1994)1 SCC1).

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud it can be evidence of fraud; as observed in Ram Preeti Yadav, (2003) 8 SCC 311.

16. In Lazarus Estate Ltd. v. Beasley (1956) 1 QB 702, Lord Denning observed at pages 712 & 713: (AllER p. 345C) "No judgment of a Court no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

In the same judgment, Lord Parker LJ observed that fraud "vitiates all transactions known to the law of however high a degree of solemnity".

(emphasis supplied)

21. In the case of **Jai Narain Parasrampuria v. Pushpa Devi Saraf** reported **(2006)7 SCC 756**, the Supreme Court observed that fraud vitiates every solemn act. Any order or decree obtained by practicing fraud is a nullity. This Court held as under:

"55. It is now well settled that fraud vitiated all solemn act. Any order or decree obtained by practicing fraud is a nullity. [See.1)Ram Chandra Singh v. Savitri Devi and Ors., (2003) 8 SCC 319 followed in (2) Vice Chairman, Kendriya Vidyalaya Sangathan, and Anr. v. Girdhari Lal Yadav, (2004) 6 SCC 325; (3) State of A.P. and Anr. v. T. Suryachandra Rao, (2005) 6 SCC 149; (4)Ishwar Dutt v. Land

Acquisition Collector and Anr., (2005) 7 SCC 190; (5) Lillykutty v. Scrutiny Committee, SC & ST Ors., (2005) 8 SCC 283; (6) Chief Engineer, M.S.E.B. and Anr. v. Suresh Raghunath Bhokare, (2005) 10 SCC 465; (7) Smt. Satya v. Shri Teja Singh, (1975) 1 SCC 120; (8) Mahboob Sahab v. Sayed Ismail, (1995) 3 SCC 693; and (9) Asharfi Lal v. Koili, (1995)4 SCC 163.]"

(emphasis supplied)

22. In ***A.V. Papayya Sastry v. Govt. of A.P.,*** reported in ***(2007) 4 SCC 221***, the Supreme Court was pleased to held that if any judgement or order is obtained by fraud it cannot be said to be a judgement or order. The relevant portion of the aforesaid judgement is quoted below :-

"19. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;

Fraud avoids all judicial acts, ecclesiastical or temporal.

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22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non-est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

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38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and nonest and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as nonest by every Court, superior or inferior."

23. The Supreme Court again in the case of ***Madhukar Sadbha Shivarkar v. State of Maharashtra,*** reported in ***(2015) 6 SCC 557,*** held that fraud had been played by showing the records and the orders obtained unlawfully by the declarant, would be a nullity in the eye of law though such orders have attained finality. Following observations were made in paragrah 27 of the aforesaid judgement, which reads as follows :-

"27. The said order is passed by the State Government only to enquire into the landholding records with a view to find out asto whether original land revenue records have been destroyed and fabricated to substantiate their unjustifiable claim by playing fraud upon the Tehsildar and appellate authorities to obtain the orders unlawfully in their favour by showing that there is no surplus land with the Company and its shareholders as the valid subleases are made and they are accepted by them in the proceedings Under Section 21 of the Act, on the basis of the alleged false declarations filed by the shareholders and sub- lessees Under Section 6 of the Act. The plea urged on behalf of the State Government and the defacto complainants owners, at whose instance the orders are passed by the State Government on the alleged ground of fraud played by the declarants upon the Tehsildar and appellate authorities to get the illegal orders obtained by them to come out from the clutches of the land ceiling provisions of the Act by creating the revenue records, which is the fraudulent act on their part which unravels everything and therefore, the question of limitation under the provisions to exercise power by the State Government does not arise at all. For this purpose, the Deputy Commissioner of Pune Division was appointed as the Enquiry Officer to hold such an enquiry to enquire into the matter and submit his report for consideration of the Government to take further action in the matter. The legal contentions urged by Mr. Naphade, in justification at this stage, we are satisfied that the allegation of fraud in relation to getting the land holdings of the villages referred to supra by the declarants on the alleged ground of destroying original revenue records and fabricating revenue records to show that there are 384 sub-leases of the land involved in the proceedings to retain the surplus land illegally as alleged, to the extent of more than 3000 acres of land and the orders are obtained unlawfully by the declarants in the land ceiling limits will be nullity in the eye of law though such orders have attained finality, they are tainted with fraud, the same can be interfered with by the State Government and its officers to pass appropriate orders. The landowners are also aggrieved parties to agitate their rights to get the orders which are obtained by the declarants as they are vitiated in law on account of nullity is the tenable submission and the same is well founded and therefore, we accept the submission to justify the impugned judgment and order of the Division Bench of the High Court."

24. In the facts and circumstances, the Court is of the opinion that the order passed by the Deputy Director of Consolidation dated 19.5.2015 is absolutely perfect and valid order and does not call for any interference by this Court specially under Article 226 of the Constitution of India.

25. The writ petition being devoid of merit is hereby dismissed.

(2020)11ILR A178
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2020

BEFORE

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

Habeas Corpus Writ Petition (Civil) No. 430 of 2020

Master Atharva (Minor) & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Anil Kumar Singh, Sri Kishan Gautam

Counsel for the Respondents:
A.G.A., Sri Sanjay Vikram Singh

Civil Law - Hindu Minority and Guardianship Act, 1956- Section 6(a) - The proviso to Section 6 shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The word "ordinary" signifies that as a matter of rule, children up to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc.

The custody of a child less than six years of age, has to be ordinarily with the mother excepting those cases where the mother is leading an immoral life , has remarried or is convicted of a heinous offence.

Hindu Minority and Guardianship Act - Section 13 - Even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In the matter of appointment or a declaration of a guardian or grant of custody of a minor, the right of the person seeking custody is not important. It is the welfare of the minor that is of paramount importance- Financial capacity is not the sole index by which the suitability of a guardian for the minor's custody is to be judged. If it be found that the father is financially better of, that is not a factor that would work against the mother. This is so because the father still would have the responsibility to provide for the minor. If he fails to do so, the law would take care of it.

The mother is not disentitled even after the child crosses the age of five or is financially less better off than the father, as the welfare of the child is paramount.

Writ Petition allowed. (Para 8. 9, 11, 12) (E-3)

Case Law/ Judgements relied upon:-

1. Roxann Sharma Vs Arun Sharma, (2015) 8 SCC 318

2. Habeas Corpus Writ Petition No. 3921 of 2018, Aharya Baranwal & 3 ors. Vs St.of U.P. & 2 ors.

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

1. This petition for a writ of habeas corpus has been effectively instituted by Smt. Shalini Singh, wife of Mukesh Kumar Singh asking that her minor son Master Atharva, petitioner no. 1 be ordered to be produced before the Court by Mukesh Kumar singh, Brijesh Kumar Singh and Smt. Madhuri Singh, respondent nos. 6,7 and 8 and ordered to be liberated from the said respondents' custody by ordering the minor to be given into the custody of his mother, the second petitioner.

2. Smt. Shalini Singh, the second petitioner and Mukesh Kumar Singh, the 6th respondent were married according to Hindu rites on 03.12.2017. The wife says that there was an early onset of matrimonial cruelty in her life, with her husband and in-laws being the ones to blame. She says that there was demand of additional dowry and assault by the husband on a number of occasions. It appears that the marriage rode a bumpy course. A child, Master Atharv was born of the wedlock of parties on 05.11.2018. If the wife were to be believed the newborn did not do much to cement the cracks that were widening in the parties' marriage. The wife claims that *postpartum*, the husband, Mukesh turned more abusive

and on occasion even attempted to assault the infant.

3. This Court does not intend to form opinions about this description of the parties' relationship by the wife but to shorten an account of malady, it must be said that on 11.08.2020, the husband and wife parted ways. The wife says, if her version again is to be believed in, that she was thrown out of the matrimonial home along with her infant on 11.08.2020. She then proceeded to her parents' place at Varanasi. Whichever way the couple fell apart, it is safe to infer that the second petitioner and her husband, the 6th respondent became an estranged couple on and after 11.08.2020. It is claimed by the wife that the 6th respondent came over to her parents' place in the evening hours of 11.08.2020 expressing his repentance and remorse, but she is quick to add that it was neither repentance or remorse; it was a decoy. The wife and her parents were taken in by the ruse and she agreed to go along with the 6th respondent back to her matrimonial home. By that time, it was very late in the evening hours. Therefore, the couple decided to spend the night at the wife's parents' place. The next day that is on 12.08.2020, when the wife's father and brother were away to run some errands, the husband and the second petitioner's in-laws, who were also staying back at the wife's parents' place, forcibly took away the minor, Master Atharv. It is claimed that in the scuffle, Smt. Shalini Singh and her minor son Master Atharv got severely injured. In spite of the injuries sustained by the child, the husband and other members of his family, who were involved in the mischief along with him, whisked away the child. The second petitioner, on her father and brother's return home, narrated the incident. Her father and brother immediately did their best to contact Mukesh Kumar Singh. Initially, Mukesh Kumar Singh did not receive the call, but lateron turned off his phone. The wife appears to have reported the matter through a written complaint addressed to the Station House Officer on 13.08.2020 as well as to the S.S.P., Varanasi and the Chairman Women's Commission, U.P., Lucknow on 17.08.2020 and 18.08.2020, respectively. None of these complaints were of any avail. The wife's father and brother proceeded to her matrimonial home but found the same locked with no one present. None of the second petitioner's in-laws or her husband would answer their phone calls.

4. It is pleaded in the writ petition that the wife did not know about the whereabouts of her minor son, the first petitioner, Master Atharv. The minor needs her badly as he is aged about one and a half years. The parameters of welfare determined in such matters place the minor's mother, that is to say, Smt. Shalini Singh, way above the minor's father and Shalini Singh's husband, Mukesh Kumar Singh.

5. The minor, who is an infant, needs his mother most and it is with her that the minor's welfare will be best secured. The complete deprivation of the mother of contact with her minor son, Master Atharv has been assailed as an unlawful custody by his father Mukesh Kumar Singh, the father's brother Brijesh Kumar Singh and Smt. Madhuri Singh, Shalini Singh's mother-in-law and Mukesh Kumar Singh's mother.

6. It was in the background of the above facts that this writ petition asking for a writ order or direction in the nature of

habeas corpus was instituted on 31.08.2020. This court issued a *rule nisi* on 31.08.2020 ordering the minor to be produced on 17.09.2020. On 17.09.2020 service of the rule was awaited and the matter was ordered to be put up on 18.09.2020. On 18.09.2020, the S.P. Bhadohi was ordered to cause the detenue, Master Atharva to be produced before this Court on 22.09.2020 at 2:00 p.m. It was a bit surprising that the police were unable to trace the minor and they prayed two weeks time to comply with the rule nisi. Time was granted on 22.09.2020, until 06.10.2020. It was on 06.10.2020 that the minor along with his father was produced by the police before the Court. The Court felt that the second petitioner and the 6th respondent, who are an estranged couple and still young, ought to be given an opportunity to reconcile their differences amicably. A mediated settlement of the dispute was thought fit by the Court, in the circumstances. Accordingly, parties were referred to the Allahabad High Court Mediation and Conciliation Centre vide order dated 06.10.2020, asking the Centre to report back on the following day. The report of the Mediation Centre dated 07.10.2020 shows that the Center adjourned the mediation to 17.10.2020. The report of the Centre dated 17.10.2020, shows that in terms of the interim settlement agreement of that date, the parties agreed to stay together in a tenanted premises at Bhadohi and endeavour to work out their relationship. The next date fixed before the Centre was 09.11.2020. However, this Court vide order dated 07.10.2020, while asking the parties to appear before the Mediation Centre on 17.10.2020, as desired by the Centre, asked the parties to appear before the Court on 19.10.2020. In the meanwhile, while the parties entered into an interim settlement before the Mediation Centre, on 19.10.2020 before the Court, they did a volte-face and refused to act on the interim settlement. Thus, this Court had to discontinue the process of mediation and proceed with the hearing.

7. Respondent nos. 6,7 and 8 who are represented before this Court by Mr. Sanjay Vikram Singh, Advocate, have chosen not to file a counter affidavit and have addressed the Court on merits.

8. The facts for the purpose of this matter are not in much dispute. This Court does not intend to venture into determining allegation traded between parties about matrimonial cruelty which the wife sets up or whatever the husband says in rebuttal. The substance of the matter is that the first petitioner Master Atharva is a very young child, an infant aged about two years. He has hardly any say in the matter about his choice for a custody. The child being so young, it brooks little doubt that, being so young, his needs and welfare would be best secured in the mother's hand. An infant or a young child has a very special relationship with his mother, which no one else can substitute. So long as the mother is around, it is incomprehensible to deprive a young child or an infant, two years old, of his mother's care and love. The assumption that a young child's welfare is best secured in the mother's hand is no construction of the law. It is a conclusion dictated by human nature and the experience of mankind. It finds statutory embodiment in the provisions of Section 6(a) of the Hindu Minority and Guardianship Act, 1956, where the proviso appended to Section 6(a) is of particular relevance. Section 6 of the Act, last mentioned, is extracted below:

"6. Natural guardians of a Hindu minor.--The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl--the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.--In this section, the expression "father" and "mother" do not include a step-father and a step-mother."

9. A reading of the terms of the proviso to Section 6 shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The only *niche*, therefore, so far as the statue goes, is the word "ordinary". The word "ordinary" signifies that as a matter of rule, children up to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc. In the present case, no such circumstance has been indicated, much less pleaded and proved so as to place the mother in that exceptional category where she may be deprived of the custody of her young child, who is still well below the age of five years.

10. It must also be remarked that even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In this connection, reference may be made to the decision of the Supreme Court in **Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318,** where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

11. It is now almost a truism in the law that in the matter of appointment or a

declaration of a guardian or grant of custody of a minor, the right of the person seeking custody is not important. It is the welfare of the minor that is of paramount importance. That principle is engrafted in Section 13 of the Hindu Minority and Guardianship Act and is the golden thread that runs across various statutes and transcends jurisdictions, when it comes to the question of a decision about guardianship or custody. The principles embodied in the Guardian and Wards Act, 1890 are no different. There are some very illuminating remarks made with reference to equally momentous authority by **Rajul Bhargava, J. in Habeas Corpus Writ Petition No. 3921 of 2018, Aharya Baranwal and 3 others vs. State of U.P. and 2 others,** that emphasize the principle of welfare as the paramount consideration and also the mother's special place in securing that welfare to a young child. These remarks come from His Lordship in the course of dealing with an objection about the maintainability of a habeas corpus petition to decide a custody dispute about a minor. In **Aharya Baranwal** *(supra)* while dealing with the objections as to maintainability, it has been held:

"21. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to be kept in view by a writ-Court is `welfare of the child'.

22. In Habeas Corpus, Vol. I, page 581, Bailey states;

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. ***The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."***

23. It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

24. In Mc Grath, Re, (1893) 1 Ch 143 : 62 LJ Ch 208, Lindley, L.J. observed;

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word `welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded. (emphasis supplied) American Law

25. Law in the United States is also not different. In American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated;

"As a rule, in the selection of a guardian of a minor, the best interest of the

child is the paramount consideration, to which even the rights of parents must sometimes yield". (emphasis supplied) In para 148; pp.280-81; it is stated;

"Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, ***these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another;*** *and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.*

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment". (emphasis supplied)

26. In Howarth v. Northcott, 152 Conn 460 : 208 A 2nd 540 : 17 ALR 3rd 758; it was stated;

"In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as parens patriae, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity". It was further observed;

*"**The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute,** but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate".*

(emphasis supplied)

27. It was also indicated that ***ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child....****"*(emphasis supplied)"

12. It has been particularly pointed out here that the father cannot take care of

the child as he is employed as an Assistant Teacher and has to stay away from home almost all day. As already remarked, a child who is two years old, inevitably needs his mother more than he does his father. It is well known that financial capacity is not the sole index by which the suitability of a guardian for the minor's custody is to be judged. It is to be judged on far more sensitive parameters. For once, if it be found that the father is financially better of, that is not a factor that would work against the mother. This is so because the father still would have the responsibility to provide for the minor. If he fails to do so, the law would take care of it. The father's financial strength is available to the minor whether he stays with the father or the father and the mother living together or the mother, where the two live apart and estranged. In the considered opinion of this Court, therefore, the welfare of the minor would be best secured in the hands of his mother, the second petitioner, Smt. Shalini Singh.

13. In the result, the *rule nisi* is made **absolute.** The minor, Atharva is ordered to be handed over to the mother, Smt. Shalini Singh forthwith in Court. The writ petition is **allowed.**

14. It is further ordered that the father, respondent no. 6, Mukesh shall have visitation rights whereunder he shall be entitled to visit his minor son Master Atharva at Smt. Shalini Singh's abode twice a week on the Tuesdays and Saturdays, between 5:00 p.m. to 7:00 p.m. In case of any obstruction with his visitation rights, the S.H.O. P.S. Lalpur Pandepur, Varanasi shall lend necessary assistance to Mukesh Kumar Singh.

15. Let this order be communicated to the S.H.O., P.S., Lalpur, Pandeypur through the S.S.P., Varanasi by the Joint Registrar (compliance).

(2020)11ILR A185
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE

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

Habeas Corpus Writ Petition No. 495 of 2020

Rinku Rukshar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri G.K. Srivastava, Sri Dilip Kumar Srivastava

Counsel for the Respondents:
A.G.A., Sri Radhey Shyam

Constitution of India - Article 226-Writ of habeas corpus- Guardianship and Wards Act, 1890 – Maintainability- The question of the custody being lawful or unlawful has to be seen in some measure with the origin of the complaint or the transaction through which the custody has been taken away by one parent or the other, when they have separated- This principle about the welfare of the child being of paramount consideration, working to the exclusion of all entitlement under the personal laws, is well recognized. Once the Court finds that the custody with one parent subserves the welfare of the minor best, the custody with the other becomes unlawful enough to be corrected by way of a habeas corpus. If it can be determined on obvious facts, not much in dispute, the writ must issue or be refused on merits according to the conclusion reached.

A writ of habeas corpus would be maintainable upon the consideration of the transaction resulting in the custody being taken away by

one parent after separation, welfare of the child and admitted facts between the parties.

Muslim Personal Law (Shariat) Application Act, 1937- Guardianship and Wards Act, 1890- Conflict between- The principle that the provisions of the Guardians and Wards Act would prevail over the personal law of parties in the matter of appointment or declaration of a guardian of the person or the property of a minor, is a principle that has been accepted without cavil by consistent authority.

It is settled law that where the provisions of Muslim Personal law are in conflict with those of the Guardians and Wards Act, the provisions of the Act shall prevail over the Personal law.

Constitution of India- Article 226-Writ of habeas corpus - It is certainly more important to a minor's welfare that he receives the mother's love and guidance, as also her close supervision, that may groom him into a young adult and a good citizen. Away from the mother, in the father's company, the likelihood of delinquency is higher as the father is away to earn his livelihood. So far as the financial needs of the minor are concerned, it is the father's responsibility to provide for him and the law would take care that the father discharges that responsibility towards the minor, though the minor stays with the mother.

The paramount consideration before the Court , while granting custody of the child , would be the welfare of the child which can only be best subserved if the mother is granted the custody of the child.

Habeas Corpus petition allowed. (Para 15, 16, 17, 21, 22, 23) (E-3)

Judgements/ Case law relied upon:-

1. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

2. Nithya Anand Raghavan Vs State (NCT of Delhi) & anr., (2017) 8 SCC 454

3. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

4. Yashita Sahu Vs St. of Raj. & ors., (2020) 3 SCC 67

5. Mulla's Principles of Mahomedan Law (Nineteenth Edition) by M. Hidayatullah & Arshad Hidayatullah

6. Sahil (Minor) & anr. Vs St. of U.P., Habeas Corpus Writ Petition No. 387 of 2020, decided on 03.09.2020

7. Mohammad Shafi Vs Shamin Banoo, AIR 1979 Bom 156

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

1. This petition for a writ of habeas corpus has been filed by Rinku Rukshar, asking that the detenue, Asif, her minor son, be ordered to be produced before this Court from the unlawful custody of Arshad, the minor's father, and, set at liberty by being given into her custody. The relief though worded differently in substance seeks what the Court has delineated above.

2. The facts here go to show that Rinku Rukshar, the sole petitioner and the respondent no. 4, Arshad were married according to the Muslim rites on 14.12.2014. A child Asif, the minor, now aged a little less than six years was born of the wedlock of parties. The petitioner claims to have been driven away from her matrimonial home about five years ago, and since then, she is staying with her maternal aunt. It appears that on 13.05.2020, the husband Arshad came over to the petitioner's maternal aunt's place and said that she may come over and stay with him along with her children.

3. The petitioner appears to have stayed with the husband for a few days

before bickerings, again marred the parties' matrimonial peace. She was once again thrown out of the matrimonial home, with the husband telling her that he could not take care of the petitioner and her children. It is the petitioner's case that on 04.08.2020, her husband assaulted her with an intention to kill. The petitioner called rescue at the Police facility number 112. Before the police could arrive, the petitioner's husband Arshad and Arshad's sister Reshma, who is the 5th respondent here escaped from the village, taking along with them the detenue, the petitioner's minor son, Asif.

4. The petitioner lodged a first information report against Arshad and his sister Reshma on 08.08.2020. This report was lodged on some portal relating to *Jan Sunwai*, where it has a reference number. It does not appear to have been registered as a crime. The petitioner's grievance is that no action has been taken by the Police to recover her son, the minor. It is the petitioner's case, therefore, that the minor's custody with the father, who has virtually snatched him away from her lap, along with his sister Reshma, is unlawful. The minor should be liberated from his father's custody unlawfully taken and held, and restored to the mother, the petitioner.

5. Heard Sri Dilip Kumar Srivastava, learned counsel for the petitioner, Sri Radhey Shyam, learned counsel appearing on behalf of respondent no. 4 and Sri Indrajeet Singh, learned AGA appearing on behalf of the State.

6. In compliance with the *rule nisi* issued by this Court on 05.10.2020, the minor-detenue Asif has been produced in Court. The mother, Rinku Rukshar and her husband, the minor's father Arshad have also appeared.

7. I have spoken to the minor, who is less than six years old. He is an intelligent child but of tender years. Though, he has expressed his wish to stay with his father but going by his age and maturity of the mental faculty, the choice is far from an intelligent one. The choice has been expressed that way out of emotions because he is staying with the father. This aspect of the matter shall be considered a little later in the judgement.

8. Learned counsel appearing for respondent no.4, Sri Radhey Shyam has raised a preliminary objection that a petition for a writ of habeas corpus cannot be maintained against the father, who is the minor's natural guardian. A writ of habeas corpus is available, according to Mr. Radhey Shyam, against an utter stranger or a distance kindred, who holds the minor in custody without any semblance of a right. Learned counsel for respondent no.4 emphasizes that the father is the minor's natural guardian under the personal law of parties. In case, the petitioner wishes to show that she has a better right to the minor's custody on the principle about the minor's welfare being paramount that ought to prevail over what the personal law of parties says, the remedy of the petitioner is to move the Court under the Guardianship and Wards Act, 1890 through an appropriately framed application under Section 25 of that Act, or as may be advised. Learned counsel for the petitioner Sri Dilip Kumar Srivastava rebutting the aforesaid contention submits that a writ of habeas corpus can issue against one parent, at the instance of the other, provided the parent who holds the custody does so unlawfully. He submits that by now, it is

well settled that a writ of habeas corpus can issue in a custody dispute relating to children between the parents, both of whom are natural guardians, or generally under the law have a right to custody, provided the custody can be shown to be unlawful.

9. This Court has keenly considered the issue about the maintainability of this petition, where both parties are parents of the minor. This question fell for consideration of the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247.** It was held in **Syed Saleemuddin** thus:

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children."

10. Again, the question arose before the Supreme Court in **Nithya Anand Raghavan vs. State (NCT of Delhi) and another, (2017) 8 SCC 454. In Nithya Anand Raghavan,** it was held:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980] , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana [Sayed

Saleemuddin v. Rukhsana, (2001) 5 SCC 247 : 2001 SCC (Cri) 841] , has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth [Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court [see Paul Mohinder Gahun v. State (NCT of Delhi) [Paul Mohinder Gahun v. State (NCT of Delhi), 2004 SCC OnLine Del 699 : (2004) 113 DLT 823] relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.

11. This question recently came up before the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. In **Tejaswini Gaud**, their Lordships examined the question elaborately and held:

"19. Habeas corpus proceedings is not to justify or examine the legality of

the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

12. The maintainability of a habeas corpus petition in child's custody disputes figured as a prominent question very recently in a decision of the Supreme Court where a writ of habeas corpus was asked by one parent against the other to secure the custody of a child, who was claimed to be in the unlawful detention of the other. This question arose in **Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67.** It was held in **Yashita Sahu** thus:

"10. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary wirt jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw v. Arvand M. Dinshaw, Nithya Anand Raghavan v. State (NCT of Delhi) and Lahari Sakhamuri v. Sobhan Kodali* among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable."

13. The issue about minor's welfare here can be conveniently resolved without a reference to facts that require a searching probe.

14. It may be remarked that this kind of an issue relating to the custody of a child when raised between two parents, is always tricky ground to tread on. This is so because in case of parents, the right to hold the child's custody under the law, rests with both of them.

15. The question of the custody, therefore, being lawful or unlawful has to be seen in some measure with the origin of the complaint or the transaction through which the custody has been taken away by one parent or the other, when they have separated. But, that test about the issue is less substantial. The legality of the custody held by one parent to the exclusion of the other would depend upon the kind of right that the parent who holds custody enjoys under the personal law of parties, and more than that, by the abiding principle that welfare of the child is of paramount consideration. This principle about the welfare of the child being of paramount consideration, working to the exclusion of all entitlement under the personal laws, is well recognized. The question of welfare of the minor has to be determined on the basis of various criteria about it, judicially evolved over time, applied to the facts and circumstances of each case. Once the Court finds that the custody with one parent subserves the welfare of the minor best, the custody with the other becomes unlawful enough to be corrected by way of a habeas corpus.

16. Of course, inquiry in proceedings for a writ of habeas corpus being summary, the determination of the question if found to be mired in too much complexity of facts and evidence, the parties may be asked to seek their remedies under the Guardianship and Wards Act, 1890. If it can be determined on obvious facts, not much in dispute, the writ must issue or be refused on merits according to the conclusion reached. Still again, the nature of remedy being summary, the Court may order custody in favour of one party or the other, leaving the party not found entitled, to establish his right before the competent forum under the Guardianship and Wards Act.

17. It is, therefore, held that this petition is indeed maintainable.

18. In the present case, what the Court finds is that the parties are Muslims where the personal law has some bearing on the question of guardianship and the right to custody of a minor. Under the personal law of the parties, the father, no doubt is the natural guardian of a minor but the right to custody in case of a minor boy is with the mother, till he attains the age of the seven years. It may be noted that there are different principles governing the guardianship of the person and property of the minor. Reference may be made with profit to **Mulla's Principles of Mahomedan Law (Nineteenth Edition) by M. Hidayatullah and Arshad Hidayatullah**. Section 352 of Mulla's Mahomedan Law, which falls under Part B of Chapter XVIII dealing with "Guardians of the Person of a Minor', provides:

"352. Right of mother to custody of infant children. - The mother is entitled to the custody *(hizanat)* of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."

19. Again, sections 353, 354 and 355 that have material bearing on the issue are extracted below:

"353. Right to female relations in default of mother.- Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:-

(1) mother's mother, how highsoever;

(2) father's mother, how highsoever;

(3) full sister;

(4) uterine sister;

(5) consanguine sister;

(6) full sister's daughter;

(7) uterine sister's daughter;

(8) consanguine sister's daughter;

(9) maternal aunt, in like order as sisters; and

(10) paternal aunt, also in like order as sisters.

354. Females when disqualified for custody.- A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody -

(1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261), e.g., a stranger, but the right revives on the dissolution of marriage by death or divorce; or

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take proper care of the child.

355. Right of male paternal relations in default of female relations.- In default of the mother and the female relations mentioned in sec. 353, the custody belongs to the following persons in the order given below:-

(1) the father;

(2) nearest paternal grandfather;

(3) full brother;

(4) consanguine brother;

(5) full brother's son;

(6) consanguine brother's son;

(7) full brother of the father;

(8) consanguine brother of the father;

(9) son of father's full brother;

(10) son of father's consanguine brother;

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 260-261).

If there be none of these, it is for the Court to appoint a guardian of the person of a minor."

20. Part C of Chapter XVII of **Mulla's Mahomedan Law,** makes provision regarding guardianship of the property of a minor. Section 359 reads thus:

"359. Legal guardians of property.- The following persons are entitled in the order mentioned below to be guardians of the property of a minor:-

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father."

21. We had occasion to consider the question about the entitlement to custody of a minor child under the Muslim Law in **Sahil (Minor) and another vs. State of U.P., Habeas Corpus Writ Petition No. 387 of 2020, decided on 03.09.2020,** where doing a review of relevant authority, it was held:

"13. This entitlement of the mother to the custody of a minor male child (as well as female, which is not relevant here) fell for consideration of the Privy Council in Imambandi and ors. vs. Sheikh Haji Mutsaddi and ors., (1918-19) 23 CWN

50, where it has been held by their Lordships:

"It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant....."

"As already observed, in the absence of the father, under the Sunni law the guardianship vests in his executor. It the father dies without appointing an execute or (wasi) and his father is alive, the guardians hip of his minor children devolves on their grandfather. Should he also he dead, and have left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689; Hamilton's Heddya, Vol. IV, p. 555). ....."

14. This then is the position about the entitlement to the custody of a minor male child under the Muslim Law. But, it must be remembered that the personal law of parties is not the final word about entitlement to custody or guardianship in India. The right is regulated by statute. The statute is the Guardians and Wards Act, 1890. The principle that the provisions of the Guardians and Wards Act would prevail over the personal law of parties in the matter of appointment or declaration of a guardian of the person or the property of a minor, is a principle that has been accepted without cavil by consistent authority. The point was considered and the law expounded in Rafiq vs. Smt. Bashiran and another, AIR 1963 Raj 239. In Rafiq (supra), Jagat Narayan J. after doing a survey of the provisions of Sections 17 and 19 of the Guardians and Wards Act and relying on a decision of this Court in Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan(1) Sulaiman, AIR 1932 All 215, held:

"The learned Senior Civil Judge ignored the provisions of Sec. 19 of the Guardians and Wards Act, which runs as follows:--

"Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person--

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

He did not come to a finding that the father is unfit to be the guardian of the person of the minor.

It may be mentioned here that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter prevail over the former. It is only where the provisions of the personal law are not in conflict with the provisions of the Guardians and Wards Act that the court can take into consideration the personal law applicable to the minor in the appointment of a guardian. The provisions of Sec. 19 of

the Guardians and Wards Act prevail over the provisions of Sec. 17 which runs as follows:--

"(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) The Court shall not appoint or declare any person to be a guardian against his will."

(3) In Mt. *Siddq-un-Nissa Bibi v. Nizam-Uddin Khan, ILR 54 All 128 : (AIR 1932 All 215)*, Sulaiman, Acting C.J. observed at page 134 (of ILR All) : (at p. 217 of AIR): --

"The personal law has been abrogated to the extent laid down in the Act. Where, however, the personal law is not in conflict with any provision of the Act, I would not be prepared to hold that it has necessarily been superseded."

and at page 131 (of ILR All) : (at p. 216 of AIR)--

"There can be no doubt that so far as the power to appoint and declare the guardian of a minor under Sec. 17 of the Act is concerned, the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the court, which must look to the welfare of the minor consistently with that law. This is so in cases where Sec. 17 applies. In such cases the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. Sec. 19 then provides that "Nothing in chapter shall authorise the Court ..... to appoint or declare a guardian of the person (a) of a minor who is a married female and whose bus-band is not, in the opinion of the court, unfit to be guardian of her, person, or (b)..... of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor." The language of the section, as it stands, obviously implies that when any of the three contingencies mentioned in the sub-clauses exists there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred upon it by Sec. 17 to appoint or declare a guardian is ousted where the case is covered by Sec. 19."

There is nothing on record to show that the father of the minor is unfit to be the guardian of her person. As was observed in *B.N. Ganguly v. G.H. Sarkar, AIR 1961 Madh-Pra 173* there is a presumption that the parents will be able to exercise good care in the welfare of their children."

15. The entire law about the right of the mother to the custody of her minor children, a son and a daughter, where the parties were an estranged Muslim couple, was considered by the Bombay High Court

in Mohammad Shafi vs. Shamin Banoo, AIR 1979 Bom 156. It must be remarked that the facts of the case in Mohammad Shafi show that it was truly a custody dispute between the estranged parents of the two minors, where the application by the mother for custody appears to be one made under Section 25 of the Guardians and Wards Act. She had asked for the custody of her minor son, aged four years and a minor daughter, aged two and a half years, at the time of commencement of action. The facts of the case founded on pleadings of parties can best be understood by a reference to their statement in paragraph nos.2 and 3 of the report, that read:

"2. An application for appointment of herself as guardian and for the custody or returning the minors to her custody was filed by Shamim Banu against her husband Mohomed Shafi under sections 7 and 25 of the Guardian and Wards Act. She alleged therein that she was married to Mohomed Shafi and bore three children from respondent Mohomed Shafi, namely Mohomed Raees whose age was given as 4 years, Waheeda Begum, whose age was given as 2½ years and Farooque who was aged 1½ years at the time when this application was presented. She then stated that she was given very cruel treatment by the respondent who wanted to marry another woman and drove her out and at that time snatched Mohomed Raees and Waheeda Begum from her. Farooque was then only a month old and was allowed to be retained with her. She, therefore, filed this application for custody or return of the custody of the minors to herself, namely, Mohomed Raees and Waheeda Begum and for appointment of herself as the guardian under section 7. She also stated in the application that the respondent has married Sajjidabegum after the petitioner was driven away and that the respondent and his newly married wife are living together along with the minors who were, according to her, treated cruelly by the wife, step-mother and the respondent.

3. The respondent filed his written statement to this application and denied that the petitioner was driven away and was treated cruelly. He claimed that he was the natural father of the minor children whose ages were not disputed and was, therefore, entitled to their custody. He contended that the petitioner was divorced by him on 7th November, 1975 and that she was a woman of suspicious character and had connections with others and used to leave the house of the respondent at night in the company of somebody secretly. That she has left him with a view to carry on her affair with her boy friend. In these circumstances and also under the personal law to which the parties belong, namely, Mahomedan Law, he claimed that he was entitled to the custody of the children and was the proper and legal guardian of the minors. It is his claim that the application is motivated by the proceedings which she has commenced under section 125 of the Code of Criminal Procedure against him. He did not deny that he has married a third time, but denied that either the minors were given cruel treatment by him or his new wife. Lastly, he contended that the minors are being properly looked after and that the petitioner who is staying with her father has no means of income as also her parents which could be sufficient to bring up these minor children. That they would be practically starving whereas the respondent has sufficient earnings of his own. That there are other members in his family who come to him and look after his children by the petitioner."

22. In the present case, the Court finds that the child is still of tender years.

The child is aged about six years who needs just not the financial means of his father but also the loving care and guidance of his mother. The father is, of course, there but the mother is required to be around the child, at close quarters. It is certainly more important to a minor's welfare that he receives the mother's love and guidance, as also her close supervision, that may groom him into a young adult and a good citizen. Away from the mother, in the father's company, the likelihood of delinquency is higher as the father is away to earn his livelihood.

23. So far as the financial needs of the minor are concerned, it is the father's responsibility to provide for him and the law would take care that the father discharges that responsibility towards the minor, though the minor stays with the mother. There is nothing pleaded or said on behalf of the father to show that the mother is disentitled to the minor's custody on the basis of any principle recognized by law. It has also not been shown that the minor's welfare would be better secured for some demonstrable cause with the father, while the father stays estranged with the mother.

24. In these circumstances, the principles of law clearly work in a way that the conclusion has to go in favour of a better welfare for the minor in the hands of his mother. This Court must observe here that during the interaction with the minor whatever words of choice he expressed for the father were no more than clinging emotions, because he is staying with his father for some time now. There is nothing expressed in the minor's words that may persuade the Court to decide against the mother, or in the father's favour. The mother's insistence to hold the custody of the minor is more than a mere wish.

25. In the entirety of the circumstances of the present case, this Court is satisfied that *prima facie* the welfare of the minor would be better secured in the mother's hands. This Court makes it clear that the conclusions recorded above are tentative in nature. If the father still thinks that on a more meticulous analysis of evidence that he can adduce, it may be shown that welfare of the minor is better secured in his hands than the mothers, it would be open to respondent no.4, the minor's father, to institute proceedings under the Guardian and Wards Act, 1890 before the court of competent jurisdiction to establish his right to custody. If that course is adopted, nothing said here will be read for or against either of the parties and the concerned Court will decide in accordance with law on basis of the evidence adduced.

26. In the result, this habeas corpus writ petition succeeds and is **allowed**. The *rule nisi* is made absolute. Let custody of the minor Asif, who is present in Court, be handed over to the mother Rinku Rukshar forthwith. She is also present in Court. The father, Arshad will have visitation rights once a month on the second Tuesday of every month between 10:00 a.m. to 01:00 p.m. The mother Rinku Rukshar and all her family members with whom she stays, will extend due courtesy and facilitate the minor's meeting with his father, Arshad.

27. Let this order be communicated to the Senior Superintendent of Police, Prayagraj by the Joint Registrar (Compliance).

(2020)11ILR A197
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2020

BEFORE

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

Habeas Corpus Writ Petition No. 507 of 2020

Gautam Saroj & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mohd. Aqueel Khan

Counsel for the Respondents:
G.A., Sri Manoj Kumar Pandey

Civil Law - The Hindu Minority and Guardianship Act- Section 6(a) - The minor's welfare, without exception, has always been regarded as a matter of paramount consideration when the question is about appointment or declaration of a guardian or the custody of a minor *inter se* natural guardians.

It is settled law that while deciding the custody of a minor, the consideration of the welfare of the minor is of paramount importance.

The Guardians and Wards Act, 1890- Section 17(2) - It is true that in situations where a natural guardian like a father or the mother is facing criminal trial for the other's murder or unnatural death, as is the case here, Courts have been generally reluctant to entrust custody to such parents, unless they are acquitted and come out clean. This, however, is not an inflexible *rule* that the moment a parent is charged with a homicidal crime relating to the other's death, he/she is to be deprived of his/her children's custody. The Court must consider the circumstances of the crime, not with a view to pronounce upon guilt or otherwise, but to broadly gauge whether indeed the circumstances are such that the minor's custody cannot be trusted in the hands of the surviving spouse.

It is not an inflexible rule that where one of the parent is charged with the homicidal death of the other, he would be deprived of the custody of the child.

The Guardians and Wards Act, 1890- Section 17(2) -The father's conduct is not apparently so blameworthy as may dis-entitle him to the child's custody, *ipso facto*- The added circumstance that the father is taking care of his other child, who is the minor's sister and younger to her - There is no complaint by the 4th respondent about the other child's welfare being, in any manner, not ensured with the father.

In the facts of the case, the character and conduct of the father, though allegedly involved i the homicidal death of his wife, is not such that could disentitle him from the custody of the child moreso when the father is taking care of the other child without any complaint.

Habeas Corpus petition allowed.
(Para 18, 21, 25, 26) (E-3)

Case law/ Judgements relied upon:-

Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413

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

1. This petition for a writ of habeas corpus has been effectively brought by the first petitioner, Gautam Saroj praying that the second petitioner, Garima, his minor daughter may be ordered to be produced from the custody of Ganesh Prasad, respondent no. 4, the minor's grandfather (maternal) and set at liberty in the manner that her care and custody be entrusted to Gautam Saroj.

2. This petition was admitted to hearing on 12.10.2020 and a *rule nisi*

returnable on 21.10.2020, was issued. In compliance with the *rule*, Mr. Manoj Kumar Pandey, Advocate appeared for respondent no. 4. He has chosen not to file a counter affidavit on behalf of the said respondent. This Court, accordingly, proceeds to hear the matter.

3. During the hearing, the Court has spoken to the minor's grandfather (maternal), Ganesh Prasad, respondent no. 4 and the minor's father, Gautam Saroj. The Court has also spoken to the minor, Garima, who is aged three years and a half. She does not attend school yet. The Court has interacted with the child mindful of her tender years. She seems to be a bright child but too young to express an intelligent choice about her guardian or the person in whose custody she would like to be.

4. This Court, while speaking to the minor's father on one hand and to her grandfather (maternal) on the other, has tried to ascertain their respective circumstances, their relations *inter se*, the circumstances under which the minor's mother met an unnatural death - all to the end of determining in whose custody the welfare of the minor would be best secured.

5. Heard Mr. Mohd. Aqeel Khan, learned counsel for the petitioner, Mr. Manoj Kumar Pandey, learned Counsel for respondent no. 4 and Mr. Gyan Prakash Singh, learned State Law Officer appearing for the State.

6. The broadly undisputed facts are that marriage of Rachna Devi d/o Ganesh Prasad was solemnized with Gautam Saroj on 05.03.2016, according to Hindu rites. Two daughters were born to the couple, to wit, Garima, now aged about three years and a half and Karishma, aged about two years. Gautam Saroj says that his wife Rachna Devi met with an accident by fire on 09.04.2019, while she was cooking food. Gautam Saroj also says that he took his injured wife to the hospital for treatment. She died during treatment at the hospital on 09.04.2019. Ganesh Prasad, respondent no. 4, lodged a first information report on 14.04.2019 against Gautam Saroj, the first petitioner and other members of his family, giving rise to Case Crime No. 253 of 2019, under Sections 498-A, 304-B I.P.C. and Section ¾ D.P. Act, P.S. Barra, District Kanpur Nagar. It appears that the police investigated the matter and submitted a final report dated 09.05.2019, on 30.05.2019, exculpating all the accused, including Gautam Saroj.

7. A reading of the Final Report, that is on record, shows that the conclusion to exculpate Gautam Saroj and the other accused was reached by the police, bearing in mind a dying declaration of the deceased, which, in the opinion of the police, did not show that the husband or the in-laws were, in any manner, involved in the occurrence that was a pure and simple accident. Gautam Saroj has very candidly stated and brought on record a xerox copy of the final report and said that though he was exculpated by the police, the learned Magistrate has taken cognizance of the offence against him on the basis of the said report vide order dated 25.10.2019, passed in Misc. Case No. 5409 of 2019. Gautam Saroj has, thus, been summoned to stand his trial in the case. It is, however, added that the Magistrate has taken cognizance of the offence for no good reason.

8. It is pointed out that on the day that the police filed a final report in the case, that is to say, July the 30th, 2019, Ganesh Prasad took away the minor, Garima

illegally from the custody of her father Gautam Saroj and refused to send her back. Gautam Saroj moved an application before the Station House Officer, P.S. Barra, District Kanpur Nagar on 30.07.2019 regarding this incident, which is said to have taken place at about ten minutes past seven o'clock in the evening hours. Once the police did not take any action in the matter, Gautam Saroj moved the Special Chief Judicial Magistrate, Kanpur Nagar on 19.08.2019, invoking the provisions of Section 156(3) Cr.P.C. He prayed to the Magistrate that the police be ordered to register and investigate the case. A copy of the said application is on record as Annexure No. 4, which discloses the details of the incident and also the fact that the Senior Superintendent of Police too, was moved through a written application to order registration of a case against the 4th respondent.

9. It appears that the Special Chief Judicial Magistrate called for a report from the police station. The police submitted a report dated 16.10.2019, that the minor Garima was indeed taken away by Ganesh Prasad and that now he was ready to hand over the child back to her father, Gautam Saroj. The police, however, opined that the minor was taken away in the background of deep hostilities between parties after the minor's mother died, but there was no evidence of any act of kidnapping.

10. The Court has perused the aforesaid police report submitted to the Magistrate. The Magistrate, on the basis of the police report, proceeded to reject the application under Section 156(3) Cr.P.C. That order of the Magistrate is also on record. It is claimed by Gautam Saroj that it was after rejection of his application under Section 156(3) Cr.P.C. that Ganesh Prasad refused to send Garima back to Saroj. Instead, he demanded a sum of Rs. 5 lacs in lieu of that favour.

11. This Court must remark at once that the allegation regarding Ganesh Prasad, demanding a sum of Rs. 5 lacs, in lieu of repatriating his maternal grand daughter to her father's home, appears to be an exaggeration stemming from the mutual bitterness that parties suffer from, under the unfortunate circumstances that they are placed in.

12. Mr. Khan, learned counsel for the petitioner has emphasized the fact that the father is the natural guardian of a minor under Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and in his presence, the maternal grandfather has no right to hold the child's custody. He submits that the welfare of the minor too, would be better secured with the father than with the grandfather (maternal). It is pointed out by the learned counsel for the petitioners that the father already has the care and custody of his other daughter, much younger to the detenue, who is well adapted in the father's home. The family are already a victim of misfortune, where the children have lost their mother. It is urged that the two sisters, staying together, would have a better effect on the overall development of both the young children. It is also emphasized that the father has means enough to maintain both his daughters and the necessary inclination to groom them into useful citizens.

13. It is re-emphasized by Mr. Khan that the father, being the natural guardian under the statute, that legislative command cannot be ignored, discounted or trifled with. According to him, children's interest are normally presumed to be best taken

care of by their parents. Where one of them is lost, the other is to be regarded as best suited to bring up his/her minor children. Learned counsel for the petitioner has emphasized that the criminal prosecution that has been brought against Gautam Saroj and his family members, is not to be regarded as a disentitling factor, once the totality of circumstances are considered. On behalf of Gautam Saroj, it is urged that the minor's welfare would be best ensured with her father and that it would be ensured far better than it would be with the grandfather.

14. Mr. Manoj Kumar Pandey, learned counsel for the 4th respondent has vociferously disputed Gautam Saroj's case. Mr. Pandey submits that there is material on record to show that Garima was home alone after the FIR was lodged by the 4th respondent against Saroj and his family. Finding his granddaughter alone, Ganesh Prasad had brought her along and is taking care of her along with his wife. It is urged that Gautam Saroj is facing a serious criminal charge about doing his wife to death. Unless acquitted, he is not a person fit to take care of the child. It is emphasized by Mr. Pandey that a natural guardian, who is facing trial on a criminal charge, is most unsuitable to be entrusted with the minor's care and custody. Learned counsel emphasizes that the welfare of the minor has many facets. Prime, according to learned counsel, is the inculcation of good moral values. He submits that a man, who is facing a criminal charge about causing his wife's death, would do disservice to the minor's moral grooming.

15. This Court has given a thoughtful consideration to the rival contentions and the material on record. The Court has also borne in mind whatever could be gathered about the circumstances of the parties vis-a`-vis the welfare of the minor.

16. The preference of the minor about who would have her care and custody, in a delicate relationship between the parties, is important. But, for that preference to be taken into account by the Court, the minor must be, to borrow the phraseology of Section 17 (3) of the Guardians and Wards Act, "old enough to form an intelligent preference". Here, the minor is far below that age, as this Court has already remarked.

17. This Court finds from a close interaction with the father that he is a Physiotherapist by profession. He holds a diploma in Physiotherapy and currently pursuing a course leading to a bachelors degree at the Himalaya University. He has earned his diploma from the Roopa Medical College, Kanpur Nagar. He has given this Court to understand that he has a professional income of Rs. 25,000/- per mensem and pays income tax. He has his mother, father and a sister at home. Besides them, the minor's younger sister, Karishma is also there. About the circumstances leading to his wife's death, he told the Court that he was away to Prayagraj when the incident happened. The accident was caused by a leak in the gas cylinder. Saroj is presently aged 33 years. He has not remarried. To the Court's question, if he wishes to remarry, he said that he has not thought about the matter. The minor's grandfather, respondent no. 4, Ganesh Prasad, on the other hand, told the Court that his daughter was set afire by her husband and in-laws. He said that he had lodged an FIR, but the police put in a final report. He had approached the higher authorities of the police, but to no avail. He is employed with the Jal Nigam as a Peon.

18. No doubt, the father is the natural guardian of a minor, and that status is conferred upon him by Section 6(a) of the Hindu Minority and Guardianship Act, but so far as the question of choice about a guardian for the minor is concerned, or so to speak, his/her custody is concerned, the statute, last mentioned, makes provision under Section 13 that mandates that the welfare of a minor in the matter of appointment and declaration of his/her guardian is of paramount importance. The minor's welfare, without exception, has always been regarded as a matter of paramount consideration when the question is about appointment or declaration of a guardian or the custody of a minor *inter se* natural guardians. The welfare is to be tested on various parameters. Some of them, but not all, are spelt out by Section 17(2) of the Guardians and Wards Act, 1890. These are, the minor's age, sex and religion. The proposed guardian's character and capacity, besides his nearness of kin to the minor, are also envisaged. The wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property are also to be taken into account. It is only in cases where the minor is old enough to express an intelligent preference that his/her choice also gains importance. But, these criteria are not exhaustive. These serve as broad guidance in judging subtler aspects of human relationship and the minor's interest. What is not lost sight of is the principle that a custody dispute relating to a minor is not about the right which the guardian may have under the law. It is about the welfare of the minor and where it would be best secured.

19. The necessary wherewithal to fund the minor's basic needs about food, shelter and clothing would, of course, require the Court to ensure that the person who asks for the minor's custody, has it. The guardian's education and his ability to provide the minor with reasonably good education would be of great importance. The ability to provide good education does not come from mere financial capacity to fund education. The Court has to bear in mind the fact whether the guardian himself/herself is educated enough to guide the minor's education so that his formal education in school may become meaningful and come to fruition. Above all, it would be instilling in the minor good human values without which physical comforts of life and the mental training imparted through education would be of little consequence.

20. This Court has little doubt that the father has the necessary wherewithal to provide for the minor. He also has seemingly better education than the grandfather. The only serious issue, that has been debated with much vehemence before this Court, is about the minor's moral training and development, which the learned counsel for the 4th respondent says, would suffer in the hands of a father who is facing trial for the murder of the minor's mother, his wife.

21. It is true that in situations where a natural guardian like a father or the mother is facing criminal trial for the other's murder or unnatural death, as is the case here, Courts have been generally reluctant to entrust custody to such parents, unless they are acquitted and come out clean. The principle is that a person whose moral uprightness is under a cloud of doubt, ought not to be trusted with a child's moral grooming. This, however, is not an inflexible *rule* that the moment a parent is charged with a homicidal crime relating to

the other's death, he/she is to be deprived of his/her children's custody. What is required is that the Court must consider the circumstances of the crime, not with a view to pronounce upon guilt or otherwise, but to broadly gauge whether indeed the circumstances are such that the minor's custody cannot be trusted in the hands of the surviving spouse.

22. In **Nil Ratan Kundu and Another vs. Abhijit Kundu, 2008 (9) SCC 413,** dealing with the issue relating to custody between the minor's grand parents (maternal) and his father, where the mother had become the victim of an unnatural death in her matrimonial home, and the husband was facing trial for offences under Sections 498-A, 304-B I.P.C. etc., it was held by their Lordships of the Supreme Court thus:

62. Now, it has come in evidence that after the death of Mithu (mother of Antariksh) and lodging of first information report by her father against Abhijit (father of Antariksh) and his mother (paternal grandmother of Antariksh), Abhijit was arrested by the police. It was also stated by **Nil Ratan Kundu** (father of Mithu) that mother of accused Abhijit (paternal grandmother of Antariksh) absconded and Antariksh was found sick from the house of Abhijit.

63. In our considered opinion, on the facts and in the circumstances of the case, both the courts were duty-bound to consider the allegations against the respondent herein and pendency of the criminal case for an offence punishable under Section 498-A IPC. One of the matters which is required to be considered by a court of law is the *"character"* of the proposed guardian. In *Kirtikumar* [(1992) 3 SCC 573 : 1992 SCC (Cri) 778] , this Court, almost in similar circumstances, where the father was facing the charge under Section 498-A IPC, did not grant custody of two minor children to the father and allowed them to remain with the maternal uncle.

64. Thus, a complaint against the father alleging and attributing the death of the mother, and a case under Section 498-A IPC is indeed a relevant factor and a court of law must address the said circumstance while deciding the custody of the minor in favour of such a person. To us, it is no answer to state that in case the father is convicted, it is open to the maternal grandparents to make an appropriate application for change of custody. Even at this stage, the said fact ought to have been considered and an appropriate order ought to have been passed.

23. A reading of their Lordships decision in **Nil Ratan Kundu** *(supra)*, particularly on the point in hand, does not show it to be an inflexible *rule* laid down that in all cases where one parent is facing a criminal prosecution for the other's unnatural death, his/her claim to the minor's custody must, in all cases, be negatived. It has been emphasized as an important factor, which the Court must consider before deciding upon what order about custody ought to be made. In **Nil Ratan Kundu** *(supra)*, the approach of the lower courts who said that in case the father were convicted, it would be open to the maternal grandparents to claim the minor's custody, was held to be flawed.

24. To the understanding of this Court, what would make the case of one natural guardian, facing charges for the unnatural death of his/her spouse, different from the other, would be his/her conduct and the circumstances in which he/she has

come to be arraigned. Else, it would not have been held by their Lordships that the pendency of a criminal case under Section 498-A I.P.C. etc. would be a relevant factor, which the Court must address while deciding a minor's custody. It would have been laid down as an inflexible *rule* that an arraigned parent ought not to be entrusted with the minor's custody till he/she comes out clean with a judgment of honorable acquittal. This is not the *rule* laid down, to this Court's understanding, in **Nil Ratan Kundu** *(supra)*. It is on account of this feature of the principle in **Nil Ratan Kundu** *(supra)* that the circumstances of each case ought to be considered by the Court whenever the issue about the custody of a minor being entrusted to a parent, who is facing charges about the death of the other, arises.

25. In **Nil Ratan Kundu** *(supra)*, their Lordships noticed the facts which show that upon death of the minor's mother, the husband was arrested by the police. Here, the facts show that the FIR did not lead to any immediate arrest. Rather, a dying declaration of the deceased was recorded, exculpating the husband and her in-laws. It is on the basis of the said dying declaration that a final report was filed. It is quite another matter that the Magistrate, on the basis of some material in the case diary, found it a case where the final report recommending closure of proceedings, ought to be rejected. It does show, however, but limited to judge the father's suitability to hold the minor's custody, that the father's conduct is not apparently so blameworthy as may dis-entitle him to the child's custody, *ipso facto*. There is also the added circumstance that Gautam Saroj is taking care of his other child, who is the minor's sister and younger to her. There is no complaint by the 4th respondent about the other child's welfare being, in any manner, not ensured with the father. The 4th respondent has not asked for the other minor's custody. This would indicate that the 4th respondent too, does not altogether distrust his son-in-law.

26. On the other hand, the fact cannot be lost sight of that, in case, the minor and her younger sister are separated, by being placed in two different families, it might adversely affect the children's development together. The two minors are not just siblings, but very close in their years. They would be happier together than separated. It hardly need be gainsaid that a happy and congenial atmosphere is also of great importance in ensuring a happy and satisfied childhood; in turn, it is a harbinger to a balanced and well-groomed youth. The two minors, torn apart, might suffer more psychologically than if they were placed together in the same family. Also, the father has presently not remarried. The possibility that he may, cannot be *rule*d out. But it is a possibility and no more. The minors also have two paternal grandparents at home, besides each others company, which would develop into a strong bond at the age that they are. In the circumstances, the custody that the father asks for, *prima facie*, certainly promises a better welfare for the minor detenue than what would obtain in the 4th respondent's hand.

27. At the same time, this Court makes it clear that a custody dispute decided in a habeas corpus matter is a summary determination. The party, in whose favour this Court has not found, that is to say the 4th respondent, would be at liberty to establish a superior claim to custody through regular proceedings taken before the Court of competent jurisdiction under the Guardians and Wards Act. This

tentativeness about the determination made here proceeds on the nature of the jurisdiction that is exercised primarily on limited evidence, founded on affidavits and some interaction. A final determination, therefore, ought to be left to the Court of competent jurisdiction, where intricate questions on facts can be better gone into, if the aggrieved party chooses to avail that remedy.

28. It is made clear, in case, the 4th respondent moves the Court of competent jurisdiction under the Guardians and Wards Act through an appropriate petition asking for the minor's custody, or may be the custody of both minors involved here, it will be open to that Court to decide his claim vis-a-vis the first petitioner, strictly in accordance with law and the evidence led, without being influenced by anything said in this judgment.

29. In the result, this habeas corpus writ petition succeeds and is **allowed**. The *rule nisi* made is **absolute.** The minor, Garima, is set at liberty in the manner that her custody shall be handed over to her father, Gautam Saroj, who is present in Court. The father, Gautam Saroj, the minor, Garima and the minor's grandfather (maternal) are all present in Court. The 4th respondent, Ganesh Prasad, has handed over the minor's custody to Gautam Saroj in Court.

30. However, looking to the relationship between parties and the fact that the 4th respondent, Ganesh Prasad is the minor's grandfather (maternal), he is found entitled to meet and interact with the minor. It is ordered that the first petitioner, Gautam Saroj shall permit Ganesh Prasad to meet the minor, Garima once a month, on the second Sunday between 10:00 a.m. to 01:00 p.m. at Gautam Saroj's residence. If for some reason, the aforesaid schedule cannot be adhered to, it shall be mutually determined between the parties, but not so as to infringe the minimum monthly meeting once for the grandfather (maternal). It is further directed that during the grandfather's meetings with the minor, Gautam Saroj and his family members shall extend due courtesy to Ganesh Prasad and facilitate the meetings.

31. Let this order be communicated to the learned District Judge, Kanpur Nagar and the Senior Superintendent of Police, Kanpur Dehat by the Joint Registrar (compliance). The learned District Judge and the Senior Superintendent of Police shall act in aid of this order.

(2020)11ILR A204
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE

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

Habeas Corpus Writ Petition No. 2805 of 2018

Km. Vaibhavi Sharma (Minor) & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Gulab Chandra

Counsel for the Respondents:
A.G.A., Sri Anil Tiwari, Sri Sharda Prasad Mishra

Constitution of India- Article 226- Habeas Corpus Writ Petition- Maintainability of- It is only in cases where the question of welfare of the minor is enmeshed in complicated detail of facts and evidence

and this Court is handicapped to determine those questions in the exercise of its writ jurisdiction, that parties may be asked to approach the competent Civil Court, invoking jurisdiction under the Guardians and Wards Act. In all other cases, the Court can and must decide the question of illegal confinement between close family members, even parents of the minor. The determination made by this Court in a petition for a writ of habeas corpus is summary in nature- The decision of the Judge under the Guardians and Wards Act would prevail upon this Court's determination in summary proceedings for the issue of a writ of habeas corpus.

A Writ of Habeas Corpus may be issued where complicated and disputed questions of facts are not involved- Proceedings before this Court being summary in nature, the aggrieved party can always take recourse to proceedings under the Guardians and Wards Act and judgement pronounced in the same shall prevail over that pronounced by this Court.

The Hindu Minority and Guardianship Act, 1956- Section 6(a)- Section 13- Have to be harmoniously construed- In some cases, though a natural guardian, whose right is disputed as such, may have to seek a declaration about his legal status. There, the provisions of Section 13 would apply *proprio vigore.*

Where the right of custody of a natural guardian is disputed then he may have to seek a declaration for his right of custody of the minor u/s 13 of the Act.

Constitution of India- Article 226- Habeas Corpus Writ Petition – Custody of minor with grandfather- The fourth respondent has shown that the detenue lives happily in his household, where she is taken care of, physically, emotionally and morally, and in all other necessary facets of her life and personality. On the other hand, there is one decisive feature that this Court cannot ignore. The father has remarried and there is a stepmother for the minor-detenue, if she were asked to be placed in the father's household -The presence of a step-parent in the household of his/ her parent is certainly a strong circumstance that would weigh against the father's claim to custody; at least, in these summary proceedings it would be a very important factor. There is then the fact that the minor has stayed with the grandfather in his household, almost since her birth. In the circumstances, it would be very unjust to uproot her from that family and transplant her in her father's household. There is no such circumstance obtaining here that may persuade this Court to hold the grandfather's custody of the minor to be unlawful.

A natural guardian/ father may not get the custody of the child where it is shown that he has re-married, is unemployed or is uneducated and the child is already being taken care of by the person who is not a natural guardian, since the welfare of the child is the paramount consideration.

Habeas Corpus petition rejected.

(Para 16, 19, 20) (E-3)

List of Cases Cited:-

1. Syed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

2. Nithya Anand Raghavan Vs State (NCT of Delhi) & anr., (2017) 8 SCC 454

3. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

4. Yashita Sahu Vs St. of Raj. & ors., (2020) 3 SCC 67

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

1. Akhilesh Sharma, the second petitioner says that his minor daughter, Km. Vaibhavi Sharma is in the unlawful detention of Surya Kant Sharma, the minor's grandfather (maternal) and the fourth respondent to this petition. Akhilesh Sharma wants this Court to issue a writ, order or direction in the nature of habeas

corpus to liberate his minor daughter, Km. Vaibhavi Sharma from unlawful custody of the fourth respondent and to entrust the minor's custody to him.

2. A *rule nisi* was issued in this case on 05.10.2020, ordering the minor to be produced before this Court on 08.10.2020. The minor was produced. At the hearing of the rule, besides the minor, Km. Vaibhavi Sharma, who was produced by the police, the minor's father, Akhilesh Sharma and her grandfather, Surya Kant Sharma, were also present. This Court individually ascertained the stand of each of these parties, including the minor. This Court, particularly, inquired of the minor, her choice and comfort in the matter of custody. The Court also spoke to the minor's father and her grandfather (maternal), not only to ascertain their stand, but to gain acquaintance with so much of their affairs as would materially bear on the minor's welfare.

3. This cause has arisen in the backdrop of facts that Akhilesh Sharma, the second petitioner and Smt. Priyanka Sharma were married according to the Hindu rites at Bulandshahr on 16.02.2004. The late Smt. Priyanka Sharma was Surya Kant Sharma's daughter. Akhilesh Sharma and Smt. Priyanka Sharma lived together in their matrimonial home. Two children, a son, Vaibhav and Km. Vaibhavi Sharma, a daughter were born of the wedlock of parties. Vaibhav Sharma was born on 24.07.2006, whereas Km. Vaibhavi Sharma (the detenue) was born on 05.11.2013. As misfortune would have it, Smt. Priyanka Sharma met with an accident by fire while cooking on 11.07.2014. Akhilesh Sharma is said to have done his best to save his wife, but in vain. Akhilesh Sharma too, sustained serious burn injuries in the incident. Smt. Priyanka Sharma died of her injuries on 17.07.2014, during treatment at the Dr. Ram Manohar Lohia Hospital, New Delhi. Akhilesh Sharma was not prosecuted for any offence relating to his wife's accidental death, his innocence being known to the wife's family, including the fourth respondent. It appears that after Priyanka's death, the parties' minor children, Vaibhav and Km. Vaibhavi Sharma continued to live with their grandmother (paternal), Smt. Meena Sharma, who took good care of them. The son, Vaibhav is reading at the Heritage Academy, Modi Nagar, District Ghaziabad.

4. Akhilesh Sharma has moved on in life and has remarried one Smt. Sadhna Sharma. He remarried on 05.02.2016, well within the knowledge of Surya Kant Sharma and other kinsmen of his deceased wife. Smt. Sadhna Sharma is a Trained Graduate Teacher and employed as such in a School at Modi Nagar. She is claimed to be in receipt of a salary of Rs.6000/- per mensem. In addition, Smt. Sadhna Sharma also undertakes private tuitions, that yield her a further income of Rs.4000/- per month. Akhilesh Sharma claims to be well educated and a qualified young man, who undertakes private tuitions, that yield him an income of Rs.25,000/- per month. He is an income tax payee. Akhilesh Sharma says that when the detenue was an infant of eight months, she was taken away by Surya Kant Sharma with the assurance that as soon as she grows a little older and becomes a manageable child, she would be entrusted back into the care and custody of her father. This happened before Akhilesh Sharma remarried.

5. It is also claimed by Akhilesh Sharma that Km. Vaibhavi Sharma came back to him in the month of May, 2017, comfortably settling in her father's family.

Surya Kant Sharma visited Akhilesh Sharma on 15.06.2017 and persuaded him to permit Km. Vaibhavi Sharma to accompany her grandfather (maternal) for a few days. Akhilesh Sharma agreed and Km. Vaibhavi Sharma went along with the fourth respondent. Akhilesh Sharma says that he went to Surya Kant Sharma's place on 21.06.2017 to fetch his daughter back, but the latter demanded money spent on the child's board and lodging. Surya Kant Sharma is claimed to have badly insulted Akhilesh Sharma and refused to allow the detenue to accompany her father. This led to a complaint by Akhilesh Sharma to the Police. And, that is how a cause about illegal confinement has arisen.

6. The aforesaid broad statement of facts is based on how Akhilesh Sharma, the second petitioner has brought up this cause. There are some matters, about which parties are ad idem; but there are more, where the parties are at issue. Surya Kant Sharma has filed a counter affidavit, dated 14.05.2018 in compliance with the notice issued by this Court vide order dated 30.01.2018. The following facts have been brought out in the fourth respondent's counter affidavit: Akhilesh Sharma's wife and the fourth respondent's daughter died in circumstances that are not benign. There was a background of cruelty and harassment for dowry. Her death occurred under suspicious circumstances, as a result of burn injuries. Surya Kanta Sharma's family did their best to know the circumstances in which their daughter perished in the fateful accident by fire, but to no avail. It is hinted that an FIR was not lodged because there was some other matrimonial alliance between the two families.

7. All this may not be very relevant and this Court would be content to remark that Akhilesh Sharma, for whatever reason, was not prosecuted vis-a-vis his wife's death. It is then pointed out on behalf of the fourth respondent that Akhilesh Sharma is not a highly qualified person, but a graduate. He does not have any diploma or a higher degree, entitling him to teach. Akhilesh Sharma lives separately in his father's house. He has no secured job or a dependable income. His mother is an illiterate woman and a simple housewife. She is aged 65 years. Akhilesh Sharma's brother stays away from their father's family. He too does not have any dependable source of income. He is married and has a daughter. Akhilesh Sharma has married Sadhna, a divorcee on 05.02.2016. Sadhna too does not possess any qualifications, entitling her to teach. She is a shrewd woman, who does not take care of Akhilesh Sharma's son, Vaibhav, who has stayed on in his father's home. The atmosphere at Akhilesh Sharma's home is not conducive to a healthy grooming for the detenue. Akhilesh Sharma's father, Pt. Deoki Nandan Sharma has renounced the world and become an ascetic *(Sadhu)*. Akhilesh Sharma, his brother and mother, all stay separately.

8. About himself, Surya Kant Sharma says that he is a retired employee of the U.P. Power Corporation. He retired as a Technician Grade-2. He has two sons: one a reputed businessman and the other an Advocate, practicing at the District Court, Bulandshahr. His daughters-in-law are also educated women, who take good care of the detenue. The fourth respondent's wife too is a literate woman and has a caring hand for the detenue, who is her deceased daughter's daughter. The detenue is happy in her grandfather's home. It is also asserted for a fact by Surya Kant Sharma that his grandson, who lives in his father's

household, complains to him about the misbehaviour of his stepmother (Akhilesh Sharma's wife), during telephonic conversation and occasional meetings. It is also said that Akhilesh Sharma had given the custody of his eight months' old infant daughter to Surya Kant Sharma on condition that he would not reclaim ever in the future.

9. During the hearing of this rule, this Court spoke to Km. Vaibhavi Sharma, the minor. She appears to be an intelligent child, all of seven years. She told the Court that she lives with her maternal grandparents *(Nana and Nani)* and goes to School. She reads in Class-II at the St. R.J. Public School. She also has a friend there going by the name, Mansi. She knows that her father stays at Modi Nagar and informed the Court that her father speaks to her over cellphone. She said in unqualified terms that she wants to stay with her maternal grandparents and does not want to go to her father. On being asked if the father loves her, she answered in the affirmative. The child was asked if she wanted to meet her father; she answered in the negative. The Court asked her if she wanted to meet her father at home, to which she signified her approval, nodding her head in affirmation supplementing her words.

10. Surya Kant Sharma told the Court that he was 61 years old and a retired employee of the U.P. Hydel Department. He is in receipt of pension. Back home, he has a wife, two sons, two daughters-in-law and three grand children. On being asked pointedly about the objection that he has to the minor being given into the custody of her father, he cited the father's remarriage as a cause of concern and the basis to object. He also said that the father has hardly an income of Rs.2000/- - 3000/- from the job that he undertakes. He also informed the Court that the minor has been staying with him since she was seven months old and that he is all inclined to bring up the minor.

11. The second petitioner, Akhilesh Sharma told the Court that he is 43 years old and his wife, the minor's mother died in an accident. He said that he has his mother, father, a brother and his wife at home. He did not dispute the fact that he has remarried. He further urged that his wife works in a private School, whereas he does business of dealing in scrap and also runs a coaching centre. He told the Court that he could earn Rs.3 - 4 lakhs a year. Akhilesh Sharma also told the Court that he has an average monthly income of Rs.50,000 - 60,000/-. Upon a pointed question as to why he did not ask earlier for the minor's custody, he said that he sustained injuries in the accident and was then not in a position to raise the infant. About his present desire to have his daughter's custody, Akhilesh Sharma said that he had asked for her custody much earlier, but the fourth respondent never agreed.

12. Heard Mr. Gulab Chandra, learned Counsel for the petitioners, Mr. Sharda Prasad Mishra, learned Counsel appearing on behalf of respondent no.4 and Mr. S.K. Pal, learned Government Advocate appearing on behalf of the State-respondents.

13. Mr. Gulab Chandra, learned Counsel for the petitioners submits that the second petitioner is the detenue's natural guardian by virtue of Section 6(a) of the Hindu Minority and Guardianship Act, 1956, and that the father being around and seeking his minor daughter's custody, the

minor's mother's father has no right under the law. He submits that quite apart from the law, the minor after all is part of his father's family, where her welfare would be far better secured than with the grandfather. It is argued that notwithstanding his second marriage, he has taken care of his son with no trouble. He has the necessary wherewithal to support and raise his minor daughter, the detenue. The fourth respondent's case about the second petitioner's wife ill-treating his son, Vaibhav is bereft of any evidence. Nothing has been brought on record to show that Vaibhav has any complaint in his father's household or that his welfare is in any manner adversely affected by the presence of the stepmother. Rather, the second petitioner's wife takes care of the child with all fondness and affection of a mother, which is essential to a child's balanced development.

14. Mr. Mishra appearing on behalf of the fourth respondent on the other hand says that there is no explanation why the minor was not accepted in the father's home when his wife passed away; or, as he says that there is no reason demonstrated why the father entrusted the custody of an infant daughter to her grandfather, which he now reclaims after years. The child's welfare is well taken care of by the grandfather, the grandmother, their two sons and their wives. There are other grandchildren of the fourth respondent, who are all integrated into a family with the minor being part of it. There is no case of unlawful detention. Mr. Mishra submits that there is no evidence brought on record to indicate that the minor's custody was handed over back to the father by the fourth respondent and then retaken. The minor has always been with her grandfather since she was seven months old. The fourth respondent has a Government pension to support the minor, whereas the second petitioner has no known source of income. The minor is, therefore, financially also insecure within her father's household.

15. Mr. S.K. Pal, learned Government Advocate has raised an objection about the maintainability of this petition. He submits that this petition does not disclose a cause of action for the issue of a writ of habeas corpus or some order in the nature of it. According to Mr. Pal, it is a custody dispute simpliciter, where the parties ought to approach the Court of competent jurisdiction under the Guardians and Wards Act, 1890. This petition, according to the learned Government Advocate, is not maintainable.

16. The issue whether a writ of habeas corpus in custody dispute about a minor is maintainable is no longer *res integra* in view of the decisions of the Supreme Court in **Syed Saleemuddin v. Dr. Rukhsana and Ors., (2001) 5 SCC 247, Nithya Anand Raghavan vs. State (NCT of Delhi) and another, (2017)8 SCC 454, Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42 and Yashita Sahu vs. State of Rajasthan and others, (2020) 3 SCC 67.** It is only in cases where the question of welfare of the minor is enmeshed in complicated detail of facts and evidence and this Court is handicapped to determine those questions in the exercise of its writ jurisdiction, that parties may be asked to approach the competent Civil Court, invoking jurisdiction under the Guardians and Wards Act. In all other cases, the Court can and must decide the question of illegal confinement between close family members, even parents of the minor. Of course, the determination made

by this Court in a petition for a writ of habeas corpus is summary in nature. It is always subject to the right of the disillusioned party approaching the Court of competent jurisdiction under the Guardians and Wards Act asking for the minor's custody. The decision of the Judge under the Guardians and Wards Act would prevail upon this Court's determination in summary proceedings for the issue of a writ of habeas corpus. The petition is, therefore, held maintainable.

17. Now turning to the merits of the case, much has been made by Mr. Gulab Chandra of the fact that the second petitioner is the detenue's father and under Section 6(a) of the Hindu Minority and Guardianship Act, 1956 is the natural guardian. Section 6 of the Hindu Minority and Guardianship Act, 1956 is extracted below:

"**6. Natural guardians of a Hindu minor.**--The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother:

Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl--the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a stepfather and a stepmother."

18. Here, Section 13 of the Act under reference is also relevant, which reads:

"**13. Welfare of minor to be paramount consideration**.--(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

19. No doubt, the father is the natural guardian and normally it is presumed that welfare of the children is best secured in the hands of their parents; but, it is not an inflexible rule. Irrespective of the fact as to who the natural guardian is, the decision about custody of a minor is one where the minor's welfare is of paramount consideration. All legal rights to the minor's custody in favour of the natural guardian under the Personal Laws, codified or uncodified, stand subordinated to the consideration about the minor's welfare. Obviously, once the Court is required to determine who would best secure the minor's welfare, there cannot be a

straitjacket formula about it. It is a question that has to be sensitively judged by the Court bearing in mind fine personal details about the parties, the circumstances and their behaviour. It must be remarked that Section 13 of the Hindu Minority and Guardianship Act, 1956 read with Section 6(a) have to be harmoniously construed. There is, in fact, no conflict between the two. Section 6 spells out the rule about who would be the natural guardian of a Hindu minor, whereas Section 13 envisages a rule by which the appointment or declaration of any person as a guardian of a Hindu minor is to be made. Now, a natural guardian may *stricto sensu* not fall within the mischief of the provisions of Section 13. These provisions relate to persons other than natural guardian, who have to be appointed or declared as such. In some cases, though a natural guardian, whose right is disputed as such, may have to seek a declaration about his legal status. There, the provisions of Section 13 would apply *proprio vigore.* In cases of natural guardian also, the principle embodied in Section 13 must also be extended when the issue is about the custody of the minor. The principle that welare of the minor is of paramount consideration was elaborately considered in ***Tejaswini Gaud*** (supra) by the Supreme Court, where their Lordships held:

"26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in *Nil Ratan Kundu [Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413] , it was held as under: (SCC pp. 427-28, paras 49-52)

"49. In *Goverdhan Lal v. Gajendra Kumar [Goverdhan Lal v. Gajendra Kumar*, 2001 SCC OnLine Raj 177 : AIR 2002 Raj 148] , the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in *M.K. Hari Govindan v. A.R. Rajaram [M.K. Hari Govindan v. A.R. Rajaram*, 2003 SCC OnLine Mad 48 : AIR 2003 Mad 315] , the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In *Kamla Devi v. State of H.P. [Kamla Devi v. State of H.P.*, 1986 SCC OnLine HP 10 : AIR 1987 HP 34] the Court observed: (SCC OnLine HP para 13)

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.'

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

28. Reliance was placed upon *Gaurav Nagpal [Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] , where the Supreme Court held as under: (SCC pp. 52 & 57, paras 32 & 50-51)

"32. In McGrath (Infants), In re [McGrath (Infants), In re, (1893) 1 Ch 143 (CA)] , Lindley, L.J. observed: (Ch p. 148)

"... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only nor merely physical comfort. The word "welfare" must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being. Nor can the tie of affection be disregarded.'

* * *

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in *Mausami Moitra Ganguli case [Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673]* , the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have

also to be noted. They are equal if not more important than the others.

51. The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising it*sparens patriae jurisdiction arising in such cases.*

(emphasis in original)

29. Contending that however legitimate the claims of the parties are, they are subject to the interest and welfare of the child, in Rosy Jacob *[Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840] , this Court has observed that: (SCC pp. 847 & 855, paras 7 & 15)

"7. ... the principle on which the Court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors.

***

15. ... The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned Single Judge, in our view, was correct and we agree with him. The Letters Patent Bench on appeal seems to us to have erred [*Jacob A. Chakramakkalv. Rosy J. Chakramakkal*, 1972 SCC OnLine Mad 90 : (1972) 85 LW 844] in reversing him on grounds which we are unable to appreciate."

30. The learned counsel for the appellants has placed reliance upon G. Eva Mary Elezabath [*G. Eva Mary Elezabath v. Jayaraj, 2005 SCC OnLine Mad 472 :* AIR 2005 Mad 452] where the custody of the minor child aged one month who had been abandoned by father in church premises immediately on death of his wife was in question. The custody of the child was accordingly handed over to the petitioner thereon who took care of the child for two and half years by the Pastor of the Church. The father snatched the child after two and a half years from the custody of the petitioner. The father of the child who has abandoned the child though a natural guardian therefore was declined the custody.

31. In *Kirtikumar Maheshankar Joshi [Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi*, (1992) 3 SCC 573 : 1992 SCC (Cri) 778] , the father of the children was facing charge under Section 498-A IPC and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.

34. As observed in *Rosy Jacob [Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840] earlier, the father's fitness has to be considered, determined and weighed predominantly in terms of the

welfare of his minor children in the context of all the relevant circumstances. The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc. The child Shikha lost her mother when she was just fourteen months and is now being deprived from the love of her father for no valid reason. As pointed out by the High Court, the father is a highly educated person and is working in a reputed position. His economic condition is stable.

35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child."

20. Now in this case too, this Court finds that the minor, Km. Vaibhavi Sharma is an intelligent and bright child. She attends a good School and reads in Class-II. She has expressed her definitive desire to stay in her grandfather's (maternal) household, where she is integrated into the family, almost since birth. She has been with them since she was seven months old. The father has not been able to come up with a logical explanation as to why he entrusted the care of his infant daughter to his father-in-law, the fourth respondent. He has also not been able to show by any evidence the steps he took earlier to secure the minor's custody. The grandfather is a retired Government servant and apparently has means to raise the minor. The minor seems to be happy in her grandfather's household. The emotional comfort and ease that the child finds in his/ her home is key to the development of a balanced personality. Within the limited scope of the inquiry that this Court undertakes in a petition for a writ of habeas corpus, this Court finds that affirmatively speaking the fourth respondent has shown that the detenue lives happily in his household, where she is taken care of, physically, emotionally and morally, and in all other necessary facets of her life and personality. On the other hand, there is one decisive feature that this Court cannot ignore. The father has remarried and there is a stepmother for the minor-detenue, if she were asked to be placed in the father's household. There is no presumption that every stepmother is a vamp, but the presence of a step-parent in the household of his/ her parent is certainly a strong circumstance that would weigh against the father's claim to custody; at least, in these summary proceedings it would be a very important factor. There is then the fact that the minor has stayed with the grandfather in his household, almost since her birth. In the circumstances, it would be very unjust to uproot her from that family and transplant her in her father's household. There is no such circumstance obtaining here that may persuade this Court to hold the grandfather's custody of the minor to be unlawful.

21. It is, however, made clear that it will be open to the second petitioner to establish his entitlement to the minor's

custody before a Court of competent jurisdiction by invocation of such remedy as may be advised. In the event, the second petitioner approaches a Court of competent jurisdiction to establish his claim to the minor's custody, it shall be determined by that Court in accordance with law, without being influenced anything said here.

22. In the result, this Habeas Corpus Writ Petition fails and is **dismissed**. The *rule nisi* is discharged.

23. However, the minor's father, Akhilesh Sharma has a right to meet his daughter and spend time with her. Learned Counsel for the second petitioner has said that unless provision is made for visitation, the right of the father may remain a dead letter. In the circumstances, it is ordered that the second petitioner, Akhilesh Sharma shall be entitled to visit his daughter, Km. Vaibhavi Sharma at Surya Kant Sharma's home, where she lives, on the second Sunday of every month between 10:00 a.m. to 1:00 p.m. He will be allowed by Surya Kanta Sharma to spend time with his daughter. During each of these visits, Surya Kant Sharma and other members of his family shall extend all due courtesy to Akhilesh Sharma. It would be open to the parties to adjust the schedule of these visitations, but not so as to deprive the second petitioner of his right to visit his daughter at least once a month for three hours.

24. Let this order be communicated by the Joint Registrar (Compliance) to the learned District Judge, Bulandshahr, the learned Chief Judicial Magistrate, Bulandshahr and the Senior Superintendent of Police, Bulandshahr.

(2020)11ILR A215
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2020

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Matters Under Article 227 No. 2231 of 2020
(Criminal)

Dhirendra Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Deepak Kumar Kulshrestha

Counsel for the Respondents:
C.S.C.

Civil Law-Negotiable Instrument Act,1881-Section 138-Cheques were dishonoured due to insufficient amount-complain filed-Contended- Cheques were issued by the firm and Petitioner is a proprietor-firm not arraign as accused-Petitioner sole proprietor-no vicarious liability may ever arise-no defect in complaint lodged-Petition dismissed.

Held, Besides, in the case of a sole proprietary concern, there are no two persons in existence. Therefore, no vicarious liability may ever arise on any other person. The identity of the sole proprietor and that of his 'concern' remain one, even though the sole proprietor may adopt a trade name different from his own, for such 'concern'. Thus, even otherwise, conceptually, the principle contained in section 141 of the Act is not applicable to a sole-proprietary concern. **(para 15)**

Petition dismissed. (E-9)

List of Cases cited:-

1. Aneeta Hada Vs M/s Godfather Travels & Tours Pvt. Ltd

2. Devendra Kumar Garg Vs St. of U.P. & anr.

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. The matter under Section 227 of Constitution has been filed by petitioner to set aside the impugned orders dated 31.10.2018 passed by Additional Court No. 3, Agra in Complaint No. 1500 of 2011 (Nepal Singh Vs. Dhirendra Singh) under Section 138 of Negotiable Instruments Act, 1881 and the order dated 6.2.2020 passed by Additional Sessions Judge, Court No. 17, Agra in Criminal Revision No. 552 of 2018 (Dhirendra Vs. State of U.P. and Another) and to quash the summoning order dated 28.3.2012 as well as entire proceeding of Complaint Case No. 1500 of 2011 pending in the court of Additional Court No. 3, Agra.

2. Brief facts of this case are as follows-:

That respondent no. 2 stated that present petitioner borrowed Rs. 1,00,000/- from him and on 8.2.2011, the petitioner handed over two cheques bearing no. 850213 & 850214 dated 9.4.2011 and 15.4.2011, respectively. Cheques were presented before the Bank but the same were dishonoured due to insufficient amount in the account. ON 18.10.2011, respondent no. 2 sent a notice to the petitioner and same was served but all in vain. On 8.11.2011, respondent no. 2 filed a complaint case no. 1500 of 2011 (Nepal Singh Vs. Dhirendra Singh) under section 138 of Negotiable Instruments Act, 1881 against the petitioner in the court. Trial court vide its order dated 28.3.2012 has taken cognizance and summoned the petitioner.

3. Learned counsel for the petitioner submitted that complainant / respondent is wholly incompetent to lodge the prosecution as cheques were issued by the firm M/s Rashmi Arosole & Chemicals and petitioner is proprietor of this firm but the firm is not arraign as an accused. Reliance has been placed on section 138 of Negotiable Instruments Act, 1881 (Hereinafter referred as N.I. Act) i.e. read as under:-

Section 138 in The Negotiable Instruments Act, 1881

"18 [138 Dishonour of cheque for insufficiency, etc., of funds in the account. --Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20[within thirty days] of the receipt of

information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

4. It is further submitted that cheques issued by proprietorship firm after referring to Section 141 of the N.I. Act in relying the decision of the Hon'ble Supreme Court in the case of ***Aneeta Hada Vs. M/s Godfather Travels & Tours Pvt. Ltd.*** In this case Hon'ble Supreme Court has clearly held that if the cheques were issued by the firm or company, the firm / company must be arraign as an accused. So learned counsel for the petitioner submitted that until and unless company or firm is arraign as an accused director or the other officer of the company / firm cannot be prosecuted / punished in the complaint. The submission raised by learned counsel for the petitioner that proceeding of complaint is wholly illegal, hence petition is liable to be allowed on this sole ground.

5. Learned counsel for the petitioner also relied upon the judgment of this court in ***Devendra Kumar Garg Vs. State of U.P. and Another*** for maintaining prosecution in which it was held that for maintaining prosecution under section 141 of N.I. Act as above for arraining the company as an accused. Company was not arraign as a party in the notice or in complaint so cognizance order is liable to be quashed.

6. Dr. S.B. Maurya, the learned A.G.A. vehemently opposed the prayer and submits that cheques drawn by the petitioner in his personal capacity. It is further submitted that cheques were given by petitioner by way of security for payment of money. So in these circumstances, no need to arraign the firm as a party.

7. I have heard learned counsel for the petitioner, Dr. S.B. Maurya, the learned A.G.A. and perused the material available on record.

8. Perusal of cheques shows that it is drawn by the petitioner and petitioner admitted that impugned cheques bearing his signature. It is also not disputed that the petitioner is proprietor of the firm M/s M/s Rashmi Arosole & Chemicals, main contention of the petitioner is that the prosecution could not launch unless and until the firm arraign as accused.

The provision of Section 141 in The Negotiable Instruments Act, 1881 read as under:-

21 [141 Offences by companies. --

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and 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 accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: 22 [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the

Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.-- For the purposes of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.]"

9. A plain reading of the provision makes it clear, if the person committing the offence is a "company", in that event every natural person responsible for such commission as also the artificial person namely the company shall be deemed to be guilty of the offence and be liable to be proceeded against and punished accordingly. Also, certain other natural persons may be held guilty, if so proved.

10. Perusal of the registration of firm, Annexure no. 1, it transpires that the petitioner is the proprietor of the firm namely M/S Rashmi Arosole & Chemical Avas Vikas Colony, Sector 10, Sikandara Agra. Perusal of registration certificate of firm, petitioner Dhirendra Singh, is the proprietor of the firm and it is clear that this is the sole proprietorship firm. Thus, the main question arises whether in sole proprietorship firm indictment of firm arraign as parties is necessary or not.

11. Thus, the phrase "association of individuals" necessarily requires such entity to be constituted by two or more individuals i.e. natural persons. On the contrary a sole-proprietorship concern, by very description does not allow for ownership to be shared or be joint and it defines, restricts and dictates the ownership to remain with one person only. Thus, "associations of individuals" are absolutely opposed to sole-proprietorship concerns, in that sense and aspect.

12. A 'partnership' on the other hand is a relationship formed between persons who willfully form such relationship with each other. Individually, in the context of that relationship, they are called 'partners' and collectively, they are called the 'firm', while the name in which they set up and conduct their business/activity (under such relationship), is called their 'firm name'.

13. While a partnership results in the collective identity of a firm coming into existence, a proprietorship is nothing more than a cloak or a trade name acquired by an individual or a person for the purpose of conducting a particular activity. With or without such trade name, it (sole proprietary concern) remains identified to the individual who owns it. It does not bring to life any new or other legal identity or entity. No rights or liabilities arise or are incurred, by any person (whether natural or artificial), except that otherwise attach to the natural person who owns it. Thus it is only a 'concern' of the individual who owns it. The trade name remains the shadow of the natural person or a mere projection or

an identity that springs from and vanishes with the individual. It has no independent existence or continuity.

14. In the context of an offence under section 138 of the Act, by virtue of Explanation (b) to section 141 of the Act, only a partner of a 'firm' has been artificially equated to a 'director' of a 'company'. Its a legal fiction created in a penal statute. It must be confined to the limited to the purpose for which it has been created. Thus a partner of a 'firm' entails the same vicarious liability towards his 'firm' as 'director' does towards his 'company', though a partnership is not an artificial person. So also, upon being thus equated, the partnership 'firm' and its partner/s has/have to be impleaded as an accused person in any criminal complaint, that may be filed alleging offence committed by the firm. However, there is no indication in the statute to stretch that legal fiction to a sole proprietary concern.

15. Besides, in the case of a sole proprietary concern, there are no two persons in existence. Therefore, no vicarious liability may ever arise on any other person. The identity of the sole proprietor and that of his 'concern' remain one, even though the sole proprietor may adopt a trade name different from his own, for such 'concern'. Thus, even otherwise, conceptually, the principle contained in section 141 of the Act is not applicable to a sole-proprietary concern.

16. Accordingly, there is no defect in the complaint lodged against the applicant, in his capacity as the sole proprietor of the concern M/s Rashmi Arosole & Chemicals. There was no requirement to implead his sole proprietary concern as an accused person nor there was any need to additionally implead the applicant by his trade name.

17. On perusal of the averment of the parties, it is crystal clear that petitioner taken the money in advance by way of loan and petitioner handed over the cheques bearing no. 850213 & 850214 amount of Rs. 50,000/- each only for the security for payment of money advance by way of loan. So the transaction of money and cheques not in the prosecution of business of firm but cheques handed over by petitioner to Nepal Singh in individual capacity. So due to aforesaid reason too no need to implead the sole proprietor firm by his firm name.

18. So the reason aforesaid, there is no illegality or irregularity in the orders dated 31.10.2018 passed by Additional Court No. 3, Agra and the order dated 6.2.2020 passed by Additional Sessions Judge, Court No. 17, Agra against the petitioner, hence no interference warranted.

19. The petition lacks merit and is, accordingly, **dismissed**.

(2020)11ILR A219
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2020

BEFORE

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

Matters Under Article 227 No. 4533 of 2019
(Criminal)

Meva Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Srivastava, Sri Jai Prakash Rao

Counsel for the Respondents:
A.G.A.

Civil Law - Uttar Pradesh Motor Vehicles Rules, 1998 - Rule 203B (3) - Prohibition against release of Vehicle - No court to release a vehicle involved in accident causing death or permanent disability - when such vehicle is not covered by Policy of Insurance against third party risks - unless the *owner/registered owner of the vehicle* - furnishes sufficient security to the satisfaction of the Court to pay compensation that may be awarded in a claim case arising out of such accident - *Held* - it is the *registered owner at the time of accident* who alone would be liable to satisfy the award made by a claims tribunal- subsequent owner of the vehicle has no liability to satisfy the award involving the vehicle that he owns, which was earlier involved in an accident at some point of time when someone else was the registered owner - A fortiorari subsequent owner cannot be made liable to furnish security for the satisfaction of an award that the tribunal may make in relation to the fatal accident - provisions of Rule 203-B (3) would not apply in a case where the vehicle is seized from the hands of a registered owner, who is a transferee and not at all connected to the offending vehicle when the accident happened (Para 19, 21)

Allowed (E-5)

List of Cases cited:-

Prakash Chand Daga Vs Saveta Sharma, (2019) 2 SCC 747

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

1. This petition under Article 227 of the Constitution is directed against an order passed by the learned Additional Sessions Judge, Court No. 9, Allahabad dated 02.05.2019 in Criminal Revision No. 86 of 2019, dismissing the said revision and affirming an order of the Chief Judicial Magistrate, Allahabad dated 11.12.2018 in Case Crime No. 682 of 2014, under Section 279/304A I.P.C., P.S. Civil Lines, District Allahabad (now Prayagraj). The learned Magistrate by his order, last mentioned, has required the petitioner on his application seeking release of his car, bearing registration No. U.P. 70 CA 9417, to furnish a sum of Rs. 5 lacs in cash or in the form of bank security, as a condition precedent to the consideration of his application.

2. Meva Lal, the petitioner is a retired government servant. He is aged about 74 years. He was an employee with the District Collectorate, Allahabad (now Prayagraj). Meva Lal purchased a second-hand car on 18.04.2017 from Mrs. Archana Mohan w/o Sudhanshu Asthana r/o 573-A/4, Bailly Colony, Rajapur, Police Station Cantt., District Prayagraj. The car is a Hyundai i10. He purchased the said vehicle for a price of Rs. 2 lacs. Meva Lal applied to the Registering Authority under Sub Section (1) of Section 50 Motor Vehicles Act, 1988 requesting that transfer of ownership may be entered in his name, in the certificate of registration. This application was accepted by the Registering Authority and his name was entered in the certificate of registration dated 12th March, 2013, on 18.04.2017. Meva Lal also took out an insurance policy that covers inter alia 3rd party risks. This policy was purchased from the United India Insurance Company Limited. It was issued on 09.03.2018. The policy was valid from 10.03.2018 to 09.03.2019.

3. Meva Lal says that on 15.09.2018 at 5:45 in the evening hours, the S.H.O., Civil Lines along with one Deena Nath, a Sub Inspector and four police constables were about their task of checking vehicles

at the Subhash Chauraha, Civil Lines, Prayagraj. Sub Inspector Deena Nath signalled Meva Lal's car to stop and asked him to show its papers. Meva Lal claims that he produced all documents relating to the car required under the law, but Deena Nath had something else in mind. He demanded some illegal gratification. Meva Lal firmly declined. Annoyed, Deena Nath Yadav seized Meva Lal's car. Meva Lal says that on his demand, as to why his car had been seized, S.I. Deena Nath Yadav told him that the vehicle was wanted in connection with Case Crime No. 682 of 2014, under Section 279, 304-A I.P.C., P.S. Civil Lines, District Allahabad (now Prayagraj). Meva Lal further says that he asked the Sub Inspector to show him a copy of the FIR, so that he may know that his car was indeed wanted in connection with that crime, but the police officer declined that request. Meva Lal secured a copy of the FIR under reference, which is one registered on 16.10.2014. It presently bears Case Crime No. 682 of 2014, under Section 279, 304A I.P.C., P.S. Civil Lines, District Allahabad, but earlier, it was registered as Case Crime No. 632 of 2014 at the same police station. Meva Lal asserts with reference to the contents of the said FIR that it does not show that his vehicle is mentioned there or otherwise wanted.

4. In these circumstances, Meva Lal made an application seeking release of his car to the Chief Judicial Magistrate, Allahabad. The accident subject matter of Case Crime No. 682 of 2014 was a fatal accident, where one Viswajeet Sachan s/o Sadhu Ram Sachan lost his life. The learned Magistrate, by his order dated 11.12.2018, required the applicant to furnish in cash a sum of Rs. 5 lacs or a bank security worth the said amount, to be appropriated towards payment of compensation that may be awarded in the claim by the deceased's heirs, relating to the accident. The Magistrate ordered that the release application would be considered on merits, once the aforesaid deposit was made good or security furnished. The Magistrate put this condition precedent, subject to fulfillment of which he would consider the release application, on the strength of Rule 203-B (3) of the Uttar Pradesh Motor Vehicles Rules, 1998.

5. Aggrieved, Meva Lal carried a revision to the learned Sessions Judge, Allahabad where it was numbered as Criminal Revision No. 86 of 2019. This revision came up for determination before the learned Additional Sessions Judge, Court No. 9, Allahabad, who dismissed the same by means of his order dated 02.05.2019. Both these orders shall hereinafter be referred to collectively as "the impugned orders'; singularly they shall be referred to as the context may require.

6. A counter affidavit has been filed on behalf of the State, dated 10th July, 2019, to which a rejoinder dated 22nd July, 2019 has been put in on behalf of Meva Lal. Meva Lal has further filed a supplementary affidavit dated 30th July, 2019, on 23rd September, 2019. A supplementary counter affidavit on behalf of the State to the supplementary has been put in on 9th August, 2019. Meva Lal has rebutted it with the supplementary rejoinder affidavit presented on 21st September, 2019.

7. Parties have exchanged much pleadings because they are at issue as to how this car, that is subject matter of release proceedings, came to be connected to the crime. Also, the police dispute the

manner of apprehension of the vehicle that Meva Lal has asserted.

8. Heard Mr. Rajesh Kumar Srivastava, learned counsel for the petitioner and Mr. J.P. Tripathi, learned Additional Government Advocate appearing on behalf of the State.

9. It is submitted by Mr. Rajesh Kumar Srivastava, learned counsel for the petitioner that a reading of the FIR relating to Case Crime No. 682 of 2014 does not show the slightest involvement of the car in question, or for that matter, of any four wheeler whatsoever. It is a complete account of the occurrence which has no place for the involvement of a car, let alone the car in question. He submits that the FIR specifically describes the offending vehicle as a two wheeler, a Pulsar motorcycle bearing registration No. U.P. 70 BN 8519. Learned counsel for the petitioner submits that the FIR, to its face, is telltale that S.I. Deena Nath has falsely implicated Meva Lal's vehicle in connection with this crime, misusing his statutory powers. Learned counsel also submits that the accident in question involved a solitary vehicle, a Pulsar motorcycle bearing the registration number, last mentioned that happened on 16.10.2014, at the road crossing of the Accountant General's Office. He asserts that the car in question which is a four wheeler of Hyundai make, bearing registration No. U.P. 70 CA 9417, has nothing to do with the accident dated 16.10.2014. In addition, he submits that Meva Lal was not the owner of the car on 16.10.2014 which he, as already said, acquired second hand on 18.04.2017. He is, therefore, in no way liable, either under the criminal law or for the compensation claim arising from the accident dated 16.10.2014. At the most, learned counsel submits that Meva Lal could be regarded as a witness, who holds custody of material evidence in the crime, which he would be obliged to produce at the trial.

10. Mr. Tripathi, the learned Additional Government Advocate on the other hand has refuted the submissions advanced on behalf of the petitioner. He urges that Rule 203-B (3) of the Uttar Pradesh Motor Vehicles Rules, 1998 (for short, "the Rules') are unambiguous and do not invest the Court with jurisdiction, in case of a fatal motor accident, to release a vehicle involved therein when the vehicle is not covered by an insurance policy against 3rd party risks, unless the owner/registered owner of the vehicle furnishes sufficient security, to the satisfaction of the Magistrate, to pay compensation that may be awarded in the claim petition concerning the accident. He submits that there is no issue about the fact that the accident here was a fatal accident.

11. It is also a fact, according to Mr. Tripathi, that the petitioner was the registered owner of the vehicle, when it was seized and the release applied for. He points out that in the report submitted under Rule 203-A in Form SR-48 Ka, the insurance policy/insurance certificate number and its particulars have not been indicated by the Investigating Officer, which would show that the vehicle was not covered by an insurance policy, against third party risks. In the circumstances, the Court had no option but to require the registered owner to furnish security that would be appropriated towards satisfaction of an award, which the claims tribunal may render. He has taken this Court through the Investigating Officer's report dated 08.11.2018 submitted to the C.J.M. in Form 48 Ka, annexed to the writ petition, part of

Annexure No. 5. He also submits that the supplementary affidavit annexes a copy of the claim petition, filed on behalf of the deceased's heirs. In the claim petition, there is a clear mention of the involvement of the car in question, besides the motorcycle mentioned in the FIR. The registration numbers of both vehicles appear in column No. 15 of that petition.

12. It is also pointed out that in the first paragraph of the claim petition, the manner of the accident described, mentions the involvement of both vehicles, leading to fatal consequences for the victim. In the circumstances, learned A.G.A. submits that the learned Magistrate had no option but to insist on strict compliance with the provisions of Section 203-B (3) of the Rules. Learned counsel for the petitioner, at this stage, points out that the FIR does not at all indicate a word about the involvement of any four-wheeler. The four-wheeler has been brought in, in the claim petition because the police involved this vehicle without basis, whereas the claimants have thought that they would receive a higher compensation, may be under some ill-advice, owing to the involvement of a car in that accident.

13. This Court has given a thoughtful consideration to the matter and perused the record. What is not in doubt is the fact that when the accident took place, Meva Lal was not the registered owner of the car or any kind of an owner. The Court says so because Rule 203-B of the Rules contemplates liability, not only of the registered owner, but also of the owner who could be a person other than the registered owner. This is evident from the terms of Rule 203-B.

14. A perusal of the report submitted by Investigating Officer in SR Form 48 Ka dated 28.11.2018 shows that in column 8, it is clearly mentioned that the name and address of the owner at the time of the accident was: Archana Mohan w/o Sudhansu Asthana r/o 573-A/4 , Bailley Colony Rajapur, P.S. Cantt., District Allahabad. Thus, it is admitted to the prosecution that on the date of the accident, the petitioner, Meva Lal had nothing to do with the vehicle, let alone be its registered owner. He has absolutely no connection to the accident.

15. A reading of the FIR does show that it carries a graphic and comprehensive description of the accident, where the solitary offending vehicle identified, is a motorcycle of Pulsar make, bearing registration No. U.P. 70 BN 8519. It is a way with reporting motor accidents that FIR's, subject to some exceptions, carry a detailed account, at least indicating the complete description of the offending vehicle. The FIR here, even if a generalisation is to be eschewed, certainly carries a comprehensive account. There is absolutely no mention of a four-wheeler being involved across the length and breadth of it. The Court does not wish to comment much about this issue, as it would ultimately be a matter to be judged at the trial. The remarks in this connection carried in this judgment must be understood as limited to the purpose of a decision about the unconditional maintainability of the release application and nothing more. These ought not to weigh with the Court holding trial.

16. This Court notices that the involvement of the car in question was brought in through a written application made on behalf of Neelima Sachan, the deceased's wife to the S.S.P., Allahabad (now Prayagraj) annexed as CA-1 to the

supplementary counter affidavit. This application, of which a photostat copy is annexed, does not bear any date. This application has been described in paragraph 4 of the supplementary counter affidavit, where also, there is no reference to the date when this application was made on behalf of Neelima Sachan. An eye-witness of the occurrence, a certain Imtiyaz Husain, has been recorded by the police in a statement under Section 161 Cr.P.C. mentioned in CD-11. A photostat copy of the aforesaid CD also shows overwriting in the CD number, where CD-10 has been overwritten with CD-11. The I.O. has signed this particular part of the case diary on 13.12.2015. There is a mention of the vehicle in the said CD. There could be some doubts about the manner in which it has been written, but again this Court does not wish to comment on this point. The vehicle has been shown parked outside the railway station, unclaimed in CD-27, dated 16.09.2018. About this discovery and recovery of the car in question, there is GD entry number 14 dated 16.09.2018, made at 5 minutes past 11 o'clock. The police, therefore, in substance, deny all that Meva Lal has said about the apprehension of his vehicle, while he was moving in it at the Subhash crossing, Civil Lines. This Court need not go into the precise detail of how the vehicle was apprehended and fell into the hands of the police. What is notable is the fact that it is not in issue at all that at the time of accident, Meva Lal was not the owner or the registered owner, as already said.

17. In a case like this, would the provisions of Rule 203-B(3) at all apply? Rule 203-B (3) is designed to ensure through the criminal justice system and before the vehicle is released, recovery of money that may be applied towards satisfaction of the award or some part of it, which the claims tribunal may make in the case of a fatal accident. It is designed ultimately to ensure ready satisfaction of the award of the claims tribunal, or so much of it as may be satisfied, out of proceeds collected from the owner or the registered owner, before he takes back the offending vehicle. The provisions of Section 203-A and 203-B of the Rules are quoted in *extenso*:

"203-A. Duties of Investigating Police Officer - (1) The Investigating Police Officer shall prepare a site plan, drawn on scale as to indicate the layout and width etc. of the road/roads or place as the case may be, the position of Vehicle/Vehicles, or persons, involved and such other facts as the case may be relevant, authenticated by the witnesses and in case no witness is available same shall be recorded, so as to preserve the evidence relating to accident. He shall also get the scene of accident photographed from such angles as to clearly depict the accident, as above, *inter-alia* for the purpose of proceeding before the Claims Tribunal.

(2) The Investigation Police Officer shall get full particulars of the insurance Certificate/Policy in respect of the Motor Vehicle involved in the accident and to require the production of documents mentioned in-sub-section (1) of Section 158, and thereupon either to take the same in possession against receipt, or to retain the photocopies of the same, after attestation thereof by the person producing them.

(3) The Investigating Police Officer may verify the genuineness of the documents gathered under sub-rule (2) by obtaining confirmation in writing from the authority purporting to have issued the same.

(4) The Investigating Police Officer shall submit detailed report regarding the accident to the Claims Tribunal, along with site plan and photograph prepared under sub-rule (1), documents gathered and verified under sub-rules (1) and (3) or action taken, in case of documents found forged copies of report under Section 173 of the Code of Criminal Procedure, medico legal reports and post-mortem report (in case of death), First Information Report, by not later than fifteen days or receipt of order/requisition issued by the Claims Tribunal:

Provided that such information may also be furnished to the Insurance Company if requested by or through its agent or by the injured/sufferer or next of the kin or legal representatives of the deceased of the accident. The Investigating Police Officer shall submit report under this rule to the Claims Tribunal in Form SR 48-A.

(5) Duties of Investigating Police Officer, enumerated in sub-rules (1) to (3) shall be construed as if they are included in Section 23 of U.P. Police Act, 1861 and any break thereof, shall entail consequences envisaged in that law.

203-B. Prohibition against release of vehicle.-(1) No vehicle, involved in any accident, shall be released by investigating Police Officer or any Police Officer superior to him unless a release order is passed, by the court having jurisdiction.

(2) No vehicle, involved in any accident shall be released by the Judicial Magistrate, having jurisdiction, unless the compliance of sub-rules (1) to (3) of Rule 203-A is ensured from the investigating Police Officer and duly attested copies of Registration Certificate, Insurance Certificate, Route Permit, Fitness Certificate of vehicle as the case may be and driving license of the driver who was driving at the time of accident, are filed by the applicant.

(3) No court shall release a vehicle involved in accident causing death or permanent disability when such vehicle is not covered by Policy of Insurance against third party risks unless the owner/registered owner of the vehicle furnishes sufficient security to the satisfaction of the Court to pay compensation that may be awarded in a claim case arising out of such accident.

(4) Where the vehicle is not covered by a policy of insurance against third party risks, or when the owner/registered owner of the vehicle has failed to furnish sufficient security under sub-rule (3), or the policy of insurance produced by owner is found fake/forged, the vehicle shall be sold in public auction by the Judicial Magistrate having jurisdiction, on expiry of six months of the vehicle being seized by the investigating Police Officer and proceeds thereof, shall be deposited with the Claims Tribunal, having jurisdiction over the area in question, for the purpose of satisfying the compensation to be awarded in claim case."

18. A reading of Rules 203-A and 203-B together leads one to the conclusion that it is the owner or the registered owner at the time when the accident occurred, who alone would be within the mischief of this Rule. If, by some failure of the Investigating Agency or some other cause, the vehicle is transferred to a third party by the registered owner, the third party having no concern with the accident, the provisions of Rule 203-B would not impinge upon such transferee owner's rights to secure release. This would be the conclusion from the whole gamut of the provisions. The Rule contemplates, in the

first instance, particulars of the insurance policy to be secured by the I.O. and disclosed to the Magistrate and in the event of the vehicle not being covered by a policy of insurance against third party risk, the owner or the registered owner of the vehicle may be required to furnish sufficient security that may satisfy an award made by the claims tribunal relating to the accident. The policy of insurance contemplated in the scheme of Section 203 A and 203-B (3) is a policy covering the vehicle at the time of the accident. Here, the registered owner, who is a transferee and had nothing to do with the vehicle when it caused the accident, can possibly never furnish the insurance policy which sub-rule (3) of Rule 203 B envisages. A fortiorari he cannot be made liable to furnish security for the satisfaction of an award that the tribunal may make in relation to the fatal accident.

19. There is another facet of the matter. The subsequent owner of the vehicle has no liability to satisfy the award involving the vehicle that he owns, which was earlier involved in an accident at some point of time when someone else was the registered owner. Rather, it is the registered owner at the time of accident who alone would be liable to satisfy the award made by a claims tribunal.

20. In this connection, reference may be made to the guidance of the Supreme Court in ***Prakash Chand Daga v. Saveta Sharma, 2019 (2) SCC 747***. Here, the issue was where a vehicle had been transferred and the statutory period prescribed under Section 50(1)(b) of the Motor Vehicles Act to report the transfer to the Registering Authority had not expired or the transfer of ownership entered in the certificate of registration, an accident took place, would the transferor be liable to satisfy an award made by the claims tribunal? Their Lordships in **Prakash Chandra Daga** *(supra)* held:

5. It is true that in terms of Section 50 of the Act, the transfer of a vehicle ought to be registered within 30 days of the sale. Section 50(1) of the Act obliges the transferor to report the fact of transfer within 14 days of the transfer. In case the vehicle is sold outside State, the period within which the transfer ought to be reported gets extended. On the other hand, the transferee is also obliged to report the transfer to the registering authority within whose jurisdiction the transferee has the residence or place of business where the vehicle is normally kept. Section 50 thus prescribes timelines within which the transferor and the transferee are required to report the factum of transfer. As per sub-section (3) of said Section 50, if there be failure to report the fact of transfer, fine could be imposed and an action under Section 177 could thereafter be taken if there is failure to pay the amount of fine. These timelines and obligations are only to facilitate the reporting of the transfer. It is not as if that if an accident occurs within the period prescribed for reporting the said transfer, the transferor is absolved of the liability.

6. Chapter XII of the Act deals with the Claims Tribunals and as to how applications for compensation are to be preferred and dealt with. While considering such claims, the Claims Tribunal, in case of an accident is required to specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or whether such amount be paid by all or any of them, as the case may be. It is well settled that for the purposes of fixing such liability the concept of

ownership has to be understood in terms of specific definition of "owner" as defined in Section 2(30) of the Act.

7. In *Pushpa v. Shakuntala [Pushpa v. Shakuntala,* (2011) 2 SCC 240 : (2011) 1 SCC (Civ) 399 : (2011) 1 SCC (Cri) 682] the vehicle in question belonged to one Jitender Gupta who was its registered owner. He sold said vehicle to one Salig Ram on 2-2-1993 and gave its possession to the transferee. Despite said sale, the change of ownership was not entered in the Certificate of Registration. The earlier insurance policy having expired, the transferee took out fresh insurance policy in the name of original owner Jitender Gupta. In an accident that took place on 7-5-1994, two persons lost their lives. The heirs and legal representatives lodged separate claims and an issue arose as to who was liable as owner. The submissions that Jitender Gupta, the registered owner had no control over the vehicle and the possession and control of the vehicle was in the hands of the transferee and as such no liability could be fastened on the transferor were rejected by this Court. It was observed in para 11 as under: (SCC p. 244)

"11. It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its sale on 2-2-1993."

8. In the decision in *Naveen Kumar [Naveen Kumar v. Vijay Kumar,* (2018) 3 SCC 1 : (2018) 2 SCC (Civ) 1 : (2018) 1 SCC (Cri) 661] the legal position was adverted to and this Court observed as under: (SCC pp. 11-12, paras 13-14)

"13. The consistent thread of reasoning which emerges from the above decisions is that in view of the definition of the expression "owner" in Section 2(30), it is the person in whose name the motor vehicle stands registered who, for the purposes of the Act, would be treated as the "owner". However, where a person is a minor, the guardian of the minor would be treated as the owner. Where a motor vehicle is subject to an agreement of hire purchase, lease or hypothecation, the person in possession of the vehicle under that agreement is treated as the owner. In a situation such as the present where the registered owner has purported to transfer the vehicle but continues to be reflected in the records of the registering authority as the owner of the vehicle, he would not stand absolved of liability. Parliament has consciously introduced the definition of the expression "owner" in Section 2(30), making a departure from the provisions of Section 2(19) in the earlier 1939 Act. The principle underlying the provisions of Section 2(30) is that the victim of a motor accident or, in the case of a death, the legal heirs of the deceased victim should not be left in a state of uncertainty. A claimant for compensation ought not to be burdened with following a trail of successive transfers, which are not registered with the registering authority. To hold otherwise would be to defeat the salutary object and purpose of the Act. Hence, the interpretation to be placed must facilitate the fulfilment of the object of the law. In the present case, the first respondent was the "owner" of the vehicle involved in the accident within the meaning of Section 2(30). The liability to pay compensation stands fastened upon him. Admittedly, the vehicle was uninsured. The High Court has

proceeded [Vijay Kumar v.Rakesh, 2016 SCC OnLine P&H 18767] upon a misconstruction of the judgments of this Court in *Reshma [HDFC Bank Ltd. v. Reshma,* (2015) 3 SCC 679 : (2015) 2 SCC (Civ) 379 : (2015) 2 SCC (Cri) 408] and *Purnya Kala Devi [Purnya Kala Devi v. State of Assam,* (2014) 14 SCC 142 : (2015) 1 SCC (Civ) 251 : (2015) 1 SCC (Cri) 304] .

14. The submission of the petitioner is that a failure to intimate the transfer will only result in a fine under Section 50(3) but will not invalidate the transfer of the vehicle. InT.V. Jose [*T.V. Jose v. Chacko P.M.*, (2001) 8 SCC 748 : 2002 SCC (Cri) 94] , this Court observed that there can be transfer of title by payment of consideration and delivery of the car. But for the purposes of the Act, the person whose name is reflected in the records of the Registering Authority is the owner. The owner within the meaning of Section 2(30) is liable to compensate. The mandate of the law must be fulfilled."

9. The law is thus well settled and can be summarised: (SCC pp. 625-26, para 4)

"4. ... even though in law there would be a transfer of ownership of the vehicle, that, by itself, would not absolve the party, in whose name the vehicle stands in RTO records, from liability to a third person. ... Merely because the vehicle was transferred does not mean that [such registered owner] stands absolved of his liability to a third person. So long as his name continues in RTO records, he remains liable to a third person." [*P.P. Mohammed v. K. Rajappan,* (2008) 17 SCC 624, para 4 : (2010) 4 SCC (Cri) 587]

21. The principle of law laid down by the Supreme Court, therefore, makes it clear that the liability to satisfy an award made by the claims tribunal is of the registered owner, when the accident takes place. The provisions of Rule 203-B (3) would, therefore, not apply in a case where the vehicle is seized from the hands of a registered owner, who is a transferee and not at all connected to the offending vehicle when the accident happened. The scope of the provisions of Rule 203-B (3) stood exhausted here, upon transfer of the vehicle in favour of Meva Lal and the time it was seized. The Rule applies not by virtue of seizure of the vehicle in connection with a fatal motor accident, but by virtue of the vehicle being in the hands of the registered owner, or may be the owner, at the time when the accident took place; and such a registered owner, or the owner, seeking release.

22. In the opinion of this Court, both the Courts below were, therefore, in manifest error to require the petitioner to deposit in cash a sum of Rs. 5 lacs, or in the alternate, furnish bank security before his application for release was considered.

23. In the result, this petition succeeds and is **allowed**. The impugned orders dated 11.12.2018 and 02.05.2019 passed by the Chief Judicial Magistrate, Allahabad and the learned Additional Sessions Judge, Court No. 9, Allahabad, respectively, are hereby set aside. It is ordered that the learned Chief Judicial Magistrate, Allahabad shall proceed to decide the petitioner's release application within a period of three weeks from the date of receipt of a computer generated and self attested copy of this order downloaded from the official website of High Court Allahabad, in accordance with law, after hearing the parties concerned, but without requiring the petitioner to make any cash deposit or furnish bank security.

(2020)11ILR A229
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.10.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Misc. Application U/S 372 Cr.PC (Leave to Appeal) No. 4 of 2019

Bhanu Pratap Singh Yadav ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Ram Prakash Patel

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

A. Criminal Law - Indian Penal Code - Section 307 - Ingredients - "Intention" or "knowledge" are two alternative statutory elements to hold any person guilty for the commission of offence u/s 307 IPC - one should have mens-rea intending to commit murder or should possess knowledge that overt act, in all probability, would cause death of victim - bodily injury - Mere bodily injury capable of causing death or not, are not sufficient to hold any person guilty for committing crime under aforesaid sections - blameworthy condition of mind could be gathered from the direct evidence, circumstantial evidence, conduct of accused etc (Para 41)

B. Evidence Law - Evidence Act (1 of 1872) – Section 3 - Evidence - Appreciation of - Discrepancies – minor discrepancies vis-à-vis - glaring contradictions and discrepancies - Over importance cannot be given to minor discrepancies - Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, not important - however where glaring contradictions & discrepancies exists and such discrepancies affect the genesis of the crime - totters basic version of the witnesses, affects the accusation made by prosecution and the occurrence of crime, it become relevant. (Para 32)

C. Criminal Law - Criminal Procedure Code (2 of 1974) , S.372 - Appeal against acquittal - power of appellate court to interfere with acquittal - cardinal principle - if two views on appreciation of evidence are reasonably possible, one supporting acquittal & other conviction, Appellate Court should not reverse the order of acquittal - appellate court may overrule or disturb trial court's acquittal only if it has *"very substantial and compelling reasons"* for doing so - and for that Appellate Court must come to the conclusion that the findings of the Court below are not based on the evidence on record, or suffers from misreading of evidence - or that the view taken by the court below, while acquitting cannot be the view of a reasonable person (Para 43, 44, 45)

Criminal Law – Indian Penal Code (45 of 1860) – Section 307 - Attempt to murder - Proof – Allegation that accused shot fire at the informant, due to which his motorcycle tottered down towards the right side - No recovery of firearm - I.O. neither found any empty cartridge on spot nor recovered any used cartridge - Timing of inflicting injuries to victim is different as mentioned in FIR, examination-in-chief and cross-examination of informant - medical report, all the injuries are shown to be superficial and simple in nature - no retrieval of pellets or bullets from the wound - considering medical report, circumstances in totality, it cannot be said that the accused made attempt to murder - no such circumstances to suggest the intention of the accused persons for committing homicidal death of the informant or his wife - Acquittal, proper. (Para 22, 24, 39, 40 42)

Dismissed (E-5)

1. Bharwada Ghoginbhai Hirjibhai Vs St. of Guj. AIR 1983 SC 753

2. St. of Karn. Vs K. Gopalkrishna (2005) 9 SCC 291

3. Sudershan Kumar Vs St. of Himachal (2014) 15 SCC 666

4. Dilawar Singh Vs St. of Har. (2015) 1 SCC 737

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Shri Ram Prakash Patel, learned counsel appearing for the appellant on admission.

2. The instant appeal under Section 372 Cr.P.C. has been preferred by the informant/appellant challenging the judgment and order dated 25.09.2018 passed by the Additional Sessions Judge/Fast Track Court (Offences against Women), Rampur in Sessions Trial No.306 of 2012, acquitting the accused persons namely, Chhattrapal (respondent no.2) and Rakesh (respondent no.3) for commission of the alleged offence under Section 307 IPC, arising out of Case Crime No. 1141 of 2012, Police Station-Civil Lines, District-Rampur.

3. As per the version of the First Information Report (hereinafter referred to as "FIR"), on 12.04.2012 at 4:00 P.M., the informant-Bhanu Pratap Singh Yadav (PW-1) along with his wife Vimla Devi (PW-2) went to Guddu's house at Punjab Nagar, Rampur to know the well being of his mother and son. He left his wife there and went away Vijaeeya to attend reception of the daughter of Operator Bulakhi Ram and to collect the installment from Kamal Singh. Therefrom, he came back to Punjab Nagar, took his wife and gave receipt to Vijay at Wajinagar. Thereafter, his wife asked him to go via his village so that they could meet his mother and to know her well being. At about 7:30 PM, while they were coming comfortably towards the village, he saw two persons standing on the road adjacent to the agricultural plot of Kewal and recognized them as Chhattrapal son of Swaraj and Rakesh son of Chandrapal in the light of his motorcycle's headlight. Two more unknown persons were also standing there at some distance. Chhattrapal shot fire at the informant, due to which his motorcycle tottered down towards the right side in the agricultural plot of Kewal, but the fired bullet hit on the temple region of his wife. In retaliation, the informant, after balancing himself, fired three shots from his service revolver. Thereafter, the accused persons opened indiscriminate firing and fled away towards the forest. The informant saw his wife lying down on the road in unconscious condition. He rang to his family members. Sunil son of Pappu immediately rushed to him and asked as to who had shot fire, then the informant took the name of the aforesaid two accused persons. Sunil told him that he saw Chhattrapal and Rakesh on the culvert while they were running towards forest. On his information to the police by phone, police force reached there and took him and his wife to the hospital through police vehicle and got her admitted. The police left the informant to look after her.

4. On the written report dated 12.04.2012 (Exhibit Ka-1) submitted by Bhanu Pratap Singh Yadav (PW-1), FIR dated 12.04.2012 (Exhibit Ka-7) has been lodged at about 23:40 hours registered as Case Crime No. 1141 of 2012 under Section 307 IPC, Police Station Civil Lines, District Rampur against Chhattrapal (respondent no. 2), Rakesh (respondent no. 3) and also against two unknown persons.

5. On 12.04.2012, the victim (w/o informant) was medically examined at

about 8:30 p.m. in the District Hospital, Rampur by Dr. Lalit (PW-3), Medical Officer (EMG), District Hospital, Rampur who had prepared and signed the medical report dated 12.04.2012 (Exhibit Ka-2) showing three injuries on the body of the victim. Dr. Lalit had also submitted supplementary medical report dated 14.04.2012 (Exhibit Ka-3), after considering the X-ray report of the victim. First medical report dated 12.04.2012 and the supplementary medical report dated 14.04.2012 are as follows :-

First Medical Report dated 12.04.2012 :-

(1) Multiple firearm wound of entry of size ranging from 0.4 cm x 0.4 cm to 0.3 cm x 0.3 cm x depth not probed on right side of fact and right side back of head in an area of 13 cm x 4 cm collor of abrasions present oozinal of blood present. KUO advised X-rays.

(2) Fire wounds of entry (two in number) of size 0.3 cm x 0.3 cm x depth not probed on dorsal aspect of right forearm and right hand 07 cm aparts of each other KUO oozinal of blood present.

(3) Abraded contusion 3 cm x 2 cm on top of right shoulder

Opinion

Injury No.(1) and (2) are KUO Advised X-ray of skull AP/Lat fal. Injury No.(1) for Injury No.(2) advised X-ray of Right forearm c Rt. Head AP/Lat injury no.(3) KUO Advised X-ray of Rt. Shoulder AP/Lat. Injury no.(1) and (2) caused by firearm and Injury no.(3) is caused by hard and blunt object. Duration about fresh Sd. (Dr. Lalit) Attested Sd. Ashish Medical Officer (EMO) Dist. Hospital.

Supplementary Medical Report dated 14.04.2012 :-

Supplementary Report of Vimla Devi aged about 35 years/F, wife of Bhanu Yadav R/o Sai Vihar Colony Jawala Nagar P/S Civil Line, Rampur who was examined by me on dated 12.04.2012 at 8:30 PM in D.H.R.

Injury no.(1), (2) and (3) were KUO Advised X-Rays Skull, Right forearm Right hand and Right shoulder.

X-Ray Report no.453 dated 13.04.2012 by Radiologist D.H. Rampur shows that

X-Ray Skull-Six Small Radio-opeque

X-Ray Rt. Forearm
c Rt. Hand-Two
Shadows of metallic density seen
X-Ray Rt. Shoulder-NAD

Opinion: Hence injury no.(1), (2), (3) which were KUO are simple in nature."

6. After investigation, the Investigating Officer (hereinafter referred to as "I.O.") has submitted the charge-sheet dated 10.05.2012 (Exhibit Ka-5) against Chhattrapal and Rakesh under Section 307 IPC. On the said charge-sheet, learned Magistrate took cognizance vide order dated 11.07.2012 and committed to the Sessions Court for trial.

7. Vide order dated 10.04.2013, the learned Court has framed charges against both the accused persons under Section 307 IPC.

8. As to hold guilty, the prosecution has produced as many as five witnesses.

9. PW-1, Bhanu Pratap Singh Yadav (Informant), had stated that he was residing in Sai Vihar since last 13-14 years and his other family members were residing in the village Raipur. On 12.04.2012 at about 4:00 P.M., he and his wife went to the residence of Guddan at Punjab Nagar. While returning along with his wife by

motorcycle, at about 7:30 P.M., he reached near the agricultural plot of Kewal and saw Chhattrapal and Rakesh standing on the road to whom he recognized in the light of his motorcycle's headlight. Besides them, two more unknown persons were also standing there. Chhattrapal shot fire at him and his wife with an intention to kill them due to political antipathy. The fired bullet hit on the temple region of his wife. Thereafter, the informant had opened fire and discharged three shots from his service revolver. Thereafter, the accused persons fled away by opening indiscriminate firing. He saw his wife lying on the road in unconscious condition. Sunil and other persons reached on the spot after receiving a telephone call from the informant. Sunil told him that on the same day he saw Chhattrapal and Rakesh running away through a culvert. On his information, police personnel reached there, took the informant and his wife to the District Hospital. He had proved the written report as Exhibit Ka-1.

10. PW-2, Vimla Devi, wife of Informant, had supported the version of FIR. She had deposed that on being hit by firearm, she and her husband fell down on the ground. The accused persons ran away towards the village and her husband had followed them with his service revolver. She further stated that due to election antipathy, the accused persons were intending to kill them, but she alone had sustained gun shot injury. She had also stated that after 05-06 months, it came to their knowledge that Satyapal and Pappu @ Jai Singh were also involved in the incident. They challenged her husband that he could not do anything.

11. PW-3, Dr. Lalit had accepted that the medical examination of victim, Vimla Devi was conducted by him and proved her medical report dated 12.04.2012, prepared and signed by him, as Exhibit Ka-2 and also proved the supplementary medical report dated 14.04.2012, as Exhibit Ka-3, which was also prepared and signed by him after perusing the X-Ray report dated 13.04.2012. It is stated by Dr. Lalit (PW-3) that there was no letter written by police for medical examination of victim. Even after completion of medical examination, no permission of Chief Medical Officer (hereinafter referred to as "C.M.O.") had been obtained and submitted by injured.

12. PW-4, Ram Khiladi Solanki (Retired Inspector) is the Investigating Officer of the case and had proved the Site Map dated 13.04.2012 as Exhibit Ka-4 and the Charge Sheet dated 10.05.2012 as Exhibit Ka-5.

13. PW-5, Narendra Kumar Sharma (Constable No.258) had proved that he had prepared the original Chik FIR and endorsed in General Diary No.64. He had proved the General Diary as Exhibit Ka-6. He had also proved the Chik FIR as Exhibit Ka-7.

14. In reply to questions put to them, while recording their statements under Section 313 Cr.P.C. by Court below, accused persons had denied their involvement in the incident in question, pleaded their innocence and claimed for trial on merits.

15. After considering the facts and circumstances of the case and the evidence available on record, learned Trial Court, vide impugned judgment and order dated 25.09.2018 has acquitted both accused persons from the charge under Section 307 IPC, which is under challenge in the instant criminal appeal.

16. Learned counsel for appellant had submitted that the Court below had passed the order without considering the material evidence available on record. Bhanu Pratap Singh (PW-1) is the ocular witness of the crime in which his wife Vimla Devi (victim/PW-2) had sustained gun shot injury but the learned trial Court had illegally disbelieved the statement of PW-1 and ignored the injuries sustained by the victim. It is also submitted that accused persons had criminal intention to kill the informant due to political rivalry, inasmuch as, both the parties had antipathy due to election of Pradhan. He has also emphasized the medical report showing several injuries on the body of victim from where blood was oozing out, which had been caused due to firearm. Learned Court below had passed the impugned judgment and order in a cursory manner, without applying judicial mind, only on the basis of conjectures and surmises. Witnesses adduced on behalf of appellant have fully corroborated prosecution case whereas defence failed to produce any credible evidence in their support. Learned counsel for the appellant has submitted that the Court below had misread and misinterpreted the evidence available on record and illegally acquitted the accused on technical ground, which is not sustainable in the eyes of law.

17. We have carefully considered the submissions advanced by the learned counsel for the appellant, perused the impugned judgment passed by the Trial Court and the Lower Court's record, which was summoned in pursuance of the order dated 04.01.2019 passed by this Court.

18. The present appellant/informant (PW-1) has made opposite party nos. 2 and 3 as accused of attempt to murder with an allegation that they had intentionally shot fire at him, but unfortunately his wife (PW-2) had sustained gun shot injuries. The aforesaid incident allegedly took place on 12.04.2012 at about 7:30 p.m., while he was returning back along with his wife from Punjab Nagar to his village. Just after three kilometers from Punjab Nagar, he saw two persons standing on the road, whom he recognized in light of his motorcycle's head light, as present respondents no. 2 and 3. At the time of incident, it was quite dark and the road was desolate. Chhattrapal (accused) had shot single fire inflicting injuries to the wife of the appellant/informant. In retaliation, the appellant had also opened three fires but by that time the accused fled away by making indiscriminate firing. Thereafter, he saw that his wife was injured and lying on the road. On his telephonic information one Sunil and other persons reached there. Sunil had informed that he saw Chhattrapal and Rakesh while they were running through culvert. On his telephonic information about the incident the police personnel reached on the place of occurrence and took them to the hospital by official jeep. After getting his wife admitted in the hospital, he went to the police station to lodge FIR.

19. During trial, the appellant/informant had moved an application dated 27.05.2014 being Paper No. 40-Ka under Section 319 Cr.P.C. to summon Satyapal and Pappu @ Jai Singh alleging therein that these two persons were also present on the spot but could not be named in the FIR. The learned Trial Court had rejected the application vide order dated 20.04.2015.

20. The learned Trial Court has raised doubt qua facts and circumstances of the

present case wherein the appellant/informant and his wife had been attempted to be killed by the accused/ respondents no. 2 and 3. The learned Trial Court has pointed out several discrepancies and contradictions in the statement of prosecution witnesses and the circumstantial evidence and found it appropriate to acquit both the accused persons.

21. The version of FIR could be discussed in two perspectives. First, occurrence of crime under which fire was shot by the accused persons inflicting the injuries to PW-2 (i.e. wife of informant). Second, information of the crime under which informant, PW-1 had telephonically informed his family members and the police, who took them to the hospital.

22. So far as the first part of FIR, regarding the occurrence of crime, is concerned, there are several discrepancies and contradictions in the statements of witnesses of fact, namely, PWs-1 and 2 respectively, which creates doubt with respect to the facts and circumstances of the case in which alleged crime said to have been occurred. No recovery of firearm is shown which was allegedly used by accused persons in the crime scene. That apart, service revolver of PW-1 and three empty cartridges, as stated by PW-1, has also not been recovered by the police. The non-recovery of gun or pistol or country made pistol, which is not made clear in the FIR, and used cartridges from the said firearm, creates doubt with respect to happening of the occurrence. I.O. (PW-4) had categorically stated that he had not found any empty cartridge on the spot, neither he recovered any used cartridge from the barrel of licensee revolver. He had also denied the presence of blood stain on the place of occurrence.

23. As per prosecution case, informant was going by motorcycle from Punjab Nagar to his village and road was running from west to east. Incident took place after three kilometers beside the agricultural field of Kewal, which is situated on the southern side. PW-1, in his cross-examination, has stated that the accused persons were standing fifteen steps away towards the south side from the place where he received bullet injury. Such event of bullet injury received by the appellant has neither been mentioned in the FIR nor deposed by him in his examination-in-chief. Even there is no medical report available on the record to corroborate his statement in this respect. In his cross-examination, PW-1 has stated that while he had been challenged by the accused persons, his motorcycle was tottered and he fell down along with his motorcycle towards southern side in the agriculture field of Kewal but his wife remained standing on the road just four steps away from the agriculture field of Kewal. While he fell down, the accused Chhattrapal shot one fire on the appellant/informant whereas, in the FIR and in the examination-in-chief, it has been mentioned that he and his wife were coming by motorcycle, Chhattrapal shot fire at him which inflicted injury to his wife who fell down on the road and he saw his wife injured lying on the road.

24. Timing of inflicting injuries to the victim is different as mentioned in the FIR, examination-in-chief and the cross-examination of PW-1. In examination-in-chief, PW-1 stated that his wife sustained gun shot injury on the way while she was sitting on the motorcycle and coming to the village, but in cross-examination he stated that his wife had sustained gun shot injury when she was standing on the road. PW-1 deposed that while he received bullet injury, the accused persons were standing

fifteen steps away towards south whereas later on, he had deposed he was not injured rather his wife had sustained injury.

25. As per deposition made by PW-1, his wife was unconscious due to bullet injury and had been taken by the police to the hospital where she regained consciousness at about 2:30 A.M., whereas, on the other hand, the I. O. has stated that he could not find any evidence that the injured victim (PW-2) had been carried by the police jeep to the hospital for medical examination. That apart, sequence of events as narrated by PW-2, i.e. after sustaining gun shot injury until her admission in the District Hospital, indicates that she was fully conscious even after sustaining injury and she had observed all activities from the beginning of the incident until her discharge from the hospital. There is nothing on record to prove that at the time of medical examination i.e. 8:30 P.M., victim was brought to the hospital in unconscious condition. No such endorsement, regarding her unconscious state, is depicted in the medical report.

26. Deposition made by PW-2 is also full of contradiction and hard to believe. In her cross-examination, she had stated that she was in her house at Sai Vihar, Rampur, till 4:00 P.M., and thereafter, she had reached house of Guddu in dark atmosphere. On the contrary, PW-1 had stated that it was not dark, while he started from the house of Guddu, about 7:00 P.M., with his wife to his village-Raipur. According to PW-2, from the house of Guddu, she along with her husband departed to her house at Sai Vihar, Rampur, whereas, PW-1 has stated that they were going to their village-Raipur. Therefore, according to PW-2 they were not going to Raipur.

27. As per deposition made by PW-2 agriculture field of Kewal was situated hardly about ½ km from the house of Guddu, whereas, during his examination-in-chief at page-5, PW-1 had deposed that place of incident is situated near agriculture field of Kewal, was about 3 km far away from the house of Guddu. There is an absolute difference between ½ km and 3 km, which creates doubt with respect to the place of occurrence. As per deposition of PW-2, road was unpaved and there was darkness on the desolated road and the motorcycle was being driven towards east side of the road. In the Site Map (i.e. Exhibit Ka 4) road coming from Punjab Nagar to Raipur is shown running from west to east. Towards south, adjacent to the road, agriculture field of Kewal has been shown to be situated, where the incident took place. As per deposition of PW-1, while he was coming back on the motorcycle, his wife (PW-2) was sitting on the back seat with joint knees facing towards north. According to Site Map (Exhibit Ka 4) and as per version of prosecution, accused persons were standing on the south side and therefrom they shot fire, meaning thereby, accused persons were standing towards right side of the running motorcycle (i.e. west-east) and face of victim was towards left side of running motorcycle. On the contrary, PW-2 has deposed at page-6 that she was sitting on the motorcycle with her joint knees towards right side and her husband was driving the bike facing east side. Therefore, as per her statement, she was facing right side (towards south) and the motorcycle was running from west to east. Therefore, according to her statement, accused persons were standing towards left side of the motorcycle and on instigation of Rakesh, Chhattrapal had shot fire from left side. On single fire, she sustained injury on her

head, thereafter, accused persons fled away towards the village by opening indiscriminate firing. According to her deposition, she fell down on the right side of the motorcycle immediately after sustaining bullet injury and was little bit conscious. Learned trial court has observed that though PW-1 is a lady, who belongs to rural area, but she was well acquainted about all the four directions.

28. PW-2 has deposed that her husband went towards east chasing the accused persons, whereas as per prosecution case as well as the Site Map (Exhibit Ka 4), accused persons fled away towards south direction. PW-2 has stated that on the spot where she fell down, blood oozed out from her wound. On the contrary, PW-4 I.O. has deposed in his cross-examination that he did not find any blood stains on the spot. As per statement of PW-2, one pellet injury was inflicted on her back side below the waist, but in the injury report, no injury has been shown on that part of her body. Later on, she stated that she sustained said injury because of falling down on the earth. At page-'8', she has deposed that she had nowhere stated that after chasing the accused persons, her husband returned back after 10-15 minutes and till he returned the motorcycle was lying there, beside her. She stated that her husband did not sustain any injury even after falling down from the motorcycle. But, later on she deposed that her husband had made balance, of motorcycle, with his legs, therefore, the motorcycle had not fallen down rather, she alone fell down from the motorcycle.

29. As per prosecution, while PW-2 sustained injury on her temple region, the motorcycle fell down towards right side in the agriculture field of Kewal. As per statement of PW-1, he and his motorcycle fell down in the agriculture field of Kewal and his wife remained standing on the road. Therefore, there is major contradiction with respect to the physical position of PW-1 and PW-2 on the spot. Even position of the motorcycle is also doubtful in the light of statements made by PW-1 and PW-2. PW-1 deposed that after sustaining bullet injury, his wife became unconscious and remained in that condition till 2:30 A.M. in the night, whereas, statement of PW-2 shows that she was conscious. At page-'3', she stated that she was lying on the road for 15-20 minutes, thereafter, his Jethh (brother-in-law) came on the spot and after half an hour, police reached on the spot and took her along with her husband to the Rampur Hospital. From there, they reached hospital within 15 minutes and doctor had examined her injuries and she was admitted there. However, she was not sure about the time by which she reached the hospital.

30. Surrounding circumstances as deposed by PW-2 and the statement/reply of accused under Section 313 Cr.P.C. reveal that political rivalry existed between both the parties. Victim (PW-2) and wife of Satyapal (brother of Chhatrapal/accused) had contested the election of Pradhan and wife of Satyapal had won the election, since then PW-1 informant bears enmity. In this backdrop of fact, it seems improbable that Chhatrapal committed the crime out of enmity, whereas his sister-in-law had won the election of Pradhan. On the other side, informant could have chance to bear the political antipathy and had got the motive to falsely implicate the accused persons in criminal case, inasmuch as, his wife (PW-2) was defeated in the said election.

31. Though the minor discrepancies or contradictions are not of much relevance

in examining the facts and circumstances responsible for the commission of the crime, inasmuch as, with the passage of time when witnesses are called in the witness box, they may have some problem, for many reasons, in recollecting the exact happening which took place on the date of occurrence. In this respect, Hon'ble Supreme Court in **Bharwada Ghoginbhai Hirjibhai v. State of Gujrat, AIR 1983 SC 753,** has expounded the law showing several conditions wherein minor discrepancies could be occurred and same should be ignored. The relevant portion of paragraph 5 and paragraph 6 are being quoted below :

"5. .....Over much importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

32. In the present matter, as discussed above, glaring contradictions and discrepancies have been found and such discrepancies affected the genesis of the crime. All discrepancies, totters basic

version of the witnesses, which affects the accusation made by prosecution and the occurrence of crime.

33. So far as second perspective qua information of the crime is concerned, we are not satisfied with its correctness in the light of chronology of events as portrayed by the prosecution. It is mentioned in the FIR that when informant rang his family members by his mobile phone, one Sunil immediately rushed to the place of occurrence, but unfortunately Sunil, who is informant's relative, had not been brought in the witness box to corroborate the prosecution case. Sunil appears to be an important witness to authenticate the presence of PWs-1 and 2 at the place of occurrence, injury of PW-2 and the presence of the police, who reached on the spot after him.

34. Perusal of FIR evinces that in presence of Sunil, informant dialled his mobile phone to call the police for help who, in turn, reached on the spot and took them to the hospital for medical examination. Statement of I.O. (PW-4) does not corroborate the prosecution case with respect to arrival of the police on the informant's call and taking the victim and her husband (informant) to the hospital. Factum of arrival of the police on the spot and phone call of PW-1 has been denied by the I.O. (PW-4), who has stated in his cross-examination that there is no evidence on the record to prove that victim had been carried to the hospital by the police jeep. The relevant portion of statement of PW-4 is being quoted below :-

"विवेचना के दौरान ऐसा कोई साक्ष्य मुझे नहीं मिला कि घटनास्थल से चुटैल विमला देवी को उठाकर थाने की पुलिस जीप में डालकर डाक्टरी मुआयने के लिए पुलिस ले गयी हो।"

35. In case, the incident was informed by the informant to the police, who reached on the spot at informant's phone call, there should be an endorsement in the general diary (G.D.) with regard to movement of the police on the call of informant and carrying them to hospital. There is no such entry in the G.D. to show the movement of the police on the call of informant and took them to the hospital for medical treatment.

36. It is also very astonishing that there is no documentary evidence on the record to prove that victim had been medically examined on the instructions of the police. No letter for medical examination of victim (majruvi chithhi) had been issued by the police. In the light of the aforesaid facts, case of prosecution regarding the telephonic information to the relative of informant namely Sunil and thereafter to the police, who allegedly took them to hospital, is under cloud and no credence could be given to it.

37. It is pertinent to point out that medical report indicates that the victim had been brought by Bhanu Yadav (i.e. husband of victim/informant). Aforesaid endorsement in the medical report contradicts the prosecution case that PW-1 and his victim wife (PW-2) were brought to the hospital by the police. Dr. Lalit (PW-3) has clearly stated that there was no letter (majruvi chithhi) issued by the police for medical examination of the victim. He has further deposed that in absence of any letter from the police for examination of injuries, there is a requirement of permission from the concerned Chief Medical Officer (hereinafter referred to as "C.M.O.") but

there is nothing on the record to show that the prosecution had obtained permission from the concerned C.M.O. either prior to, or after, the medical examination.

38. Perusal of the record revealed that original Medical Report was missing from the medical register, which was allocated for the same purpose. PW-3, Dr. Lalit clearly stated that original Medical Report was the victim is not available on the record and only the photostat copy of that report was available, which had not been copied by him. He had further deposed that he does not know the person concerned, who has attested the photocopy of the medical report. Perusal of record revealed that photocopy of the medical report, which had been said to be prepared and signed by Dr. Lalit (PW-3) on 12.04.2012, is marked as Exhibit Ka 2. On the rear side of the certificate there is seal of a Medical Officer and just above the seal there is an initial of someone with an endorsement "attested". Original copy of Supplementary Medical Report dated 14.04.2012 is available on the record. It is pertinent to point out that in fourth line of front page, where the date of medical examination is mentioned; a tampering appears to have been made over the month of report which has been tried to be made '4' by running the pen repeatedly in the same direction for making it '4'. PW-3, Dr. Lalit had admitted the medical examination of victim but refused attestation of photostat copy of the medical report.

39. Even assuming the correctness of the medical report, we are not in a position to convince ourselves, after appreciation of the medical report and the deposition of Dr. Lalit (PW-3) that the wounds inflicted to the victim are attributable to single gun shot, as hammered by the prosecution. Inflicted wounds could be examined under two perspectives i.e. nature of wound and use of firearm. In the medical report, all the injuries are shown to be superficial and simple in nature. After X-Ray report, nothing had been found in the wound except an observation-"Shadows of metallic density". In the Supplementary Medical Report, Dr. Lalit (PW-3) opined as under :-

"Opinion: Hence injury no.(1), (2), (3) which were KUO are simple in nature."

40. In the first Medical Report, only shape and size of wound have been mentioned, but depth of the wound has not been mentioned. There is no retrieval of pellets or bullets from the wound. Dr. Lalit (PW-3) deposed that injury no.(1) could be caused because of use of different types of firearms. Aforesaid deposition of Dr. Lalit had not corroborated the prosecution case with respect to the single shot fired by accused. It has not been made clear, anywhere, as to which type of firearm had been used by the accused in commission of the crime. Dr. Lalit had categorically stated that collar of abrasion, as mentioned in first injury, could be emerged, in case, fire is shot from a distance of 1 and 1 ½ feet and it would not emerge when fire was shot from the distance of 8-10 feet. In his cross-examination, PW-1 has deposed that while accused Chhattrapal challenged PW-1, he was standing 15 steps away from him towards south side and therefrom he shot fire at him which inflicted wounds to his wife (PW-2). As per rough calculation one step could be counted as two feet, therefore, 15 steps would be reckoned about 30 feets. In this view of the matter, depositions of Pws-1, 2 and 4 are contradictory qua cause of injury.

41. In the facts and circumstances of the present case, statutory element of Section 307 IPC are not attracted. "Intention" or "knowledge" are two alternative statutory elements to hold any person guilty for the commission of offence u/s 307 IPC. Therefore, one should have mens-rea intending to commit murder or should have possess knowledge that overt act, in all probability, would cause death of victim. Term "attempt" as embodied in the aforesaid sections could stem from the specific intention to commit murder and such blameworthy condition of mind could be gathered from the direct or circumstantial evidence, including the conduct of accused. Mere bodily injury capable of causing death or not, are not sufficient to hold any person guilty for committing crime under aforesaid sections.

42. After considering the medical report and circumstances in totality, it cannot be said that the accused have made attempt to murder as defined under Section 307 IPC. There are no such circumstances to suggest the intention of the accused persons for committing homicidal death of the informant or his wife.

43. Instant appeal is preferred against judgment of acquittal. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views on appreciation of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the Trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna reported in (2005) 9 SCC 291,** the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evnidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

44. In **Sudershan Kumar v. State of Himachal** reported in **(2014) 15 SCC 666,** the Hon'ble

"31. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under:

"37. In ***Chandrappa v. State of Karnataka reported in (2005) 9 SCC 291,*** *this Court held:*

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

(1) The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

(2) The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

(3) The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

(4) The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

(5) If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

45. In **Dilawar Singh v State of Haryana, (2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under:

*"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, whi*le acquitting,

cannot be the views of a reasonable person on the material on record."

46. After analyzing the facts and circumstances of the case and perusal of the record, we are of the considered view that Court below has rightly acquitted opposite party nos.2 and 3 for the commission of alleged crime under Section 307 IPC. If the evidence of prosecution is read and considered in totality of surrounding circumstances along with other evidences available on the record, in which the crime is alleged to have been commissioned, it cannot be said that accused persons had attempted to commit homicidal death of informant/appellant and his wife. Neither depositions of prosecution witnesses inspire confidence of the Court, nor it disclose the true genesis of the crime under Section 307 IPC. Prosecution has failed to prove its accusation beyond all reasonable doubts. In such a situation of fact, accused persons i.e. respondent nos.2 and 3 are entitled to get benefit of doubt and their innocence could easily be inferred. There is no substantial and compelling reasons to reverse the order of acquittal passed by the trial court. Learned counsel for the informant/appellant has failed to point out any illegality or perversity in the impugned judgment and order, which is under challenge in this appeal. Thus, we find no ground to interfere in the findings of fact recorded by Court below which has decided the matter in favour of respondents-accused persons.

47. In the result, this appeal is dismissed at the stage of admission itself. Consequently, the impugned judgment and order dated 25.09.2018 passed in Sessions Trial No.306 of 2012, is hereby affirmed and maintained.

48. Let a copy of this judgment along with lower Court's record be transmitted to the concerned Court below forthwith.

(2020)11ILR A242
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Misc. Application U/S 372 Cr.PC (Leave to Appeal) No. 65 of 2016

Pankaj Jaiswal ...Applicant
Versus
Narendra Kumar Singh & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Rajendra Kumar Rathore, Sri Vivek Jaiswal, Sri Kumdax Kumar Dwivedi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Indian Penal Code - Sections 307, 308 - Attempt to murder/ culpable homicide - Bodily injury - Mere bodily cannot be made the solitary basis for conviction of the accused for commission of crime u/ss 307, 308 IPC - statutory ingredient - 'Intention' or 'Knowledge' - one should have mens-rea intending to commit murder or should possess knowledge that overt act, in all probability, would cause death of the victim (Para 32)

B. Criminal Law - Criminal Procedure Code, 1973 - Sections 221, 222, 464 - Conviction for lesser offence - without framing charge - no absolute bar or impediment, in punishing a person for an offence less grave than the offences for which the accused was charged - an accused can be convicted for an offence with which he may not have been specifically charged - an omission in framing of charge is, by itself not sufficient for upsetting the conviction - interference only if it is shown that

omission in the framing of charge caused prejudice to the accused & failure of justice (Para 38, 39)

Trial court framed charges u/ss 307, 308/34, 326/34, 504, 506 I.P.C. but convicted for lesser offences u/s 323/34, 325/34 - Allegation that offender intentionally shot fire with kata upon informant and attempted to murder him as such accused ought to have been convicted for the graver offence u/ss 307, 308, 326 IPC- *Held* - Except the statement of P.W. 1 (informant) no one corroborated his version with respect to use of country made pistol - used cartridge not found on the spot – no recovery of alleged 'katta' & empty cartridge - Injuries not capable of causing death of the victim - no dangerous weapons or means used in the crime for voluntarily causing grievous hurt - graver offences not proved beyond reasonable doubt (Para 33, 34)

Appeal Dismissed (E- 5)

List of Cases cited:-

1. Dinesh Seth Vs St. of N.C.T. of Delhi (2008) 14 SCC 94

2. Rafiq Ahmed @ Rafi Vs St. of U.P. AIR 2011 SC 3114

(Delivered by Hon'ble Dinesh Pathak, J.)

Ref: Delay Condonation Application No. 387488 of 2016

On the application under Section 5 of the Limitation Act in moving the application seeking leave to appeal, time was granted to file counter affidavit vide order dated 17.12.2016.

No counter affidavit has been filed, till date.

The explanation given by the applicant for the delay is found satisfactory.

The application under Section 5 of the Limitation Act is hereby allowed. Delay condoned.

The application is treated to have been filed within time prescribed for the purpose.

Order on Appeal

1. Heard Sri Vivek Jaiswal, learned counsel for the appellant at admission stage.

2. Instant criminal appeal u/s 372 Cr.P.C. has been preferred by the appellant, who is son of informant, Ramesh Chandra Jaiswal (since deceased), challenging the impugned judgement dated 15.3.2016 passed by the Additional District & Sessions Judge, Court, Varanasi in S.T. No. 529 of 1999 (State of U.P. vs. Narendra Kumar Singh & others), convicting the accused Narendra Kumar Singh (respondent no. 1), Ajay Kumar Singh (respondent no. 2) and Shiv Shankar Singh (respondent no. 3) for the commission of lesser offences under Sections 323/34, 325/34, 506 I.P.C., than the commission of graver offences for which they had been charged under Sections 307, 308, 326 & 504 I.P.C. Each of them (accused) has been sentenced to undergo imprisonment for six months under Section 323/34 and three years imprisonment under Section 325/34 I.P.C. along with fine to the tune of Rs.2000/-. In case of default, they shall further undergo three months additional imprisonment. That apart, they have also been sentenced to undergo imprisonment for one year under Section 506 I.P.C. along with fine of Rs.500/-. In case of default, they shall further undergo one month additional imprisonment. All sentences will go simultaneously.

3. It is pertinent to mention here that Jata Shankar Singh, one of the accused and informant Ramesh Chandra Jaiswal (P.W.1) had died during the pendency of the trial.

4. As per the FIR version, informant Ramesh Chandra Jaiswal was owner and in possession of House No. B-28/7-A, Ghasiyaritola, P.S. Bhelupur, District Varanasi. On the date of the incident i.e. 16.11.1994 at 9.00 p.m. Jata Shankar Singh s/o Chatradhari Singh, Narendra Singh s/o Jata Shankar Singh, Ajay Kumar Singh, son of Ravi Shankar Singh, all residents of B-28/7-A, Ghasiyaritola, P.S. Bhelupur along with their relative Shiv Shankar Singh s/o Gauri Shankar Singh, resident of village Bhikaripur, P.O. & P.S. Kachwa, District Mirzapur, who were tenants of southern portion of the house, armed with 'katta' (country made pistol), iron rod and hockey stick barged into the house of informant Ramesh Chandra Jaiswal and asked him to vacate the house. While the informant resisted, one of the accused namely, Narendra Singh shot at him by 'katta' intending to kill him. Still, he escaped by breath's distance and tried to run away, the remaining accused chased after him and thrashed him by iron road and hockey stick. While the informant screamed, his servant Bajrangi Lal (P.W. 2) son of Chhedi Lal, resident of D-41/3, P.S. Dashaswamedh, Districk Varanasi, who worked at his cement shop situate outside of his house, rushed to the informant but the accused had beaten him up as well by iron rod and hockey stick. Due to fracas, bypassers and bystanders gathered at the seen, consequently, anyhow lives of the informant and his servant could be saved. Thereafter, the accused threatened them to take their lives and fled away.

5. In this backdrop, the informant filed the written report dated 16.11.1994 (Ext. Ka-1) at 10.00 p.m. and on the basis thereof, first information report (Ext. Ka-6) was lodged at the P.S. Bhelupur, District Varanasi. Head Clerk, Sri Ram Suchit Yadav (P.W. 6) of P.S. Bhelupur, District Varanasi had endorsed the contents of the written report in chik no. 300, registered as case crime no. 402/1994 against four accused namely, Jata Shankar Singh (since deceased), Narendra Singh (respondent no. 1), Ajay Kumar Singh (respondent no. 2) and Shiv Shankar Singh (respondent no. 3) under Section 307, 308, 326, 504, 506 I.P.C. at P.S. Bhelupur, District Varanasi. The aforesaid version was also endorsed in G.D. at Rapat no. 44.

6. Injuries inflicted to informant, Ramesh Chandra Jaiswal, P.W. 1 had been medically examined by Dr. Narendra Pratap Singh (P.W.4) on 17.11.1994 at Swami Vivekananda ChiKitsalaya, Bhelupur, District Varanasi. He had opined the age of the informant to be 44 years and had prepared/signed the injury report (Ext. Ka-2) of Ramesh Chandra Jaiswal showing the following injuries :

1– फटा हुआ घाव आधा सेमी. गुणे आधा सेमी. ऊपरी ओठ के बाई तरफ मध्य रेखा से एक सेमी. की दूरी पर, रक्तस्राव हो रहा था।

2– फटा हुआ घाव 1 सेमी. गुणे 1.4 सेमी ऊपरी ओठ के अन्दरूनी हिस्से मध्यरेखा से सटा हुआ।

3– उखड़ा हुआ बाया सेन्ट्रील इनसीजर दॉत, रक्तस्राव हो रहा था व दॉत निकल गया था।

4– बाया लैटरल इनसीजर दॉत टूटा हुआ, जिसका टुकड़ा निकल गया था।

5– उखड़ा हुआ दाहिना इनसेन्ट्रल दॉत और दाया सेन्ट्रल इनसीजर दॉत गायब था और रक्तस्राव हो रहा था।

6– बाया सेन्ट्रल इनसीजर दॉत और बाया लैटरल इनसीजर दॉत व बाया केनाइन दॉत और पहला प्रीमैरल उखड़े हुए थे, रक्तस्राव हो रहा था और दॉत गायब था।

7– फटा हुआ घाव 1 सेमी. गुणे 1/2 सेमी. बाए ओठ के अन्दरूनी हिस्से में मध्य रेखा से सटा हुआ।

8– नीलगू 4 सेमी. गुणे 2 सेमी. दाहिने पैर पर एड़ी से सटा हुआ।

9– दर्द की शिकायत छाती पर सामने की ओर दाहिने अग्रबाहू तथा ऊपरी हिस्से में।

7. With respect to the aforesaid injuries, Dr. Narendra Pratap Singh has opined that injury nos. 1, 2, 7 & 8 were simple in nature, caused by *'Kundala'* (Blunt object) whereas injury nos. 3, 4, 5 & 6 were severe in nature which were also caused by *'Kundala'*(Blunt object).

8. On the same day i.e. 17.11.1994 at about 12.10 a.m. Bajrangi Lal, P.W. 2 was also medically examined by Dr. Narendra Pratap Singh, who had prepared and signed the medical report (Ext. K-3) showing three injuries which are given below :

1– फटा हुआ घाव आधा 3.5 सेमी गुणे .5 सेमी बाए कान के पिन्ना पर, बाए कान के पीछे रक्तस्राव हो रहा था। पिन्ना का किनारा फआ हुआ था।

2– खरासदार नीलगू 2 सेमी. गुणे 1.5 सेमी. माथे पर बाए तरफ बाई भौ से 1.5 सेमी. ऊपर और मध्य रेखा से 2 सेमी. दूरी पर,

3– दर्द की शिकायत बाए हाथ पर।

9. On FIR being lodged, the case was entrusted to Sri Suresh Yadav, Sub-Inspector for investigation who has recorded the statement of P.W. 1 on the same day, inspected the place of occurrence and prepared the site plan (Ext. K-4). On 17.4.1994 he arrested Narendra Kumar Singh, Ajay Kumar Singh and Shiv Shankar Singh and recorded their statement in the case diary. Fourth accused Jata Shankar Singh had surrendered in the court on 8.12.1994. His statement was recorded in the case diary on the same day.

10. After thorough investigation, the investigating officer had submitted charge-sheet (Ext. ka-5) under Section 307, 308, 326, 504, 506 I.P.C., P.S. Bhelupur, District Varanasi. Vide order dated 31.3.1995, the trial court had taken cognizance of the offence and given copy of evidence to the accused under Section 207 Cr.P.C. Thereafter, the trial court vide order dated 17.7.1999 committed the case to the Court of Sessions for trial. The trial court vide order dated 1.11.2010 framed charges against the accused namely, Narendra Kumar Singh, Ajay Kumar Singh and Shiv Shankar Singh under Section 307, 308/34, 326/34, 504 and 506 I.P.C. Apart from that, Narendra Kumar Singh had been separately charged for the offence under Section 307 I.P.C.

11. To prove the guilt of the accused, the prosecution has examined as many as six witnesses. Out of them, three are the witnesses of fact whereas the remaining three are formal witnesses.

12. P.W. 1 Ramesh Chandra Jaiswal was the first informant of the occurrence and had proved his written report as Ext. K-1. He had deposed that he was the sole owner of the house in question i.e. B-28/7A, Ghasiyaritola, District Varanasi and resided there. Jata Shankar Singh was the tenant of the ground floor towards the southern portion of the house. According to his version, on 16.11.1994 at 9 p.m., accused Narendra Kumar Singh armed with country made pistol, Ajay Kumar Singh armed with hockey stick, Shiv Shankar Singh armed with iron rod and Jata Shankar

Singh barged into the flat of the informant and threatened him to vacate the same. In the meantime, Narendra Kumar Singh had shot fire at him but he escaped by breath's distance. He further stated that, while he tried to run away, accused persons had caught and thrashed him by hockey stick and iron rod due to which he sustained grievous injuries. On his screaming, P.W. 2 Bajrangi Lal, servant of the informant who worked at his cement shop, reached there but he had also been thrashed by iron rod and hockey stick, consequently, he fainted on the floor. In the meantime, several people gathered there and intervened in the matter. P.W. 1 further stated that the aforesaid incident was witnessed by PW-3, Ashok Kumar and one Rajesh. Thereafter, he went to the police station to lodge written complaint. The informant also stated that after FIR being lodged, he had been taken by the investigating officer at the place of occurrence and had been sent for medical examination accompanied by a constable.

13. P.W. 2 Bajrangi Lal who is injured witness has corroborated the statement of P.W. 1 with respect to the occurrence in his deposition. P.W. 3 Ashok Kumar who has been produced as a witness of the incident, has also corroborated the occurrence. P.W. 4 Dr. Narendra Prapat Singh has proved the medical report/inury report (Ext. K-2) of Sri Ramesh Chandra Jaiswal and medical report/injury report (Ext. K-3) of Bagrangi Lal. P.W. 5 Sri Suresh Chandra Yadav, the investigating officer has deposed the sequence of investigation as mentioned in the case diary. He has proved the site map (Ext. K-4) and charge-sheet (Ext. K-5) filed against the accused. P.W.6, Head Clerk, Sri Ram Suchit Yadav has proved the Chik report No. 300 (Ext. K-6) which has been written by him on the basis of written report filed by the informant on 16.11.1994 at about 22 p.m. He has also proved the carbon copy of G.D. Entry (Ext. K-7).

14. The prosecution has submitted several documentary evidence to prove the ownership and possession of the informant over the property in dispute, like as copy of plaint of O.S. No. 162/1994 (Ramesh Chandra vs. Phulvasa Devi & others) (Ext. Ka- 8), Death certificate of Vishwanath Pandey (Ext. Ka-10), Death certificate of Smt. Chabiraji Devi (Ext. Ka-11), Copy of the registered sale deed dated 9.12.1993 (Ext. Ka-12) executed in favour of the informant Ramesh Chandra Jaiswal, Copy of the order dated 25.2.1994 passed in O.S. No. 162 of 1994 (Ramesh Chandra vs. Phulvasa Devi & others) (Ext. Ka-13), Copy of Misc. case no. 259/1989 (Jata Shankar vs. Shiv Nath Pandey) (Ext. Ka - 14), Copy of the order dated 1.8.1992 passed in Misc. case no. 259/89 (Ramesh Chandra vs. Phulvasa Devi & others) (Ext. Ka-15), Copy of the Commissioner's report filed in O.S. no. 760/1994 (Ramesh Chandra vs. Phulvasa Devi & others) (Ext. Ka-16), Copy of the affidavit filed by Ramesh Chandra Jaiswal in O.S. No. 760/1994 (Ramesh Chandra vs. Phulvasa Devi & others) (Ext. Ka - 17)

15. Accused namely, Jata Shankar Singh (since deceased), Narendra Singh, Ajay Kumar Singh and Shiv Shankar Singh had made their statement under Section 313 Cr.P.C. They had denied the alleged incident and pleaded their innocence. They stated that they had been falsely incriminated in the alleged offence and claimed for trial.

16. In addition to the answer of the questions put to the accused under Section

313 Cr.P.C., Jata Shankar Singh has stated that on the date of occurrence, he was not present in the house. After returning home, he came to know that Ramesh Chandra Jaiswal, with whom he is prosecuting, came along with police personnel of P.S. Bhelupur, District Varanasi, had ransacked and plundered his house. They had flailed Narendra Kumar Singh and others, who were present in the house and illegally roped in them in a false criminal case. With respect to the same incident, Narendra Kumar Singh had also initiated separate criminal proceedings.

17. Accused Narendra Singh has deposed that true owner of the house in dispute was Smt. Phulvasa Devi and in respect of house in question Ramesh Chandra Jaiswal was pursuing civil litigation. On the date of occurrence at about 10 a.m. Ramesh Chandra Jaiswal alongwith police personnel of P.S. Bhelupur barged into his house and plundered it. On resistance, they flailed him and illegally incriminated all of them in false case.

18. Accused Ajay Kumar Singh stated that on the date of occurrence, he was present at the house of his relative Jata Shankar Singh and in the night the police came and plundered the house. On resistance being made, they had falsely incriminated Narendra Singh and Shiv Shankar Singh in false case. Accused Shiv Shankar Singh had also made statement in the same way corroborating the statements of other three accused.

19. Accused had not examined any other independent witness in their defence, rather filed several documents to prove their ownership over the property in dispute. To prove their victimization, they filed cross-case with respect to the same incident registered as case crime no. 125/1996. In the aforesaid case, final report dated 3.12.1997 had been submitted by the investigating officer. Feeling aggrieved, the accused preferred protest petition registered as Misc. case no. 504/2000. After considering the statement under Section 200 Cr.P.C. made by Jata Shankar Singh and statement of witnesses namely, Santosh Kumar, Narendra Kumar Singh and Ajay Kumar Singh under Section 202 Cr.P.C., the trial court passed an order dated 9.6.2000 summoning Ramesh Chandra Jaiswal under Section 447, 379 I.P.C.

20. After considering the facts and circumstances of the case and the documentary evidence available on record, the trial court found that no offence under Section 307, 308 & 326 I.P.C. was made out, rather convicted the accused for the commission of lesser offence under Section 323/34, 325/34 and 506 I.P.C., as mentioned in the preceding paragraphs.

21. Feeling aggrieved against the conviction of accused for the lesser offence, present appeal has been preferred by the appellant who is the son of the informant late Ramesh Chandra Jaiswal seeking conviction of the accused, for the incident in question, in accordance with law.

22. Learned counsel for the appellant submitted that the punishment awarded by the trial court under Section 323/34, 325/34, 506 I.P.C. to the accused/respondents is disproportionate to the injuries sustained by the informant, Ramesh Chandra Jaiswal, whereas serious injuries were inflicted which could cause homicidal death of the informant. Therefore, accused should also be punished

under Section 307, 308, 326 and 504 I.P.C. He further submitted that conviction for lesser offence without framing any charges in that respect, had illegally been awarded, on the basis of surmises and conjectures, which is unjustified. Sri Ramesh Chandra Jaiswal, the father of the appellant had received fatal injuries, which were nine in number but his medical report and the surrounding circumstances had not been properly appreciated by the trial court whereas the statement of Ramesh Chandra Jaiswal was fully corroborated by other relevant evidence available on record. It is further submitted that cross-FIR filed by the accused clearly proved their presence on the spot, who had beaten up Ramesh Chandra Jaiswal with an intention to cause his death.

23. We have carefully considered the submissions advanced by learned counsel for the appellant and perused the impugned judgment passed by court below and the papers filed by the appellant.

24. Occurrence of crime was the result of property dispute. Both the parties were claiming their right, title and possession over the house in dispute i.e. house No.B-28/7-A, Ghasiyaritola, P.S.Bhelupur, Varanasi. The informant Ramesh Chandra Jaiswal was claiming his right and title over the property in dispute on the basis of the registered sale deed dated 9.12.1993 (Ext. K-12) which had been executed by the heirs and legal representatives of Shiv Nath Sharma through the power of attorney holder. According to the prosecution case, the house in dispute orginally belonged to one Vishwanath Pandey who died on 25.5.1988. His death certificate had been filed as Ext. K-10. He was succeeded by his son Shiv Nath Sharma who also died on 13.1.1991, his death certificate had been filed as Ext. K-11. After death of Shiv Nath Sharma, his heirs had executed registered sale deed in favour of the informant. At the time of the sale deed, when the informant got the possession of the property in dispute, Jata Shankar was residing in a flat situate towards southern portion of the house. Ramesh Chandra Jaiswal (P.W.1) had filed a suit registered as O.S. no. 162/1994 (Ramesh Chandra Jaiswal vs. Smt. Phulvasa Devi w/o Jata Shankar) for permanent injunction and cancellation of the alleged Will deed. On the other hand, accused were claiming their right and title on the basis of an unregistered Will Deed dated 21.5.1988, from which Smt. Phulvasa Devi wife of Jata Shankar had derived her right and title over the property in dispute. Smt. Phulvasa Devi had also filed a suit being O.S. No. 760 of 1994 for a direction to the Senior Superintendent of Police to restrain the Ramesh Chandra Jaiswal from interfering in her peaceful possession over the property in question. At a later stage, after the date of occurrence, she amended the plaint seeking dispossession of Ramesh Chandra Jaiswal from the house in question.

25. The trial court entered into the civil dispute between the parties and recorded a finding with respect to the title and possession of the parties over the property in dispute. At this juncture, we may note that we are not supposed to go into the merits of the title and possession of the parties over the property in dispute because of the nature of proceedings before us.

26. As per the prosecution case, late Ramesh Chandra Jaiswal was the owner of the house in question and was residing in it's northern portion whereas accused Jata

Shankar and others were residing, as a tenant, towards the southern portion of the house in dispute. On the date of incident i.e. 16.11.1994 at about 9.00 p.m. accused barged into the flat of the informant and asked him to vacate the premises in question. While the informant had resisted their conduct, one of the accused namely, Narendra Kumar Singh had shot fire at him who escaped by breath's distance and tried to run away from the seen but the accused thrashed him by iron rod and hockey stick inflicting several injuries. While he raised alarm, Bajrangi Lal, who is his servant and worked at his cement shop, reached there to save him but he had also been beaten up by the accused inflicting injuries. By-passers and by-standards who had heard fracas, gathered on the spot and due to their intervention, the informant and his servant could save their lives.

27. After perusing the documentary evidence available on record, the trial court came to the conclusion that mutation case decided in favour of the informant Ramesh Chandra Jaiswal on the basis of the registered sale deed dated 9.12.1993 and appeal filed by Smt. Phulvasa Devi wife of Jata Shankar against the mutation order was pending and the informant Ramesh Chandra Jaiswal was in possession over the property except southern portion of the house, which was in the tenancy of Jata Shankar since the time of the original landlord. In this back ground, trial court came to the conclusion that accused barged into the house of Ramesh Chandra Jaiswal in furtherance of the common intention to cause him harm which resulted into occurrence in question.

28. With respect to the same occurrence, accused had also lodged an FIR registered as case crime no. 125/1996 at a belated stage. After due investigation, the investigating officer submitted final report, against which present accused had preferred protest petition which was converted into the complaint registered as complaint case no. 504/2000 under Section 447 and 379 I.P.C. The impugned judgement reveals that both the parties were prosecuting two civil litigations and four criminal cases, details of which are mentioned as below :

1) O.S. No. 162/1994 (Ramesh Chandra vs. Phulvasa Devi & others) which was filed by the informant (Ramesh Chandra Jaiswal) against Smt. Phuvasa Devi wife of Jata Shankar (accused) for permanent injunction with respect to the house in question except the possession of the flat which is in the possession of Jata Shankar. Subsequently, by way of amendment, new relief had been sought for cancellation of will deed dated 21.5.1988 which was allegedly executed by the original owner in favour of Smt. Phulvasa Devi.

2) O.S. no. 760/1994 was filed by Smt. Phulvasa Devi for injunction and at subsequent stage she added a relief for possession by way of amendment after the incident-in-question had occurred.

3) FIR registered as case crime no. 125/1996 (now converted into complaint case no. 504/2000 under Section 447 and 379 I.P.).

4) Case crime no. 23 of 2008 with respect to the incident dated 29.12.2007 under Section 452, 323, 504, 506, 308 I.P.C. filed by Smt. Gauri Yadav wife of Bajrangi Lal against Jata Shankar and others. Aforesaid FIR was registered as S.T. no. 414/2009.

5) FIR registered as case crime no. 540/2008 (State vs. Jata Shankar) under Section 147, 452, 323, 504 & 506 I.P.C.

6) Case crime no. 375/2008 under Section 147, 452, 324, 323, 504 & 506 I.P.C.

29. Series of litigations on the civil and criminal side evince the indulgence of the parties for the title and possession over the house in question, due to which they bore enmity against each other.

30. In the instant matter, we are confining ourselves to the incident which took place on 16.11.1994 at 9 p.m., in which P.W. 1 and P.W. 2 had sustained injuries. P.W. 1 clearly deposed that accused respondents in furtherance of the common intention barged into his house and dragged him from his flat to the lawns within the precincts of the house. He further deposed that his servant Bajrangi Lal had also sustained injuries, who came to his rescue. P.W. 2 had corroborated the statement of P.W. 1 that while he went on the spot after hearing the sound of gunfire and fracas, he saw the accused beating Ramesh Chandra Jaiswal and, while he tried to interpose himself in the scuffle, he had also sustained injuries. P.W. 3 Ashok Kumar had also corroborated the statement of P.W. 1., stating that after hearing the fracas, he went on the spot and saw that accused persons were beating up Ramesh Chandra Jaiswal and Bajrangi Lal.

31. Learned counsel for the appellant has emphasized the use of katta, by which informant was shot, in the crime scene and submitted that accused persons should have been convicted for the graver offence. He has tried to portray the role of charged person as an offender who had intentionally shot fire and attempted to murder and, or, attempted to commit culpable homicide of an informant. Close scrutiny of impugned judgment evince the coherent and justifying approach of the trial court, after considering the circumstances and evidence available on the record, in negating the commission of crime u/s 307, 308 and 326 IPC.

32. "Intention" or "knowledge" are two alternative statutory elements to hold any person guilty for the commission of offence u/s 307 and 308 IPC. Therefore, one should have *mens-rea* intending to commit murder or should possess knowledge that overt act, in all probability, would cause death of the victim. Term "attempt" as embodied in the aforesaid sections could stem from the specific intention to commit murder and such blameworthy condition of mind could be gathered from the direct or circumstantial evidence, including the conduct of accused. Mere bodily injury capable of causing death or not, are not sufficient to hold any person guilty for committing crime under aforesaid sections.

33. The allegations of the prosecution with regard to use of country made pistol during scuffle between the parties, while the accused barged into the house of the informant, is not supported by any evidence. Except the statement of P.W. 1, no one had corroborated his version with respect to use of firearm. P.W. 2 and P.W. 3, both had stated that they rushed towards the place of occurrence after hearing the sounds of gunshot and fracas, meaning thereby both the witnesses were not present at the relevant time when Narendra Kumar Singh had allegedly shot fire at informant (P.W.1) Ramesh Chandra Jaiswal. Even otherwise, used cartridge was not found on the spot. The investigating Officer had not shown any recovery of alleged 'katta' and empty cartridge used in the crime. By any stretch of the imagination, it cannot be said

that at the time of the incident 'katta' was used with intention to kill the informant who allegedly escaped by breath's distance which could, otherwise, have caused his death, in case, he came in its the range. The medical reports of P.W. 1 & P.W. 2 dated 17.11.1994 (Ext. K - 2 & 3 respectively) clearly revealed that blunt object had been used by the accused while they had allegedly attacked on P.W. 1 and beaten up P.W. 2. The injury report of P.W. 1 shows nine injuries, most of them, according to the Doctor, could be caused by a blunt object. There was a cut and abrasion on his lips and jaw. A contusion has been shown at his ankle of right leg. As per the medical report of P.W. 1, Dr. Narendra Pratap Singh opined that injury nos. 1, 2, 7 & 8 are simple in nature which could be caused by blunt object and injury nos. 3, 4, 5 & 6 are severe in nature which could be caused by blunt object as well and all the injuries were fresh and blood was oozing from the wound. In medical report it is show that three tooth of the informant were broken and not present in mouth and one was ruptured. The probability of infliction of such injuries is quite possible when two parties were engaged in fierce face-off. In the medical report, there is no sign of injury on the other part of the body of the informant except, injury no. 8 which has been shown as contusion on the ankle of the right leg. Injuries shown in the medical report are not capable of causing death of the victim.

34. The allegation made by prosecution with respect to the shot fired from katta (country made pistol), thus, is not corroborated by any evidence, as discussed by the trial court. Even, counsel for the appellant has shown his helplessness to show any credible evidence in this regard. Mere injury caused to P.W.1 and P.W.2 cannot be made the solitary basis for conviction of the accused for commission of crime under Sections 307 and 308 IPC. Non recovery of alleged 'katta' and empty cartridge, use of which have been heavily relied upon by the prosecution in making out the genesis of crime, totally wiped out the accusation of the prosecution for commission of offence under the aforesaid sections. As such, the graver offences are not proved beyond reasonable doubt.

35. After considering the medical report and circumstances in totality, it cannot be said that the accused have made attempt to murder or attempted to commit culpable homicide as defined under Section 307 and 308 I.P.C. There are no such circumstances to suggest the intention of the accused persons for committing homicidal death of the informant.

36. Learned trial court has also examined the facts and circumstances of the prosecution case in light of the ingredients for commission of offence, under Section 326 IPC and negate the charge, inasmuch as, no dangerous weapons or means had been found to be used by accused in the crime scene for voluntarily causing grievous hurt to the prosecution.

37. Charge under section 504 IPC was also framed vide order dated 01.11.2010, against accused/respondent but same has not been dealt with by the trial court. We have appreciated the circumstance of the occurrence as discussed in the impugned order. There is no intentional insult committed by the accused to provoke the prosecution, intending or knowing that such provocation would cause another to break the public peace or to commit any

other offence. Instant matter at hand is a result of property dispute between the parties and, as per prosecution case, the aggression was on the part of accused, though accused have filed cross case with respect to same incident showing the aggression on the part of instant prosecution in ensuing the crime. Therefore, statutory elements as embodied u/s 504 IPC are not satisfied and no commission of offence is made out therein.

38. After the appreciation of evidence and considering the circumstances, learned court below has convicted the accused for lesser offence u/s 323/34 and 325/34 IPC. Learned counsel for the appellant has submitted that the trial court has illegally passed the conviction order for the lesser offence without framing any charge against the accused under the aforesaid sections. We do not agree with the submission made by learned counsel for the appellant. Considering the provisions as embodied u/s 221, 222 and 464 Cr.P.C., Hon'ble Apex Court has expounded in the case of **Dinesh Seth vs. State of N.C.T. of Delhi, (2008) 14 SCC 94** that non framing of charges or some defect in drafting of the charges would not vitiate the trial. Para '21' of the said judgment quoted below :

"21. The ratio of the abovenoted judgments is that in certain situations an accused can be convicted for an offence with which he may not have been specifically charged and that an error, omission or irregularity in the framing of charge is, by itself not sufficient for upsetting the conviction. The appellate, confirming or revisional court can interfere in such matters only if it is shown that error, omission or irregularity in the framing of charge has caused prejudice to the accused and failure of justice has been occasioned."

39. The concept of punishing the accused for a lesser offence than the one for which he was charged has been discussed in detail by the Apex Court in the matter of **Rafiq Ahmed @ Rafi vs. State of U.P., AIR 2011 SC 3114,** while considering the two Full Bench decisions of Apex Court and two decisions of Constitutional Bench, and expounded in para '31' :

"31. As is evident from the above stated principles of law in various judgments, there is no absolute bar or impediment, in law, in punishing a person for an offence less grave than the offences for which the accused was charged during the course of the trial provided the essential ingredients for adopting such a course are satisfied."

40. Reverting to the facts and circumstances of the case at hand, we find that with respect to the incident in question both sides had lodged FIR showing injuries caused by other side. Matter at hand relates to the FIR lodged by Ramesh Chandra Jaiswal (since deceased) who and his servant Bajrangi Lal, had sustained injuries mainly on the face as evident from their medical reports (Ext Ka '2' and Ext Ka '3'), respectively. After framing charges, full and fair opportunity of hearing had been afforded to the parties. Thus, precisely it was well within the knowledge of the parties as to what were the accusation made by the prosecution and accordingly, other side had taken his defence. Learned trial court has negated the charges u/s 307, 308, 326 IPC, inasmuch as, ingredients of commission of offence under aforesaid sections are not satisfied. The court below has punished the accused for a less grave offence of cognate nature, i.e. u/s 323 and 325 IPC, whose essentials are satisfied with the evidence on record. Voluntarily causing

hurt/voluntarily causing grievous hurt as embodied u/s 323 and 325 of IPC are alike the main ingredient of Section 326 IPC i.e voluntarily causing grievous hurt, which was one of the offence under trial, and after careful consideration of fact and circumstances of the case trial court had rightly convicted the accused for an offence of lesser gravity, which has been proved by the prosecution beyond reasonable doubt. No prejudice can be said to have been caused to either side owing to non framing of charges under the sections under which punishment for the offence of lesser gravity has been awarded.

41. We are of the considered view, after perusing the impugned order and analyzing the circumstances of the case, that the trial court has rightly convicted the accused for commission of the offences u/s 323/34, 325/34 and 506 I.P.C. on account of the injuries sustained by the informant (P.W.1) and his servant Bajrangi Lal (P.W.2). Other offences of graver nature, qua the charges framed, are not proved beyond reasonable doubt satisfying their statutory elements. There is no illegality or infirmity in the impugned judgment passed by court below warranting interference of this court in an appeal filed on behalf of the informant. We find no good ground to alter or modify the impugned judgment for conviction of the accused for the offences of higher gravity.

42. Resultantly, the instant appeal is dismissed being devoid of merits. Impugned judgment and order dated 15.03.2016 passed by the Additional District & Sessions Judge, Court, Varanasi in S.T. No. 529 of 1999 (State of U.P. vs. Narendra Kumar Singh & others) convicting the accused under Sections 323/34, 325/34, 506 I.P.C. is hereby affirmed.

(2020)11ILR A253
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2020

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Misc. Application U/S 372 Cr.PC (Leave to Appeal) No. 318 of 2019

Ramji Sharan Sharma ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Nipun Singh, Sri Vivek Chaubey

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 372 - Appeal against acquittal - power of appellate court to interfere with acquittal - cardinal principle - if two views on appreciation of evidence are reasonably possible, one supporting acquittal & other conviction, Appellate Court should not reverse the order of acquittal - appellate court may overrule or disturb trial court's acquittal only if it has *"very substantial and compelling reasons"* for doing so - and for that Appellate Court must come to the conclusion that the findings of the Court below are not based on the evidence on record, or suffers from misreading of evidence - or that the view taken by the court below, while acquitting cannot be the view of a reasonable person (Para 32, 34, 35)

Allegation that respondents eight in number grabbed prosecutrix & thrashed her while she going to the police station to register a criminal case concerning the earlier incident of molestation - *Held* - difficult to believe that eight persons jointly beat up the prosecutrix with

sticks, rods & other blunt objects, but only minor injuries of contusion occurred and no fracture, abrasion caused on the body of P.W. 1 - Injuries inflicted on the prosecutrix not proportionate to the alleged severity of violence - no independent witness adduced to corroborate FIR version - statement of daughter in contradiction to the statement of the P.W. 1 (prosecutrix) – Important witness not brought in witness box - probability of election enmity cannot be ruled out - no substantial & compelling reason to reverse the order of acquittal passed by the trial court (Para 31, 32, 36)

Appeal Dismissed (E- 5)

List of Cases cited:-

1. State of Karn. Vs K. Gopalkrishna (2005) 9 SCC 291
2. Sudershan Kumar Vs St. of Himachal (2014) 15 SCC 666

3. Dilawar Singh Vs St. of Har. (2015) 1 SCC 737

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Shri Vivek Chaubey, learned counsel for the applicant/appellant on the question of admission.

2. The instant appeal under Section 372 Cr.P.C. has been preferred by informant-Ramji Sharan Sharma challenging the judgment and order dated 28.05.2019 passed by the Special Judge, Prevention of Corruption Act/Additional Sessions Judge, Jhansi in Special Case No. 155 of 2007 (CNR No. UPJS01-000160-2007), State vs. Briju @ Brijesh Sharma and 07 others, acquitting six accused-respondents namely Suresh (respondent no.2), Sunil (respondent no.3), Raju (respondent no.4), Smt. Genda (respondent no. 5), Smt. Sandhya (respondent no.6) and Smt. Sheela (respondent no.7), for the alleged commission of offences under sections 147, 452, 354, 294, 270, 341, 342, 323, 395 and 412 IPC.

3. The trial commenced against eight (08) accused persons, out of them case of Satish son of Suresh Sharma was separated being juvenile and he had been tried separately by the Juvenile Justice Board. By the impugned judgment only one accused Briju was convicted and the remaining six accused have been acquitted, who are arrayed as respondents in the present appeal.

4. As per the version of the First Information Report (hereinafter referred to as "FIR"), co-villager Briju @ Brijesh Sharma barged into the house of Ramji Sharan Sharma (informant) on 08.09.2007 at about 9:00 a.m. and molested his wife, while she was alone in the house. His daughter (PW-3), went outside to take water from the hand pump. She had immediately rushed to the house hearing screams of her mother and tried to save her. The accused had flailed her daughter as well and fled away. While his wife and daughter were going to the Police Station, BHEL to get the occurrence registered, Briju @ Brijesh Sharma and his accomplices namely Suresh, Sunil, Raju and Satish had surrounded and flogged them on the periphery of the village. The accused then brought them naked in the village, paraded them and filled their mouths with cow-dung and forced them to drink sewage water and hit their private parts as well. His wife and daughter had narrated all these facts to him. The informant, along with his daughter, went to the police station and described the incident to the Police Inspector who, in turn, reached the village. Taking the Maxi (dress) of his wife, the informant also went to the village and again came back to the

police station along with his wife. From there, police personnel had sent his wife and daughter for medical examination. He admitted his wife in the District Government Hospital.

5. Describing all these facts, initially, the informant had moved an application dated 09.09.2007 (which is treated as written report marked as Ext. Ka-1) before the Senior Superintendent of Police, Jhansi. He had passed the order on the said application to register a case and to take legal action against the accused persons. In compliance thereof, concerned police station had lodged the F.I.R. On 09.09.2007 registered as Case Crime No. 133 of 2007 (Ext. Ka-2) under Sections 147, 452, 354, 294, 270, 341, 342 & 323 IPC, against five (05) persons namely Briju @ Brijesh Sharma, Suresh, Sunil, Satish and Raju.

6. In further development, on 11.09.2007 at about 21:10 hours, police had arrested Sunil and Satish in connection with another Case Crime No. 591 of 2007 under Sections 147, 452, 454, 494, 270, 341, 342, 323 & 395 IPC, Police Station Babina, District Jhansi and recovered mobile phone looted from the present prosecutrix and two currency notes of Rs.500/- and Rs.100/- (one each) from the possession of Satish.

7. After investigation, the Investigating Officer had prepared the site map (Ext. Ka-5) and filed the charge-sheet (Ext. Ka-7) against eight (08) persons namely Briju @ Brijesh Sharma, Suresh, Sunil, Raju, Satish, Smt. Genda, Smt. Sandhya and Smt. Sheela respectively under Sections 147, 452, 354, 294, 270, 341, 342, 323, 395 and 412 IPC.

8. On their appearance, accused had been served with the police report and other documents under Section 207 Cr.P.C. The learned Trial Court had framed charges against seven (07) accused persons (including Briju and respondents herein), vide order dated 10.04.2009 under Sections 147, 452, 354, 294, 270, 341, 342, 323, 395 and 412 IPC. Prosecutrix (PW-1) and her daughter (PW-3) had been taken to the hospital by the police and were medically examined by Dr. Ajay Saxena (PW-6) who had prepared and signed the injury report of the prosecutrix (Ext. Ka-9) and the medical/injury report of her daughter (Ext. Ka-8). In the medical report of the daughter (Ext. Ka-8), only one injury had been shown as contusion on the upper portion of the shoulder but in the injury report of the prosecutrix, 06 injuries had been shown. The doctor has opined that these injuries were inflicted prior 6 to 8 hours and could have been caused by blunt object. The injuries shown in the medical report of PW-1 is noted below :-

"१.छाती के पीछे बांयी ओर नीलगू सूजन ६सेमी०X २ सेमी० रीढ़ की हड्डी से ३ सेमी० दूरी पर थी।

२. छाती के बांयी ओर नीलगू सूज १ सेमी०X२ सेमी० जो कि चोट सं०-१ के ३ सेमी० नीचे थी।

३. एब्डोमन पर नीचे की तरफ एवं पीछे की तरफ नीलगू निशान ४ सेमी०X२सेमी० बीचे में,

४. बांये Buttock पर नीलगू सूजन १९ सेमी०X १८ सेमी० जो कि जांघ के पिछले हिस्से तक गई थी।

५. दाहिने Buttock पर नीलगू सूजन १७ सेमी०X१२ सेमी० पर मिली।

६. बांयी टांग के पीछे की ओर नीलगू सूजन १० सेमी०X३ सेमी० एवं घुटने से ६ सेमी० नीचे।"

9. So as to hold the accused guilty, prosecution had examined as many as 07 witnesses, out of them 03 are the witnesses of fact and remaining are formal witnesses.

10. (PW-1) Prosecutrix (wife of Informant) has stated that the incident took place on 08.07.2007 at 9:00 a.m. Her daughter went to fetch water from the government hand pump installed in front of the house and at the same time Briju @ Brijesh Sharma barged into the house and started molesting her. While she raised alarm, her daughter immediately rushed into the house and tried to save her. Accused Briju @ Brijesh Sharma had kicked, punched and flailed them and went away from the house. While she and her daughter were going to the Police Station, BHEL, to get the occurrence reported, Briju @ Brijesh Sharma and his accomplices namely Suresh, Sunil, Raju, Satish, Genda, Sandhya & Sheela had surrounded and flogged them on the periphery of the village. Accused had made them naked, filled their mouths with cow-dung, forced them to drink sewage water, hit their private parts as well and while beating them up paraded them to their home. She further stated that during this incident, they had looted her mobile phone and currency notes of Rs.500/- and Rs.100/- (one each). At the time of incident her husband was not present in the home. She further stated that due to fear, she could not tell her husband about the event of looting mobile phone and Rs.600/-, as well as the involvement of Genda, Sandhya and Sheela in the crime scene. After getting back to normal, she told these facts to her husband, who took her and her daughter by taxi, to the Police Station BHEL, where-from the Police Inspector had sent them to the hospital at Babina for medical examination. On that day police did not register the occurrence. Therefore, on the following day, her husband had moved an application dated 09.09.2007 before the Senior Superintendent of Police, Jhansi for a direction to register a criminal case concerning the incident in question. On the direction of the Senior Superintendent of Police, Jhansi, a criminal case was registered. Next day, she was admitted in the District Hospital, Jhansi for medical treatment.

11. (PW-2), Ramji Sharan Sharma (informant) has narrated the same story as mentioned in the F.I.R. According to his statement, he was not present at the time of incident and when he came to the house, he had been informed by his wife and daughter qua the incident. In his statement he has supported the version of his wife (PW-1) qua looting of mobile phone and Rs.600/- from the prosecutrix and participation of 03 ladies in the crime, whose names are mentioned in the charge-sheet. He has proved his application (written report) as Ext. Ka-1.

12. PW-3 is the daughter of PW-1 & PW-2. She has repeated the sequence of occurrence as narrated by her parents. She has also narrated the event of looting mobile phone and Rs.600/- from her mother and involvement of 03 ladies in the crime.

13. (PW-4) Vidya Dhar, (Constable Clerk) has proved the Chik F.I.R. as Ext. Ka-2. He has also stated that he had endorsed the occurrence in G.D. at Rapat No. 14 at 16:20 hours, dated 09.09.2007. He has stated that original G.D. had been weeded out as per the rules and he had produced the weeding out certificate issued from the office of the Senior Superintendent of Police, Jhansi and proved the same as Ext. 'Ka-3'.

14. (PW-5), J.P.Shahi (S.H.O.) has stated that initially investigation was conducted by the earlier Inspector Rajesh

Chowdhary and after his sad demise, he has taken the charge for further investigation. He has verified the signature and hand writing of earlier Investigating Officer, Rajesh Chowdhary and proved the site map as Ext. 'Ka-5' and the recovery map as Ext. 'Ka-6'. He has also proved the charge-sheet, which has been submitted by him as Ext. 'Ka-7'.

15. (PW-6), Dr. Ajay Saxena, deposed that on 08.09.2007 he was posted as Medical Officer, C.H.C., Babina and had medically examined PW-1 & PW-3. He has proved the medical report of PW-3 as Ext. 'Ka-8' and also proved the medical report of PW-1 as Ext. 'Ka-9'.

16. (PW-7), Constable, has verified the signature and writing of the earlier Investigating Officer late Rajesh Chowdhary.

17. In their statements under Section 313 Cr.P.C., accused persons had denied all the allegations made against them and stated that prosecution story is totally false and baseless. No such incident took place on the spot. They had never commissioned such crime as alleged by the prosecution. They had been falsely roped in the present criminal case because of election antipathy and claimed for trial on merits. In their support, accused persons produced two (02) defence witnesses.

18. (DW-1), Brij Mohan, had stated in his cross-examination that neither any scuffle took place with the prosecutrix in the village on 08.09.2007 nor Briju @ Brijesh Sharma barged into her house. He further stated that Brijesh Sharma, Raju, Satish, Smt. Genda, Smt. Sandhya & Smt. Sheela are well known to him and they are neighbour in the village. House of Ramji Sharan Sharma is situated in front of his well. Neither any scuffle took place with Ramji Sharan Sharma or his wife and daughter in the village, nor anyone had been molested or beaten them up.

19. (DW-2), Ashok, in his cross-examination had stated that no scuffle took place with the prosecutrix on 08.09.2007 and all the accused persons are well known to him who are co-villagers. House of Ramji Sharan Sharma is situated after 5-6 houses from his house. No scuffling or incident of molestation occurred with the prosecutrix and her daughter.

20. After considering the facts and circumstances of the case and the evidence (documentary as well as oral), the trial court had acquitted all the accused except one Briju @ Brijesh Sharma who has been convicted under Section 354, 242, 323 I.P.C. Feeling aggrieved by the acquittal of the present opposite parties/accused, the informant has preferred the instant appeal challenging the impugned judgement dated 28.5.2019.

21. Learned counsel for the appellant has submitted that the trial court has failed to appreciate the evidene available on record and the facts and circumstances of the present case. He has further submitted that the trial court has decided the matter in a cursory manner, only on the basis of conjectures and surmises. The statements of P.W. 1, P.W. 2 and P.W. 3 are fully corroborating the prosecution case but the same have been misread and misinterpreted. The court below has miserably failed to consider the injuries sustained by P.W. 1 and P.W. 2 who are victims of the incident. He has also submitted that the prosecution story is based on true facts but the trial court has

illegally acquitted the accused opposite party nos. 2 to 7 without any rhyme and reason.

22. We have carefully considered the submissions advanced by the learned counsel for the appellant and perused the impugned judgement passed by the trial court and also perused the record of the Court below, summoned in compliance of order dated 06.08.2019 passed by this Court.

23. The FIR, as per the version therein, consists of two incidents happened at two different locations at different point of time on the same day. The first incident took place at the residence of the prosecutrix, while she was alone at home and her daughter was out to fetch water from a government hand pump, the accused entered the house and subjected her to molestation and violence. On hearing her screaming, her daughter immediately rushed to the house and tried to save her mother but the accused had beaten up her as well. The second incident took place on the periphery of the village where accused Briju @ Brijesh Sharma, Suresh, Sunil, Raju, Satish, Smt. Genda, Smt. Sheela and Smt. Sandhya had grabbed the prosecutrix and her daughter and thrashed them while they were going to the police station to register a criminal case concerning the earlier incident. After that, accused paraded them naked in the village, filled their mouths with cow-dung, forced them to drink sewage water and hit on their private parts as well while leaving the victims at their house.

24. Treating both the incidents as a chain of one crime, a holistic FIR had been registered in compliance of the order passed by the Senior Superintendent of Police indicting five persons. The FIR evinced the central involvement of accused Briju @ Brijesh Sharma in the accomplishment of both the incidents. Whereas, participation of remaining four accused had been shown only at the second stage of occurrence. Later on, after investigation, the names of three ladies were also included namely, Smt. Genda, Smt. Sheela and Smt. Sandhya. Consequently, the trial had been concluded against eight accused persons.

25. The trial court had convicted Briju @ Brijesh Sharma for the commission of crime under Section 354, 452, 323 I.P.C., whereas acquitted remaining accused, excluding the juvenile Satish, for the alleged commission of a crime under Section 147, 452, 294, 270, 341, 342, 323, 395 and 412 I.P.C.

26. No independent witness had been produced on behalf of prosecution to corroborate the version of the FIR. The statements of P.W. 1 and P.W. 3 evince the presence of several persons at the time of occurrence but it is astonishing that no villager could be brought in the witness box to support the case of the prosecution.

27. P.W. 1 (prosecutrix) has deposed at page (7) that her 'Jethh' Hari Sharma (elder brother of her husband) was sitting at the doorstep of their house at the time of occurrence. At page (8), she has deposed that her house is situated at the central part of the village and in front of her house, there is a public road which starts with commuting activities from dawn and on the other side of the road, there is house of Kishori Lal Ahirwar. There is traffic for the whole day on the road. At the time of incident i.e. 9:00 a.m. commuters were passing through the said road but no one

had heard her screams. She was alone in the house. As per deposition made by P.W. 3, several persons were present at the place of the hand pump from where she was fetching water and when her mother screamed she alone rushed to the house and no other person followed her. She has further deposed that at the time of occurrence, no other family member was present there. In this view of the matter, the statement of P.W. 3 is in contradiction to the statement of the P.W. 1 who has stated that her brother-in-law (Jethh) was sitting at the doorstep of the house. It is astonishing and ridiculous that Hari Sharma (elder brother of the husband of prosecutrix), who was present at the time of occurrence, had not been brought in the witness box though he could be an important/ocular witness to corroborate the prosecution case. There is no whisper in the statement of PW-1 that her Jeth had come to their rescue or he had entered the house hearing her screams. In the light of the defence taken by the accused, in the facts and circumstances of the present case, probability of election enmity cannot be ruled out. After considering the statement of P.W. 1 and the statement of accused under Section 313 Cr.P.C., the trial court came to the conclusion that at the relevant time one daughter-in-law of the family of the accused was village Pradhan.

28. In the FIR, all three ladies (opposite party nos. 5 to 7) were not named. Indicting them at belated stage, creates doubt with regard to the factum of occurrence as mentioned in the written report (Ext. Ka-1). The prosecutrix (P.W. 1) has given an excuse that initially she could not take the names of three ladies (accused) but later on, after recovering from the shock, she had mentioned their involvement. The aforesaid excuse given by the prosecutrix is ridiculous, inasmuch as, the incident took place at 9 a.m. on 8.9.2007 and, thereafter, for the whole day she, along with her husband, was wandering on way to the police station, village and hospital. On the next day i.e. on 09.09.2007, her husband moved an application to the Senior Superintendent of Police, Jhansi for getting the criminal case registered. It is astonishing that after even lapse of more than 24 hours, she did not mention the name of three ladies in the F.I.R. registered on the directions of the Senior Superintendent of Police, who were allegedly involved in her harassment and beating her daughter. The aforesaid conduct of P.W.1 creates serious doubt with respect to the truthfulness of the second incident in which three ladies were said to be participated.

29. That apart, in the scene of second incident, five male persons were already present with blunt objects to beat P.W. 1 and P.W. 3. In that situation, probability of the presence of three ladies with intention to participate in the aforesaid incident, becomes very less. It appears that name of three ladies had been indicted to exaggerate the severity of the crime, as put forth by the prosecution.

30. Dr. Ajay Saxena (P.W. 6) opined that injuries inflicted on the persons of P.W. 1 and P.W. 3 could be caused by blunt objects. The prosecution came forward with the case that prosecutrix and her daughter had been badly thrashed twice. For the first time, they had been beaten up by Briju @ Brijesh Sharma inside their house and second time they had been beaten up by Briju @ Brijesh Sharma and his accomplices (accused opposite parties (including juvenile Satish) on the periphery of the village while duo were

going to lodge the FIR. As per the medical report, P.W. 3 had sustained one injury on the upper portion of her shoulder which is contusion, whereas P.W. 1 had sustained six injuries and all are contusions. Seeing the nature of injuries, all general in nature, it would be difficult to believe that duo had been beaten up by the accused twice with stick and other blunt objects. Dr. Saxena opined that injury on the body of P.W. 3 could be caused because of falling down. In the X-ray report of the prosecutrix, no grave injury has been shown.

31. In light of aforesaid surrounding circumstances, it is difficult to believe that eight persons had jointly beaten up the prosecutrix and her daughter, and that too, with the help of sticks, rods and other blunt objects, but only minor injuries of contusion had occurred and no fracture, cut or abrasion had been caused on the body of P.W. 1 and P.W. 3.

32. The whole facts and the surrounding circumstances are, thus, not supporting the case of the prosecution with respect to participation of the opposite parties/accused in the crime which occurred at second stage on the same day i.e. 8.9.2007. In criminal law, the prosecution has to prove its case beyond all reasonable doubts while the defence has to prove its case on the touch stone of preponderance of probability. In the present matter, no independent witness had been adduced to corroborate the prosecution version. Injuries inflicted on the prosecutrix and her daughter, as shown in the medical report are not proportionate to the severity of violence which took place at two stages of the incident as portrayed by the prosecution. In the written report five persons have been indicted. But later on, number of accused has been increased up to eight on the basis of the statement made by P.W. 1 under Section 161 Cr.P.C. No evidence had been adduced to prove the incident of loot of mobile and cash from P.W. 1. Defence witnesses Brijmohan (D.W. 1) and Ashok (D.W. 2), who are co-villagers, have clearly denied the incident. The statement of the accused given under Section 313 Cr.P.C. with respect to the election enmity between the parties appears to be credible. Hari Sharma, elder brother of her husband who could be an important witness being present at the time of occurrence has not been brought in the witness box.

33. While considering the scope of interference in an appeal or revision against acquittal, it is noted that the Supreme Court has held that if two views on appreciation of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the Trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna** reported in **(2005) 9 SCC 291,** the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evnidence on record, or suffers from serious illegality including ignorance or misreading of evidence on

record, the Appellate Court will be justified in setting aside such an order of acquittal."

34. In **Sudershan Kumar v. State of Himachal** reported in **(2014) 15 SCC 666**, the Hon'ble Supreme Court observed thus:-

"31. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under:

"37. In ***Chandrappa v. State of Karnataka reported in (2005) 9 SCC 291,*** *this Court held:*

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

(1) The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

(2) The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

(3) The appellate court should always keep in mind that the trial court had

the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

(4) The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

(5) If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

35. In **Dilawar Singh v State of Haryana, (2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under:

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record."

36. We are of the considered view, after analyzing the facts and surrounding circumstances of the case and perusal of record, that the trial court has rightly acquitted the opposite parties no. 2 to 7 who had been shown to have participated in the second stage of crime on the periphery of the village as the deposition of prosecution witnesses in that regard do not inspires confidence of the Court. No unimpeachable evidence had been adduced by the prosecution to prove its accusations. In such a situation of fact, accused opposite parties are entitled to get benefit of doubt and their innocence could easily be inferred. Apart from that, prosecution itself has failed to prove its accusations beyond all reasonable doubts. The presence of ladies in the commission of crime at the second stage is also doubtful. All the statutory elements, as required in the commission of crime under sections 147, 452, 344, 294, 341, 342, 323, 315 and 412 I.P.C. are lacking. There is no substantial and compelling reason to reverse the order of acquittal passed by the trial court. Learned counsel for the appellant has failed to point out any illegality, infirmity or discrepancies in the impugned judgement passed by the trial court.

37. Resultantly, the present appeal is **dismissed** at the admission stage itself. The impugned judgement dated 28.05.2019 passed by the trial court in Special Case No. 155 of 2007 (CNR No. UPJS01-000160-2007), State vs. Briju @ Brijesh Sharma and other is hereby affirmed.

(2020)11ILR A262
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.11.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Arbitration Application No. 17 of 2019
connected with
Arbitration Application No. 18 of 2019
& other connected cases

Ms. Motilal & Sons ...Applicant
Versus
M.D. U.P. Cooperative Sugar Factories Federation Ltd. ...Respondent

Counsel for the Applicant:

Counsel for the Respondent:

A. Civil law - Arbitration and Conciliation Act, 1996: Section 2(4), 11(6) - U.P. Cooperative Societies Act, 1965: Section 2 (a-4), 2(4), (5), 70 - The Court held that the reference of the dispute to the forum provided under the Special Act rather than under the provisions of the Arbitration and Conciliation Act, 1996 , despite the fact that there was an agreement tot he contrary between the parties. (Para 24)

In order to address the issue whether an agreement has been entered into by U.P. Cooperative Societies (respondent) and their agents (applicants), the provisions of Section 70 of the U.P. Cooperative Societies Act, 1965 would be attracted or the provisions of U.P. Arbitration and Conciliation Act, 1996 would be applicable, the Court opined that Section 2(4) of the Act of 1996 makes provision of any other enactment or any rules made thereunder to prevail over the Act of 1996, subject to the conditions prescribed therein. (Para 21)

U.P. Cooperative Societies Act is a special act and the provision of resolution of disputes has been specifically provided for, as it was the intention of the legislature that the matter should not be sent to the civil courts, but an expeditious disposal of disputes was provided in the act itself. (Para 26)

Writ Petition Rejected. (E-10

List of Cases cited:-

1. Madhya Pradesh Rural Road Development Authority & anr. Vs. L.G. Chaudhary Engineers & Contractors (2012) 3 SCC 495

2. T. Barai Vs Henry Ah Hoe (1983) 1 SCC 177

3. Gujrat Urja Vikas Nigam Vs Essar Power (2008) 4 SCC 755 *(followed)*

4. Bharat Heavy Electricals Ltd. Vs St. of U.P. & ors. 2014 (4) AWC 3543 *(followed)*

5. Krishna Bahadur Vs Purna Theatre & ors. (2004) 8 SCC 229

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Vidhu Bhushan Kalia, learned counsel for all the applicants as well as Sri Sudhanshu Chauhan for the respondent through video conferencing in view of COVID-19 pandemic.

2. Since by means of instant applications all the applicants have approached this Court under Section 11 of Arbitration and Conciliation Act, 1966 for appointment of a sole arbitrator for adjudication of the dispute with the respondent and, thus, involve common questions of facts and law, hence, they are being decided by this common judgment and order.

3. It has been submitted that the applicants are agents, authorized and appointed by U. P. Cooperative Sugar Factories Federation by means of similar agreements entered into, between the applicants and U. P. Cooperative Sugar Factories Federation Ltd. on different dates i.e. 1.9.2015, 4.11.2016, 27.9.2017, 5.9.2018, 4.11.2016, 3.10.2015, 12.10.2016, 30.10.2017, 30.10.2017, 30.10.2017, 2.2.2017, 21.12.2016, 31.8.2015, 16.11.2016, 30.10.2017, 21.12.2016, 21.8.2015 17.5.2015 and 21.8.2015 respectively for a period of three years.

4. According to the terms of the agreement, the applicants (agents) were to sell and dispose of the sugar offered to it to the best advantage of the concerned factories for maximum price obtainable in the market. It has been submitted that certain differences arose between the applicants and the respondent with regard to supply, rate and payment pursuant to which a notice dated 21st February, 2019

(dated 12.3.2019 by some applicants) were sent by the applicants to the respondent invoking Arbitration Clause 26 of the aforesaid agreements for reference of the disputes to the sole arbitrator to be appointed in accordance with Arbitration and Conciliation Act, 1996.

5. When the respondent did not respond to the above notice dated 21st February, 2019/12.3.2019, the applicants have approached this Court under Section 11(6) of Arbitration and Conciliation Act, 1966 for appointment of an arbitrator.

6. It has been submitted that according to clause 26 of the agreements, the dispute, differences or questions touching or arising out of the said agreement shall be referred to the sole arbitrator by the Managing Director of the Federation, who may either arbitrate himself or appoint any other person as arbitrator, and it was further agreed that the provisions of U.P. Arbitration and Conciliation Act, 1996 as amended from time to time shall apply.

7. It has been submitted that in view of the above fact that the differences and disputes have arisen between the parties and also that the provisions of Arbitration and Conciliation Act, 1996 have been made applicable as per the agreements, therefore, prayer was made that a sole arbitrator be appointed to settle the disputes arising between the applicants and the respondent.

8. The opposite parties have contested the claim of the applicants. It has been submitted that a perusal of the agreements would indicate that the Federation is an Apex society of Cooperative Sugar Mills Societies in Uttar Pradesh, and all the cooperative societies in Uttar Pradesh are its members and whereas, a decision was taken that the Federation will appoint agents who shall sell the sugar produced by various cooperative sugar factories. In furtherance to the said agreements, the applicants were appointed as agents. The respondent- Federation is a Cooperative Society duly registered under the provisions of U.P. Cooperative Societies Act 1965, and is also an Apex society of the cooperative sugar mills in the State of Uttar Pradesh as defined under the provisions of Section 2 (a-4) of U.P. Cooperative Societies Act, 1965.

9. The contention of the learned counsel for the respondent is that in the agreements entered into between the applicants and the respondent i.e. between the apex society cooperative (Federation) and its agents (the applicants), the provision of Section 70 of the U.P. Cooperative Societies Act, 1965 are attracted, which provide for reference of the dispute to the Registrar, Cooperative Societies, under the provisions of U.P. Cooperative Societies Act, 1965.

10. It was contended by the respondent that one of the businesses of the respondent-federation is the sale of sugar produced by its member - societies, hence, the present dispute is within the scope of *"business of co-operative society"* i.e. Federation, and the dispute squarely falls within purview of section 70 of Cooperative Societies Act. Even otherwise, the final authority to decide whether the dispute comes within the ambit of business of a cooperative society or not, is the Registrar.

11. In sum and substance, it was vehemently urged that the dispute arising between the co-operative societies and its

agents relating to sale of the sugar can be settled by resorting to the machinery prescribed under U.P. Cooperative Societies Act, 1965. It was further contended that the provisions of the Act of 1996 are inconsistent with the provisions of the Act of 1965, and therefore provisions of Arbitration and Conciliation Act, 1996 would not be applicable in the present case as special adjudicatory forum is provided in Statute for settlement of a dispute.

12. The question which arises for determination by this Court is as to whether in the facts of the present case where an agreement has been entered into by U.P. Cooperative Societies (respondent) and their agents (applicants), the provisions of Section 70 of the U.P. Cooperative Societies Act, 1965 would be attracted for reference of the dispute for arbitrator or the provisions of U.P. Arbitration and Conciliation Act, 1996 would be applicable.

13. Clause 26 of the agreements is quoted as under:-

"26. Every disputes, difference or questions touching or arising out of this agreement or the subject matter thereto excepting where the decision of the Federation shall be final under this agreement shall be referred to the sole arbitration of the Managing Director of the Federation, who may either himself or appoint any person as arbitrator whose decision thereon shall be binding on the parties hereto. The provisions of Arbitration and Conciliation Act, 1996 as amended from time to time shall apply."

14. Clause 26 of the agreements clearly provide that disputes, differences or questions touching or arising out of the agreement would be referred to the sole arbitrator and also that the provisions of Arbitration and Conciliation Act, 1996 shall apply.

15. Counsel for the applicants has vehemently submitted that provisions of the Arbitration and Conciliation Act, 1996 would be applicable in the present case as the parties have unequivocally agreed as such, and the said agreement has also been acted upon by both the parties and is therefore binding between them.

16. Learned counsel of the applicants has submitted that the Arbitration and Conciliation Act 1996 was enacted to give effect to the United Nations Commission On International Trade Law (UNCITRAL) adopted in 1985, by the Parliament in exercise of powers under Article 253 of the Constitution of India. It is submitted that any law made by the Parliament to give effect to any treaty, agreement or convention or any decision made at an international conference in exercise of powers under article 253 of the Constitution of India would prevail over any law made by the state legislature. It is noticed that the applicants have not sought any relief to declare section 70 of the U. P. Cooperative Societies Act 1965 to be repugnant to the provisions of Arbitration and Conciliation Act 1996, and neither Union of India or State of U.P have been made parties and, therefore, no relief in this regard can be granted.

17. Even otherwise the argument of repugnancy deserves to be rejected on the account of the fact that entry 13 of the concurrent list in the 7th schedule reads as under:-

"13. Civil procedure, including all matters including the Code of Civil Procedure at the commencement of this Constitution, limitation and ***arbitration****"*

18. The U.P. Cooperative Societies Act, 1965 had received the assent of the President on 24.3.1966. The requirement, therefore, of Article 254(2) of the Constitution was satisfied and hence the U.P. Cooperative Societies Act,1965 prevailed over the Indian Arbitration Act, 1940. Thereafter the Arbitration and Conciliation Act, 1996 was enacted by the Parliament repealing the earlier Arbitration Act, 1940. The Arbitration and Conciliation Act 1996, itself saves the provisions of other enactments like the U.P. Cooperative Societies Act as per section 2(4) and (5) of the said Act which specifically provide for operation of other special acts which provides for arbitration, and therefore, there cannot be any repugnancy between the two Acts. This aspect of the matter has been duly considered by the Hon'ble Supreme Court in the case of **Madhya Pradesh Rural Road Development Authority and another vs L.G Chaudhary Engineers and Contractors (2012) 3 SCC 495**. The Supreme Court relied upon its earlier judgement in the case of **T.Barai vs Henry Ah Hoe (1983) 1 SCC 177**.

19. To resolve the controversy, scope of both the enactments need scrutiny. Section 2(4) of the Arbitration and Conciliation Act provides that:-

*"This part except subsection (1) of section 40, section 41 and 43 shall apply to of the arbitration under any other enactment for the time being in force, as of the arbitration purpose was to //**********arbitration agreement and if that other enactment for an arbitration agreement, except insofar as the provisions of this part are inconsistent with that another in enactment or with any rules made thereunder."*

Section 2 (4) of the Arbitration and Conciliation Act, 1986 provides that the provision of that section will apply only if it is not inconsistent with the other enactment or with any rules made thereunder.

20. A perusal of the U.P. Cooperative Societies Act, 1965 and rules of 1968 clearly indicate that they together form a complete code so far as arbitration in matters relating to Cooperative societies are concerned. The rules provide for the manner in which the reference is to be made, for the appointment of an arbitrator, an appeal against his decision, a second appeal against the decision of the appellate authority and also the manner in which the arbitration award shall be executed. The act and the rules provide for all aspects relating to the operation of Arbitration proceedings in connection with the dispute, and it is difficult to see as to which provision of the Arbitration and Conciliation Act, 1996 can be made applicable to an order passed under the U.P. Cooperative Societies Act read with the rules.

21. The inconsistencies in both the enactments are writ large. Under the Arbitration and Conciliation Act there has to be an agreement containing the arbitration clause in order to invoke the provisions of the Act, while under the cooperative societies act the existence of agreement is dispensed with. Any dispute relating to Constitution, management of the business of a cooperative society other than a dispute regarding the disciplinary action taken against the paid servant of the society arises, would be referable for arbitration.

Again there is difference in formation of the Arbitral Tribunal in both the enactments. Under the Arbitration and Conciliation Act, 1996 Arbitral Tribunal as defined under section 2(1)(d), a sole arbitrator or a panel of arbitrators can be appointed, while under the U.P. Cooperative Societies Act the dispute is referable to the Registrar or Board of arbitrators in accordance with chapter XVII of the rules of 1968, who may decide the matter himself or appoint an arbitrator. The parties, therefore, clearly do not have a choice or autonomy in the choice of the Arbitral Tribunal under the Cooperative Societies Act.

In my considered opinion section 2 (4) of the Arbitration and Conciliation Act makes provision of any other enactment or any rules made thereunder to prevail over of the Arbitration and Conciliation Act,1996, subject to the conditions prescribed therein.

22. Hon'ble Apex Court in the case of ***Gujrat Urja Vikas Nigam vs Essar Power (2008) 4 SCC 755*** considering the applicability of the provision for arbitration in the Electricity Act, 2003 viz. a viz. The Arbitration and Conciliation Act 1996 held that the general act will have to give way to the special act and in paragraph No.60 of the said judgement it has been held as under:-

"However, since the electricity act, 2003 has come into force w.e.f 10/06/2003, after the date on adjudication of disputes between licensees and generating companies can only be done by the State Commissions or the arbitrator (or arbitrators) appointed by it. After 10/06/2003 there can be no anyone other than state commission of the arbitrator (or arbitrators) nominated by it."

23. A Division Bench of this Court in the case of **Bharat Heavy Electricals Ltd vs State of U.P. and Others 2014 (4) AWC 3543**, where in similar circumstances where the agreement between the parties had provided for application of The Arbitration and Conciliation Act 1996, while according to the Micro, Small and Medium Enterprises Development Act, 2006 which was a special Act, provided for Arbitration according to Section 18 of the said Act and this Court while dismissing the petition observed as under:-

"5. Section 18 empowers the Council, upon receipt of a reference, to conduct a conciliation in terms of the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996. Where the conciliation is not successful and is terminated without a settlement between the parties, the Council is empowered to itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services. Sub-section (4) of Section 18 begins with a non obstante clause which operates notwithstanding anything contained in any other law for the time being in force. Under sub-section (4), the Council or as the case may be, the centre providing alternative dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

6. The Act thus provides for a statutory remedy of an arbitration in 5 sub-section (4) to Section 18 notwithstanding anything to the contrary contained in any other law for the time being in force.

7. In the present case, the Council is seized of the reference on a claim petition filed by the second respondent.

8. In this view of the matter, the relief of certiorari for quashing all the

proceedings before the Council is manifestly misconceived. The proceedings had been entertained by the Council in pursuance of the provisions of the Act. Though there may be an arbitration agreement between the parties, the provisions of Section 18 (4) specifically contain a non obstante clause empowering the Facilitation Council to act as an Arbitrator. Moreover, section 24 of the Act states that sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

24. The Division Bench of this Court in the above judgement has approved the reference of the dispute to the forum provided under the Special Act rather than under the provisions of the Arbitration and Conciliation Act 1996, despite the fact that there was an agreement to the contrary between the parties, as is the case in the instant petition also. The above Division Bench Judgment clearly applies to the facts of the present case, and the *ratio decidendi* therefore is liable to be followed in present case also.

25. It was contended by the counsel for the applicants that where the parties have willingly and voluntarily agreed that the dispute be referred under the provisions of the Arbitration and Conciliation Act 1996, then they cannot be permitted to resile from the same. It was contended that the said agreement is binding between the parties. It is the contention of the applicants that the respondent is deemed to have waived its statutory right for redressal of their disputes in terms of the U.P. Cooperative Societies Act.

26. U.P. Cooperative Societies Act is a special act and the provision of resolution of disputes has been specifically provided for, as it was the intention of the legislature that the matter should not be sent to the civil courts or other forum, but an expeditious disposal of disputes was provided in the act itself. Public purpose can also be read into this provision, so as to prevent the cooperative societies from being exposed to litigation in the civil courts.

27. In the present case even though it is accepted that the respondent cooperative society had waived its right for arbitration in accordance with the provisions of the U.P. Cooperative Societies Act, 1965, the same shall not be given effect to by the court, as it has to be demonstrated that no public interest is involved in such a waiver. This aspect of the matter was considered by the Hon'ble Apex Court in the case of ***Krishna Bahadur vs Purna Theatre and others (2004) 8 SCC 229*** when it was observed:-

"9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

28. In the present case, the applicants have entered into agreements with the Federation for purchase of the sugar produced by the members of the Federation which are themselves Cooperative societies. A dispute having arisen which is clearly pertaining to the business of a cooperative society where all the members of the respondent would be affected by the dispute raised by the applicant and therefore the agreement was entered into by the Federation, was clearly on behalf of all its member Sugar Mills and therefore there was a "public interest" element involved in the said agreement and hence the Federation could not have intended to waive this statutory prescription of redressal of disputes by arbitration in accordance with U.P. Cooperative Societies Act, 1965.

29. It has also been contended by the counsel for the applicants that the arbitration proceedings cannot proceed under the Cooperative Societies Act, inasmuch as the Registrar of the Cooperative Societies has sufficient interest and involvement of the respondent Federation, while an arbitrator has to be an independent person. This argument of the applicant also cannot be accepted in light of the fact that the reference of dispute under section 70 of the Cooperative Societies Act has to be referred to the Registrar, who may either arbitrate the matter himself or appoint another arbitrator. In case the applicants have any apprehension about the independence of the arbitrator, the same can be raised before the Registrar who is competent to resolve such a controversy as he is sufficiently empowered under the Act.

30. In light of the above discussions, in the facts of the present case where there exists a dispute between the Federation and agents, then the same has to be referred to the Registrar, Cooperative Societies, under the provisions of Cooperative Societies Act, 1965 and provisions of Arbitration and Conciliation Act, 1996 would not be attracted. The applications of the applicants under the Arbitration and Conciliation Act, 1996 are, therefore, misconceived.

31. No other point was urged by the applicants.

32. These applications moved by the applicants under section 11(6) of the Arbitration and Conciliation Act 1996 for appointment of sole arbitrator are devoid of merits and are hereby **rejected**.

(2020)11ILR A269
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2020

BEFORE
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Civil Misc. Arbitration Application No. 143 of 2019

M/s. Wise Industrial Park Ltd., Moradabad ...Petitioner

Versus

UPSIDC Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Anurag Khanna, Ms. Gunjan Jadwani

Counsel for the Respondents:
Sri Anadi Krishna Narayana, Swapnil Kumar, Sri Sudhanshu Kumar

A. Civil Law - Securitisation and Enforcement of Financial Assets and Enforcement of Security Interest Act, 2002- Section 13(2) Existence of Arbitration Agreement - - Arbitration and Conciliation Act, 1996: Section 2(b), 7, 11(6A) - Clause 33 is an arbitration clause

providing for dispute to be settled through arbitration, but the same cannot be read in isolation and this arbitration agreement has to be in existence as per Clause 11(6A) on the date when the said arbitration clause is invoked and the matter is referred to arbitration. The petitioner invoked the arbitration agreement after 14 years after the promoter's agreement came to an end. Thus arbitration agreement was not in existence at the time of making of the application. (Para 53, 54, 56)

As Clause 34 of the Promoter's Agreement categorically provides that the life of the agreement which is 12 years which is subject to renewal. But as it is evident from the pleadings of the parties that the said agreement was never extended beyond 12 years and the life of the agreement came to an end on 18.07.2005. Thus, petitioner cannot reply upon the provisions of the agreement which is not in force between the parties as time was the essence of the contract. Newly amended Section 11(6A) categorically provides for the enforcement of arbitration proceedings only in case of existence of arbitration agreement. (Para 46)

Promoter's Agreement was executed on 19.07.1993 and a joint venture company was formed for the development of Agro Industrial Park. There were no dispute until the petitioner company failed to carry out the obligation of making payment for the third transfer in the year 2001. In the year 2002, the lease deed of the earlier first and second transfer was cancelled due to the fact that work was not completed. Petitioner company itself came to know about the cancellation of the lease deed during the proceedings initiated by the Bank before the Debt Recovery Tribunal and it was for the first time in the year 2017 after a lapse of about 12 years they approached this Court. Then subsequently after a lapse of two years on 14.10.2019 the petitioner gave notice for invocation of arbitartion clause. (Para 36, 37, 40)

Application Rejected. (E-10)

List of Cases cited:-

1. Olympus Superstructures Pvt. Ltd. Vs Meena Vijay Khetan & ors. (1999) 5 SCC 651

2. Ameet Lalchand Shah & ors. Vs Rishabh Enterprises & anr. (2018) 15 SCC 678 *(distinguished)*

3. M/s Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs Northern Coal Field Ltd. Special Leave Petition (C) No. 11476 of 2018. *(distinguished)*

4. Duro Felguera, S.A. Vs Gangavaram Port Ltd. (2017) 9 SCC 729 *(distinguished)*

5. M/s Mayavati Trading Pvt. Ltd. Vs Pradyut Deb Burman Civil Appeal No. 7023 of 2019 *(distinguished)*

6. P. Manohar Reddy & Bros. Vs Maharashtra Krishna Valley Development Corporation & ors. (2009) 2 SCC 494 *(followed)*

7. Hema Khattar & anr. Vs Shiv Khera (2017) 7 SCC 716 *(followed)*

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Anurag Khanna, learned Senior Counsel, assisted by Ms. Gunjan Jadwani, learned counsel for the applicant and Sri Swapnil Kumar, Advocate along with Sri Sudhanshu Kumar, learned counsel for the respondents.

2. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed for the appointment of arbitrator invoking the arbitration clause, as provided in the Promoter's Agreement dated 19.07.1993.

3. Facts in brief, of the case which is admitted to both the parties are, that State of Uttar Pradesh acquired 800 acres of land at Masuri Gulaoti Industrial Area comprising of Village Dehra, Amapur, Lodha, Raoli, Shekhupura, Khichra, Pargana Dasna, Tehsil Hapur, District

Ghaziabad. The land so acquired was conveyed to Uttar Pradesh State Industrial Development Corporation Limited (for short "UPSIDC") for the purpose of industrial development.

4. UPSIDC decided to set up and develop an "Agro Industrial Park" in financial collaboration with the company associated with the said sector on 400 acres of land out of total acquired land.

5. On 19.07.1993, respondent no. 1, UPSIDC entered into a Promoter's Agreement with one M/s. Western India Industrial Technologies Limited (for short "WIITL"). According to the agreement, 400 acres of land was to be developed by engaging in financial collaboration with the co-promoter WIITL. As per the agreement, UPSIDC and WIITL agreed to form a public limited company within three months of the signing of the agreement. On 30.08.1993, a joint venture company in the name of Western India Industrial Park Limited (for short "WIIPL") was formed. The equity participation of WIITL and UPSIDC was in the ratio of 89% and 11%, respectively.

6. Thereafter, on 15.05.1995 WIITL executed a deed of assignment, assigning all its rights over 89% of equity held by it in WIIPL in favour of one M/s. Western India Services and Estate Limited (for short "WISEL"). A supplementary agreement was executed on 24.01.1996 between UPSIDC and WISEL, replacing the name of WIITL with WISEL as co-promoter, while all the terms and conditions of the Promoter's Agreement remained the same and equity participation of WISEL and UPSIDC stood as 89% and 11%, respectively. While these, change of name of co-promoter was going on, the Regional Manager of the UPSIDC entered into a license agreement with the joint venture company WIIPL for setting up Agro Industrial Park on 400 acres of land. This agreement was followed by a supplementary license agreement executed on 09.02.1998 between UPSIDC and the joint venture company WIIPL to modify certain terms in the original lease agreement. On 15.04.1998, name of the joint venture company WIIPL was changed to Wise Infrastructure Limited. This name was again changed on 25.06.1998 and was renamed as "Wise Industrial Park Limited" (for short "WIPL").

7. Certificate of incorporation was issued by Registrar of Companies, Kanpur on 30.06.1998. In the meantime, in pursuance of Promoter's Agreement as well as license agreement and supplementary license agreement, a registered lease deed was executed between UPSIDC and petitioner company on 11.03.1998 for 133.33 acres of land. Secondly, lease deed for the same area i.e. 133.33 acres of land was executed between UPSIDC and the petitioner company on 30.03.1999, thus, a total of 266.66 acres of land was leased out in favour of petitioner company by UPSIDC through two lease deeds of 1998 and 1999, out of the total area of 400 acres, and the vacant possession was delivered to the joint venture company on 26.03.1998 and 06.03.2000.

8. After the transfer of first and second phase of land, petitioner company was required to make payment for transfer of third phase of 133.33 acres of land on or before 30.03.2000, as the petitioner could not make payment the allotment of third phase was cancelled on 23.03.2001.

9. It appears that there was some outstanding demand pending against the

petitioner company which was raised by UPSIDC but was not paid.

10. Petitioner company subleased its developed land measuring about 40 acres to M/s. Hindustan Coca Cola Bottling Ltd., 1 acre to Meeta Deep Fridge and 5 acres to Mode Attire. As the petitioner company was in need of money, it availed loan from one Global Trust Bank (now amalgamated with Oriental Bank of Commerce) and mortgaged 133 acres of land which was transferred in the first phase. However, 46 acres of land was discharged from mortgage when it was subleased. Another 100 acres out of second phase of transfer of 133.33 acres of land, was mortgaged to Global Trust Bank, thus a total of 188.33 acres of land remained with the Global Trust Bank out of allotted 266.66 acres of land for the development of Agro Industrial Park.

11. As there was default in repayment of loan to the Bank, a notice under Section 13(2) of the Securitisation and Enforcement of Financial Assets and Enforcement of Security Interest Act, 2002 was issued. Thereafter, possession of the land was taken over by Global Trust Bank in November, 2002.

12. The Bank initiated recovery proceedings and filed Original Application No. 37/2004, Global Trust Bank Ltd. vs. Wise Infrastructure Ltd. and Original Application No. 38 of 2004, Global Trust Bank Ltd. vs. Wise Infrastructure Park Ltd. and others, before the Debts Recovery Tribunal- II, Delhi, in which UPSIDC was impleaded as one of the defendants.

13. In the meantime, as the company had not commenced/ completed the development work on 266.66 acres of land, UPSIDC cancelled the lease deed of the first and second transfer and intimated the same to the petitioner company on 11.11.2002.

14. However, according to petitioners, the notice as well as the intimation regarding cancellation of the lease deed was never received by them and it was for the first time they came to know from the written statement filed by UPSIDC i.e. respondent no. 1 before Debts Recovery Tribunal at Delhi in recovery proceedings initiated by Global Trust Bank.

15. As per petitioner company, they had tried to negotiate and settle the matter with respondent no. 1 but the same failed and they were compelled to file a writ petition before this Court bearing Writ Petition No. 4411 of 2017 with the following prayer:-

"(a) Issue a writ, order direction in the nature of mandamus, directing the UPSIC to function within terms and conditions of the promoter's agreement dated 19.07.1993 and not to interfere in any manner, with the lease property of the Petitioner and to restore the lease deeds dated 31.03.1998 and 11.03.1999 executed in favour of the Petitioner;.

(b) Issue a writ, order or direction in the nature of mandamus directing the UPSIDC to decide the representation of the Petitioner and till then no third-party rights may be created over the property in dispute."

16. This writ petition has been filed for the restoration of the lease deed executed in the year 1998 and 1999, meaning thereby that cancellation order of the lease deed be set aside.

17. The Division Bench of this Court on 31.01.2017 dismissed the writ petition and granted liberty to petitioner to avail any of the remedies available in law. The order of the Division Bench is extracted hereasunder:-

"Heard Sri Anurag Khanna, learned Senior Counsel for the petitioner and Sri Arvind Srivastava, learned counsel for UPSIDC.

This writ petition prays for mandamus directing the UPSIDC to proceed in terms of agreement dated 19th July, 1993 and to take such steps so as to restore the lease deeds dated 31st March, 1998 and 11th March, 1999. The second relief claimed is for deciding the representation which is in the shape of an offer for negotiation in order to settle any rights that the petitioner may claiming as against the lease rights earlier offered by the UPSIDC.

We are not inclined to entertain this cause of action as the nature of the relief prayed for is in the shape of a specific performance which is being raised on the ground as if there is some obligation cast on the UPSIDC to accept the request of the petitioner. If such a request has to be made or there is any dispute arising therefrom, then the remedy is by way of an arbitration or by an internal negotiation with the UPSIDC itself for which the petitioner appears to have moved a representation.

The writ petition is, accordingly, dismissed with liberty to the petitioner to avail of any of the aforesaid remedies, in accordance with law."

18. After the dismissal of writ petition, petitioner company on 14.10.2019 sent a notice invoking the arbitration clause pursuant to the Promoter's Agreement dated 19.07.1993.

19. Sri Anurag Khanna, learned Senior Advocate submitted that all the four agreements i.e. Promoter's Agreement dated 19.07.1993, licence agreement dated 24.05.1995, lease deed dated 11.03.1998 and second lease deed dated 30.03.1999 were entered to achieve the object of setting up Agro Industrial Park and all the agreements contained reference of Promoter's Agreement which is the main agreement.

20. He invited the attention of the Court to Clause 33 of Promoter's Agreement wherein provision for arbitration is provided. It was further contended that the dispute between the parties is covered within the ambit and extent of arbitration clause no. 33 of the Promoter's Agreement. Reliance was placed upon decision of Apex Court in case of ***Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and others, 1999 (5) SCC 651.***

21. The second limb of argument was that while dismissing the Writ Petition No. 4411 of 2017, this Court on 31.01.2017 had observed that remedy available to petitioner was either by the way of arbitration or by internal negotiation with UPSIDC itself and the Court had given liberty to avail the remedies in accordance with law.

22. Sri Khanna submitted that the Court itself accepted the existence of dispute and it was for respondent no. 1 to have either actually resolved the dispute or should have appointed the arbitrator once the arbitration clause was invoked. Reliance was placed upon decision of Supreme Court in case of ***Ameet Lalchand Shah and others vs. Rishabh Enterprises and another, 2018 (15) SCC 678.***

23. The third point canvassed by Senior Counsel was that petition under Section 11 of the Act is not affected by the provisions of Limitation Act. Reliance was placed upon decision of Apex Court rendered on 27.11.2019 in ***Special Leave Petition (C) No. 11476 of 2018, M/s. Uttarakhand Purv Sainik Kalyan Nigam Ltd. vs. Northern Coal Field Ltd.***, wherein the Apex Court had considered that after 2015 amendment and incorporation of Section 11(6A), the only scope of examination is now confined to existence of arbitration agreement at Section 11 stage and nothing more. He further submitted that all the issues regarding limitation would be decided by arbitrator in view of provisions of Section 16 and the same cannot be decided at the pre-reference stage.

24. Lastly, it was contended that notice invoking arbitration dated 14.10.2019 is sufficient for the appointment of arbitrator in accordance with arbitration agreement dated 19.07.1993.

25. Per contra, Sri Swapnil Kumar, learned counsel appearing for respondents submitted that as per Promoter's Agreement breach of terms and conditions is governed by Clause 29.3 and not Clause 33 which is an arbitration clause. Thus, dispute, if any, regarding breach of terms and conditions by any party has to be resolved in terms of Clause 29.3.

26. Sri Swapnil Kumar invited the attention of the Court to Clause 34 of the Promoter's Agreement which categorically states and specifies the period during which the said agreement shall remain in force. According to Clause 34 the agreement was to remain in force for 12 years from the date of signing and was renewable for further period by mutual consent as the agreement was signed on 19.07.1993, it came to an end on 18.07.2005 as it was only for a period of 12 years and was never extended beyond the said date.

27. It was also contended that lease deed was cancelled in the year 2002, and if for the sake of argument it is accepted that petitioner came to know about the said fact through written statements then too more than 15 years have elapsed and the Promoter's Agreement is not in existence.

28. According to Sri Kumar petitioner is aware of the fact that the agreement was for only 12 years and no effort was made to renew the same nor any notice or intimation was given by petitioner to extend the same. The present petition for arbitration is nothing but an attempt to give life to a dead claim. Reliance has been placed upon a decision of Apex Court in the case of ***Duro Felguera, S.A. vs. Gangavaram Port Ltd., 2017 (9) SCC 729.***

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

30. Before adverting to decide the controversy, it would be relevant to have a glance of Section 2(b) and Section 7 of the Act.

31. Section 2(b) provides for "arbitration agreement", which means an agreement referred to in Section 7.

Section 7

*"**7. Arbitration agreement.**- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between*

them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication1[including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

32. From the conjoint reading of above provision, it culls out that arbitration agreement means an agreement by which parties submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of their relationship whether contractual or not.

33. In the present dispute admittedly a Promoter's Agreement was executed between the parties on 19.07.1993. Three clauses of the said Promoter's Agreement are relevant in deciding the present controversy which are Clause 29.3, Clause 33 and Clause 34, and are extracted hereasunder:-

"29.3 In case the parties commit breach of any of the terms and conditions and stipulations herein contained to be observed and performed by them, the aggrieved party shall be at liberty to give notice in writing to the other party to set right or rectify the breach or omission complained of within 30 days of receipt of notice failing which the aggrieved party may seek the relief of specific performance from the competent court of law.

33. All differences of disputes with the parties hereto on any clause or matter herein contained or their respective rights, claims, or liabilities hereunder or otherwise, whatsoever in relation to or rising out this agreement shall be referred to arbitration by two arbitrators (one to be appointed by each party) who shall before proceeding with the reference appoint an umpire by mutual consent and each arbitrator shall be governed by the Indian Arbitration Act, 1940 or in modification or re-enactment thereof for the time being in force. The venue of the arbitration shall be Kanpur or New Delhi if agreed to in writing between the parties hereto.

34. This agreement shall be in force for a period of 12 years from the date of its signing and shall be renewable for a further period by mutual consent."

34. Clause 29.3 is in relation to breach of terms and conditions of the agreement by either of the parties and the aggrieved party having an option to give notice to the other side for rectifying such breach or omission and if the same is not carried out within 30 days, the party may seek a relief of specific performance from the competent court.

35. Likewise, Clause 33 provides that in case of dispute between the parties the same shall be referred to the arbitration.

Lastly, clause 34 provides period of existence of the agreement which is 12 years from the time of signing of the same and if it is not extended or renewed, the same coming to an end on 18.07.2005 by efflux of time.

36. From the pleading of parties as well as their oral and written submissions, it transpires that both parties are adverting to the Promoter's Agreement executed on 19.07.1993, but no averment in the pleading or in oral submission was made as to whether the agreement was ever extended or renewed at the instance of either of the parties. It is not in dispute that originally Promoter's Agreement was executed on 19.07.1993 and a joint venture company was formed for the development of Agro Industrial Park. Out of 400 acres of land, 266.66 acres of land was allotted to petitioner company and possession was handed over in the year 1998 through first transfer, and in the year 1999 through second transfer. Uptil this point of time there was no dispute and it was only when the petitioner company failed to repay the amount and was not able to carry out the obligation of making payment for the third transfer that firstly in the year 2001, the allotment of the third phase of transfer of 133.33 acres of land was cancelled and, thereafter, in the year 2002, the lease deed of the earlier first and second transfer was cancelled due to the fact that work was not completed.

37. During this period, petitioner company who had taken loan from Global Trust Bank had been litigating with the Bank and the possession of the land was taken over by the Bank some times in November, 2002.

38. According to petitioner company itself they came to know about the cancellation of the lease deed during the proceedings initiated by the Bank before the Debts Recovery Tribunal, but they did not challenge the said cancellation of lease deed and it was for the first time in the year 2017 after a lapse of about 12 years, they approached this Court through Writ Petition No. 4411 of 2017, which was dismissed on 31.10.2017, leaving it open to petitioner to pursue the remedy so available under law.

39. The argument of learned Senior Counsel, Sri Khanna to the extent that the Court had cast obligation upon UPSIDC to decide the representation which they have failed to do so and thus an arbitrator should be appointed by the Court, cannot be accepted, as the said writ petition was filed with a prayer for restoring the lease deed dated 31.01.1998 and 11.03.1999, meaning thereby that the said lease deed was cancelled and the Court had refused to interfere and had dismissed the writ petition.

40. The petitioner company again after lapse of two years on 14.10.2019 gave notice to respondents invoking the arbitration clause 33 as per Promoter's Agreement dated 19.07.1993. The question which crops up for consideration is as to whether an agreement which is executed between the parties for stipulated period (as time being essence of the contract) with a provision for renewal at the instance of parties came to an end on the expiry of such period, and renewal not being sought or initiated at the instance of either of the parties, can be the basis for invoking the arbitration agreement.

41. After the amendment in the year 2015 Sub-section (6A) to Section 11 was inserted w.e.f. 23.10.2015, which reads as under:-

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

42. The said provision provides for the existence of an arbitration agreement and the intention of legislature is clear that the Court should and need only look into one aspect and that is existence of an arbitration agreement. The Apex Court in case of ***Duro Felguera, S.A.*** (supra) held as under:-

"48. Section 11(6-A)added by the 2015 Amendment, reads as follows:

"11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."(emphasis supplied)

From a reading ofSection 11(6-A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect- the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple - it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power underSection 11(6) of the 1996 Act was considerably wide in view of the decisions in ***SBP and Co. v. Patel Enggg. Ltd. (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267.*** *This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated inSection 11(6-A) ought to be respected."*

43. In case of ***M/S Mayavti Trading Pvt. Ltd. vs. Pradyut Deb Burman, Civil Appeal No. 7023 of 2019***, decided on 05.09.2019, relying upon decision of **Duro Felguera, S.A.** (supra), the Apex Court held as under:-

"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning containing in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of and arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment ***Duro Felguera, S.A.*** *(supra)- see paras 48 and 59."*

44. The legislative intent has been clearly dealt in the decision of the Apex Court referred above and by insertion of Section 11(6A) examination is confined

only to the **existence** of arbitration agreement and nothing more has to be seen by the Court in proceedings under Section 11(6) for the appointment of arbitrator.

45. In the present case, the moot question which arises is whether the arbitration agreement i.e. arbitration clause provided in the Promoter's Agreement is in existence or not. The word "existence" has been defined in the Advanced Law Lexicon, III Vol. 2005, which is as under:-

*"**Existence.** Created life; living beings in general (as) "fellow-feeling with all forms of existence" (Carlyle) Being; the fact or state of existing."*

46. Existence means, which has life or which exists. In the present context, existence of arbitration agreement means existence of an agreement which is capable of execution. As from the reading of Clause 34, it emerges that the promoter's agreement was executed between the parties for a period of 12 years from the date of signing, meaning thereby that its life came to an end on 18.07.2005. It is also not in dispute that this agreement was ever extended or renewed by either of the parties. Thus, in view of amended provisions of Section 11(6A) as well as the decision of the Apex Court the Promoter's Agreement in question has outlived its life and was not in existence after 18.07.2005. The petitioner company though had remedy under various provisions of law in getting the lease deed restored, while one such attempt having failed in Writ Petition No. 4411 of 2017, the invoking of arbitration clause 33 of the Promoter's Agreement is in respect of an agreement which is not in existence as per Section 11(6A) of the Act.

47. The argument made by learned counsel for petitioner to the extent that there exists dispute between the parties which can only be resolved through arbitration clause 33 of the Promoter's Agreement and petition under Section 11 of the Act is not affected by provisions of Limitation Act, cannot be accepted in the facts and circumstances of the present case, as Clause 34 of the Promoter's Agreement itself categorically provides the life of the agreement which is 12 years, unless and until extended or renewed. As it is evident from the pleading as well as the argument that the said agreement was never extended beyond 12 years and the life of the agreement came to an end on 18.07.2005. Thus, petitioner cannot rely upon the provisions of the agreement which is not in force between the parties as time was the essence of contract. The amended provision categorically provided for the enforcement of arbitration proceedings only in case of existence of arbitration agreement.

48. The Apex Court while dealing with 2015 Amendment, is of the constant view that the Court should and need only look into one aspect and that is the existence of arbitration agreement. Reliance placed by learned counsel for petitioner on the decision of the Apex Court in case of ***Ameet Lalchand Shah and others*** (supra) is not applicable in the present case as the arbitration agreement had come to an end 14 years prior to the invocation of the same.

49. Likewise, reliance placed upon decision in case of ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Ltd.*** (supra) also does not come to rescue of the petitioner and the Apex Court in Para 9.9 has held as under:-

"9.9. The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or

"Compétence de la recognized", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement.Section 7of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'."

50. In the case of ***P. Manohar Reddy and Bros. vs. Maharashtra Krishna Valley Development Corporation and others, (2009) 2 SCC 494***, while dealing with a situation where arbitration clause although part of contract, need not in all situation perish with coming to an end of the contract. The Court evolved the state of separability of arbitration clause. Relevant paras 27 and 28 are extracted hereasunder:

"27. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to anend of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability inArticle 16(1).The Indian law - The Arbitration andConciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach inArticle 16 (1)(b), which reads as under:-

"16. Competence of Arbitral Tribunal to rule on its jurisdiction. - (1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

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(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

(Emphasis supplied).

Modern laws on arbitration confirm the concept.

28. The United States Supreme Court in the recent judgment in Buckeye Check Cashing, Inc. v. Cardegna, 546 US

460 (2005) acknowledged that the separability rule permits a court "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." The Court, referring to its earlier judgments in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1966), and Southland Corp. v. Keating, 465 U.S. 1 (1984), inter alia, held :-

"Prima Paint and Southland answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."

But this must be distinguished from the situation where the claim itself was to be raised during the subsistence of a contract so as to invoke the arbitration agreement would not apply."

51. In ***Hema Khattar and another vs. Shiv Khera, (2017) 7 SCC 716***, the Apex Court dealing with a situation where the arbitration clause contained in agreement was waived by mutual consent of the parties the Court held that arbitration clause would continue to be operative. Relevant para 35 is extracted hereasunder:-

"35. In ***P. Anand Gajapathi Raju & Others vs. P.V.G. Raju (2000) 4 SCC 539,*** *it was held as under:(SCC p. 542, para 5)-*

"5. The conditions which are required to be satisfied under sub-

sections (1) and (2) ofSection 8before the court can exercise its powers are:

(1) there is an arbitration agreement;

(2) a party to the agreement brings an action in the court against the other party;

(3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute."

In view of the above, where an agreement is terminated by one party on account of the breach committed by the other, particularly, in a case where the clause is framed in wide and general terms, merely because agreement has come to an end by its termination by mutual consent, the arbitration clause does not get perished nor is rendered inoperative. This Court, in the case of ***P. Anand Gajapathi Raju*** *(supra), has held that the language ofSection 8is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.*

52. Thus, the above decisions referred clearly distinguishes the situation, that claim must be raised during subsistence of contract, and further if the agreement exists it cannot be waived by mutual consent. Thus, both the decisions lead to the concept of existence of agreement.

53. After the 2015 Amendment of the Act, the only thing left with the Court to see was existence of arbitration agreement for referring the dispute to arbitrator. This amendment got approval of the Court in case of ***Duro Felguera, S.A.*** (supra), ***M/S Mayavti Trading Pvt. Ltd.*** (supra) and ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Ltd.*** (supra) but the instant case is totally on different footing, and the facts of the case are totally distinguishable from the facts and issue in decision cited above, as in the present case Clause 34 which is part of the Promoter's Agreement categorically provides for the period for which the agreement was to remain in force i.e. 12 years, from the date of signing of the agreement. Undisputedly, the agreement was signed on 19.07.1993 and it was never extended or renewed and came to an end on 18.07.2005. No doubt clause 33 is an arbitration clause providing for dispute to be settled through arbitration, but the same cannot be read in isolation and this arbitration agreement has to be in existence as per Clause 11(6A) on the date when the said arbitration clause is invoked and the matter is referred to arbitration.

54. It was on 14.10.2019 that the petitioner had invoked Clause 33 for the appointment of arbitrator i.e. more than 14 years after the promoter's agreement came to an end. Once the agreement is not in force (existence), none of its provisions can be invoked as the entire agreement has come to an end by efflux of time.

55. No doubt it is true that Court at pre-reference stage has to only look into the existence of arbitration agreement, no more no less. But in the present case, the agreement itself has come to an end in the year 2005 and after a lapse of 14 years petitioner cannot be permitted to invoke one of its clauses for the appointment of arbitrator.

56. Having considered the rival submissions and material on record, I find that the case of petitioner does not fall under Section 11(6) of the Arbitration Act for the appointment of arbitrator in pursuance to the Promoter's Agreement dated 19.07.1993, as the 2015 Amendment provides in Section 11(6A) for the existence of the arbitration agreement and there being no arbitration agreement in existence at the time of making of the application as the said Promoter's Agreement which is relied upon had come to an end on 18.07.2005, as per Clause 34 of the said agreement.

57. Petition has no force and is ***dismissed***.

58. Parties to bear their own costs.

(2020)11ILR A281
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE
THE HON'BLE DINESH PATHAK, J.

Criminal Revision No. 98 of 2020

Rajesh Kumar ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Akhilesh Srivastava, Sri Saksham Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Satendra Kumar Upadhyay

A. Criminal Law - Code of Criminal Code, 1973-Section 397/401 - Indian Penal

Code, 1860-Sections 393, 302 - Juvenile Justice (Care and Protection of Children) Act, 2000-Sections 7, 7-A, 9, Juvenile Justice (Care and Protection of Children) Rules 2007-Clause 12-Application- Claim to be juvenile-rejection- issue of juvenility regarding revisionist has been wrongly decided by the trial court and application has been rejected even after giving specific finding in favour of revisionist- trial court has unnecessarily entered into hyper technical things while rejecting the application for juvenility which is contrary to procedure provided under the Act- On the date of occurrence i.e. 04.05.2012, age of revisionist was below 18 years-the court below has illegally applied the provisions of J. J. Act, 2015 to assess the ability of the revisionist to understand the nature of crime and declined to treat him as a juvenile. (Para 3 to 20)

B. Under the newly inserted Section 7-A to the J. J. Act, 2000 it is made obligatory to the court that, after enquiry, if it finds a person to be juvenile on the date of commission of offence, it shall refer the matter to the Juvenile Justice Board for passing appropriate orders as per provisions of law. Provisions as contained in Section 7-A r/w Rule 12 of J. J. Rules, 2007 clearly reveals that after enquiry, in case the person considered as juvenile he should be given benefit of the Act.

(Para 17)

The revision is allowed. (E-6)

List of Cases Cited:-

1. Abdul Razzak Vs St. of U.P. (2015) AIR SC 1770

2. Jitendra Singh @ Babboo Singh & anr. Vs St of U.P. (2013) 11 SCC 193

3. Abuzar Hossain Vs St. of W. B. (2012) 10 SCC 489

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Akhilesh Srivastava, learned counsel for revisionist, Sri O. P. Mishra, learned A.G.A. for State, Sri Satendra Kumar Upadhyay, learned counsel for O.P. no.2., who has refused to file the counter affidavit, and perused the record on board.

2. The instant criminal revision under Section 397/401 Cr.P.C., has been preferred against order dated 22.11.2019 passed by Additional Sessions Judge/Fast Track Court, Court No.2, Aligarh in Sessions Trial No.961 of 2012 arising out of Case Crime No.189 of 2012 under Sections 393, 302 IPC, Police Station-Akrabad, District-Aligargh, whereby application dated 09.07.2017 filed by revisionist, claiming himself to be a juvenile at the time of incident, has been rejected.

3. In the present matter, revisionist is claiming himself as a juvenile. As per FIR version, in the intervening night of 03/04.05.2012, accused-revisionist along with two other persons barged into the tower with an intention of looting the battery installed there. While they were challenged, two of the accused fled away from the scene and third accused i.e. revisionist was caught hold by the informant's son namely, Bablu and in order to set himself free, accused-revisionist discharged fire shot upon Bablu, who sustained injury on his chest and died on the spot. In the process of catching hold, one wallet, one combination plier (pilash), one wrench (pana), a handle of screwdriver and one white towel fell down on the spot. The wallet contained driving license and identity card of revisionist as well as one mobile sim and cash amounting Rs.30 in it. On the basis of aforesaid recovery from the spot, accused-revisionist has been named in the FIR. Taking the plea of juvenility, revisionist claimed for separate trial and to

this effect, he moved an application dated 09.07.2017 before the trial Court to declare him juvenile, as his date of birth is 07.07.1994 and at the time of incident, he was hardly aged about 17 years 9 months and 27 days.

4. In support of his claim of juvenility, revisionist had filed School Leaving Certificate and one medical report. Ram Singh, father of revisionist, and one Veer Pal Singh, teacher of the school have given their statements in support of revisionist's claim of juvenility and they had corroborated the claim of revisionist that his date of birth is 07.07.1994.

5. After examining the school certificate, which was proved by school teacher from the S. R. Register and statements of witnesses, learned Court below came to a conclusion that date of birth of revisionist is 07.07.1994 and, accordingly, at the time of incident i.e. 04.05.2012 he was aged about 17 years 10 months, but the Court below has refused to treat the revisionist as a juvenile on the ground that hardly 50-55 days were short in completion of 18 years of his age and he was able to understand the consequences of the occurrence.

6. Learned counsel for the revisionist submitted that since the revisionist was a juvenile, as his date of birth was noted to be 07.07.1994, on the date of occurrence i.e. 04.05.2012, he is entitled to the benefit of provision of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "J. J. Act, 2000"). The Court below had partly applied J.J. Act, 2000 only with respect to determining the age of present revisionist but it had illegally applied the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "J. J. Act, 2015") in negating his juvenility on the ground of his ability to understand the nature of crime. Learned counsel for revisionist has emphasized upon the provisions of J. J. Act, 2015 which denotes the power of Board by conducting preliminary assessment into the heinous offence. Under the aforesaid provision Board has been entrusted to conduct preliminary enquiry to assess with regard to mental and physical capacity of an accused for committing a crime and also his ability to understand the consequences of the offence and circumstances in which he allegedly committed the offence. Learned counsel for the revisionist submitted that since this matter relates to the year 2012, provisions of J. J. Act 2000 ought to have been applied in determining the question of juvenility of the accused and, as per provisions of Section 7-A of J. J. Act, 2000, after coming to the conclusion that accused is below the age of 18 years on the date of occurrence, it shall forward the matter before the Juvenile Justice Board for passing appropriate order. Learned counsel has placed reliance on a judgement of Hon'ble Supreme Court in the matter of **Abdul Razzak vs. State of U.P., reported in AIR 2015 SC 1770**. In the aforesaid case, the accused/petitioner was convicted under Section 302 I.P.C. and sentenced to undergo life imprisionment by the trial court. The order of the trial court was affirmed by the High Court and his Special leave petition was also dismissed by the Hon'ble Supreme Court. Even the review petition filed before the Hon'ble Supreme Court was also dismissed. At subsequent stage, Hon'ble High Court took suo-moto action under the provisions of Section 7-A of J.J. Act, 2000. Juvenile Justice Board, Agra had examined the case of the petitioner/accused and held that on the date

of incident, he was less than 18 years of age. In this background, accused/petitioner moved before the Hon'ble Supreme Court with the prayer to release him from the custody and his prayer was allowed. After discussing several decisions of the Hon'ble Supreme Court, it has been held that even if a person was not entitled to the benefit of juvenilities under 1986 Act or the present Act prior to its amendment in 2006, such benefit is available to a person undergoing sentences if he was below 18 years of age on the date of the occurrence. Such relief can be claimed even if a matter has been finally decided.

7. Per contra, learned counsel for O.P. no.2 has supported the impugned order passed by the Court below and submitted that the Court below has rightly rejected the claim of the revisionist with respect to declaring him as a juvenile. It is further submitted that accused has almost attained age of majority i.e. 18 years of age and was having ability to understand the consequences of the offence and the circumstances in which he was involved in the crime. He has further submitted that present revisionist should be treated as an adult and no ground is made out to consider his claim as a juvenile under the Juvenile Act.

8. The Juvenile Act is a special enactment to protect the fundamental right of the children and meet out their needs, as enshrined in our Constitution. Now it is no more res-integra that a child or juvenile in conflict with law, who is treated to be less than 18 years of age, can claim benefit under the time to time modified/amended enactments. At present, J.J. Act, 2015 is enforced after consolidating the amending law relating to children alleged and found in conflict with law.

9. In the matter in hand, the occurrence is of dated May 4, 2012 and on the date of occurrence, J.J. Act, 2000 was enacted. Therefore, the revisionist can claim his juvenility and benefits relating to it under the J.J. Act, 2000. Date of occurrence i.e. May 4, 2012 is the relevant date to determine the age of accused claiming himself as juvenile under the J. J. Act, 2000.

10. For the purpose of determining of juvenility of the accused and giving benefit relating to it, reference may be made to Section 7-A of J.J. Act, 2000 read with Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "J.J. Rules, 2007").

11. Section 7-A was inserted in J.J. Act, 2000 by virtue of Act No. XXXIII, 2006. Section 7-A is nothing but an extension of Section 7 of J.J. Act, 2000 which denotes that after enquiry, in case the court is of the opinion that the accused is a juvenile on the date of commission of offence, then the court should refer the matter to the Juvenile Board for passing the appropriate order. Section 7-A is quoted below :

"7-A. Procedure to be followed when claim of juvenility is raised before any Court.*-(1) Whenever a claim of juvenility is raised before any court or a 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 enquiry, taken 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 the 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 order, and the sentence if any, passed by a court shall be deemed to have no effect."

12. Rule 12 of J.J. Rules, 2007, denotes the procedure for determining the age of a child or a juvenile in conflict with law. Rule 12 is quoted below :

*"**Rule 12.** Procedure to be followed in determination of age.--(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

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

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

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

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

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

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

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

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, 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."

13. A bare perusal of aforesaid section clearly reveals that the Court concerned shall make an enquiry with respect to determining the juvenility of an accused on the date of commission of the offence and in that process it can take such evidence as may be necessary so as to determine the age of such person and shall record a finding whether the person is juvenile or child or not, stating his age as nearly as may be.

14. Hon'ble Supreme Court has expounded in the matter of **Jitendra Singh alias Babboo Singh and Anr v. State of U.P, (2013) 11 SCC 193** that claim of juvenility can be raised by a person at any stage and in case, Court finds that the person is juvenile on the date of commission of offence, it has to forward the juvenile to the Board for passing appropriate order. The relevant paragraphs 81 and 82 of the aforesaid judgment are quoted below :

"81. The matter can be examined from another angle. Section 7-A(2) of the Act prescribes the procedure to be followed when a claim of juvenility is made before any court. Section 7- A(2) is as under:

*"7-A. Procedure to be followed when claim of juvenility is raised before any court.-- (1)****

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

82. A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any court, upon such court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have (sic no) effect. There is no provision suggesting, leave alone making it obligatory for the court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim expressio unius est exclusio alterius, it would be reasonable to hold that the law insofar as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the courts to set aside the conviction recorded by the lower court. Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence

awarded to the juvenile without interfering with the conviction recorded by the court concerned and thereby complied with the mandate of Section 7-A(2) of the Act."

15. In the matter of **Abuzar Hossain vs. State of West Bengal, reported in (2012) 10 SCC 489**, a three Judges Bench of Hon'ble Supreme Court has summarized the law relating to juvenility as to how and when it can be claimed by a person. The relevant paragraph 39 of the said judgment is quoted below :

"39. Now, we summarise the position which is as under:

39.1. 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.

39.2. 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.

39.3. 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 enquiry 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 Sheikh and Pawan these documents were not found prima facie credible while in Jitendra Singh 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 enquiry for determination of the age of the delinquent.

39.4. 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 enquiry 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 enquiry into determination of age of the delinquent.

39.5. 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.

39.6. 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."

16. Learned Court below has illegally partly applied the provisions of J.J. Act, 2015 to assess the ability of the revisionist/accused to understand the nature of crime and declined to treat him as a juvenile. It is an admitted fact that date of occurrence is 04.05.2012, therefore, J. J. Act, 2000 should have been applied in the present matter. There is no provision in J.J. Act, 2000, in determining the juvenility, with respect to assessment of mental and physical capacity of an accused to commit such offence as well as his ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence.

17. Under the newly inserted Section 7-A to the J.J. Act, 2000, it is made obligatory to the court that, after enquiry, if it finds a person to be juvenile on the date of commission of offence, it shall refer the matter to the Juvenile Justice Board for passing appropriate orders as per the provisions of law. Provisions as contained in Section 7-A read with Rule 12 of J. J. Rules, 2007, clearly reveals that after enquiry, in case the person is considered as juvenile he should be given benefit of the Act.

18. Learned counsel for the opposite party no.2 has not made any comment qua the enquiry conducted by the Court below in determining the age of the accused-revisionist. It appears that respondent no.2/first informant is satisfied with respect to the date of birth and age of the accused as determined by the Court below.

19. In view of the settled legal proposition and the discussions made above, present revisionist is entitled to benefit of J.J. Act 2000, inasmuch as, on the date of occurrence i.e. 4.5.2012, he was below 18 years of age. The trial Court, after discussing the documents and statements made by the witnesses, came to the conclusion that the accused/revisionist was below the age of 18 years on the date of occurrence.

20. In the present matter, once the Court below has completed its enquiry after discussing the relevant documents and statements of the witnesses that the revisionist/accused is less than 18 years of age, it has no option but to refer the matter to the Board, for passing appropriate orders, as provided in Section 7-A of J.J. Act, 2000. Juvenility of the present revisionist has illegally been denied by applying the provisions of J.J. Act, 2015 on the ground that he was capable of understanding the consequence of the offence and circumstances in which he had allegedly committed the offence.

21. In the light of the facts and law as discussed above, impugned order passed by the Court below is not sustainable and is liable to be quashed.

22. In the result, this revision is allowed. Impugned order passed 22.11.2019 passed by Additional Sessions Judge/Fast Track Court, Court No.2, Aligarh in Sessions Trial No.961 of 2012 arising out of Case Crime No.189 of 2012, is quashed. Matter is remitted to the Court below for taking appropriate action under the provisions of law as embodied under Section 7-A(2) of J.J. Act, 2000.

23. Certify this judgment to the lower Court immediately for information and necessary compliance.

(2020)11ILR A289
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2020

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

Criminal Revision Defective No. 411 of 2020

Rajbahadur Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Anil Kumar Mishra

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

A. Criminal Law - Code of Criminal Procedure, 1973- Section 397/401 - Indian Penal Code, 1860-Sections 379, 504, 505-challenge to-misuse of process of law u/s 204(4) Cr.P.C.-accused successfully evaded appearance-non-presence of accused should have been procured by way of invoking procedure u/s 87 of the Cr.P.C.-instead of that, learned Magistrate dismissed the matter of the complainant at the stage of issuance of bailable warrant- revision against summoning order was also dismissed, despite that accused/Sub-inspector did not appear-at the stage of seeking the presence of accused, the presence of complainant was not at all necessary-Once, the summons was already sent, there was no necessity of paying further court fees.(Para 3 to 10)

In the present matter, there is a clear misuse of process of law by the accused who even after coming to know that summons were issued and revision was dismissed, did not appear before the court and strange enough the learned Magistrate dismissed the complaint at the stage of bailable warrant. There was no question of affixing process fees, once the process fees has been affixed, it is the duty of the police authority to procure the presence of the accused. The accused was shielded by Superintendent of Police even after noticed, no action was taken by him.(Para 6 to 8) (E-6)

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

1. Delay in filing the revision has been condoned vide order of the date passed on delay condonation application.

2. This revision has been preferred against the order dated 13.8.2018 passed by the Chief Judicial Magistrate, Moradabad in Complaint Case No. 10657 of 2012.

3. The factual matrix in short is that the complainant is a practising advocate and he complained to the Chief Judicial Magistrate, Moradabad about commission of offences under Section 379, 504 and 505 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC'). His statement was recorded as per Section 200 of Code of Civil Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') and that of the witness under Section 202 of Cr.P.C. The Court issued summons to the accused. Against the summoning order, instead of appearing before the Court below one Jaibhagwan

Singh, Sub Inspector preferred revision being Revision No.305 of 2016 which was rejected vide order dated 5.2.2018. Non bailable warrant also was issued on 29.11.2016. Unfortunately, the learned Judge predecessor to the one who passed the order on 13.8.2018 had even sent notices to the higher authorities to procure the presence of the accused which went in vain. The advocate fell sick namely the complainant and the learned judge below dismissed the complaint under Section 204 (4) of Cr.P.C. It is this order which is under challenge.

4. I have heard learned A.G.A. for the State. Private respondents are deemed to have been served as even before the Court below they have not appeared and they seem to be head strong police officer as even after dismissal of their revision challenging the summoning order was passed they have not appeared before the learned Magistrate since 2012. Till 2016 the chronology of events would go to show that the learned Magistrate on 12.7.2016 wrote to the police authority at Moradabad by way of notice which had been annexed that the summons were not served on the accused though they were police officials. It is after this notice that the accused challenged the issuing summons order being Revision No.305 of 2016 (Jaibhagwan Singh, Sub Inspector Vs State of U.P. and others). The revision was rejected by the Court of Session on 5.2.2018 and despite that, the accused did not appear.

5. It is very strange that the learned Judge whose order is under challenge did not pass orders for procuring the presence of the accused. The summons was already issued which meant that Section 204 (4) of Cr.P.C. was already complied with.

Section 204 of Cr.P.C. reads as follows :

*"**204. Issue of process.***

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear

at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub-section (1) shall be accom- panied by a copy of such complaint.

(4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

6. The order dated 13.8.2018 goes to show that despite the fact that the accused lost before the appellate authority was successful in evading appearance and the complainant sought to be lodged by an advocate was dismissed. It is very strange that instead of procuring presence of the accused, the learned Magistrate dismissed

the complaint under Section 204 (4). Once the summons was already sent, there was no necessity of paying further court fees. The non presence of the accused should have been sought to be procured by way of invoking procedure as per provisions of Section 87 of the Cr.P.C. Instead of that, the learned Judge has dismissed the complaint of the present revisionist which shows that the order is perverse. The said order is required to be quashed and set aside.

7. The respondents accused shall be forthwith dealt with by the learned Magistrate and their presence shall be procured even if it has to be procured by way of non bailable warrant to be served through Superintendent of Police.

8. The order passed by the learned Judge below dismissing the case is absolutely cryptic. The stage was for appearance of the accused who was evading summons and was aware that summoning order was passed. The accused is shield by Superintendent of Police, Moradabad as after notice, no action is taken by him. The revision filed by the accused was also dismissed on 5.2.2018. All these factual aspect ought to have been taken care of by the Magistrate. At stage of seeking the presence of accused, the presence of the complainant was not at all necessary.

9. In view of the above, this revision is allowed. The order impugned in this petition is set aside. The learned Magistrate shall proceed from the stage, summons was issued and accused is aware of the summons the presence of the accused be procured first and thereafter the presence of the complainant be insisted upon.

10. The learned Magistrate has the duty cast to see that there is no misuse of the Court proceedings. In this case, there is a clear misuse of process of law by the accused who even after coming to know that summons were issued against them and their revision were dismissed, did not appear before the Court below and strange enough the learned Magistrate dismissed that matter of the complainant at the stage of issuance of bailable warrant as accused had not appeared before it pursuant to the summons already issued. There was no question of affixing process fees and, therefore, the dismissal under Section 204 of Cr.P.C. is bad.

11. A copy of this order be sent to the Superintendent of Police, Moradabad who shall explain to this Court as to what action he had taken pursuant to the notice dated 12.7.2016.

12. This judgment be circulated to the Trial Court Judge not to insist for the presence of complainant at the stage of service of summons/warrants and/as their presence would not be required for any adjudicatory purpose.

13. Once the process fees has been affixed, it is the duty of the police authority through the Court to procure the presence of the accused unless orders otherwise are passed. The compliance be filed in the Registry of the High Court on or before 25.10.2020 by Superintendent of Police, Moradabad and the learned Magistrate concerned.

(2020)11ILR A291
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2020

BEFORE
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Revision No. 596 of 2020

Km. Rehana & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Pradeep Kumar Pal, Sri S.I. Jafri, Sri Gufran Ahmad Khan, Sri Ram Sunder Yadav, Sri N.I. Jafri

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 397/401 - Indian Penal Code, 1860-Sections 498-A, 304-B - Dowry Prohibition Act, 1961-Section 3/4 - application- Section 319- challenge to-summoning of proposed accused for trial u/s 319 Cr.P.C.-examination-in-chief is sufficient if it satisfactorily proves the presence and role of accused in the crime-revisionists actively participated in the commission of crime-mere taking name is not sufficient there must be something more to show implication of person-on mere probability of complicity revisionists have not been summoned but there is appropriate material and evidence to justify summons of revisionists-trial judge has committed no error of law to summon the revisionists for trial.(Para 3 to 6)

B. An inquiry can be conducted by the Magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the Magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 CrPC it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensu, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.(Para 5)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Hardeep Singh etc. Vs St. of Panj. & ors. etc., (2014) 3 SCC 92

2. Amrawati & anr. Vs St. of U.P. (2004) 57 ALR 290

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

(Delivered by Hon'ble Gautam Chowdhary, J.)

1. Heard Sri N.I. Jafri, Senior Advocate assisted by Sri Gurfan Ahmad Khan, learned counsel for the revisionists, learned A.G.A. for the State of U.P. and perused the record.

2. The present criminal revision has been filed with a prayer to allow the revision and set aside the judgement and order dated 07.01.2020 passed by learned Sessions Judge, Badaun, in Sessions Trial No. 62 of 2019 (State Vs. Mushrarat Khan & others) in Case Crime No. 446 of 2018, under sections 498-A, 304-B IPC readwith section 3/4 Dowry Prohibition Act, Police Station- Wazir Ganj, District- Budaun upon application filed under section 319 Cr.P.C. filed by opposite party no. 2 which is pending in the court of Sessions Judge, Badaun.

3. In short brief facts of the case are that the revisionists of the said case were exonerated during investigation and no charge-sheet was submitted against them. The first information report of the incident was lodged by the father of the deceased Anish Khan/opposite party no.2. According to the statement of P.W.1, prior to the incident, it was told to the informant by the daughter of the deceased that her husband Mushrarat Khan, her in-laws being father-in-law Maisar Khan, mother-in-law,

Sahida, devar Nasrat Khan and nanad Rihana used to physically and mentally torture her for dowry. It was also told that all the above accused demanded a new car and they also asked for 14 *tola* gold and one lakh rupees cash. According to the first information report, on 28.10.2016 the deceased, Maijveen was harassed and beaten up by her in-laws for demanding the said dowry and on 29.10.2016 it came within the knowledge of the first informant by his relative that her daughter Maijveen had been killed by her in-laws by poisoning. The body of the deceased was kept on the boundary of her house and all the in-laws had escaped from the house. He reported the incident at Police Station-Wazirganj against husband, Mushrarat Khan, father-in-law, Maisar Khan, mother-in-law, Sahida, devar, Nasrat Khan and nanad, Rihana but the co-accused Nasrat Khan and Rihanna got exonerated during investigation and the charge-sheet was not submitted against them, while the lower court found that Nasrat Khan and Rihanna were the participants of the said incident and therefore they needs to be summoned.

4. Revisionist's counsel has tried to point out certain infirmities in the evidence which has been made the basis to summon the accused-revisionists under Section 319 of Cr.P.C. The factual controversies have been raised and certain submissions which are more in the nature of ultimate defense that the accused may finally take to show their innocence, have also been made. The plea that the accused-revisionist has been falsely implicated, has also been taken. Learned counsel for the revisionist has not been able to point out any such illegality or impropriety or incorrectness which may persuade this Court to interfere in the impugned order. There is no abuse of court's process perceptible in the same. The relevant law also have been taken into consideration by the lower court. This Court also does not see any such element of perversity in the impugned order. The evidence as has been produced during the course of trial appears to have been sufficient to justify the summoning of the revisionists.

5. At this stage, reference may also be made to the five judges judgement of Apex Court in the Case of **Hardeep Singh etc. etc. Vs. State of Punjab and Ors etc. etc., reported in 2014 (3) SCC 92**, wherein the Apex Court has also considered the words 'Inquiry, 'Trial', the relevance of the material collected during the course of inquiry and its evidentiary value. Paragraphs 27, 29, 34, 39, 41, 81, 82, 83 of the said judgement are relevant for the controversy in hand and are therefore, reproduced herein below:

"27. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of Section 2(g) CrPC, which defines an inquiry as follows:

"2(g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court."

29. Trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led in this behalf. In Moly v. State of Kerala [(2004) 4 SCC 584 : 2004 SCC (Cri) 1348] , this Court observed that though the word "trial" is not defined in the Code, it is clearly distinguishable from inquiry.

Inquiry must always be a forerunner to the trial.

34. In Common Cause v. Union of India [(1996) 6 SCC 775 : 1997 SCC (Cri) 42 : AIR 1997 SC 1539] , this Court while dealing with the issue held: (SCC p. 776, para 1)

"1. II (i) In cases of trials before the Sessions Court the trials shall be treated to have commenced when charges are framed under Section 228 of the Code of Criminal Procedure, 1973 in the cases concerned.

(ii) In cases of trials of warrant cases by Magistrates if the cases are instituted upon police reports the trials shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure, 1973 while in trials of warrant cases by Magistrates when cases are instituted otherwise than on police report such trials shall be treated to have commenced when charges are framed against the accused concerned under Section 246 of the Code of Criminal Procedure, 1973.

(iii) In cases of trials of summons cases by Magistrates the trials would be considered to have commenced when the accused who appear or are brought before the Magistrate are asked under Section 251 whether they plead guilty or have any defence to make." (emphasis supplied)

39.Section 2(g) CrPC and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under CrPC by the Magistrate or the court. The word "inquiry" is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial.

41.In a somewhat similar manner, it has been attributed to the word "course" the meaning of being a gradual and continuous flow advanced by journey or passage from one place to another with reference to period of time when the movement is in progress. (SeeState of Travancore-Cochin v.Shanmugha Vilas Cashewnut Factory [AIR 1953 SC 333].

81.An inquiry can be conducted by the Magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the Magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 CrPC it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensu, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

82.This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before

the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83.It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence" as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court."

6. In view of the discussions made herein above, the submissions made by the learned counsel for the revisionists are not found to be cogent enough to quash the order impugned in the present revision. Consequently, the present revision is accordingly dismissed.

7. However, it is observed that if the bail has not been obtained as yet, the accused-revisionist may appear before the court below and apply for bail within two months from today. The court below shall make an endeavour to decide the bail application keeping in view the observations made by the Court in the Full Bench decision of **Amrawati and another Vs. State of U.P. 2004 (57) ALR 290** and also in view of the decision given by the Hon'ble Supreme Court in the case of **Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC).**

8. In the aforesaid period or till the date of appearance of the accused in the court below, whichever is earlier, no coercive measures shall be taken or given effect to.

(2020)11ILR A295
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Criminal Revision No. 661 of 2017

Ramesh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Anil Kumar

Counsel for the Opposite Parties:
A.G.A., Sri Shiv Badan Singh, Sri Vijay Bahadur Shivhare

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 - Indian Penal Code, 1860- Sections 147, 148, 149, 342, 302, 504, 506 & SC/ST Act, 1989-Sections 3(1)(x), 3(2)(v)-application-rejection-Challenge to-rejection order regarding summoning of other four accused u/s 319-Investigating officers had not found any reliable evidence

against them-From the evidence of PW-1 and PW-2 involvement of other four accused in the incident was not established-Hence, trial court rightly rejected the application-the power conferred to the trial court to summon an accused u/s 319 CrPC is an extra-ordinary power and it should be used very sparingly.(Para 3 to 18)

B. Though only a prima facie case is to be established form the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power u/s 319 Cr.P.C. In the present case, the trial court had considered the rival submissions and prima facie satisfied that there is no cogent evidence available to summon the other four accused along with other co-accused persons. (Para 7 to 12)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. Hardeep Singh Vs St. of Punj. & ors. (2014) 1 JIC 539 SC

2. Babubhai Bhimabhai Bokhiria & anr. Vs St. of Guj. & ors, (2014) 5 SCC 568

3. Shiv Prakash Mishra Vs St. of U.P & anr. (2019) 7 SCC 806

4. Ashish Chadha Vs Asha kumari & anr. (2012) 1 SCC 680

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

1. This criminal revision has been filed against the order dated 4.2.2017 passed by Special Judge, S.C./S.T. (P.A.) Act, Hamirpur in Special Case No.24 of 2013 by which application filed by revisionist under Section 319 of Cr.P.C. was rejected.

2. The brief facts of the case are that the revisionist had lodged an F.I.R. on 7.10.2012 against 10 accused namely (1) Dev Singh, (2) Satish, (3) Brajesh, (4) Arun, (5) Santosh, (6) Omkar, (7) Rajesh, (8) Sunil, (9) Santosh and (10) Awadhesh, which was registered as Case Crime No.462 of 2012, under Sections 147, 148, 149, 342, 302, 504, 506 I.P.C. and Sections 3(1)(x) and 3(2)(v) S.C./S.T. Act in P.S. Kurara, District Hamirpur. It was alleged in the F.I.R. that the accused persons had committed murder of informant's brother Jaitpal. The Police after investigation had submitted charge-sheet against (1) Dev Singh, (2) Satish, (3) Santosh, (4) Sunil, (5) Awadhesh and (6) Santosh but no charge-sheet was submitted against other four accused namely (1) Brajesh, (2) Arun, (3) Rajesh and (4) Omkar. The trial was proceeded and the prosecution had examined two witnesses of fact namely Ramesh (informant) as P.W.-1 and Jagannath as P.W.-2. After the evidence of P.W.-1 and P.W.-2 the informant/revisionist had moved an application on 16.5.2016 (although provision was not mentioned) under Section 319 of Cr.P.C. to summon and try the opposite party nos.2, 3, 4 & 5 (whose name were not in charge-sheet) along with other co-accused. The learned trial court after considering the evidence of P.W.-1 and P.W.-2 and other materials brought on record, had rejected the application which is Paper No.43-Ka under Section 319 Cr.P.C. vide order dated 4.2.2017, which is impugned in the present criminal revision.

3. Heard Sri Anil Kumar, learned counsel for the revisionist, Sri Raj Kamal Srivastava, learned A.G.A. for the State

and Sri Vijay Bahadur Shiv Hare, learned counsel for opposite party nos.2 to 5.

4. The learned counsel for revisionist/informant has submitted that the opposite party nos.2 to 5 were also accompanying with other co-accused and committed the murder of his brother Jaitpal but the Investigating Officer did not submit a charge-sheet against them whereas from the evidence of P.W.-1 and P.W.-2 the offence against opposite party nos.2 to 5 are fully proved and they are also liable to be tried along with other co-accused. The trial court has committed illegality in rejecting the application filed under Section 319 Cr.P.C. by the impugned order. It is further submitted by learned counsel for the revisionist that the entire facts and circumstances of the case had not been properly considered by the trial court and the application was rejected in a very casual manner.

5. On the other hand, learned A.G.A. for the State as well as learned counsel for opposite party nos.2 to 5 have submitted that the trial court after considering the entire evidence of P.W.-1 & P.W.-2 has rightly passed the order dated 4.2.2017. From the evidence of P.W.-1 and P.W.-2 the involvement of opposite party nos.2 to 5 in the incident was not established. It is further submitted that opposite party nos.2 to 5, who are sons of accused Dev Singh were named in the F.I.R. and during investigation the Investigating Officer has not found any reliable evidence against them therefore charge-sheet has not been submitted against them. It is further submitted by learned counsel for opposite party nos.2 to 5 that P.W.-1 & P.W.-2 are real brothers and are interested witnesses and their evidence are not reliable. It is further submitted that the Police neither had filed charge-sheet against opposite party nos.2 to 5 nor has submitted the final report against them as they are absconders. Lastly, it is submitted that the trial court after prima-facie satisfaction that the involvement of opposite party nos.2 to 5 are not established from the evidence of P.W.-1 and P.W.-2, had rightly rejected the application under Section 319 Cr.P.C. filed by the revisionist.

6. Learned counsel for opposite party nos.2 to 5 has further submitted that the powers given under Section 319 of Cr.P.C. are discretionary powers of the court and are to be exercised sparingly and the trial court after having thoroughly examined the record found no substance in the application filed under Section 319 Cr.P.C. and has rightly rejected the same.

7. Before considering the merits of the contention of rival parties it is necessary to refer to Section 319 Cr.P.C. which reads as under:-

"319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a

summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

8. By bare reading of Section 319 Cr.P.C. it is clear that the power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during trial to summon any person as an accused to face the trial if it appears from the evidence that such person has committed any offence for which such person could be tried together with other accused.

9. The provisions of Section 319 Cr.P.C. have been enacted in the Code of Criminal Procedure with a view to achieve objective that the real culprit should not get away unpunished and the court is empowered to proceed against any person not shown as an accused if it appears from the evidence that such person has committed any offence then he may be summoned to face the trial along with other co-accused.

10. The Full Bench of Hon'ble Apex Court in the case of ***Hardeep Singh Vs. State of Punjab and others*** reported in ***2014 (1) JIC 539 (SC)*** has laid down the principles in respect of summoning the persons who were not charge-sheeted during investigation but from the evidence they were found guilty for committing such an offence. The relevant paragraphs 96, 97, 107, 108 are quoted hereunder:-

"96. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judges Bench of this Court in Vikas v. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

97. In Rajendra Singh (Supra), the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

107. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised

sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

108. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

11. The power of trial court under Section 319 Cr.P.C. in respect to arraign any person as an accused during the course of enquiry or trial is also dealt with by Hon'ble the Apex Court in the case of ***Babubhai Bhimabhai Bokhiria and another Vs. State of Gujarat and others***, reported in ***(2014) 5 SCC 568***, the relevant paragraph 8 is quoted hereunder:-

"8. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher."

12. The same view has been taken by Hon'ble Apex Court in latest decision reported in ***(2019) 7 SCC 806 Shiv Prakash Mishra Vs. State of Uttar Pradesh and another***. The relevant paragraph 10 is quoted herein below:-

"10. The standard of proof employed for summoning a person as an accused person under Section 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person. The power under Section 319 Cr.P.C. should be exercised sparingly. As held in Kailash v. State of Rajasthan: (SCC p. 55, para 9)

*"9. ..... the power of summoning an additional accused under Section 319 Cr.P.C. should be exercised sparingly. The key words in Section are "it appears from the evidence".... "any person".... "has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material a*gainst that person, the discretion under Section 319 Cr.P.C. would be used by the court."

13. It has been repeatedly held by the Hon'ble Apex Court in series of cases that the power to summon an accused is an extra-ordinary power conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against other persons against whom action has not been taken. The powers conferred to the trial court under Section 319 Cr.P.C. are discretionary and it should not be applied mechanically.

14. The trial court had recorded the findings while passing the impugned order that the Investigating Officer while submitting the charge-sheet disclosed 20 witnesses in which several witnesses are the witnesses of fact whereas only statement of Ramesh and his brother Jagannath were recorded as P.W.-1 and P.W.-2 and other witnesses of facts still have to be examined. From the evidence of two real brothers of the deceased the involvement of opposite party nos.2 to 5 in the commission of crime are not prima-facie established. The powers of trial court under Section 319 Cr.P.C. are discretionary in nature and after considering the evidence and material which are brought on record, the trial court prima-facie was satisfied that the involvement of opposite party nos.2 to 5 are not established and has rejected the application filed by the informant/revisionist.

15. The Hon'ble Apex Court in the case of ***Ashish Chadha Vs. Asha Kumari and another*** reported in ***(2012) 1 SCC 680*** has laid down the law that it is the trial court which has to decide whether evidence on record is sufficient to make out a prima-facie case against the accused. The relevant paragraph 21 is referred as under:-

"21. In this connection, we may usefully refer to the observations of this court in Munna Devi vs. State of Rajasthan & another (SCC p.632, para 3).

"3. We find substance in the submission made on behalf of the appellant. The revision power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the first information report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

16. The Hon'ble Apex Court laid down the law that the High Court while exercising the revisional jurisdiction has no authority to appreciate the evidence in the manner as the trial court and the appellate court are required to do. The revisional powers under the Code of Criminal Procedure cannot be exercised in a routine and casual manner and while exercising the revisional power the High Court has no authority to appreciate the evidence and it could be exercised only when it is shown that there is legal bar against the continuance of the criminal proceedings. In the present case the trial court had considered the rival submissions of parties and has prima-facie satisfied that there is no cogent evidence available to summon the opposite party nos.2 to 5 along with other co-accused persons. The revisionist had failed to point out any illegality or irregularity in the order passed by trial court rejecting the application under Section 319 Cr.P.C.

17. The power confered to the trial court to summon an accused under Section 319 Cr.P.C. is an extra-ordinary power and it should be used very sparingly and not be applied mechanically. In the present case the trial court has not committed any illegality or infirmity in rejecting the application after prima-facie satisfaction that the evidence adduced by the prosecution did not establish the involvement of opposite party nos.2 to 5 in the crime. The evidence brought on record during trial does not prima facie show the complicity of opposite parties no.2 to 5 in the occurrence and the trial court has rightly refused to summon them as accused.

18. After considering the rival submissions of the parties as well as material brought on record, the impugned order does not suffer from any illegality or irregularity and the learned trial court has not committed any error in rejecting the application filed by revisionist under Section 319 Cr.P.C. The revisionist has failed to point out any infirmity or illegality in the order. The present criminal revision lacks merits and deserves to be dismissed.

19. Accordingly, the criminal revision is dismissed.

(2020)11ILR A301
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.10.2020

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Criminal Revision Defective No. 697 of 2020

Surendra Kumar Shukla ...Revisionist
Versus
C.B.I. ...Opposite Party

Counsel for the Revisionist:
Sri Mehul Khare, Sri Prakash Sinha

Counsel for the Opposite Party:
Sri Sanjay Kumar Yadav, Sri Gyan Prakash

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 - Indian Penal Code, 1860- Sections 120-B, 420, 467, 468, 471 - Prevention of Corruption Act, 1988-Section 13(2) r/w 13(1)(d)-application-rejection-challenge to – discharge application-revisionist/auditor conspired to dupe the bank by forged and manufactured documents along with other accused-revisionist cannot be absolved as the revisionist wilfully gave false opinion and signed the document mechanically-revisionist acted unprofessionally with dishonest intention to favour the accused persons for pecuniary gain and causing wrongful loss to the bank-trial court committed no error in rejecting the application.(Para 3 to 27)

B. Turning to charge u/s 120-B IPC, an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from the other offences in that mere agreement is made an offence even if no step is taken to carry out the agreement. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming. But like other offences criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts, surrounding circumstances and antecedent and subsequent conduct, amongst other factors, constituting relevant material. The agreement or understanding may be proved by necessary implication to do an unlawful act by unlawful means.(Para 24)

The revision is dismissed. (E-6)

List of Cases Cited:-

1. CBI , Hyderabad Vs K. Narayana Rao, (2012) 9 SCC 512

2. Kehar Singh Vs St.(Delhi Administration),(1988) 3 SCC 609

3. Noor Mohammad Mohd. Yusuf Momin Vs St. of Mah., 1971 AIR 885

(Delivered by Hon'ble Suneet Kumar, J.)

1. The matter is taken up through video conferencing.

2. Heard Mr. Sri Prakash Sinha, Advocate, assisted by Sri Mehul Khare, learned counsel for revisionist; and, Sri Gyan Prakash, learned Addl. Solicitor General of India, assisted by Sri Sanjay Kumar Yadav, Advocate, appearing for C.B.I.

3. The instant revision has been filed seeking following reliefs:

"It is therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to set-aside the judgment and order dated 15.07.2019, as well as judgment and order 09.08.2019, passed by the Learned Special Court, Anti Corruption, CBI, Ghaziabad in Special Case No. 10/2012 (CBI Vs. Manoj Srivastava Etc.)

It is further prayed that this Hon'ble Court may be pleased to stay the effect and operation of the orders dated 15.07.2019 and 09.08.2019, passed by the Learned Special Court, Anti Corruption, CBI, Ghaziabad in Special Case No. 10/2012 (CBI Vs. Manoj Srivastava Etc.) as well as to stay the proceedings of Special Case No. 10/2012 (CBI Vs. Manoj Srivastava Etc.), under Sections 120-B IPC r/w 420, 467, 568, 471 IPC and 13(2) r/w 13(1)(d) Prevention of Corruption Act, 1988, pending before Learned Special Court, Anti Corruption, CBI Ghaziabad during the pendency of the present criminal revision before this Hon'ble Court, and/or pass such other and further order which this Hon'ble Court may deem fit and proper under the circumstances of the case."

4. The revisionist, a Chartered Accountant, is aggrieved by rejection of the discharge application filed before the court below.

5. The facts, stated briefly, is as follows:

6. A case came to be registered by C.B.I., Ghaziabad, on 14.12.2010 on a written complaint of the Union Bank of India, Branch Noida, wherein it was alleged that Sri Manoj Srivastava functioning as Branch Manager of SSI, Noida Branch, during May 2007 to May 2008, abusing his position as a public servant entered into criminal conspiracy with Proprietors of several (six) nominated firms/companies, thereby dishonestly causing loss to the bank and corresponding gain to the Proprietors and himself.

7. During investigation it was found that co-accused Manoj Srivastava entered into criminal conspiracy with Sri Kaushal Kishore Sharma, Proprietor of M/s Surendera Electricals, whereby, accepting the audit reports, balance-sheets, trading account, profit and loss account as on 31.03.2006, 31.03.2007 and 31.03.2008, forged statement of account of Corporation Bank, Janakpuri, New Delhi, and forged sale-tax returns to obtain loan, thereby, caused loss to the bank. It is further alleged that these financial papers were prepared by the revisionist in conspiracy with the borrower.

8. Upon investigation charge sheet dated 29.09.2012 was filed, revisionist was made an accused. The Special Judge took cognizance of the offence on 19.10.2012. The challenge to the charge-sheet and cognizance before this Court and the Supreme Court failed, consequently revisionist filed discharge application which came to rejected by the impugned order dated 15.07.2015. Hence, the present revision.

9. It is submitted by learned counsel for revisionist that the revisionist had specifically pleaded in the discharge application that he had audited the financial statements (balance-sheets, trading account and profit and loss account) of the firm whose Proprietor is a co-accused. The audit was done in compliance of Section 44 AB of Income Tax Act, 1961, and thereon he had given his opinion which is the audit report. It was further contended that the audit report is an opinion of the auditor and such an opinion may be a wrong opinion but certainly is not a false opinion. Revisionist cannot be charged for the opinion given as a professional. In support of his submissions, reliance has been placed on **Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao, (2012) 9 SCC 512.**

10. Reliance is also placed on Chartered Accountants Act, 1949, and the Auditing and Assurance Standards-2 (hereinafter referred to as "AAS-2") issued by Council of Institute. It is submitted that according to AAS-2, responsibility of financial statements rests upon the entity/enterprise and the objective of audit is to enable the auditor to express an opinion on such financial statement. The auditor can draw a reasonable conclusion, but an absolute certainty in audit is rarely attainable. Reference has been made to the relevant contents of AAS-2.

11. It is further urged that revisionist was admitted as an Associate of the Institute on 07.04.1995 and since then is a practising Chartered Accountant. No complaint in regard to his professional conduct as an auditor has ever been made by any bank or entity. It is further urged that allegation in the charge-sheet with regard to preparing false financial papers is without any evidence. The allegations, noted in the final report (charge-sheet) insofar it relates to the revisionist reads as under:

"Investigation has further revealed that Shri Manoj Srivastava, in furtherance of the said criminal conspiracy with Shri Kaushal Kishore Sharma Prop. of M/s Surindera Electricals and by abusing his official position as a public servant, accepted the false Audit Reports, Balance Sheets, Trading Profit and Loss accounts as on 31-03-2006, 31-03-2007, 31-03-2008, forged statement of account of Corporation Bank, Janakpuri, New Delhi, and forged sale tax return submitted by the borrower. The false financial papers were prepared by Shri Surendra Kumar Shukla, Chartered Accountant, in conspiracy with the borrower."

12. Learned counsel for the revisionsit submits that taking the allegations in the F.I.R./charge-sheet and the material/ evidence in support thereof, on face value, the ingredients of the offence against the revisionist is not made out; revisionist has been made an accused for merely giving an opinion in the capacity of an auditor which is based on the financial statements supplied by the firm.

13. In rebuttal, learned counsel appearing for C.B.I. submits that the allegation against revisionist is that of conspiracy; revisionist conspired with the proprietor of the firm and bank officials in preparing false report and fudging the financial statements, thereby, dishonestly causing wrongful gain and commensurate wrongful loss to the bank. The revisionist wilfully and deliberately failed to give an adverse opinion/report suggesting that documents relied upon in the financial statement is manufactured and forged, therefore, the auditor disclaims the financial statements for want of relevant documents or sufficiency of the contents of the documents.

14. I have considered the rival contentions and perused the charge-sheet and material placed on record with the assistance of learned counsels.

15. The AAS-2 mandates to establish standards on the forms and contents of auditor's report issued as a result of audit performed by an auditor on financial statements of an entity. Auditor is required to review and assess the conclusion drawn from the audit evidence obtained as the basis for the expression of an opinion on the financial statements. The review and assessment involves considering whether a financial statement has been prepared in accordance with an acceptable financial reporting framework applicable to the entity under audit. It is also necessary to consider whether financial statements comply with the relevant statutory requirements. Upon audit, the auditor's report should contain a clear written expression of opinion on financial statements taken as a whole, whether it is clean or clarificatory or does not agree.

16. The financial statements are the representations of the management of the entity. The preparation of such statements requires management to make significant account estimates and judgments, as well as, to determine the appropriate accounting principles and methods used in preparation of the financial statements. In contrast, the auditor's responsibility is to audit these financial statements based on audit evidence in order to express an opinion thereon. The auditor's report should describe the scope of the audit by stating that the audit was conducted in accordance with the auditing standards generally accepted in India. The auditor's report should describe the audit as including; (a) examining, on a test basis, evidence to support the amounts and disclosures in financial statements; (b) assessing the accounting principles used in the preparation of the financial statements; (c) assessing the significant estimates made by management in the preparation of the financial statements; and, (d) evaluating the overall financial statement presentation. Thereupon, the auditor's report should express the auditor's opinion "give a true and fair view". The term "give a true and fair view" indicates amongst other things, that the auditor considers only those matters that are material to the financial statements.

17. In view thereof, it is evident that the financial statement is based on the books of accounts, vouchers, ledgers etc. which the auditor is required to examine and then base his opinion as per the auditing standards. In other words, the auditor is not required to mechanically accept financial statement of the entity on face value but the financial statement must be examined with the corresponding vouchers, books of accounts, ledgers etc. as

a trained professional, and thereafter express his candid opinion. The auditor cannot escape his liability by merely stating that the financial statement was supplied by the entity and he signed it mechanically. The allegation against the revisionist is that he conspired to prepare the false financial statement based on manufactured documents.

18. It is pleaded and submitted that revisionist has been made an accused for merely signing the audit report, whereas, allegation against the revisionist is that of conspiracy entered with the Proprietor and bank official in preparing the false financial statement to dupe the bank. The auditor is not merely a countersigning professional but has to examine that the financial statements of the entity is based on relevant material relied upon by the entity/firm upon which the financial statement rests and that the auditor has examined the statements; ledgers, vouchers, books of accounts etc before recording his opinion.

19. The stand of C.B.I. taken in the counter affidavit filed in an earlier petition (Application No. 39089 of 2012), pertaining to quashing of the charge-sheet, is being relied upon in the present case. It is categorically stated that revisionist prepared false balance-sheet; trading account, profit and loss account of the firm for the financial years 2005-06, 2006-07 and 2007-08 to cheat the bank; revisionist acted unprofessionally becoming a parter to the fraud and conspiracy with dishonest intention to favour the accused persons for pecuniary gain and causing corresponding loss to the bank. It is further stated that balance-sheet of the firm/company is reflection of the credit worthiness of the entity; sanction of the loan rests on the balance-sheets. In the instant case the balance-sheet was not supporting the growth of the delinquent firm. The co-accused, proprietor of the firm, during investigation never produced any book of accounts to substantiate the figures reflected in the balance sheet. All financial papers viz. sale tax acknowledgement, statement of account of previous bank submitted with the bank for the purpose of loan was found to be manufactured and forged documents. It is alleged that all the forged documents are the brainchild of the revisionist, a professionally trained auditor, in conspiracy with the proprietor and manager of the bank. The balance-sheet, profit and loss account was prepared by the revisionist without there being any books of account.

20. Reverting to the case of **K. Narayana Rao** (supra), the facts therein is not applicable to the instant case. The case pertains to false legal opinion submitted by a panel advocate of the bank in respect of housing loan. The only allegation against the advocate is that he submitted false legal opinion about the genuineness of the property in question. Advocate's name was not mentioned in the F.I.R. and the opinion was based on the photocopy documents pertaining to the property provided by the bank. The Court upon examining the facts was of the opinion that liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the bank. In the given facts of the case, there was no evidence to prove that the advocate was abetting or aiding the original conspirators. In the facts of the instant case, revisionist is an auditor and responsibility of an auditor is not that of an opining advocate. Further, it is specifically and categorically alleged that revisionist in conspiracy with the proprietor of the firm actively participated and prepared false

finance documents in connivance with the bank officials. The ratio of **K. Narayana Rao** (supra) is distinguishable and not applicable to the facts of present case.

21. Ingredients of the offence of criminal conspiracy is that there should be an agreement between the persons who are alleged to have conspired and the said agreement should be for doing an illegal act or for doing by illegal means an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is to do an illegal act in furtherance of an agreement and such an agreement can be proved either by direct evidence or circumstantial evidence or by both. It is a matter of common experience that direct evidence to prove conspiracy is rarely available, accordingly circumstances proved, before and after the occurrence, have to be considered to decide about complicity of the accused.

22. In the facts of the case in hand the revisionist is charged, inter alia, for the offence under Section 120B I.P.C. For the purposes of conspiracy the allegations in the charge sheet has to be read as a whole. A single paragraph of the charge-sheet cannot be relied upon by the revisionist to contend that there is no allegation against him except of signing the audit report. The assertions in the charge-sheet, read as a whole, spells out the circumstances pointing to the conspiracy (agreement) between the proprietor of the firm, manager of the bank and the revisionist. The loan of the firm was processed on forged, fudged and manufactured documents upon which rests the financial statements of the firm. It is categorically stated that revisionist entered into criminal conspiracy with others by preparing false financial papers as an auditor/chartered accountant in conspiracy with the co-accused proprietor/borrower. The other accused persons, i.e., manager of the bank ignored the variation in financial figures available in the balance sheets, statement of account and other financial papers. Further, the manager of the bank accepted the forged statement of account and false financial figures as genuine, thereby allowing the diversion of cash credit (CC) limit. The revisionist admits of auditing the financial statements of the firm, but at the same time in the backdrop of manufactured documents did not give adverse opinion. The allegation is that the revisionist was a party to the forged, manufactured documents upon which the loan was processed.

23. Section 120B I.P.C. deals with the punishment for criminal conspiracy. The offence of "criminal conspiracy" is defined under Section 120A I.P.C. The most important ingredient of the offence "criminal conspiracy" is the agreement between two or more persons to do an illegal act or an act not illegal by illegal means. (Refer: **Kehar Singh Vs. State (Delhi Administration), (1988) 3 SCC 609).** The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. In **Noor Mohammad Mohd. Yusuf Momin Vs. State of Maharashtra, 1971 AIR 885**, the Supreme Court considered and laid down the distinction between Section 34, Section 109 and Section 120B I.P.C. Section 34 embodies the joint liability in doing a criminal act, the essence of the act being the existence of common intention, participation in the commission of the offence in furtherance of the common intention invites its application. On the

other hand Section 109 may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission.

24. Turning to charge under Section 120B I.P.C., criminal conspiracy postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from the other offences in that mere agreement is made an offence even if no step is taken to carry out the agreement. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming. But like other offences criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts, surrounding circumstances and antecedent and subsequent conduct, amongst other factors, constituting relevant material. The agreement or understanding may be proved by necessary implication to do an unlawful act by unlawful means.

25. Having considered the scope and ambit of the offence under Section 120B I.P.C. and applying it on the allegations/ facts, it is categorically alleged that the accused persons conspired to dupe the bank by illegal means based on forged, manufactured documents and financial statements, alleged to have been prepared by the revisionist. The allegations have to be proved during trial. The Court while framing the charge is required to prima facie assess that the allegations and the evidence links the accused to the offence.

26. It is settled principle of law that the Court in exercise of its inherent power under Section 482 Cr.P.C. would not enter into the merits of the evidence in support of the charge. At this stage, only a prima facie opinion is to be formed whether the ingredients of the offence alleged against the revisionist is made out from the material placed on record. The accused/auditor cannot be absolved of the offence of conspiracy with the other co-accused of giving an opinion based on manufactured documents to dupe the bank. It is a matter to be seen and examined during trial.

27. Learned counsel for the revisionist failed to point out any illegality, irregularity or jurisdictional error in the order impugned.

28. In view thereof, I find no reason to interfere with the impugned order.

29. The application, being devoid of merit, is accordingly dismissed.

(2020)11ILR A307
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.10.2020

BEFORE
THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 1161 of 2020

Shubham @ Kalua ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ajay Singh, Sri Amarendra Nath Singh

Counsel for the Opposite Parties:

A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 - Indian Penal Code, 1860-Section 376 & Juvenile Justice (Care and Protection of Children) Act, 2000-application-release of juvenile-revisionist was a juvenile aged 14 years 6 months on the date of occurrence and during pendency of the appeal he became major-revisionist completed around one year six months of sentence out of the maximum three years institutional incarceration permissible for a juvenile, u/s 15(1)(g) of the Act, 2000-Juvenile justice Board and appellate court has erred in considering the facts and the true import of section 12 of the Act,-at the time of incident the juvenile was clearly below the age of 15 years and does not fall into the special category of the juvenile between the age of 16-18-Social Investigation Report does not show him to be a desperado or misfit for the society-the two courts below disentitled the juvenile to be released on account of his case falling under each of the three exceptions of the Section 12(1) of the Act, for which no reason has been indicated.(Para 3 to 23)

The application is allowed. (E-6)

List of Cases Cited:-

1. Kamal Vs St. of Haryana, (2004) 13 SCC 526

2. Takht Singh Vs St. of M.P., (2001) 10 SCC 463,

3. Shiv Kumar @ Sadhu Vs St. of U.P. (2010) 68 ACC 616 LB

4. Dataram Singh Vs St. of U.P. & anr ,(2018) 3 SCC 22

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

Order on Memo of Revision

1. Heard Sri Amarendra Nath Singh, learned senior counsel assisted by Sri Ajay Singh, learned counsel for the revisionist as well as learned A.G.A. appearing for the State and perused the record.

2. Admit.

3. Notice has already been received by learned AGA on behalf of State and notice has already been served upon opposite party no.2.

4. Summon the lower court record.

5. Put up on 8.12.2020 in the additional cause list before appropriate Bench for hearing of the case.

Order on Bail Application

6. Heard learned counsel for the applicant/revisionist as well as learned AGA appearing for the State and perused the record.

7. The present criminal revision has been filed by the revisionist under Section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 read with Section 397/401 IPC (in short "the Act') against the judgement and order dated 12.3.2020 passed by Additional Sessions Judge/Fast Track Court-1, Ghaziabad dismissing Criminal Appeal No. 158 of 2013 (Juvenile Justice Board Ghaziabad vs State of UP) filed under Section 52 of the Act and affirming an order of Juvenile Justice Board, Ghaziabad dated 25.7.2013 passed in Case Crime No.222 of 2002, under Section 376 IPC, PS Pilakhua District Ghaziabad by which the revisionist was directed to be kept in the special home separately for a period of three years.

8. The prosecution case, as per the F.I.R lodged by the informant, is that on 12.7.2002 at about 3 p.m. his daughter Lata aged about 7-8 years was taken by the revisionist Shubham @ Kalua on the pretext of watching TV where the loud voice was coming from his house. When the informant along with Suman w/o Narendra, Gullu, Dayawati reached the spot, the accused Kalua ran away from the spot and the victim informed them that the revisionist has done wrong act with her.

9. It is submitted by learned counsel for the revisionist that the revisionist is innocent and he has been falsely implicated in the present case. There is no iota of evidence on record to show that the revisionist has committed any such offence as alleged in the FIR and the revisionist was never medically examined to determine the genuineness of the alleged incident. It is next submitted that PW-4 Dr. Sushma Yadav who has conducted the medical examination of the victim has clearly opined that there is no spermatozoa found inside or around the vagina and injured private part. Thus, the prosecution case is not supported by the medical evidence. Further, PW-5 Suman has also not supported the prosecution case and has stated that on the alleged date of incident she had never heard any screaming sound of the victim nor she was found in unconscious state. The prosecution has not examined the important witness Smt. Dayawati deliberately whose presence was noted at the time of lodging the FIR. It is further submitted that the revisionist was below 15 years at the time of alleged incident and has been falsely implicated just to pressurize his family members to marry the alleged victim as the family of the revisionist holds good financial position in the society. It is lastly contended that due to heavy pendency of the cases before this Court the revision is not likely to be heard in near future.

10. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist was a juvenile aged 14 years and 6 months on the date of occurrence and during pendency of the appeal he became major. The revisionist is in jail since 12.3.2020 and has spent around 7 months in jail. He has already remained in jail for a period of about 9 months during trial. Thus, the revisionist has completed around one year and six months of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 15(1)(g) of the Act, 2000.

11. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion and hearing of this revision.

12. Learned counsel for the revisionist further submits that in the present case, the Juvenile Justice Board, Ghaziabad vide order dated 25.7.2013 has directed to send the revisionist in special home for three years. Being aggrieved, the revisionist has preferred an appeal which was also

dismissed vide order dated 12.3.2020. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the appellate court has erred in not considering the fact that the medical examination of the revisionist has never been conducted to determine the incident which took place and ignored the same in a very mechanical manner.

(ii) That the prosecution has not examined the important witness deliberately, Smt. Dayawati and the learned appellate court has passed the impugned order illegally without taking into consideration this fact.

(iii) That PW-4 Dr. Sushma Yadav in her opinion as well as medical examination has clearly stated that there is no spermatozoa found on the hymen as per the pathological report and she has also stated that the findings of rape may not be occurred meaning thereby it is not necessary that the rape took place and further she has stated that the injury may be caused out of accident by falling of the girl. It is clear that no definite opinion of rape was made and the learned court below has ignored this fact while passing the impugned order and failed to consider the statements and evidence on record and as such the same is liable to be set aside by this Hon'ble Court.

(iv) That the ;learned Sessions Judge Court and Juvenile Justice Board have failed to appreciate that prosecution witness No.5 Smt. Suman has clearly stated in her statements that on the date of alleged incident at about 3 p.m she did not hear any voice of screaming and neither Lata was found unconscious nor any such incident took place like prosecution story.

(v) That the learned trial court has erred inasmuch as it has failed to appreciate that the house of the revisionist is away from the house of the alleged victim and in such circumstances it is highly improbable that the voice of screaming was not audible to the informant and others.

(vi) That there was absolutely no material on record to hold that the release of the revisionist would likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice, yet the courts below have illegally, arbitrary and on surmises passed the impugned orders.

(vii) That the courts have erred in law in not considering the true import of Section 12 of the Act, 2000 and thus, the impugned orders passed by the courts below suffer from manifest error of law apparent on the face of record.

(viii) That the courts below have acted quite illegally and with material irregularity in not properly considering the case of revisionist in proper and correct perspective which makes the impugned orders passed by the courts below non est and bad in law.

(ix) That bare perusal of the impugned orders demonstrate that the same have been passed on flimsy grounds which have occasioned gross miscarriage of justice.

13. Learned counsel for the revisionist has pointed out that the revisionist has by now done substantial period of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 15(1)(g) of the Act, 2000 and Section 18(1)(g) of the Act, 2015. In support of his contention, learned counsel for the revisionist has placed reliance of Hon'ble Apex Court

judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

14. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

15. Despite service of notice upon opposite party no.2 and the time being granted thrice to file counter affidavit, no one has appeared on his behalf nor any counter affidavit has been filed. It appears that the opposite party no.2 is not interested to contest the case.

16. Learned AGA has filed counter affidavit and has opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

17. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly below 15 years of age at the time of incident and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, 2000 which reads as under:

*"**12. Bail of juvenile.**-(1) When any person accused of bailable or non-*

bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety [or placed under the supervision of a probation officer or under the care of any fit institution or fit person] but he has shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychosocial danger or that his released would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

18. A perusal of the said provision show that bail for a juvenile, particularly, one who is under the age of 18 years at the time of incident, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the provision of sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the provision of sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

19. What is of prime importance in this case is that the juvenile, who was a young boy at the time of incident, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to be released on account of his case falling under each of the three exceptions enumerated in the provision of sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an **ipse dixit**, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the revisionist on bail would lead to the ends of justice being defeated.

20. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

21. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of

early hearing of this revision due to heavy pendency of criminal cases before this Court and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Apex Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra).**, this Court is of the view that the revisionist be be released on bail during the pendency of the present revision.

22. In the result, the bail application of the revisionist stands **allowed**.

23. Let the revisionist, Shubham @ Kalua be released on bail in Case Crime No. 222 of 2002, under Section 376 IPC Police Station Pilakhua District Ghaziabad upon his executing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Ghaziabad.

24. On acceptance of bail bonds and personal bonds, the lower court concerned shall transmit photostat copies thereof to this Court for being kept on the record.

25. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

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

27. 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.

28. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of revisionist's bail.

29. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2020)11ILR A313
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Revision No. 1455 of 2020

Jagarnath Chauhan ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ramashray Tripathi

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 397/401 & Indian Penal Code, 1860-Section- 363,366 & Protection of Children From Sexual Offence(POCSO) Act, 2012-section 7/8-determination of the age of the victim-two different marksheets were produced-the law is well settled that in case of dubious

factual situation regarding conflicting date of birth, the medical examination report would prevail-the Medical Board assessed the age around 18 to 19 years-Hence, no interference is required.(Para 3 to 12)

B. Provision for determining age, firstly, High School Certificate, Second option school first attended, if the same is not available, birth certificate given by a corporation or municipal authority or a panchayat and only in the absence of above three certificate, age shall be determined by an ossification test or any other medical age determination test.

The revision is disposed of. (E-6)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Ramashray Tripathi, learned counsel for the revisionist-informant, Sri Phool Chandra Singh, learned A.G.A. for the State and perused the material brought on record.

2. This revision has been preferred to quash/set aside the impugned order dated 06.01.2020, passed by the Chief Judicial Magistrate, Ghazipur in Case Crime No. 65 of 2019, under Sections - 363, 366 I.P.C. and 7/8 POCSO Act, Police Station - Dullahpur, District – Ghazipur.

3. The contention, vehemently asserted and claimed in this case, is that prior to the passing of the aforesaid impugned order, some petition was preferred before this Court, wherein the Division Bench of this Court had clarified the situation and asked the Chief Judicial Magistrate, Ghazipur to consider and ascertain the age of the victim under the provisions of law, for which the parents of the victim shall also be heard.

4. In the backdrop of the aforesaid factual position, claim is that the order impugned is absolutely illegal and *ex-parte*, without giving and affording opportunity of hearing to the parents of the victim and that way, the custodial order is illegal. At this juncture, the Court repeatedly asked the learned counsel for the revisionist-informant not only to put his case afresh on the point of age of the victim, but also to treat this Court as the appropriate forum, where the revisionist-informant can raise each and every contention in his/her support on the merit. But the counsel for the revisionist-informant insisted that the only proper forum is the Magistrate's Court. However, the Court again clarified that the opportunity of hearing can be given by this Court straightway here. If the Court considers that any injustice has been done, then the injustice can be redressed properly by it after hearing the revisionist-informant more appropriately, than by the Chief Judicial Magistrate of the district concerned and the counsel for the revisionist-informant was, thus, asked to avail and exhaust this sanguine opportunity, which he reluctantly availed.

5. He contended on the meritorial count, the date of birth of the girl to be 25.01.2004. In support of his claim he relied on record-Class-VIII mark-sheet of Shri Ram Krishna Inter College, Sikhari, Ghazipur. That way, the victim should be treated to be minor on the date of occurrence. Apart from that, charge-sheet under the relevant provisions of the POCSO Act has also been submitted against the opposite party no. 2, which, *ipso facto*, shows that the victim was minor and to treat the victim to be major on the date of occurrence is altogether erroneous.

6. Retorting to the aforesaid argument, Sri Phool Chandra Singh, learned A.G.A. has vehemently claimed

that in this case, the document believed and acted upon indicate that the date of birth of the victim, as mentioned in her Class - VIII mark-sheet presented before the learned Magistrate, was 01.01.2001 and the incident took place on 10th June, 2019. The court below, after considering the other relevant aspects and particularly, the medical examination report which assessed the victim about 18 to 19 years of age, passed the order impugned. However, he also acceded to the point that a direction was given to the learned Magistrate to call the parents of the victim, while considering the point of minority or majority of the victim at the time of the occurrence. He further claimed that in view of the medical examination report and in view of the document in shape of date of birth as 01.01.2001, the impugned order was passed under these circumstances.

7. I have considered the rival submissions and perused the entire record as brought forth before this Court.

8. Insofar as the opportunity of hearing to the parents is concerned, obviously, it is a factual situation but the grievance can be well redressed by according opportunity of fair hearing before this Court, when this application has been preferred by the father of the victim, thus redressing the point of hearing to the parents of the victim, at this juncture. Record reflects that two different mark-sheets were produced by both sides, which were taken into consideration and the medical examination report was also perused and considered. The law is well settled that in cases of dubious factual situation regarding conflicting date of birth, the medical examination report would prevail. On this point, the contention is that the medical examination was conducted after six months of the occurrence and that way, it cannot be accepted as such, but the contention does not carry substance, in view of fact that the medical examination report, unless challenged specifically, would stand and would become the foundation of the consideration on point of ascertaining age of the minor and can be acted upon by the court concerned in view of the conflicting claims regarding date of birth of the victim by both the sides. The Medical Board has assessed the age around 18 to 19 years. It means the factum of 19 years cannot be lost sight of and would prevail. That way, the margin of six months from the date of occurrence (10.06.2019) is well justified and it would not rate the calculation below 18 years in June, 2019.

9. Now, insofar as the the medical examination report is concerned, then it can be observed that in the Medical Board of three doctors, the Radiologist had, in the Medical Examination Report, expressed clear-cut view that the wrist and the elbow epiphysis/ joint, both were found to be fused and on the basis of the same, he opined that the person cannot be below 18 years of age. It is established position, insofar as the determination of the age of the victim under the Juvenile Justice (Care and Protection of Children) Act, 2015 is considered, that the margin of one year would be applicable in favour of the accused. That way also, the age of the victim can be said to be 18 or more on the relevant date of occurrence in June, 2019.

10. The point for consideration is the custody of the victim and with that view in mind, the age of the victim has got particular relevance. But insofar as the impugned order is concerned, it can be said that the Magistrate faulted partly, when he did not call the parents, but the parents

themselves moved up to this Court invoking powers under Section - 482 Cr.P.C. and this Court was kind enough to the parents, while it accorded full opportunity of hearing on the issue of custodial order in question and its authenticity.

11. This Court after considering the entirety of this matter, in view of the factual dispute and conflicting claims raised by both the sides, concludes that the medical examination report would prevail and according to medical examination report, the Medical Board assessed the age to be around 18 to 19 years. On the basis of above, the order impugned is sustained and no interference is required.

12. However, it is open to the trial court to scrutinise the aspect of minority/majority and that question will remain open till evidence is adduced led by both the sides and scrutiny is done. This Court, accordingly, disposes of the custodial matter and for that reason alone, observations made hereinabove on point of age of the victim should never come in the way of the trial court, while ascertaining the question of minority/majority of the victim.

13. Consequently, the lower court is free to exercise its jurisdiction in right perspective in accordance with law in arriving at proper conclusion regarding the age of the victim.

14. With the aforesaid observations, this revision stands **disposed of**.

(2020)11ILR A316
REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Revision No. 1521 of 2020

Sohanveer Singh ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Amit Kumar Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Amit Daga, Sri Sandeep Kumar Srivastava

Dischare Application dismissed by Court below-Submission is pure questions of fact-can be adequately adjudicated in Trial-Charge sheet makes a prima facie case-no justifiable ground to set aside the impugned order.

Criminal Revision dismissed. (E-9)

List of Cases cited:-

1. Dilawar Balu Kurane Vs St. of Mah. reported in 2002 (44) ACC 447 SC;

2. Sanghi Brothers (Indore) Private Ltd. Vs Sanjay Chaudhary & ors. reported in 2009 (64) ACC 454; 4

3. P. Vijayan Vs St. of Ker. & anr. reported in (2010) 2 SC 398;

4. L. Krishna Reddy Vs State by Station House Officer & ors. reported in 2013 (83) ACC 947 (SC) 5. Geeta Mehrotra Vs St. of U.P. reported in U.P. 2013 (80) ACC.

6. St. of Orissa Vs Debendra Nath Padhi reported in (2005) 1 SCC 568,

7. State (NCT OF DELHI) Vs Shiv Charan Bansal & ors. (2020) 2 SCC 290,

8. M.E. Shivalingamurthy Vs C.B.I., Bengaluru reported in 2020 AIR (SC) 331.

9.St. of Bihar Vs Ramesh Singh reported in 1977 (4) SCC 39

10.Superintendent and Remembrancer of Legal Affairs, West Bengal Vs Anil Kumar Bhunja reported in AIR 1980 (SC) 52

11. f Palwinder Singh Vs Balvinder Singh reported in AIR 2009 SC 887

12. Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary reported in AIR 2009 SC 9

13. R.P. Kapur Vs St. of Punjab reported in AIR 1960 SC 866

14. St. of Har. Vs Bhajan Lal reported in 1992 SCC(Cr.) 426

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This criminal revision U/s 397/401 Cr.P.C. has been filed against the the order passed by the Additional Sessions Judge/Special Judge (POCSO-III), Amroha in Sessions Trial No. 296 of 2019 (State Vs. Sohanveer Singh) arising out of Case Crime No. 93 of 2018, under Sections 420, 406, 498-A, 307, 323, 504 I.P.C. as also under Sections 3/4 D.P. Act, Police Station-Didauli, District-Amroha, whereby discharge application filed by the revisionist under Section 227 I.P.C. has been rejected.

2. Heard Mr. Amit Kumar Srivastava, learned counsel for the revisionist, Mr. Amit Daga, learned counsel for opposite party no.2 and the learned A.G.A. for the State as well as perused the entire material available on record.

3. The facts, which are born out from the records of the present criminal revision are as follows:

The marriage of Sameer Malik, son of the present revisionist, namely, Sohanveer Singh has been solemnized on 23rd November, 2010 with opposite party no.2, namely, Jyoti in accordance with Hindu Rites and Rituals. However, after some time, the relationship between the husband and wife became strained and incompatible due to which the opposite party no.2 has lodged first information report on 17th March, 2018, which has been registered as Case Crime No. 93 of 2018, under Sections 420, 406, 498-A, 307, 323, 504 I.P.C. as also under Sections 3/4 D.P. Act, Police Station-Didauli, District-Amroha against revisionist (father-in-law, Anupam Singh (mother-in-law), Sameer Malik (husband) and Shweta Malik (sister-in-law). After registration of the aforesaid first information report, the revisionist and other named accused persons had approached this Court by means of Criminal Misc. Writ Petition No. 9838 of 2018, wherein their arrest had been stayed till submission of the Police report by a Coordinate Bench of this Court vide order dated 18th April, 2018. After completing statutory investigation under Chapter XII Cr.P.C. the Police has submitted charge-sheet on 7th July, 2018 against the revisionist, his wife and son, namely, Anupam Singh and Sameer Malik respectively under Sections 420, 406, 498-A, 307, 323, 504 I.P.C. as also under Sections 3/4 D.P. Act, whereas the daughter of the revisionist, namely, Shweta Malik has been exonerated by the Investigating Officer. On the charge-sheet being submitted, cognizance was taken by the Chief Judicial Magistrate, Amroha vide order dated 19th September, 2018 and the case has been registered as Criminal Case No. 9086 of 2018 (State Vs. Sameer Malik & Others). Thereafter the revisionist has been granted bail by a Coordinate Bench of

this Court vide order dated 18th February, 2019 passed in Criminal Misc. Bail Application No. 7104 of 2019. Thereafter the revisionist has filed a discharge application in Sessions Trial No. 296 of 2019, which has been rejected by the court below vide order dated 2nd September, 2020. It is against this order that the present criminal revision has been filed.

4. Mr. Amit Kumar Srivastava, learned counsel for the revisionist submits that the revisionist, who is 70 years old, is the father-in-law of opposite party no.2. Being the father-in-law, he has been falsely implicated in the present case. Neither in the statements of witnesses nor in the first information report, any specific allegation qua demand of dowry or harassment of opposite party no.2 by the revisionist, has been levelled against him. Only general and vague allegations have been made against the revisionist without any clinching evidence. Specific allegations of harassment and attempt to kill opposite party no.2 has been levelled against his daughter, namely, Shweta Malik but she has been exonerated by the Investigating Officer, which also makes the prosecution story doubtful. He further submits that prima facie no offence under Sections 420, 406, 498-A, 307, 323, 504 I.P.C. as also under Sections 3/4 D.P. Act is made out against the revisionist. Learned counsel for the revisionist next submits that the court below has rejected the discharge application of the revisionist by means of the order impugned, only on the basis of statements of two witnesses, namely, Aditya Khatri and Mahendra Khatri, whereas their names were not mentioned in the charge-sheet as witnesses, therefore, the order impugned is per se illegal. It is further submitted that the prosecution story is not supported by any medical evidence, as the present case is a case of no injury, whereas the revisionist is facing prosecution under Sections 307 and 323 I.P.C., which also makes the prosecution story doubtful. It is further submitted that the revisionist has neither taken any dowry from opposite party no.2 nor he harassed her for the same, while on the other hand the revisionist purchased a property in the name of opposite party no.2 and gave financial assistance to the tune of Rs. 84 lacs. to opposite party no.2 and her family members. There is no independent or public witnesses on the basis of which it can be said that the revisionist has committed any offence as alleged. It is then submitted that the investigation in the present case was done in a most illegal manner. It is lastly submitted that the once the investigation is illegal, the charge-sheet on the basis of such illegal investigation has no legs to stand and entire proceedings are liable to be quashed. In support of his plea, he has placed reliance upon following judgments of the Apex Court and this Court:

1. Dilawar Balu Kurane Vs. State of Maharastra reported in 2002 (44) ACC 447 SC;

2. Sanghi Brothers (Indore) Private Ltd. Vs. Sanjay Chaudhary & Others reported in 2009 (64) ACC 454;

3. P. Vijayan Vs. State of Kerala & Another reported in (2010) 2 SC 398;

4. L. Krishna Reddy Vs. State by Station House Officer & Others reported in 2013 (83) ACC 947 (SC) and

5. Geeta Mehrotra Vs. State of U.P. reported in U.P. 2013 (80) ACC.

On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that the order impugned rejecting the discharge application is illegal and liable to be set aside.

5. Per contra, learned A.G.A. for the State and Mr. Amit Daga, learned counsel for opposite party no.2 submit that the order of the court below rejecting the discharge application has been passed on the basis of oral as well as documentary evidence as collected during the course of investigation as well as on the basis of statements of independent witnesses recorded before the court below. Therefore, the same is not liable to be set aside by this Court while exercising its power in revisional jurisdiction.

Mr. Amit Daga, learned counsel for opposite party no.2 further submits that the necessary ingredients which requires to constitute the alleged offence against accused persons including the revisionist are available in the first information report as well as in the statements of witnesses recorded by the Investigating Officer during the course of investigation and in series of judgments, the Apex Court as well as this Court have settled that if the material available on record, discloses grave suspicion against the accused, then the charges will be framed to proceed against the accused. Probative value of evidence (material) as brought on record cannot be gone into before or at the stage of framing of charges. It is further submitted that there are specific and ample allegations against the revisionist that he along with co-accused persons harassed, ill-treated and tortured the informant (opposite party no.2) for non-fulfillment of additional demand of dowry. As per the version of the first information report and the statements of the witnesses, it is evident that the revisionist and other co-accused persons are responsible for harassment of opposite party no.2 for non-fulfillment of additional demand of dowry. As per the material available on record, there are specific allegations of receiving dowry to the tune of Rs. 5 lacs by the revisionist and other co-accused persons at the time of marriage and for non-fulfillment of additional demand of dowry, they harassed and tortured her and tried to kill her also in the month of April, 2015. It is further submitted that the statements of independent witnesses, namely, Rakesh Kumar & Sm. Shobha Devi recorded by the Investigating Officer will clearly go to show that on 14th March, 2018 at about 06:00 p.m., the accused persons including the revisionist visited the parental house of opposite party no.2 and beat opposite party no.2 and her father brutally. It is also submitted that from the material available on record, it will also go to show that accused revisionist being head of his family concealed the material fact regarding education, employment and mental state of his son Sameer while solemnizing his marriage with opposite party no.2, which makes the case of cheating and harassment of opposite party no.2. It is lastly submitted that entire material available on record in the shape of first information report as well as statement of witnesses discloses the cognizable offence punishable under Sections 420, 406, 498-A, 307, 323, 504 I.P.C. as also under Sections 3/4 D.P. Act against the accused persons including the revisionist and thus, the revisionist cannot be discharged at this stage.

In support of his case, Mr. Daga has relied upon following judgments of the Apex Court:

1. State of Orissa Vs. Debendra Nath Padhi reported in (2005) 1 SCC 568,

2. State (NCT OF DELHI) Vs. Shiv Charan Bansal & Others reported in (2020) 2 SCC 290, and

3. M.E. Shivalingamurthy Vs. Central Bureau of Investigation, Bengaluru reported in 2020 AIR (SC) 331.

On the cumulative strength of the aforesaid, Mr. Daga submits that the order passed by the court below rejecting the discharge application of the revisionist is within the four corners of law and does not suffer from any illegality and infirmity. Thus, the same deserves to upheld and the present revision is liable to be dismissed.

6. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present criminal revision.

7. All the contentions raised by the revisionist's counsel relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

8. 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 Hon'ble Supreme Court which 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."

9. 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."

10. 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."

11. The following observations made by the Hon'ble Supreme 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."

12. In fact while exercising the inherent jurisdiction under Section 482 Cr.P.C. or while wielding the powers under Section 226 of the Constitution of India the quashing of the complaint can be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court decisions in **R.P. Kapur Vs. State of Punjab** reported in *AIR 1960 SC 866* and **State of Haryana Vs. Bhajan Lal** reported in *1992 SCC(Cr.) 426* make the position of law in this regard clear recognizing certain categories by way of illustration which may justify the quashing of a complaint or charge sheet.

13. In the case of State (NCT OF DELHI) (Supra), which has been relied upon by the learned counsel for opposite party no.2, tahe Apex Court in paragraph nos. 39 and 40 has observed as follows:

"39. The Court while considering the question of framing charges under Section 227 of the Cr.P.C has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case has been made out against the accused. The test to determine prima facie case would depend upon the facts of each case. If the material placed before the court discloses grave suspicion against the

accused, which has not been properly explained, the court will be fully justified in framing charges and proceeding with the trial. The probative value of the evidence brought on record cannot be gone into at the stage of framing charges. The Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the ingredients constituting the alleged offence. At this stage, there cannot be a roving enquiry into the pros and cons of the matter, the evidence is not to be weighed as if a trial is being conducted. Reliance is placed on the Judgment of this Court in State of Bihar v. Ramesh Singh where it has been held that at the stage of framing charges under Sections 227 or 228 of the Cr.P.C., if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused had committed the offence, then the Court should proceed with the trial. (1977) 4 SCC 39.

40. In a recent Judgment delivered in Dipakbhai Jagdishchandra Patel v. State of Gujarat and Another in Crl. Appeal No. 714 of 2019 decided on 24.04.2019, this Court has laid down the law relating to framing of charges and discharge, and held that all that is required is that the court must be satisfied with the material available, that a case is made out for the accused to stand trial. A strong suspicion is sufficient for framing charges, which must be founded on some material. The material must be such which can be translated into evidence at the stage of trial. The veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged at this stage, nor is any weight to be attached to the probable defence of the accused at the stage of framing charges. The court is not to consider whether there is sufficient ground for conviction of the accused, or whether the trial is sure to end in the conviction."

14. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

15. The submissions made by the revisionist's learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A 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 F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and this Court does not find any justifiable ground to set aside the impugned order refusing the discharge of the accused. This court has not been able to persuade itself to hold that no case against the accused has been made out or to hold that the charge is groundless.

16. The prayer for quashing or setting aside the impugned order 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.

(2020)11ILR A324
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.11.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 1858 of 2020

Anup Sahani ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri S.K. Srivastava

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

Impugned order passed directiong Rs.3000/- as maintainance to wife-alleged violation of natural justice as objection was not considered-alleges mandatory provision of calling report from District probation Officer not complied-3000/- is a meagre amount and Revisionist is duty bound to maintain his wife.

Revision dismissed. (E-9)

List of Cases Cited:-

1. Kirtikant D adodaria Vs St. of Guj. (1996) 4 SCC

2.Vimlaben Ajitbhai Patel Vs Vatslaben Ashokbhai Patel & ors. (2008) 4 SCC

3.Bhuwan Mohan Singh Vs Meena & ors. (2015) 6 SCC 353

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

1. This Criminal Revision, under Section 397/401 of Code of Criminal Procedure, has been filed by Anup Sahani, with a prayer for setting aside the impugned orders dated 12.10.2020 passed by the Court of Additional District and Sessions Judge/ Special Judge, P.O.C.S.O. Act-3, Gorakhpur, in Criminal Appeal No. 19 of 2018, Anup Sahani vs. State of U.P. and another, under Section, 12 of the Protection of Women from Domestic Violence Act, 2005, as well as order dated 08.02.2018 passed by the Additional Chief Judicial Magistrate/Additional Civil Judge (Senior Division), Court No. 4, Gorakhpur, in case No. 61 of 2016, Smt. Sangam Devi vs. Anup Sahani and others, under Section 12 of the Domestic Violence Act, Police Station-Gorakhnath, District-Gorakhpur.

2. Learned counsel for applicant argued, that both of the Courts below failed to appreciate facts and law placed before them and passed impugned orders, which are apparently erroneous on the face of it. There is under exercise of jurisdiction vested in both the above Courts. The impugned order is under violation of natural justice. Objection was raised before the trial Court. But the same were not considered and an amount of Rs. 3,000/-, as maintenance, per month, was directed to be paid to the opposite party no. 2 from the date of application i.e. 30.10.2017 and it was illegal. There is mandatory provision under the provisions of Protection of Women from Domestic Violence Act, that firstly the report of District Probation Officer is to be called for and thenafter, case is to be initiated. But, this was not obeyed, hence, the order was challenged before the appellate Court in Criminal Appeal No. 19 of 2018, Anup Sahani vs. State of U.P., wherein, again reiteration was there but, the appellate Court dismissed the appeal. Hence this revision, with above prayer.

3. Learned A.G.A. has vehemently opposed stating that a meagre amount of Rs. 3,000/- per month was directed to be paid and this revision has been filed.

4. Having heard learned counsel for both sides and gone through the material placed on record, it is apparent, that a complaint was filed by Smt. Sangam Devi, before the Court of Judicial Magistrate, with this contention that her marriage was performed with Anup Sahani, as per Hindu rituals on 20.05.2013. She was performing her matrimonial obligations. But, Anup Sahani and his family members made a demand of Rs. 2,000,00/- as additional dowry, which was beyond the capacity of Smt. Sangam Devi and her family members. This resulted annoyance and cruelty with Smt. Sangam Devi. She was compelled to reside in a room of upper stairs. Her father-in-law committed rape with her. A threat was extended. Subsequently, She was sexually exploited and ousted on 08.11.2014 and since then she is residing at her parental house. A Case Crime No. 10 of 2015 under Section 498-A, 323, 504, 506, 406, 376 I.P.C. read with Section 3/4 of D.P. Act, was registered at Police Station-Mahila Thana, Gorakhpur. It was submitted that Anup Sahani was maintaining a shop of light and sound in Gorakhpur and he was earning Rs. 30,000/- per month. His father, is a retired Railway employee, getting pension but, the complainant was with no means and was living in misery, hence, maintenance, in the tune of Rs. 20,000/- per month, with the right of residence was claimed. Wherein, an application for grant of interim maintenance, under Section 23 of the Act was moved. The contention of the same was in corroboration to many contentions. Anup Sahani, filed his objection, mentioning that the father of the applicant was an agriculturist and having means for maintaining the applicant. The alleged shop of light and sound was of brother-in-law of Anup Sahani. She was earning Rs. 1200/- per day by tailoring. After hearing both the sides, the Magistrate awarded for interim maintenance in the tune of Rs. 3,000/- per month, against which a Criminal Appeal was filed. Wherein, same contention was made, as in this Criminal Revision, with further allegation of loose character of applicant, and Appellate Court dismissed this Appeal. Against which this Revision has been filed.

5. Admittedly, Smt. Sangam Devi is married wife of Anup Sahani. There is criminal litigation pending in between. There is matrimonial discard in between. She is residing at her parental house. No specific proof of her income is there. She is not being maintained by the revisionist. She had claimed for her maintenance and a maintenance of meagre amount of Rs. 3,000/- per month, i.e. Rs. 100/- per day, has been awarded, as interim maintenance. It is a meagre amount and being husband the revisionist is duty bound to maintain his wife and he always remains under obligation to maintain his wife which does not arise by reason of any contract, express or implied, but out of jural relationship of husband and wife consequent to the performance of marriage. Such an obligation of the husband, to maintain his wife, arises irrespective of the fact whether he has or has no property. It is an imperative duty and a solemn obligation of the husband to maintain his wife. This has been propounded by the Apex Court in ***Kirtikant D adodaria vs. State of Gujarat (1996) 4 SCC and Vimlaben Ajitbhai Patel vs. Vatslaben Ashokbhai Patel and others (2008) 4 SCC***, which has been mentioned by the learned Appellate Court in its judgment.

6. The Apex Court in ***Bhuwan Mohan Singh vs Meena & Ors (2015) 6 SCC 353***, in para 2 has held:

"Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life ?dust unto dust?. It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds."

7. In above law and facts of the present case, there is no failure of appreciation of facts and law, nor any under exercise or over exercise or mis-exercise of jurisdiction in both the impugned orders.

8. Accordingly, this Revision merits dismissal. Dismissed as such.

(2020)11ILR A326
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.10.2016

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Criminal Misc. Writ Petition No. 2470 of 2016

Babloo Srivastava @ Om Prakash Srivastava ...Petitioner (In Jail)
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Brijesh Sahai, Sri Avdhesh Kumar Tiwari, Dipti Tiwari, Sri Vijay Singh Gaur

Counsel for the Respondents:
A.G.A., Sri Deepak Dubey. Not Known

A. Criminal Law – Code of Criminal Pracedure- Section 161 - Indian Evidence Act, 1872- Section 25 - The Extradition Act, 1962- Section 21- The bar under Section 21 of the Act, 1962 will operate from stage of cognizance not for investigation because if certain formalities are required then it is duty of Investigation Officer to take care of them. (Para 14)

The petitioner charged for kidnapping and extortion was found and arrested in Singapore. He was handed over by the Singapore Authorities under the Extradition Agreement between the Republic of India and the Singapore. The petitioner contended in view of provisions of Section 21 of the Act of 1962 that he could not be tried for the aforesaid offence as his extradition decree does not bear aforesaid crime number. To which the Court held that the formality of the provision of Section 21 of the Act, 1962 are for trial and not for investigation. **The stage of investigation is prior to the stage of cognizance and the trial.**(Para 5, 9, 12, 13)

Writ Petition Rejected. (E-10)

List of Cases cited:-

1. Daya Singh Lahoriya Vs Union of India & ors.. (2001) 4 SCC 516

2. Abu Salem Vs St. of Mah. (2010) 11 SCC 214

3. Swiss Timing Limited Vs CBI Criminal M.C. No. 18 of 2012

(Delivered by Hon'ble Ramesh Sinha, J. & Hon'ble Shamsher Bahadur Singh, J.)

1. Heard Shri Brijesh Sahai, learned counsel for the petitioner and Shri Vikas Sahai, learned AGA for the State.

2. By means of present petition, under Article 226 of the Constitution of India, the petitioner has prayed for following reliefs;

I. To issue a writ, order or direction in the nature of certiorari quashing the FIR dated 6.9.2015 lodged by respondent no.4 in case crime no.260/2015, u/s 364A, 395, 412, 342 and 120B IPC P.s. Kotwali, District Allahabad and the order dated 21.12.2015.

II. To issue any other writ, order or directions which this Hon'ble Court may deem fit and proper under the fact and circumstances of the case.

III. To award cost of the petition.

3. Necessary facts leading to present petition are that one Rahul Mahendra S/o late Sri Omkarnath Mahendra, R/o 10A, Aokland Road, P.S. Kotwali, District Allahabad lodged First Information Report with averments that his younger brother Pankaj Mahendra after closing his business at Pratishthan M/s Bhagatram Jai Narain, 45, Jawahar Square, Police Station Kotwali, Allahabad generally used to return back at above residence in between 7.30 to 7.35 P.M. On 5.9.2015, when he did not reach at home and his Cell Phone No.9415289628 was found switched off, then a suspicion arose about his missing in mysterious circumstances. Next day, i.e., on 6.09.2015 on information of the informant, First Information Report No.0193 was registered at Case Crime No.260 of 2015, under Section 364A, 120B IPC at Police Station Kotwali, District Allahabad against unknown persons for offences punishable under Section 364A, 120B IPC. As his Car No.UP 70VD-1000 was found near Lord Hanuman Temple at Sangam, Allahabad and it was apprehended that he has been kidnapped for ransom, therefore, a police team was constituted and kidnapped Pankaj Mahendra was recovered from the custody of Vikal Srivastava alias Golu, Mahendra Yadav, Sacchinand Yadav and Chandra Mohan Yadav alias Bablu. They have been charge-sheeted for offences punishable uunder Sections 364A, 120B, 342, 395, 412 IPC and Bholu alias Bholu Yadav, Arun Singh Chauhan, Kartike Pandey alias Guddu Pandey and Bablu Srivastava alias Om Prakash were suspected of hatching conspiracy and against above accused persons the investigation is still going on, as per statement of Sri Vikas Sahai, AGA for State. The Investigating Officer has obtained 'B' warrant against the petitioner on 21.12.2015 from the Chief Judicial Magistrate, Allahabad.

4. The petitioner challenged the First Information Report and order dated 21.12.2015 on the ground that FIR against him is a nefarious design for some ulterior motive and the name of the petitioner has surfaced in crime in the statement under section 161 Cr.P.C of co-accused Vikal Srivastava. The statement of co-accused has no relevance in view of the provision under Section 25 of the Indian Evidence Act, 1872 (in short 'Act,1872') and kidnapped Pankaj Mahendra has not named the petitioner in his statement under Section 161 Cr.P.C.

5. On behalf of the petitioner, a rejoinder affidavit was filed on 9.5.2016, and there it has been averted that in view of provision of Section 21 of the Extradition Act, 1962 (in short 'Act, 1962'), the petitioner could not be tried for aforesaid offence as his extradition decree does not bear the aforesaid crime number.

6. In the rejoinder affidavit, it has been further averted that Hon'ble Apex

Court in case of ***Daya Singh Lahoriya Vs. Union of India and others, 2001(4) SCC 516 and Abu Salem Vs. State of Maharashtra, 2010 (11) SCC 214*** and by the Hon'ble Delhi High Court in ***Swiss Timing Limited Vs. CBI*** decided on March, 2012 in Criminal M.C. No.18 of 2012, has interpreted the provision of Section 21 of the Act, 1962 and observed that a fugitive cannot be tried for any other offence, which has not been mentioned in extradition decree. Therefore, the FIR deserves to be quashed.

7. Above ground also has been made as part of petition to challenge the first information report.

8. The petitioner prays for quashing of FIR as well as order dated 21.12.2015 passed by Chief Judicial Magistrate, Allahabad issuing 'B' Warrant on request of Investigating Officer for judicial custody of the petitioner in crime no.260 of 2015. The order dated 21.12.2015 has attained finality as petitioner preferred a Criminal Revision No.7 of 2010 before the Session Judge, Allahabad which has been dismissed on 21.01.2016. Further, an application, under Section 482 Cr.P.C No.1866 of 2016, Bablu Srivastava Vs. State of U.P. and another was filed before this Court and the same was dismissed on 25.1.2016 and order dated 21.12.2015 was upheld. Therefore, as the order dated 25.1.2016 has not been challenged before Hon'ble Apex Court, the relief of quashing the order dated 21.12.2015 passed by Chief Judicial Magistrate, Allahabad cannot be granted.

9. Learned counsel for petitioner further contends that the petitioner was found and arrested in Singapore in August, 1995 and under the Extradition Arrangement between the Republic of India and the Singapore, the petitioner was extradited by State of Singapore and was handed over to Indian Authorities. The warrant of surrender for the fugitive (the petitioner) is as under:-

"WARRANT FOR SURRENDER OF FUGITIVE

To the Director of Prisons to Mr. Sharad Kumar (Indian Passport No. 0-275309), Mr. Harbhajan Ram (Indian Passport No. 0-317006), and Mr. D.P. Singh (Indian Passport No.0-222527).

Whereas Om Prakash Srivastava @ Arun Kumar Aggarwal @ Babloo (referred to in this Warrant as the fugitive) who is accused of the following offences:-

(i) conspiracy to commit murder of one L.D. Arora, an offence punishable under Section 120-B read with Section 302 of the Indian Penal Code, 1860;

(ii) murder of one Ram Pratap Singh Chauhan, an offence punishable under Section 302 of the Indian Penal Code, 1860;

(iii) conspiracy to commit murder of one Lalit Kumar Suneja, an offence punishable under Section 120-B read with Section 302/34 of the Indian Penal Code, 1860; and

(iv) conspiracy to kidnap one Vishwanath Mittal, an offence punishable under Section 120-B read with Section 341, 365, 324 and 307 of the Indian Penal Code alleged to have been committed within the jurisdiction of the Republic of India, was delivered into the custody of you the Director of Prisons by Warrant dated the 11th day of August, 1995, in pursuance of the Extradition Act:

NOW, THEREFORE, I, the Minister for Law, in pursuance of the Extradition Act, hereby order:-

(a) you, the Director of Prisons, to deliver the fugitive into the custody of

the said Mr. Sharad Kumar (Indian Passport No. 0-275309), Mr. Harbhajan Ram (Indian Passport No. 0- 317006), and Mr. D.P. Singh (Indian Passport No. 0-222627); and

(b) you, the said Mr. Sharad Kumar (Indian Passport No. 0- 275309), Mr. Harbhajan Ram (Indian Passport No. 0- 317006), and Mr. D.P. Singh (Indian Passport No. 0-222627), to receive the fugitive into your custody and to convey him to a place in or within the jurisdiction of the Republic of India and there surrender him to some person appointed to receive him.

Given under my hand at Singapore this 30th day of August, 1995.

Sd/-
(S.Jayakumar)
Minister for Law
Republic of Singapore"

10. The submission of the learned counsel for the petitioner is that Case Crime No.260 of 2015 does not find place in Extradition Decree, therefore, in view of provision under Section 21 of the Act, 1962, and Law propounded in aforesaid cases, the petitioner cannot be tried without fulfilment of conditions stipulated in aforesaid section and, therefore, the FIR is liable to be quashed.

11. Section 21 of the Act, 1962 provides as follows;

"21. Accused or convicted person surrendered or returned by foreign State not to be tried for certain offences.--Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State, such person shall not, until he has been restored or has had an opportunity of returning to that State, be tried in India for an offence other than--

(a) the extradition offence in relation to which he was surrendered or returned; or

(b) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or

(c) the offence in respect of which the foreign State has given its consent."

12. A bare reading of aforesaid section and case laws relied by petitioner in rejoinder affidavit, it transpires that the formality of the provision of Section 21 of the Act, 1962 are for trial and not for investigation.

13. In Code of Criminal Procedure, 1973, viz., Chapter XIV "conditions requisite for initiation of proceedings" containing Sections 190 to 210, Chapter XIII containing Sections 225 to 235 and dealing with "trial before a Court of Session" pursuant to the committal order under Section 209 and in Chapter XIX " trial of warrant cases by Magistrate " containing Section 238 to 250 etc. deals with procedures of cognizance and the trial in criminal cases. The stage of investigation is prior to the stage of cognizance and the trial. The Hon'ble Apex Court in case of ***Union of India & others Vs. Maj. Gen. Madan Lal Yadav, 1996 SSC (4) 127*** has propounded that it is settled law that under the Code trial commences with cognizance of offence and processes are issued to the accused for his appearance etc. Equally, in a session trial, the Court considers the committal order under Section 209 Cr.P.C by the Magistrate and proceeds further. It

takes cognizance of offence from that stage and proceeds with trial. The trial begins with taking of cognizance of the offence and taking further steps to conduct the trial.

14. In view of the above discussion and law propounded by Hon'ble Apex Court, the bar under Section 21 of the Act, 1962 will operate from stage of cognizance not for investigation because if certain formalities are required then it is duty of Investigating Officer to take care of them. So far as evidenciary value of confessional statement of co-accused under Section 161 Cr.P.C in view of provision of Section 25 of the Act, 1872 is concerned, there is no dispute that on the basis of confessional statement of an accused he or other accomplice cannot be convicted but investigation may proceed without any legal bar to find out truthness of accusation.

15. The learned AGA contends that the petitioner is known habitual offender as petitioner while in jail, has involved himself in serious criminal activity of threatening and extortion and FIR has been lodged by Rahul Mahendra on 05.09.2015 at about 23.50 pm as Case Crime No. 260 of 2015 under Sections 364-A, 120-B IPC Police Station Kotwali, District Allahabad against unknown persons and the kidnapping in the above mentioned case relates to a renowned jeweler of Allahabad. The Allahabad Police team on 07.09.2015 recovered Pankaj Mahendra from District Fatehpur from possession of accused Vikalp Srivastava @ Golu, Manhendra Yadav, Sachchidananad Yadav @ Sachita Yadav and Chandra Mohan Yadav @ Bablu Yadav and also arrested them. The police team also recovered 9 mm pistol, live cartridges, country made pistol 315 bore, 3 mobile sims and on further investigation the police team found involvement of Bablu Srivastava @ Om Prakash Srivastava. During investigation police team found that Bablu Srivastava @ Om Prakash Srivastava, who is maternal uncle of accused Vikalp Srivastava and is presently detained in Central Jail Bareilly, hatched the conspiracy for kidnapping of Pankaj Mahendra for the demand of Rs. 10 crores. The police team also found that the said conspiracy was hatched by Bablu Srivastava @ Om Prakash Srivastava alongwith other co-accused persons at District Court Lucknow, while he had came for his appearance in a case 25 days prior to the incident. The police after investigation has already submitted charge sheet against Vikalp Srivastava @ Golu, Vinit Parihar, Sachchidananad @ Sachchidanand, Mahendra Yadav, Chandra Mohan Yadav @ Bablu Yadav, Sankalp Srivastava and Sandeep Chaudhary @ Rajesh Kumar Yadav under Sections 364-A, 120-B, 342, 395 and 412 IPC before the Court concerned, whereas investigation with regard to accused Bablu Srivastava @ Om Prakash Srivastava, Bholu Yadav @ Bholu, Arun Singh and Kartikeya Pandey is still pending and after collecting evidence against Bablu Srivastava @ Om Prakash Srivastava the Investigating Officer had moved an application for issuance of 'B' warrant against him, who is lodged in Central Jail Bareilly. On 21.12.2015 'B' warrant was issued against him by Chief Judicial Magistrate, Allahabad which has already been served in Central Jail, Bareilly.

16. In view of above, discussion, the submissions made on behalf of petitioner have no legs to stand and in the result, we are of the considered view that the F.I.R do not deserves to be quashed.

17. The petition lacks merits and is,accordingly, **dismissed**.

(2020)11ILR A331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Criminal Misc. Writ Petition No. 10492 of 2020

Devendra Singh Parihar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Kumar Singh

Counsel for the Respondents:
A.G.A.

A. U.P. Co-operative Societies Act, 1965 - Section 68, 70, 103, 105, 122-A - U.P. Primary Agricultural Credit Co-operative Centralized Service Rules, 1976 - IPC: Section 405, 409 - General Clauses Act, 1897 - Section 26 - Practice & Procedure - The allegations made in the impugned FIR, prima facie, discloses commission of an offence of criminal breach of trust, which is cognizable and non-bailable offence. Hence, merely because the impugned FIR may not disclose commission of an offence punishable under Section 409 IPC the same is not liable to be quashed because in any case it discloses commission of a cognizable offence. (Para 10)

An FIR is not to be quashed if it discloses commission of a cognizable offence unless there is a legal bar with regard to its institution/lodgment in the manner in which it has been lodged or instituted. (Para 8)

There is nothing in the Act, 1965 which may expressly or impliedly bar prosecution of an employee or member or office bearer of a co-operative society in the State of Uttar Pradesh for an offence punishable under IPC, if otherwise the ingredients of that offence are made out. Further, the offence of criminal breach of trust as defined under Section 405 IPC is qualitatively different from any of the offences specified in section 103 or any provisions of the Act, 1965. Therefore a cooperative society, employee/servant or member or an office-bearer, notwithstanding the provisions of the Act, 1965 can be prosecuted for an offence punishable under Penal Code, provided the necessary ingredients of that offence are made out. (Para 20)

Writ Petition Rejected. (E-10)

List of cases cited:-

1. St. of Mah. Vs Laljit Rajshi Shah & ors. AIR 2000 SC 937: (2000) 2 SCC 699 *(Distinguished)*

2. Vijayander Kumar & ors. Vs St. of Raj. & anr. (2014) 3 SCC 389

3. P. Swaroopa Rani Vs M. Hari Narayana @ Hari Babu (2008) 5 SCC 765

4. St. of Raj. Vs Hat Singh (2003) 2 SCC 152

5. St. of (NCT of Delhi) Vs Sanjay (2014) 9 SCC 772

6. St. of Mah. Vs Sayyed Hassan Subhan Criminal Appeal No. 1195 of 2018 arising out of Special Leave Petition (Criminal) No. 4475 of 2016

7. St. of A.P. Vs Ramchandra Rabidas (2019) 10 SCC 75

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Saumitra Dayal Singh, J.)

1. Heard learned counsel for the petitioner; learned A.G.A. for respondents no.1 and 2; and perused the record.

2. The instant petition seeks quashing of the first information report (for short

FIR) dated 19.06.2020 registered as Case Crime No.120 of 2020, under Sections 409 I.P.C., at Police Station- Baberu, District- Banda.

3. The allegation in the impugned FIR is that while the petitioner was working as Secretary of Kisan Sewa Sahkari Samiti Limited, Baberu (for short the society) there had been defalcation of 10.485 MT of urea, valued at Rs.88,140, and 20 bags of D.A.P., valued at Rs.23,000, the consideration of which was not deposited in the bank account of the society. The allegation is founded on inspection/ inquiry report which indicated that though the said stock of fertiliser was reflected by entries made in the stock register but the stock was not available.

4. It appears from the pleadings that, on the said ground, the petitioner was also placed under suspension and, later, dismissed from service.

5. The case of the petitioner is that the petitioner had been a Cadre Secretary of a Primary Agricultural Credit Co-operative Society, which though, as part of centralized service, is governed by the provisions of U.P. Primary Agricultural Credit Cooperative Centralised Service Rules, 1976 framed under section 122-A of the U.P. Co-operative Societies Act, 1965 (for short Act, 1965) but salary is paid through business margin of the society and not by the State. As such, the petitioner is not a pubic servant. And since the petitioner is neither banker nor merchant nor agent of the society, no offence punishable under Section 409 I.P.C. is made out. It is also the case of the petitioner that if there is any defalcation, as alleged, there could be recovery of the amount defalcated, if any, under the provisions of the Act, 1965, such as section 68 of the Act, 1965, and, in case of any dispute, there could be a reference for arbitration under section 70 of the Act, 1965. Moreover, if any offence is committed by an employee of the society then there could be prosecution under section 103 of the Act, 1965, for which a special procedure is provided under section 105 of the Act, 1965.

6. In a nutshell, the submission of the learned counsel for the petitioner is that the Act, 1965 is a complete and self-contained code which, by necessary implication, ousts the applicability of Indian Penal Code (for short the Penal Code or IPC). And, in any view of the matter, an offence punishable under section 409 IPC is not made out. Hence, the FIR is liable to be quashed. In support of the above submission, the learned counsel for the petitioner placed reliance on a decision of the Apex Court in **State of Maharashtra Vs. Laljit Rajshi Shah and others: AIR 2000 SC 937 : (2000) 2 SCC 699,** wherein, with reference to the Maharashtra Co-operative Housing Societies Act, the Apex Court affirmed the view of the Bombay High Court that the Chairman and members of the Management Committee of a Co-operative Society in Maharashtra are not public servants within the meaning of Section 21 of the Penal Code and therefore are not liable to be prosecuted for an offence punishable under section 409 of the Penal Code or under the provisions of the Prevention of Corruption Act.

7. Per Contra, the learned AGA submitted as follows: that there is nothing in the Act, 1965 which may expressly or impliedly bar the applicability of the Penal Code; that even assuming that there could be recovery of the defalcated amount from

the petitioner as per the provisions of the Act, 1965 but that would not absolve the petitioner of his liability to be punished for commission of an offence under the Penal Code, if found guilty; that section 103 of the Act, 1965 though enumerates various offences but they do not specifically deal with an offence of the nature of criminal breach of trust as defined by section 405 of the Penal Code; that section 105 of the Act, 1965 provides for a special procedure for offences punishable under that Act, and not for offences punishable under the Penal Code for which the Code of Criminal Procedure, 1973 (for short the Code or CrPC) would continue to apply; and even if it is assumed that the petitioner is neither a public servant nor banker, merchant, factor, attorney or agent, he being the chief executive officer of the society and entrusted with the possession and control of the goods is liable for an offence of criminal breach of trust, which is a cognizable and non-bailable offence. Hence, the prayer to quash the impugned FIR is liable to be rejected. In respect of the decision cited by the learned counsel for the petitioner, the learned AGA pointed out that the accused in that case were being proceeded under Sections 120-B, 409, 420, 467, 471 and 477-A I.P.C., Sections 7 and 9 of the E.C. Act and Section 5(1)(c) and Section 5 (1)(d) read with Section 5(2) of the Prevention of Corruption Act, after taking of cognizance by the Special Judge. The High Court had held that members of Managing Committee and the Chairman of the Co-operative Societies in Maharashtra are not public servants, therefore they cannot be prosecuted under Section 409 I.P.C. and Sections 5(1)(c) and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, though they can be prosecuted for other offences for which cognizance had been taken. The Apex Court upheld the decision of the Bombay High Court and dismissed the appeal. It is thus submitted by him that the decision of the Apex Court cannot be read so as to infer that for no offence punishable under the Penal Code, a Secretary of a Co-operative Society in the State of U.P. can be prosecuted.

8. Before we proceed to deal with the rival submissions, it would be apposite to remind ourselves of the settled legal position which is that while the matter is under investigation, ordinarily, an FIR is not to be quashed if it discloses commission of a cognizable offence unless there is a legal bar with regard to its institution /lodgement in the manner in which it has been lodged or instituted. Once a cognizable offence is reported under the Code, the police or the investigating agency, as the case may be, derives power to investigate. As to what offence, punishable under which provision, has been committed, and by which accused, is to be determined, first, by the police on the basis of material collected by it, from time to time, during the course of investigation, and finally, while submitting its report under section 173(2) CrPC. Where after, the court at the time of taking cognizance, on the basis of material available in the police report, may come to its own conclusion with regard to the offence, prima facie, found committed, and proceed accordingly. Thereafter, before framing of charge, again, the court derives power to discharge the accused from all or certain charges and frame charge accordingly. During the course of trial, on the basis of evidence available, again charge can be altered. Thus, at the stage of addressing the prayer to quash the FIR the court should ordinarily decline the prayer if the allegations in the FIR, if taken on their

face value, disclose commission of a cognizable offence and there is no legal bar to its lodgement or institution.

9. Coming to the issues raised in the instant petition, there is no serious challenge as to the disclosure of an offence of criminal breach of trust by the impugned FIR. The challenge is to: (a) the offence being punishable under section 409 IPC, inasmuch as, according to the petitioner, neither he is a public servant, as defined by section 21 IPC, nor falls in any of the other specified categories mentioned in section 409 IPC therefore offence punishable under section 409 IPC is not made out; and (b) the registration of the FIR for an offence punishable under the Penal Code, inasmuch as, according to the petitioner, the FIR for an offence punishable under the Penal Code is impliedly barred as the Act, 1965 is a self-contained code which not only provides for recovery but also for punishment of offences specified in the Act, 1965, if committed by an employee, member, etc of a co-operative society and for prosecution of which a specific procedure is provided therein.

10. The first limb of the challenge, that an offence under section 409 IPC is not made out because the petitioner is neither a public servant nor falls in any of the other categories specified therein, should not hold us for long inasmuch as even assuming that the petitioner is not a public servant within the meaning of section 21 of the Penal Code he can still be investigated and held liable for an offence of criminal breach of trust punishable under section 406 IPC, which is a cognizable offence. Further, if there is a master and servant relationship between the petitioner and the society or its management committee, and the petitioner is found entrusted with goods as a servant thereof, defalcation of the goods may amount to an offence punishable under section 408 IPC. Likewise, if the petitioner in his capacity as a secretary of the society acts as an agent of the society and is entrusted with goods in such capacity and commits criminal beach of trust, he may be held liable for an offence punishable under section 409 IPC. In that context, regard be had to the provisions of section 31(2) of the Act, 1965 as per which the secretary of a co-operative society is the chief executive officer of the society and subject to control and supervision of the chairman and the committee of management as may be provided by the rules or the bye-laws of the society and shall--(a) be responsible for the sound management of the business of the society and its efficient administration; (b) carry on the authorised and normal business of the society; (c) subject to the provisions of the bye-laws of the society, operate its accounts and, except where the society has a cashier or treasurer, handle and keep in his custody its cash balances; (d) sign and authenticate all documents for and on behalf of the society; (e) be responsible for the proper maintenance of various books and records of the society and for the correct preparation and timely submission of periodical statements and returns in accordance with the Act, 1965, the rules, the bye-laws and the instructions of the Registrar or the State Government; (f) convene meetings of the general body, the Committee of Management and any sub-committee constituted by the Committee of Management and maintain proper records of such meetings; and (g) perform such other duties and exercise such other powers as may be imposed or conferred on him under the rules or the bye-laws of the society. Whether this relationship between the society and the

secretary partakes the character of a relationship as between a principal and his agent would depend on various factual aspects including the bye-laws of the society. Hence, expressing any concrete opinion as to whether an offence punishable under section 409 IPC is made out or not, at this stage, would not be appropriate, particularly, when the matter is under investigation. Similarly, the issue whether the petitioner can be treated as a public servant within the meaning of section 21 of IPC can appropriately be examined with reference to all the material collected during the course of investigation, particularly, keeping in mind the wide encompass of section 21 of the Penal Code. Moreover, the apex court's decision in **State of Maharashtra Vs. Laljit Rajshi Shah (supra)** is in the context of prosecution of Chairman and Managing Committee Member of a society and their relationship qua the society and that too with reference to the law relating to Maharashtra Cooperative Societies. Thus, without expressing any definite opinion on the plea taken by the petitioner that the Secretary of a Primary Agricultural Credit Co-operative Society is not a public servant and, therefore, not liable under section 409 IPC, we deem it appropriate to leave this issue to be dealt with at the appropriate stage, say at the stage of framing charge, if required. However, what is important is that, in any view of the matter, the allegations made in the impugned FIR, prima facie, disclose commission of an offence of criminal breach of trust, which is a cognizable and non-bailable offence. Hence, merely because the impugned FIR may not disclose commission of an offence punishable under section 409 IPC the same is not liable to be quashed because in any case it discloses commission of a cognizable offence.

11. In respect of the second limb of challenge, that is the impugned FIR is barred by the provisions of the Act, 1965, the argument of the learned counsel for the petitioner is that the Act, 1965 is a self-contained code inasmuch as it not only confers power to recover the dues but also provides for a mechanism to adjudicate upon any such dispute by way of arbitration. In addition thereto, it provides for a complete set of offences that could be committed by a servant/employee or member or office-bearer of a society as also its punishment including the procedure for prosecution of those offences with reference to the mode of its institution and cognizance. Thus, recourse to the general provisions of the Penal Code is impliedly barred.

12. Dealing with the above argument, with regard to existence of mechanism under the Act, 1965 to secure recovery of money, suffice to say that it can never be a bar to drawing criminal proceeding inasmuch as it is trite law that given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant / complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint or FIR disclose a criminal offence or not **(vide Vijayander Kumar and others Vs. State of Rajasthan and Another, (2014) 3 SCC 389, para 12).** Further, there could be simultaneous civil and criminal proceedings if the facts so justify **(vide (2008) 5 SCC 765: P. Swaroopa Rani Vs. M. Hari Narayana @ Hari Babu)**. Thus, merely because there is a platform available to initiate and culminate recovery proceeding of the defalcated amount, it cannot be said that penal proceedings to punish the wrongdoer

for an offence punishable under the Penal Code cannot be initiated.

13. To ascertain whether prosecution of an employee of a cooperative society for an offence of criminal breach of trust is barred by the provisions of the Act, 1965, the relevant provisions of the Act, 1965 need to be noticed and examined. Sections 103 of the Act, 1965 provide for the penal offences; Section 104A provides for compounding; and Section 105 provides for the procedure with regard to institution of the prosecution for those offences. The aforesaid sections are extracted below:

*"**103. Offences and penalties under the Act.** - (1) It shall be an offence under this Act, if-*

(i) a committee of management of a co-operative society or a member or an officer thereof fails without reasonable cause to submit any return, report or information required under the provisions of this Act by the Registrar or by a person of a rank not below that specified by the State Government duly authorised by the Registrar in this behalf, or wilfully makes a false return or furnishes false information or fails to maintain proper account; or

(ii) an officer, employee or a member of a co-operative society fraudulently destroys, mutilates, alters, falsified or abets the destruction, mutilation, alteration or falsification or any books, papers, or securities, or makes or abets the making of any false entry in any register, book of account or document belonging to the society; or

(iii) the committee of management of a co-operative society, or an officer in possession of the books, records and property of the society refuses or fails without reasonable cause to hand over the custody of such books, records and property belonging to the society to a person lawfully entitled to receive the same under this Act, the rules or the bye-laws; or

(iv) the committee of management of a co-operative society or an officer fails, without reasonable cause, to establish a Contributory Provident Fund for its employees as required by Section 63; or

(v) any officer of a co-operative society fails to maintain such accounts and registers as may be prescribed; or

(vi) an officer or a member of co-operative society who is in possession of information, books and records, fails, without reasonable cause, to furnish such information or produce books and papers or give assistance to the person appointed by the State Government under sub-section (1) of Section 64, or any person authorised by him to conduct audit, or to the Registrar or a person authorized or appointed by the Registrar under Sections 64, 65, 66, 73 or 123; or

(vii) an employer, without sufficient cause, fails to pay to a co-operative society the amount deducted by him under sub-section (2) of Section 40 within a period of 14 days from the date on which such deduction is made; or

(viii) an officer or member of a co-operative society or any person does any act or omission declared by the rules to be an offence.

(2) (a) Whoever commits an offence under clause (i), (iv), (v), (vii) or (viii) of sub-section (1) shall on conviction be liable to be punished with fine which may extend to two thousand rupees.

Provided that, any person who does an act in relation to elections which has been made an offence under the rules, shall be punishable with imprisonment for such term not exceeding two years, or with fine not exceeding rupees five thousand as may be provided in the rules, or with both.

(b) Whoever commits an offence under clause (ii), clause (iii) or clause (vi) of sub-section (1) shall on conviction be liable to be punished with imprisonment of either description which may extend to two years and shall also be liable to fine which may extend to three thousand rupees;(c) every offence referred to in clause (b) shall be cognizable and bailable.

104A. Compounding of offences. *- (1) The Registrar may, either before or after the institution of the prosecution, compound any offence punishable under this Act on realisation of such amount of composition fee as he thinks fit, and where such offence is punishable with fine only then such composition fee shall not exceed the maximum amount of fine fixed for the offence.*

(2) Where the offence is so compounded-

(a) before the institution of the prosecution, the offender shall not be liable to prosecution for such offence and shall, if in custody be set at liberty;

(b) after the institution of the prosecution, the composition shall amount to acquittal of the accused

105. Cognizance of offences. *- (1) No court, inferior to that of a stipendiary magistrate of the first class shall try any offence under this Act.*

(2) No prosecution shall be instituted under this Act without the previous sanction of the Registrar and such sanction shall not be given without affording to the person sought to be prosecuted an opportunity to represent his case."

14. A perusal of the aforesaid provisions would reflect that the offences contemplated under the Act, 1965 including the penalties imposable thereon are described in section 103 of the Act, 1965 and the procedure relating to institution and cognizance of those offences is provided under section 105 of the Act, 1965. Neither we have been taken through nor we could find any provision in the Act, 1965 which may bar or prohibit or exclude the applicability of the Penal Code. Section 103 of the Act, 1965, in fact, carves out a new set of offences. For prosecution of those offences, procedure with regard to their institution and cognizance is provided in section 105 of the Act, 1965. Section 105 prohibits cognizance of the offences punishable under the Act, 1965 save with the previous sanction of the Registrar provided after affording opportunity to the person to be prosecuted to represent his case. Section 105 does not deal with the offences punishable under the Penal Code. We further notice that section 103 of the Act, 1965 does not specifically enlist an offence of the nature of criminal breach of trust as defined in section 405 of the Penal Code.

15. At this stage, it would be useful to refer to the provisions of Section 26 of the General Clauses Act, 1897 (for short G.C. Act) and few decisions of the Apex Court dealing with situations where an act may constitute offences punishable under separate statutes. Section 26 of G.C. Act provides as follows:

"26. Provision as to offences punishable under two or more enactments.- - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

16. In ***State of Rajasthanv.Hat Singh,*** **(2003) 2 SCC 152**, the apex court

had the occasion to examine the significance of section 26 of the G.C. Act with reference to the rule against double jeopardy enshrined under Article 20(2) of the Constitution of India and section 300 of the Code. The apex court in paragraphs 8 to 11 of its judgment, as reported, held as follows:

"8. Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract applicability of Article 20(2) there must be a second prosecution and punishment for the same offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.

9. The rule against double jeopardy is stated in the maxim nemo debet bis vexari pro una et eadem causa. It is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of autrefois acquit and autrefois convict. The manifestation of this rule is to be found contained in Section 26 of the General Clauses Act, 1897, Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Penal Code, 1860. Section 26 of the General Clauses Act provides:

"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Section 300 CrPC provides, inter alia-

"300. (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."

Both the provisions employ the expression "same offence".

10. Section 71 IPC provides--

"71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

11. The leading Indian authority in which the rule against double jeopardy came to be dealt with and interpreted by reference to Article 20(2) of the Constitution is the Constitution Bench decision inMaqbool Hussainv.State of Bombay. If the offences are distinct, there is no question of the rule as to double jeopardy being extended and applied. InState of Bombayv.S.L. Aptethe Constitution Bench held that the trial and conviction of the accused under Section 409 IPC did not bar the trial and conviction for an offence under Section 105 of the Insurance Act because the two were

distinct offences constituted or made up of different ingredients though the allegations in the two complaints made against the accused may be substantially the same. InOm Parkash Guptav.State of U.P.andState of M.P.v.Veereshwar Rao Agnihotriit was held that prosecution and conviction or acquittal under Section 409 IPC do not debar the accused being tried on a charge under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content. InRoshan Lalv.State of Punjabthe accused had caused disappearance of the evidence of two offences under Sections 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences under Section 201 IPC. It was held that neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences under Section 201 IPC though it would be appropriate not to pass two separate sentences.

17. In ***State (NCT of Delhi)v.Sanjay,* (2014) 9 SCC 772**, the principal question that arose for consideration before the apex court was whether the provisions contained in Sections 21, 22 and other sections of the Mines and Minerals (Development and Regulation) Act, 1957 operate as bar against prosecution of a person who has been charged with allegation which constitutes offences under Section 379 and other provisions of the Penal Code, 1860. In other words, the question for consideration was whether the provisions of the Mines and Minerals Act explicitly or impliedly exclude the provisions of the Penal Code when the act of an accused is an offence both under the Penal Code and under the provisions of the Mines and Minerals (Development and Regulation) Act. Deciding the issue, the apex court held as follows:

61. Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence.

62. Sub-section (1-A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder. In other words no person will do mining activity without a valid lease or licence. Section 21 is a penal provision according to which if a person contravenes the provisions of sub-section (1-A) of Section 4, he shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any Rule made thereunder except upon a complaint made by a person authorised in this behalf. It is very important to note that Section 21 does not begin with a non obstante clause. Instead of the words "notwithstanding anything contained in any law for the time being in force no court shall take cognizance....", the section begins with the words "no court shall take cognizance of any offence." 63 to 68.....

69. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute

bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.

70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the Jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorised officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code.

71. However, there may be a situation where a person without any lease or licence or any authority enters into river and extracts sand, gravel and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Penal Code.

72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section

190(1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

18. In a recent decision of the apex court, rendered in **Criminal Appeal No. 1195 of 2018 arising out of Special Leave Petition (Criminal) No. 4475 of 2016, decided on September 20, 2018** ***(State of Maharashtrav.Sayyed Hassan Sayyed Subhan)*****, (2019) 18 SCC 145** the issue that had arisen for consideration was whether an accused could be prosecuted for an offence punishable under the Penal Code for which a proceeding can also be drawn under the provisions of the Food Safety and Standards Act. By relying upon the decision of the Apex Court in *State of Rajasthanv.Hat Singh(supra) andState of Delhi (NCT)v.Sanjay*(supra), the apex court, in paragraphs 7 and 8 of the judgment, held as follows:--

"7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any other law. The High Court ought to have taken note of Section 26 of the General Clauses Act, 1897 which reads as follows:

"Provisions as to offences punishable under two or more enactments - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

8. InHat Singh's casethis Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Penal Code, 1860, this Court inState (NCT of Delhi)v.Sanjayheld that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A

perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point."

19. In **State of Arunachal Pradesh Vs. Ramchandra Rabidas, (2019) 10 SCC 75**, the issue that came for consideration before the Apex Court was whether the directions issued by the Gauhati High Court that road traffic offences shall be dealt with only under the Motor Vehicles Act, 1988 (the M.V. Act) and recourse to the provisions of Penal Code would be unsustainable in law was legally justified. Upon finding that there is no provision under the MV Act separately dealing with offences such as causing death, or grievous hurt, or hurt by a motor vehicle in cases of motor vehicle accidents and that Chapter XIII of the MV Act is silent about the act of rash and negligent driving resulting in death of a person, or hurt, or grievous hurt to persons, in paragraphs 12 to 16 of the judgment, as reported, it was held as under:

"12.The legislative intent of the MV Act, and in particular Chapter XIII of the MV Act, was not to override or supersede the provisions of IPC insofar as convictions of offenders in motor vehicle accidents are concerned. Offences under Chapter XIII of the MV Act cannot abrogate the applicability of the provisions under Sections 297, 304, 304-A, 337 and 338 IPC. The offences do not overlap, and therefore, the maxim of "generalia specialibus non derogant" is inapplicable, and could not have been invoked. The offences prescribed under IPC are independent of the offences prescribed under the MV Act. It cannot be said that prosecution of road traffic/motor vehicle offenders under IPC would offend Section 5 IPC, as held by the High Court, insofar as punishment for offences under the MV Act is concerned.

13.Considering the matter from a different perspective, offences under Chapter XIII of the MV Act are compoundable in nature in view of Section 208(3) of the MV Act, whereas offences under Sections 279, 304 Part II and 304-A IPC are not.

14.If IPC gives way to the MV Act, and the provisions of CrPC succumb to the provisions of the MV Act as held by the High Court, then even cases of culpable homicide not amounting to murder, causing death, or grievous hurt, or simple hurt by rash and negligent driving, would become compoundable. Such an interpretation would have the consequence of letting an offender get away with a fine by pleading guilty, without having to face any prosecution for the offence committed.

15.This Court has time and again emphasised on the need to strictly punish offenders responsible for causing motor vehicle accidents. With rapidly increasing motorisation, India is facing an increasing burden of road traffic injuries and fatalities. The financial loss, emotional and social trauma caused to a family on losing a bread winner, or any other member of the family, or incapacitation of the victim cannot be quantified.

16.The principle of proportionality between the crime and punishment has to be borne in mind. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. [Gopal Singhv.State of Uttarakhand, (2013) 7 SCC 545 : (2013) 3 SCC (Cri) 608] The maximum imprisonment for a first time offence under

Chapter XIII of the MV Act, is up to only six months; whereas the maximum imprisonment for a first time offence under IPC in relation to road traffic offences can go up to 10 years under Section 304 Part II IPC. The sentence imposed by the courts should be commensurate with the seriousness of the offence, and should have a deterring effect on wrongdoers. [State of Karnatakav.Sharanappa Basanagouda Aregoudar, (2002) 3 SCC 738 : 2002 SCC (Cri) 704] The punishment of offenders of motor vehicle accidents under IPC is stricter and proportionate to the offence committed, as compared with the MV Act.

17. We thus hold that a prosecution, if otherwise maintainable, would lie both under IPC and the MV Act, since both the statutes operate in full vigour, in their own independent spheres. Even assuming that some of the provisions of the MV Act and IPC are overlapping, it cannot be said that the offences under both the statutes are incompatible."

20. Having gone through the provisions of the Act, 1965, we find that there is nothing in the Act, 1965 which may either expressly or impliedly bar prosecution of an employee or member or office bearer of a co-operative society in the State of Uttar Pradesh for an offence punishable under the Penal Code, if otherwise the ingredients of that offence are made out. Further, the offence of criminal breach of trust as defined under section 405 IPC is qualitatively different from any of the offences specified in section 103 or any of the provisions of the Act, 1965. None of the offences specified therein specifically deal with dishonest misappropriation or conversion or disposal of the property entrusted as is contemplated by section 405 IPC. The decision of the Apex Court in State of Maharashtra Vs. Laljit Rajshi Shah (supra) relied by the learned counsel for the petitioner is not to be read so as to infer that there could be no prosecution for any offence under the Penal Code. Rather, it has to be understood in the context of the facts of that case which were in respect of prosecution of a chairman and member of the management committee of a cooperative society in Maharashtra, who were not public servant, and therefore their prosecution, by treating them as such, under section 409 IPC and under the Prevention of Corruption Act, was found bad in law. Moreover, in that case the Apex Court had no occasion to examine whether they could be prosecuted under section 406 IPC. Thus, in the light of the discussion made above, keeping in mind the provisions of section 26 of the G.C. Act and the decisions noticed above, we are of the firm view that a co-operative society employee /servant or member or an office-bearer, notwithstanding the provisions of the Act, 1965, can be prosecuted for an offence punishable under the Penal Code, provided the necessary ingredients of that offence are made out.

21. Reverting to the facts of the instant case, as the petitioner had been Secretary of a Primary Agricultural Credit Society who, as per Section 31 (2) of the Act, 1965, is the Chief Executive Officer of the Society and as such is responsible for the management of the business of the society and has to carry on the business of the society and, subject to the provisions of the bye-laws of the society, operate its accounts and, except where the society has a cashier or treasurer, handle and keep in his custody its cash balances, etc, it can be said that, prima facie, he holds position of trust qua the society and as such could be held liable for criminal breach of trust if the necessary ingredients thereof, as mentioned

in section 405 IPC, are found. Since it is alleged in the impugned FIR that the petitioner as a Secretary of the society had defalcated the fertiliser stock, prima facie, cognizable offence of criminal breach of trust is made out and therefore the impugned FIR cannot be quashed.

22. As to whether the petitioner is liable to be charged for an offence punishable under section 406 or section 408 or section 409 IPC would have to be determined on the strength of the material collected during the course of investigation and, therefore, the charge can be altered even by the investigating agency, if required. The court dealing with the bail prayer of the petitioner, for the purposes of examining whether a case for grant of bail is made out, can also take into consideration as to, prima facie, what offence is made out from the facts of the case regardless of the charging section put by the investigating agency. Further, if, after submission of the police report, the petitioner is aggrieved by the charging section imposed, he can always raise his grievance before the appropriate court at the stage of framing charge.

23. In view of the foregoing discussion, subject to above, the petition is **dismissed** without prejudice to the right of the petitioner to apply for bail, if so advised.

(2020)11ILR A344
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

WRIT - C No. 2993 of 2020

Rajesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar Sharma

Counsel for the Respondents:
C.S.C., Sri Krishna Kant Singh

A. Civil law - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Para 8(9) – Fair Price Shop – Allotment on the Compassionate ground – Time Limit to file application – Government Order dated 15.2.2019 and 05.08.2019 – Object of framing scheme for allotting dealership to the dependent of a deceased dealer is to tide over the financial difficulty which befall upon the family on account of death of the bread earner – Held, time limit is directory in nature and in appropriate cases, it can be relaxed – Since no fresh dealership has been finalized till date, a lenient view should be taken. (Para 6)

Petition allowed (E-1)

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The instant petition has been filed praying for quashing of the order dated 3.12.2019 passed by Sub Divisional Officer, Chhibramau, Kannauj (respondent nos. 4 herein) whereby the representation of the petitioner seeking appointment as fair price shop dealer, being dependent of the deceased dealer Bhaiya Lal, has been rejected solely on the ground that the application was filed beyond the prescribed period of 45 days.

2. The facts in brief are that the father of the petitioner, namely Bhaiya Lal was fair price shop dealer of the village. He died on 31.1.2019. According to the petitioner, he filed an application in the

office of respondent no. 4 for allotment of the dealership in his name in terms of Government Order dated 15.2.2019. However, when no heed was paid to his request, he filed Writ - C No. 36491 of 2019 before this Court. It was disposed of by order dated 6.11.2019 with a direction to respondent no. 4 to decide his representation within two weeks. In terms thereof, the instant decision has been taken. One of the findings returned in the impugned order is that the alleged representation of the petitioner dated 9.3.2019 is not on record, but only a representation dated 1.8.2019 received by registered post is available. It has also been held that the said representation dated 1.8.2019 having been received beyond 45 days from the date of death of the father of the petitioner, is beyond the time limit prescribed in Government Order dated 15.2.2019, consequently, the shop cannot be allotted to the petitioner.

3. Learned counsel for the petitioner submitted that it is usual practice in the office of respondent no. 4 not to acknowledge receipt of representations/applications. It is submitted that the representation was duly handed over to the concerned clerk in the office of respondent no. 4 on 9.3.2019, but when no action was taken on the same, another representation was sent by registered post on 3.9.2019. These facts were also clearly stated by the petitioner in his reminder dated 21.11.2019. It is also urged that till date, the dealership has not been allotted to any one and therefore, there is no impediment in considering the petitioner's application for grant of dealership to him. He also urged that as per finding recorded in the impugned order, there was a ban imposed by the State Government itself at the time of death of his father for allotting dealership on compassionate grounds to the dependent of a deceased dealer. Consequently, even otherwise, the application was not entertainable at that point of time.

4. Learned Standing Counsel submitted that in the impugned order, a specific finding has been recorded that no application dated 9.3.2019 was ever received in the office of respondent no. 4. He further submitted that since the representation dated 1.8.2019 was filed beyond the prescribed period of 45 days, therefore there is no illegality in the impugned order.

5. I have considered the submissions of learned counsel for the parties and perused the material on record.

6. Government Order dated 15.2.2019 stipulates that dependent of a deceased dealer should file application within 30 days from the date of death for allotment of dealership in his name. The said time limit is extendable by 15 days. The object of prescribing the time limit is to ensure that there is no unnecessary delay in making arrangement for distribution of scheduled commodities to the cardholders. It is for the same reason that under Government Order dated 5.8.2019, the entire proceeding relating to disposal of application for allotment of dealership on compassionate basis is required to be completed within two months. Under paragraph 8(9) of the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016, in case of cancellation of the agreement of fair price shop, new dealership agreement is required to be issued within a month of cancellation. Here also the object of prescribing a time limit, is to obviate unnecessary delay. The object of framing

scheme for allotting dealership to the dependent of a deceased dealer is to tide over the financial difficulty which befall upon the family on account of death of the bread earner. I am of the opinion that the said time limit is therefore directory in nature and in appropriate cases, it can be relaxed. Since in the instant case no fresh dealership has been finalized till date and on the other hand, the case of the petitioner is that he had duly filed application for allotment of dealership in his name well within the prescribed time limit, but its acknowledgement was not issued by the office of respondent no. 4, therefore I am of considered opinion that a lenient view should be taken. In case the application of the petitioner is directed to be considered on merits, no prejudice is going to be caused to any one, as no new dealer has been appointed till date.

7. Accordingly, the impugned order dated 3.12.2019 is quashed. Respondent no. 4 is directed to consider the application of the petitioner for allotment of dealership in his name in place of his deceased father on merits, within a period of six weeks from the date of production of a true attested copy of the instant order.

8. The petition stands allowed to the extent indicated above.

(2020)11ILR A346
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2020

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

WRIT - C No. 8526 of 2018

Godawari ...Petitioner
Versus
Zubaida & Ors. ...Respondents

Counsel for the Petitioner:
Sri Deepak Kumar Jaiswal, Sri Omkar Nath Rai

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Ojha, Sri Satish Chandra Mishra, Sri Sudhir Tiwari

A. Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12-C – Election of Pradhan – Recounting of votes – It is settled that order for recount of votes should not be passed as a matter of course unless there exists clinching evidence on record to support the election petition – Allegations to doubt correctness of votes cast have been specifically made which is duly supported by the evidence led by the election petitioner – Small margin of victory and large number of votes having been declared invalid is also a circumstance which cannot be brushed aside lightly in view of attending facts – Held, Sanctity of the election process requires a further scrutiny, which is possible only if a recount is ordered. (Para 6 and 14)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Ram Adhar Singh Vs D.J., Ghazipur, 1995 All CJ 196

2. Pratap Singh Vs St. of U.P. & ors., 2008 (3) AWC 2974

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Upon an application filed by respondent no.1 under Section 12-C of the U.P. Panchayat Raj Act, 1947, the prescribed authority has directed for recount of votes on 9.3.2018 vide order impugned dated 28.2.2018. Aggrieved by this order the the petitioner, who is elected Pradhan, has filed the present petition.

2. Elections were notified for the office of Pradhan of Gram Sabha Sarisawan, Nyay pachayat Koriyan

Khiriyan, Block Dudahi, Tahsil Tamkuhiraj, District Kushinagar. Petitioner as also respondent nos.1, 2 and 3 contested the election for which voting took place on 9.12.2015. Votes were counted on 13.2.2018 at Adarsh Anglo Inter College, Dudahi, Block Dudahi, Tahsil Tamkuhiraj, District Kushinagar in Room No.1. Booth Nos.49Ka and 50kha were set up. 1626 voters were registered. Petitioner was allotted symbal of 'Imli' whereas respondent no.1 was assigned 'Kanni' as the election symbol. Respondent no.2 was assigned election symbol of 'Anaj Ugata Hua Kisan' while respondent no.3 has 'Car' as her election symbol. According to the election petitioner, a total number of 1139 votes were cast whereas at the time of counting only 1129 votes were found available. As per the election petitioner ballots from serial no.9181001 to 9181623 were cast on booth no.49Ka while on other booth ballots from serial no.9180401 to 9180916 numbering 516 votes were cast. Total of the above number reportedly works out to 1139 votes but at the time of counting only 1129 votes were found. 37 votes were declared invalid. Petitioner with 546 votes was declared elected while the election petitioner secured 544 votes. The victory margin was for 2 votes. The other two contestant secured 1 vote each. An application for recount of votes was moved on 13.12.2015 itself. The Returning Officer, however, rejected the application by observing that results have already been declared and it is no longer possible to direct recounting of votes. It is in this background that election petition came to be filed under Section 12C of the Act of 1947. In para 9 it is averred that the election petitioner had nominated two counting agents but the Returning Officer and Assistant Returning Officer were in the influence of present petitioner so as to ensure her success. In para 10 it is stated that at the time of counting of votes on 13.12.2015 the election agents were required to stand at a long distance from the place of counting and as the ballots could not been seen and they raised an objection but the respondents removed them from the counting site. In para 11 it is averred that the Returning Officer in collusion with the elected Pradhan surreptitiously removed 10 ballots notwithstanding strong protest by her. It is further alleged that 37 votes cast in favour of petitioner were declared invalid arbitrarily. In para 16 it is stated that in the event all votes casted were counted then election petitioner would have won the election. An objection has been filed by the returned candidate denying the averments made in the election petition.

3. An objection to the maintainability of the election petition was filed by the petitioner. This objection was considered on 9.8.2017 vide annexure-1 to the counter affidavit. The prescribed authority has observed that election petition has been filed by the petitioner in accordance with law and all relevant parties have been impleaded as defendants. Initially, an order was passed on 26.10.2018 to proceed exparte but later on objections were filed by the petitioner on 12.5.2017. The prescribed authority has therefore observed that there is no further requirement of passing any order and that the election petition has been entertained subject to final orders passed therein.

4. After considering the respective pleadings and evidences led the prescribed authority has directed for recounting of votes vide order impugned.

5. Law relating to recount of votes has been examined in a larger number of

decisions of this Court, relying upon the adjudications made by the Apex Court. A Full Bench of this Court in Ram Adhar Singh vs. District Judge, Ghazipur, 1995 All CJ 196 summarized the principles in following words:-

"'Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers;

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.'"

6. The above view expressed in Ram Adhar Singh's case (supra) has since been consistently followed. It is settled that order for recount of votes should not be passed as a matter of course unless there exists clinching evidence on record to support the election petition.

7. In Pratap Singh vs. State of U.P. and others, 2008 (3) AWC 2974 this Court observed as under:-

"Although no cast iron rule of universal application can be or has been laid down, yet, from a bed-roll decision of this Court, two broad guidelines are discernible; that the court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity, or illegality in counting are founded, are pleaded adequately in the election petition, and (ii) the Court/Tribunal trying the petition in prima facie satisified that the making of such an order is imperatively necessary to do complete and effectual justice between the parties."

8. Various judgements have been relied upon by the parties in support of their respective submissions but the principles noticed hereinabove are not disputed. It is in light of the above principles that the facts of the case needs to be examined.

9. The prescribed authority has taken note of the respective submissions advanced by the parties. The result sheet has been taken note of as per which 1129 votes were counted while 37 votes declared invalid. The contention advanced on behalf of the election petitioner that in fact 1139 votes were cast as against 1129 votes that were available at the time of counting has been noticed. It has also been observed that margin of victory is only 2 votes while 37 votes have been declared invalid. The prescribed authority has therefore observed that where margin of victory is narrow in

comparison to large number of votes declared invalid then such facts would be relevant for arriving at a decision about recounting of votes. It is submitted that sanctity of election is of prime consideration for successful functioning of democracy. It has been observed that facts pleaded on behalf of the election petitioner have been substantiated by the evidence, and therefore, it would be necessary to direct recounting of votes so that sanctity of elections is not compromised.

10. Sri Deepak Jaiswal, learned counsel appearing for the petitioner states that the election petition has not been filed by the respondent no.1 as such the same is not maintainable. It is also urged that results of election has been declared on the basis of correct facts, and therefore, the direction to conduct recounting is merely to institute a roving and fishing enquiry which is impermissible.

11. Learned counsel for the respondents, however, submtis that the order of recount has correctly been passed on the basis of evidence on record.

12. I have learned counsel for the parties and have perused the materials brought on record.

13. Facts as have been noticed above are not in dispute. The margin of victory in the facts of the present case is of two votes. The election petitioner has pleaded that 10 votes have been misplaced while 37 ballots have been arbitrarily declared invalid.

14. So far as the casting of 1139 votes is concerned, the oral evidence on behalf of election petitioner is specific inasmuch as number of ballots have been clearly specified. Although the elected Pradhan states that only 1129 votes have been casted but the details of ballot numbers specifically narrated on behalf of election petitioner has not been challenged. It is also not disputed that 37 votes have been declared invalid. Specific allegations have been made against the Returning Officer and Assistant Returning Officer who are alleged to have acted in collusion of the Pradhan concerned. Specific prayer for recount of votes was made before the Returning Officer but the same has been rejected. It is clear that from the very initial stages an objection was being raised by the petitioner and her election agents which includes her husband but the same was not being examined. The Returning Officer appears to have summarily rejected the request of recount and the issues framed before him have apparently not been considered. A serious triable issue has been raised on behalf of the election petitioner in respect of which necessary pleadings have also been made. Whether or not 10 votes have been less counted or 37 votes have been wrongly excluded can be conclusively established only at the time of recount of votes. Allegations to doubt correctness of votes cast have been specifically made which is duly supported by the evidence led by the election petitioner. It is not a case of roving or fishing inquiry on the asking of election petitioner inasmuch as pleadings are specific and evidence has also been lead in its support. Sanctity of the election process requires a further scrutiny in the facts of this case, which is possible only if a recount is ordered. Small margin of victory and large number of votes having been declared invalid is also a circumstance which cannot be brushed aside lightly in view of attending facts. The election petition is also filed by respondent no.1 as is clearly recorded in the order dated 9.8.2017.

15. In such circumstances, if the prescribed authority has directed a recount of votes to be carried out this Court finds no error of jurisdiction or arbitrariness in the order which may require any interference. Writ petition lacks merit and is, accordingly, dismissed.

(2020)11ILR A350
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE DEEPAK VERMA, J.

WRIT – C No. 11611 of 2020

M/s Mata Kaila Devi Gangsar Stone Pvt. Ltd., District Agra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Singh

Counsel for the Respondents:
C.S.C., Sri Sanjai Singh

A. Civil Law - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Sections 13 and 17 – Enforcement of Secured Interest – Notice to discharge liability u/s 13(2) within 60 days and Possession notice u/s 13(8) issued – Alternative Remedy – Held, the petitioner has the remedy to prefer an appeal under Section 17 of the Act before the Debt Recovery Tribunal. (Para 16 and 17)

B. Constitution of India – Article 14 and 226 – Scope of Writ – Recovery matter – Alternative Remedy – Discretionary jurisdiction under Article 226 is not absolute and can be exercised judiciously in a given facts of the case and in accordance with law – High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person – This rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. (Para 20 and 21)

Writ Petition dismissed (E-1)

Cases relied on :-

1. United Bank of India Vs Satyawati Tandon & ors., (2010) 8 SCC 110

2. Civil Appeal No. 1281 of 2018; Authorized Officer, State Bank of Tranvancore & anr. Vs Mathew K.C.

3. Civil Appeal No. nil of 2018 (Arising out of SLP No. 10215-10217 of 2016) ITC Limited Vs Blue Coast Hotels Ltd & ors..

4. In Union Bank of India & anr. Vs Panchanan Subudhi, (2010) 15 SCC 552

5. Kanaiyalal Lalchand Sachdev & ors. Vs State of Maharashtra & ors., (2011) 2 SCC 782

6. Punjab National Bank & anr. Vs Imperial Gift House & ors., (2013) 14 SCC 622

7. State of Maharashtra Vs Digambar, (1995) 4 SCC 683

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Deepak Verma, J.)

1. Heard the learned counsel for the petitioner Sri Birendra Singh, Sri S. Singh, learned counsel appearing on behalf of the respondent no. 3 and the learned Standing Counsel appearing on behalf of respondent nos. 1 and 2.

2. The instant petition has been filed invoking extraordinary jurisdiction of this court under Article 226 of the Constitution of India with the following prayer;

"I. Issue a writ, order or direction in the nature of certiorari quashing the

Possession Notice dated 13.3.2020 and Demand Notice dated 4.2.2019 issued by the respondent no.3 (Annexure No. 1 and 2 to the writ petition).

2. Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

3. Award cost of the petition to the petitioner."

3. The proceedings initiated against the petitioner by issuing Demand Notice under Section 13 (2) dated 4.2.2019 and Possession Notice dated 13.3.2020 under Section 13 (4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for the sake of brevity hereinafter referred to as 'SARFAESI Act" read with Rule 8 of Security Interest (Enforcement) Rules, 2002. The aforesaid proceeding has been initiated in exercise of power conferred under Sub Section 12 of Section 13 read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 on failure of repaying the loan amount.

4. The contention of the learned counsel for the petitioner is that the petitioner is a private Limited Partnership Company incorporated on 8.7.2016 under the Companies Act 2013, which is carrying out business of importing and exporting, preparing, mining, cutting, polishing and processing for all types of marble and granite and other building materials. For establishment of the unit, which is situated over Khata No.114, Khasara No. 141 in Mauja Ghaskata, Tehsil Kheragarh, district Agra the partners of the petitioner applied for the loan and mortgaged the aforesaid property with the respondent no. 3 Bank of Maharashtra. The Bank granted loan of Rs. 45,00,000/- as a term loan and Rs. 15,00,000/- as cash credit limit, total amounting to Rs. 60,00,000/- in the year 2017. An order was passed on 15.10.2018 by the Regional Officer, U.P. Pollution Control Board, after inspecting the unit on 20.9.2018 that it was being run without obtaining NOC and consent of Air and Water from Pollution Control Board and that the unit comes within the limit of Taj trapezium zone. As closure order was passed on 15.10.2018 the business activities of the unit have been closed as a result of which the deposit of regular instalment of the loan could not be made. However from 15.2.2019 till 30th September 2019 the instalment of the loan amount was paid. The respondent no. 3 has issued the impugned demand notice dated 4.2.2019 under Section 13 (2) of the SARFAESI Act. The possession notice was never served upon the petitioner nor any partners or representatives of the petitioner. The notice was only pasted at the main gate of the unit on the basis whereof the partner of the petitioner came to know about the proceeding initiated under the aforesaid Act.

5. The learned counsel for the petitioner further contended that even no opportunity of hearing was afforded to the petitioner after the issuance of the impugned demand notice dated 4.2.2019 issued under Section 13 (2) of the SARFAESI Act only showing the reason that due to failure to adhere to the terms and conditions and had made default hence the account has been classified by the Bank as NPA on 31.1.2019. However, after the demand notice the petitioner has deposited the loan amount from 15.2.2019 uptill 30.9.2019. As the unit was closed due to the closure order the regular instalment of the loan amount could not be paid thereafter. The respondent no. 3 further

proceeded arbitrarily by issuing possession notice dated 13.3.2020 under Section 13 (4) read with Rule 8 of the SARFAESI Act/Rules, 2002.

6. The learned counsel for the petitioner has placed reliance before us the judgment of the Coordinate Bench of this court dated 11.12.2018 passed in Writ-C No. 38578 of 2018 (Kumkum Tentiwal Vs. State of U.P. and others) and contended that the order passed by the Additional District Magistrate for taking possession of the property in the said case was quashed as no opportunity of hearing was given before passing the order under Section 14 of the SARFAESI Act.

7. It is further contended that the Public Interest Litigation No. 1338 of 2018 (M.C. Mehta Vs. Union of India) was filed before the Hon'ble Apex Court and the Hon'ble Court vide order dated 6.12.2019 allowed permission by suspending the closure order of the U.P. Pollution Control Board dated 15.10.2018. The petitioner's unit reopened only on 16.3.2020 but was closed again due to lock down amid pandemic of Covid-19. However, the petitioner undertakes that he would be able to deposit the balance loan amount in easy instalments as may be directed by this court. The respondent bank has proceeded against the petitioner violating the statutory provisions of the Act, hence the issuance of the demand notice as well as the notice of possession are vitiated in law liable to be quashed.

8. Per contra the learned counsel appearing on behalf of the respondent no.3 has raised objection and contended that the petitioner has an alternative remedy to take all these objections in a proceeding under Section 17 of the SARFAESI Act. The petitioner had an opportunity to reply to the demand notice issued under Section 13 (2) of the SARFAESI Act within 60 days and failure of which has given rise to the respondent no.3 to declare the account as non performing asset (NPA) on 30.1.2019. The petitioner's account was declared as Non Performing Asset (NPA) much prior to the lock down due to pandemic Covid-19. Sufficient opportunity was given to the petitioner to pay the balance loan amount and the petitioner could have also ample opportunity to redeem the secured assets in accordance with the provisions of Sub Section 8 of Section 13 of the Act but the petitioner has failed to repay the amount, as such the possession notice has been issued under Section 13 (4) read with Rule 8 of the SARFAESI Act by the impugned possession notice dated 13.3.2020. The petitioner was under legal obligation to pay the outstanding dues even otherwise an alternative remedy is available to the petitioner under Section 17 of the SARFAESI Act against the action of the respondent no. 3, hence the writ petition is liable to be dismissed on this ground alone.

9. In support of his submission the learned counsel for the respondent no.3 has relied upon the various decisions of the Hon'ble Apex Court, which is delineated herein as under;

(I) 2010 (8) SCC 110, United Bank of India Vs. Satyawati Tandon and others;

(II) Civil Appeal No. 1281 of 2018 (arising out of SLP © No. 24610 of 2015) Authorized Officer, State Bank of Tranvancore and another Vs. Mathew K.C. and

(III) Civil Appeal No. nil of 2018 (Arising out of SLP (C) No. 10215-10217 of 2016) ITC Limited Vs. Blue Coast Hotels Ltd and others.

10. The learned counsel for the respondent no. 3 has submitted that the Hon'ble Apex Court in the above noted cases has declined interference under Article 226 of the Constitution of India by observing that the writ petition under Article 226 of the Constitution ought not to be entertained if alternative statutory remedies are available as ignoring the availability of statutory remedy and entertaining the writ petition granting interim relief have serious adverse impact on the right of bank and other financial institutions to recover their dues. The entire exercise for the recovery of loan have been initiated much prior to the lock down due to Covid-19 hence do not deserve any interim relief.

11. We have given thoughtful consideration to the arguments advanced by the learned counsel for the parties and gone through the record.

12. From the perusal of the impugned notices, the respondent no. 3 has initiated proceedings under the SARFAESI Act/Rules on account of failure of the petitioner to repay the loan amount. The statutory demand notice under Section 13 (2) of the SARFAESI Act was issued on 4.2.2019 declaring the account by the Bank as Non performing Asset (NPA) on 21.1.2019.

13. From the pleadings it is not the case of the petitioner that he has replied through filing objections to the statutory notice issued under Section 13 (2) of the SARFAESI Act within 60 days from the date of notice as the petitioner neglected to pay the dues, hence the Possession Notice was issued under Section 13 (4) read with Rule 8 of the SARFAESI Act, 2002 against which the petitioner has the remedy to prefer an appeal under Section 17 of the Act before the Debt Recovery Tribunal. Further he has remedy to appeal before the Appellate Tribunal under Section 18 of the Act against the order passed by the Debt Recovery Tribunal.

14. An extract of relevant provisions of the Act are reproduced herein below for ready reference;

13. Enforcement of security interest.--

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

[Provided that--

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has

raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower: Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: Provided further that where the management of whole of the business or part of the business is severble, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.....

[(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,--

(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by

way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]

17. [Application against measures to recover secured debts].--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter,1[may make an application along with such fee, as may be prescribed,]to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation.--For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction--

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

(2) **The Debts Recovery Tribunal** shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,--

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

18. **Appeal to Appellate Tribunal**-

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under Section 17, may prefer an appeal along with such fee, as may be prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

15. From the above provisions it is crystal clear that Section 13 of the

SARFAESI Act contains enforcement of secured interest. Sub Section 2 of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub section provides that if a borrower who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13 (4). Sub Section (3) of Section 13 lays down that notice issued under Section 13 (2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13 (2) and challenge the classification of his accounts as non-performing asset as also the quantum of amount specified in the notice.

16. However, in the instant case from the pleading it is not the case of the petitioner that he has replied through filing objection to the statutory demand notice dated 4.2.2019 issued under Section 13 (2) of the Act within sixty days from the date of the notice. As the petitioner neglected to pay the dues, hence the possession notice dated 13.3.2020 was issued under Section 13 (4) of the SARFAESI Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure prescribed under Section 13 (2) and 13 (4) is mandatory and the recourse taken by the respondent no. 3 is in accordance with law. The petitioner had an opportunity to reply to the demand notice. Sub section 4 of Section 13 specifies various modes, which can be adopted by the secured creditor for recovery of secured debts.

17. The impugned Possession Notice had also drawn the attention of the petitioner to the provisions contained under sub-section 8 of Section 13 of the Act in respect of time available to redeem the secured assets and has also made clear that the borrower shall not transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice without prior written consent of the secured creditor. There is no reason put forth by the petitioner why the remedy available under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and compelled him for by passing the same. The petitioner has the remedy to prefer an appeal under Section 17 of the Act before the Debt Recovery Tribunal. Further he has right to appeal before the Appellate Tribunal under Section 18 of the Act against the order passed by the Debt Recovery Tribunal, which is evident from the provisions quoted herein above.

18. The pleadings in the writ petition are in lackadaisical manner only alleging violation of principle of natural justice. If the petitioner would have invoked alternative remedy under Section 17 of the Act, it is incumbent upon the Tribunal under Section 17 of the Act to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules and if the measures taken by the secured creditor are not in accordance with sub Section 4 of Section 13 of the Act could have directed the secured creditor to restore the management

of the business or the secured assets to the borrower (the petitioner).

19. The learned counsel for the petitioner has cited the case law, which is not applicable under the circumstance of the case as in that case the question was involved that the borrower is entitled to right of hearing prior to any order passed by the District Magistrate while exercising the power under Section 14 of the Act to assist the secured creditor to take possession of the secured assets. Whereas in the present case despite notice under Section 13 (2) of the Act the petitioner did not pay any heed to pay the outstanding dues. Only after the demand notice dated 4.2.2019 the petitioner has deposited a paltry sum of loan amount as mentioned in paragraph 10 of the writ petition i.e. between 15.2.2019 to 30.9.2019, therefore the action taken by the respondent no. 3 for recovery of dues by issuing notice under Section 13 (2) and Section 13 (4) cannot be faulted with. The petitioner could have availed the remedy by filing an application under Section 17 (1) of the Act, when the remedies are available under the SARFAESI Act both to the borrower or creditor for the redressal of their grievance.

20. We are conscious of the settled law that discretionary jurisdiction under Article 226 is not absolute and can be exercised judiciously in a given facts of the case and in accordance with law, hence in view of the aforesaid statutory remedy available to the petitioner the petition is liable to be dismissed at the threshold. The reasons for not entertaining the petition where there is efficacious and alternative remedy available has been dealt with in extenso by the Hon'ble Apex Court in **Authorized Officer, State Bank of Travancore and another (Supra)**, **which is reproduced as here under;**

"9. The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for secularization and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

"10. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was held in Punjab National Bank vs. O.C. Krishnan and others, (2001) 6 SCC 569, that :-

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely,

filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

21. "**In Satyawati Tandon (supra)**, the High Court had restrained further proceedings under Section 13 (4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding :-

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislation's enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

***

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

22. **" In Union Bank of India and another vs. Panchanan Subudhi**, 2010 (15) SCC 552, further proceedings under Section 13 (4) were stayed in the writ jurisdiction subject to deposit of Rs.10,00,000/- leading this Court to observe as follows :

"7. In our view, the approach adopted by the High Court was clearly erroneous. When the respondent failed to

abide by the terms of one-time settlement, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that a statutory alternative remedy was available to the respondent under Section 17 of the Act."

23. "The same view was reiterated in **Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others,** 2011 (2) SCC 782 observing:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd.;

Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)"

24. "**In Ikbal (supra)**, it was observed that the action of the Bank under Section 13(4) of the 'SARFAESI Act' available to challenge by the aggrieved under Section 17 was an efficacious remedy and the institution directly under Article 226 was not sustainable, relying upon Satyawati Tandon (Supra), observing :

"27. No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced considerations, statutory procedures cannot be allowed to be circumvented.

28.....In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."

"15. A similar view was taken in Punjab National Bank and another vs. Imperial Gift House and others, (2013) 14 SCC 622, observing:-

"3. Upon receipt of notice, the respondents filed representation under Section 13(3-A) of the Act, which was rejected. Thereafter, before any further action could be taken under Section 13(4) of the Act by the Bank, the writ petition was filed before the High Court.

4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13(2) of the Act and quashing the proceedings initiated by the Bank."

25. Thus from the above facts and circumstances of the case, the petitioner has failed to make any representation in response to the notice dated 14.2.2019 within 60 days, which has nothing to do with the lock down due to pandemic of Covid-19. The loan was granted in 2017 the petitioner failed to adhere to the terms and conditions to repay the loan as stipulated. This compelled the respondent no. 3 to issue demand notice after declaring the account as NPA on 31.1.2019 much

prior to the lock down. Thereafter despite repeated demand the outstanding amount was not paid. The petitioner could not even redeem the secured assets according to sub-section 8 of Section 13 of the Act. Thus the entire proceeding initiated against loan account declared as NPA prior to the Covid-19 lock down. After issuance of demand notice dated 4.2.2019 the petitioner has started depositing certain instalment from 15.2.2019 uptill September 2019, which in clear violation of the statutory provisions of the SARFAESI Act/Rules. The petitioner cannot be allowed to sit on the fence and wait and thereafter coming to the writ court for the redressal of his grievance. Parity with any judgment cannot also be given for all times to come as the circumstance of the present case is quiet distinct. The writ petition is manifestly not instituted to show any bona fide from any remote corner but only to some how stall further action of the respondent no.3 showing a bald desire to repay loan in instalmentas as may be directed by this court.

26. The Hon'ble Apex Court in Satyawati Tandon case (supra) while discussing various judgements dealing with the same issue has observed thus;

"It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

"It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

27. In **ITC Limited (Supra)** also the Hon'ble Apex Court was of the view that the debtor is not entitled for the

discretionary equitable relief under Article 226 and 136 of the Constitution of India. In the aforesaid case the Hon'ble Apex Court was of the view that non compliance of sub Section 3A of Section 13 cannot be of any avail to the debtor whose conduct has been merely to seek time and not repay the loan as promised on several occasions, while relying in the case of State of Maharashtra Vs. Digambar, 1995 (4) SCC 683 wherein the Hon'ble Court observed as follows;

"19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refused to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

28. Thus from the above prolix and verbose discussion, in our considered opinion the Possession Notice dated 13.3.2020 issued under Sections 4 and 12 of Section 13 read with Rule 8 (1) and the demand notice dated 4.2.2019 issued under Section 13 (2) of the SARFAESI Act do not suffer from any error or irregularity, which may require any interference, hence we are not inclined to exercise our extraordinary jurisdiction.

29. The writ petition is accordingly dismissed.

30. No order as to costs.

(2020)11ILR A361
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE DEEPAK VERMA, J.

WRIT - C No. 12138 of 2020

Mahandra Kumar & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ramesh Chandra, Sri Neeraj Kumar

Counsel for the Respondents:
Sri C.L. Chaudhary, C.S.C.

A. Civil Law - Central Railway Act, 1989 – Section 20F (6) – Arbitration and Conciliation Act, 1996 – Section 34 – Acquisition of land – Award by the Arbitrator – Maintainability of writ petition – Alternative Remedy to file Civil Suit – No violation of Natural Justice – No plausible reason disclosed why the Court by-pass the remedy provided under Section 34 of the Act, 1996 – Held, the petitioners are required to adduce documentary evidence in support of their case – They could have raise their grievances adequately before the appropriate forum available under the law. (Para 12, 13, 18 and 19)

B. Constitution of India – Article 14 and 226 – Scope of Writ – Alternative Remedy – Interference, when warranted – High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioners and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or if there is sufficient ground to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India – High Court may still exercise its

writ jurisdiction in at least three contingencies: (a) Where the writ petition seeks enforcement of any of the fundamental rights; (b) Where there is a failure of principles of natural justice; (c) Where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged. (Para 14)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Kerala State Electricity Board Vs Kurien E. Kalathil, (2000) 6 SCC 293: AIR 2000 SC 2573: 2000 AIR SCW 2647

2. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC

3. Nivedita Sharma Vs Cellular Operators Association of India, (2011) SCC (14) 337

4. Commissioner of Income Tax & ors. Vs Chhabil Dass Agrawal, SCC 2014 (1) 603

5. Harvansh Lal Sahnia Vs India Oil Corporation Ltd., SCC 2003 (2) 107

6. Than Singh Vs Superintendent of Taxes, Dhubri & ors., AIR 1964 SC 1419

7. Mohan Pandey Vs Usha Rani, 2003 (6) 230

8. Dwarka Prasad Agarwal Vs B. D. Agrawal, 1992 (4) SCC 61

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Deepak Verma, J.)

1. Heard Sri Ramesh Chandra, learned counsel for the petitioners, Sri C. L. Chaudhary, learned counsel for the respondent Nos.1, 4 and 5 as well as Sri B. P. Singh Kachhwah, learned Standing Counsel appearing on behalf of the State and perused the record.

2. The instant writ petition has been filed on behalf of the petitioners against the order dated 17.10.2019 where by the respondent No.2-Arbitrator/Commissioner, Meerut Division, Meerut has passed the award on the ground that the land which has been acquired by the authority and that amount paid as compensation is inadequate the market value as well as acquired plot is not submerged under water. Petitioners being aggrieved against the order dated 17.10.2019 have filed the instant writ petition with the following relief:

(a) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 17.10.2019 passed by respondent No.2/arbitrator and order dated 05.08.2015 passed by respondent No.3 (Annexure No.4 and 1 to the writ petition).

(b) issue a writ, order or direction in the nature of mandamus commanding the respondent concerned to pay the compensation amount according to Abadi Land to the petitioners.

3. It is submitted by learned counsel for the petitioners that Union of India, Ministry of Railways has acquired the land for the purpose of Special Freight Corridor project known as Western Dedicator Freight Corridor. The petitioners, who are owner of land measuring 167.22 sq. meters of plot No.23 area 0.0602 hec. which, is situated in Village Dalelpur, Pargana Dankaur, Tehsil Sadar, District Gautam Buddha Nagar out of 0.0620 hec. land 167.22 sq. meter land of the petitioner was proposed for acquisition. Petitioners land in dispute is being used for residential purposes and in the surrounding area commercial activities are continuing, as such, disputed land falls in commercial area and compensation ought to have been calculated at the rate of commercial rate as applicable to commercial property. Market value of the land fixed by the state-respondent at the rate of Rs.805/- per sq. meter is much below the rate prescribed in the area as market value of residential and

commercial is about Rs.12,000/- sq. meter. The petitioners vide Annexure-2 to the writ petition has filed Misc. Case No.36 of 2019 under Section 20F (6) of Central Railway Act, 1989 (Amendment Act, 2008). The Chief General Manager, DFCCIL/NOIDA Unit (respondent No.4) has filed objection vide Annexure-3 to writ petition in which it has been stated that petitioners should have approached the authority under Section 20F (6) within a period of three years but they had filed petition/application under Section 20F (6) of the Act after about four years which is a time barred application and award dated 05.08.2015 is just and proper hence, requires no amendment/correction as the arbitrator decided the case on the merit. The publication for acquiring the land was made on 16.05.2013 and 20.05.2013 and final award was published on 05.08.2015. Petitioners claimed that they are the owner of the acquired land and land situate near residential area but award has been made without considering these aspects and rate for making award and compensation are below the rate running in that year. Petitioners aggrieved against the award hence, moved an application under Section 20F (6) of the Railways (Amendment) Act, 2008. The arbitrator/respondent no.2 on 17.10.2019 modified the award dated 05.08.2015 passed by the respondent No.3.

4. Further, the learned counsel for the petitioners contended that no notice had been served upon them before passing the order dated 17.10.2019. He submitted that land acquired is being used for residential purposes and in the surrounding areas commercial activities are continuing hence land in dispute is of commercial nature and the market value of the land in question is Rs.12,000/- per sq. meter. The respondent No.2 without considering the ground taken by the petitioners, illegally rejected the claim in an arbitrary manner.

5. The respondents counsel appearing for the respondent Nos.1, 4 and 5 raised a preliminary objection regarding the maintainability of this writ petition on the ground that against the impugned award the petitioners have a statutory alternative remedy available under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act, 1996") in view of the fact by virtue of Section 20F (6) of the Railways (Amendment) Act, 2008 (Hereinafter referred to as "the Act, 2008") as such the petitioners are not entitled to invoke the writ jurisdiction. The co-ordinate Bench of this Court in a similar case refused to entertain the petition on the ground of alternative remedy vide order dated 17.03.2020 in Writ-C No.8771 of 2020 (Mawasi Vs. Union of India and 3 others).

6. The learned Standing Counsel has submitted that the Hon'ble Apex Court and this Hon'ble Court have passed various orders in which it has been held that the Courts will not interfere under Article 226 of the Constitution of India until all normal remedies available to petitioners have been exhausted. The existence of alternative remedy is not a absolute bar. In case an alternative efficacious remedy is available, the High Court may not interfere straightaway under Section 226 of the Constitution of India and the petitioners would have been expected to pursue the remedies of appeal or revision.

7. The Hon'ble Apex Court in the case of **Kerala State Electricity Board Vs. Kurien E. Kalathil, (2000) 6 SCC 293: AIR 2000 SC 2573: 2000 AIR SCW 2647**, has held that the writ petition should not be entertained unless the party exhausted the alternative/statutory efficacious remedy.

8. Now the question before us is that order passed under Section 20F (6) of the Act, 2008 against which an application for

setting aside such award before competent civil court is provided under Section 34 of the Act, 1996 can be challenged before High Court without availing remedy provided under the Act, 1996.

9. The provisions of the Act, 1996 have been made applicable to all arbitral proceedings taken under the Act, 2008. To appreciate this objection it is necessary to extract Section 34 of the Act, 1996 and Section 20F (6) of the Act, 2004. Section 34 of the Arbitration and Conciliation Act, 1996 is quoted below:

"34 Application for setting aside arbitral award –

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral

tribunal will eliminate the grounds for setting aside the arbitral award."

10. Section 20F (6) of the Railways (Amendment) Act, 2008 is quoted below:

"20F. Determination of amount payable as compensation:

(6) If the amount determined by the competent authority under sub-section (1) or as the case may be, sub-section (3) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government in such manner as may be prescribed."

11. It is established principle of law of that self restrained is exercised by the High Court in dealing with such matters which otherwise can be looked into by the special forums or statutory authorities. Merely, the ban in granting any interim relief by special forum or Tribunal, created for the purpose of adjudicating of such disputes, would also not be a ground in itself to permit the aggrieved person to by-pass an alternative remedy and to file the petition straightaway in writ jurisdiction unless there are some cogent reasons for permitting such a challenge straightaway in writ jurisdiction. The exceptions, however, have been well defined by the Apex Court in the case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, 1998 (8) SCC**, the Supreme Court has laid down certain principles for the guidance and has observed that the High Court in determining the forum in a matter where efficacious remedy is available has the power to issue prerogative writs under Article 226 of the Constitution of India, is plenary in nature and is not limited by any other provisions of the Constitution. This power can be exercised by the High Court not only for issuing writs, for the involvement of any of the fundamental rights contained in Part-III of the Constitution of India but also for any other purpose. The Apex Court came to the conclusion that writ should not generally be entertained if statute provide for remedy of appeal and even if it is admitted, parties should be relegated to the appellate forum.

12. Herein instant circumstances where factual disputes and calculation are involved and no violation of natural justice we should refrain to exercise the power of writ jurisdiction.

13. In the instant writ petition the petitioners have not disclosed any plausible reason why this Court by-pass the remedy provided under Section 34 of the Act, 1996. It is established principle that when the proceedings are taken before the forum under a provision of law which is ultra vires or fundamental right Part-III of the Constitution and principles of natural justice have inviolated then a party aggrieved thereby to move to the High Court for quashing the proceedings on the ground that they are in competent, without a party being obliged to wait until those proceedings run their full course and doctrine of alternative remedy could have no application.

14. In the case of **Nivedita Sharma Vs. Cellular Operators Association of India,** reported in **2011 SCC (14) 337**, the Supreme Court has held that petitioners must exhaust its alternative remedy before State Commission and should not directly come to the High Court for challenging the judgment of District Forum. In the case of **Commissioner of Income Tax and others Vs. Chhabil Dass Agrawal**, reported in **SCC 2014 (1) 603**, the Supreme Court has

held that when the statutory forum is created by law for redressal of grievances, the writ petition should not be entertained ignoring statutory remedy available in law subject to certain exception. The Apex Court further opined that non entertainment of writ under the writ jurisdiction by the High Court where efficacious alternative remedy is available, is a rule of self impose limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. The Apex Court has also opined that undoubtedly, it is within the jurisdiction of the High Court to grant relief under Article 226 of the Constitution of India despite existence of alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioners and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or if there is sufficient ground to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India. The Supreme Court in the case of **Harvansh Lal Sahnia Vs. India Oil Corporation Ltd., SCC 2003 (2) 107**, it has been held that rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:

(a) Where the writ petition seeks enforcement of any of the fundamental rights.

(b) Where there is a failure of principles of natural justice.

(c) Where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged.

15. In the instant petition factual disputes are involved which is clear from the perusal of the record and the argument advanced by the learned counsel for the petitioners the dispute requires documentary evidence to prove the case that acquired property does not lie under water as has been held by arbitrator. The Hon'ble Apex Court by various judgment has restrained the High Court where factual disputes require documentary evidences for adjudication of case for which alternative remedy is available under the law.

16. The Supreme Court in the case of **Than Singh Vs. Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419, Mohan Pandey Vs. Usha Rani, 2003 (6) 230** and **Dwarka Prasad Agarwal Vs. B. D. Agrawal, 1992 (4) SCC 61**, has held that the remedy under Article 226 of the Constitution of India shall not be available except where violation of some statutory duty on the part of statutory authority is alleged. In such cases, the Court has jurisdiction to issue appropriate directions to the authority concerned. It is held that the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law, civil or criminal are available. This Court has held that it is not intended to replace the ordinary remedies by way of a civil suit or application available to an aggrieved person. The jurisdiction under Article 226 of the Constitution of India being special and extraordinary, it should not be

exercised casually or lightly on mere asking by the litigant.

17. The following principles emerge from the aforesaid decisions:

(i) Writ petition is a public law remedy and cannot be invoke for resolution of private law dispute therefore, writ petition is not maintainable for resolution of a property or for declaration of title.

(ii) Where there is an alternative, effective and efficacious remedy under law, the High Court will not exercise its jurisdiction under Article 226 of the Constitution of India but rule of such exclusion is a rule of discretion and where the matter involves enforcement of fundamental right or failure to follow principles of natural justice discretion may be exercise to entertain to under Article 226 of the Constitution of India. The writ petition is not an appropriate remedy where the matter required determination of disputed question of fact involving elaborate examination of evidence and where the fundamental rights are infringed.

18. In view of the aforesaid discussions as well as submissions made on behalf of the petitioners we are of the opinion that in the instant writ petition disputed question of facts are involved and the petitioners are required to adduce documentary evidence in support of their case. The petitioners have been given opportunity of hearing before passing impugned order and their case do not fall in any of the category discussed above as such we exercising jurisdiction under Article 226 of the Constitution of India cannot exercise the power of appellate court to reappreciate the evidence.

19. With reference to the facts and circumstances of the present case and in view of the aforesaid prolix discussion, we are of the opinion that the petitioners could have raise their grievances adequately before the appropriate forum available under the law, as such, we find no merit in this writ petition and the same is accordingly, **dismissed**.

20. No order as to costs.

(2020)11ILR A367
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

WRIT - C No. 13904 of 2020

Vibhor Vaibhav Infrahomes Pvt. Ltd., Delhi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Swapnil Rastogi, Sri Siddhartha Singhal

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Vinay Kumar Pathak, Sri Wasim Masood, Sri Jagdish Prasad

A. Civil Law -Real Estate (Regulation and Development) Act, 2016 – Sections 2(zk), 18, 43 and 71 – Violation of Builder-Buyer Agreement – Failure in handing over the Flat – Award of Compensation and Interest claimed – Jurisdiction of Adjudicating Officer – Section 71 confers power upon an Adjudicating Officer to adjudge compensation under Sections 12, 14, 18 and 19 – Held, the impugned order awarding compensation and interest for breach of provisions of Section 18 is not without jurisdiction – Petition dismissed leaving it open for the petitioner to avail remedy of appeal under Section 43(5). (Para 11 and 16)

Writ Petition dismissed (E-1)

Cases relied on :-

Writ C No. 9120 of 2020; Habitech Infrastructure Limited Vs St. of U.P. & 2 ors. decided on 06.07.2020

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Siddhartha Singhal, holding brief of Sri Swapnil Rastogi, learned counsel for the petitioner, Sri Vinay Kumar Pathak, learned counsel for Respondent No.1, Girish Vishvakarma, learned standing counsel for Respondent No.2 and Sri Jagdish Prasad holding brief of Sri Wasim Masood, learned counsel for Respondent Nos. 3 and 4.

2. This writ petition has been filed praying for the following reliefs:

"(a) Issue a writ, order or direction in the nature of certiorari calling for the record and quashing the impugned order dated 30.09.2019 passed by Adjudicating Officer, Regional Office, Uttar Pradesh, Real Estate Regulatory Authority, Gautambudh Nagar in Complaint Case No. ADJ/120185832 (Sarika Tulsian and another vs. Vibhor Vaibhav Infrahome Pvt. Ltd.) (Annexure No. 1);

(b) Issue a writ, order or direction in the nature of certiorari calling for the records and quashing the impugned recovery certificate dated 25.06.2020 issued by Adjudicating Officer, Regional Office, Uttar Pradesh, Real Estate Regulatory, Gautambudh Nagar (Annexure No. 2);

(c) Issue an appropriate writ, order or direction declaring the proviso to Section 43(5) of Real Estate (Regulation & Development) Act, 2016 as arbitrary, ultra vires to the constitution being in conflict and contradictory to the spirit of the Real Estate (Regulation & Development) Act, 2016."

3. Learned counsel for the petitioner has stated that the petitioner is not pressing the relief no.'c'.

Facts

4. Briefly stated facts of the present case are that the petitioner is the promoter within the meaning of Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "Act, 2016"). The petitioner entered into builder-buyer agreement dated 10.07.2011 with the respondent nos. 5 and 6. Undisputedly as per agreement the petitioner was under a contractual obligation to handover the flat to the respondent nos.5 and 6 within 30 months from the date of agreement. A grace period of 180 days was also provided in the agreement. Thus as per agreement the petitioner was liable to handover the flat complete in all respect to the respondent nos.5 and 6 within 30 + 6 = 36 months i.e. three years. Thus, the last date for giving possession of the flat by the petitioner to the respondent nos.5 and 6 was 09.07.2014. However, the petitioner could not complete and handover the flat to the respondent nos.5 and 6 within the agreed time and thus violated provisions of Section 18 of the Act, 2016. The actual possession of the flat was received by the respondent nos. 5 and 6 on 26.12.2017. Since the petitioner violated the provisions of Section 18 of the Act, 2016, therefore, the respondent nos.5 and 6 filed an application on 18.01.2018 before the authority as defined in Section 2(i) of the Act, 2016 claiming compensation and interest. Since the

respondent nos.5 and 6 have claimed compensation also, therefore, the authority passed an order dated 22.05.2019 holding that the Adjudicating Officer may be approached in this regard. Thus, the matter came before the Adjudicating Officer under Section 71 of the Act, 2016. The Adjudicating Officer passed the impugned order dated 30.09.2019 awarding compensation and interest. Aggrieved by the aforesaid impugned order, the petitioner has filed present writ petition under Section 226 of the Constitution of India.

Submissions

5. Learned counsel for the petitioner submits as under:

(i) Adjudicating Officer under Section 71 of the Act, 2016 has no power to award interest and compensation, in the event possession of the flat has been taken by the allottee from the promoter.

(ii) Thus, since the impugned order is without jurisdiction and, therefore, neither appeal shall lie under Section 43 (5) of the Act, 2016 nor the appeal is an appropriate remedy.

6. No other point has been argued by the learned counsel for the petitioner before us.

7. In support of his submission learned counsel for the petitioner has relied upon the judgment of this Court dated 06.07.2020 in ***Writ-C No. 9120 of 2020 (Habitech Infrastructure Limited Vs. State of U.P. and 2 others).***

8. Learned standing counsel for the respondent No.2 and learned counsel for the respondent nos.3 and 4 have supported the impugned order and jointly submit that the Adjudicating Officer under Section 71 of the Act, 2016 has ample power to adjudicate upon the compensation or interest and thus the impugned order is not without jurisdiction.

Discussion and Findings

9. Before we proceed to consider the submission of the parties it would be appropriate to reproduce the relevant provisions of the Act, 2016, as under:-

" **Section 18. Return of amount and compensation**--(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,--

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the

manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

Section 38. Powers of Authority.--(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that--

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India"

Section 43. Establishment of Real Estate Appellate Tribunal--(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the-- (name of the State/Union territory) Real Estate Appellate Tribunal.

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.

(3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.

(4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal:

Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:

Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as

may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation.--For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

Section 71. "Power to adjudicate"--(1) For the purpose of **adjudging compensation** under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections." (Emphasis supplied)

10. Learned counsel for the petitioner has not disputed the fact that as per agreement dated 10.07.2011 the petitioner-promoter was liable to handover physical possession of the flats complete in all respect to the Respondent Nos. 5 and 6 within 30 months from the date of agreement. A grace period of 180 days was also provided in the agreement. Thus the flat was liable to be handed over to the Respondent Nos. 5 and 6 by 09.07.2014 whereas possession of the flat was received by the Respondent Nos.5 and 6 from the petitioner on 26.12.2017. Thus, contravention of the agreement is undisputed. Learned counsel for the petitioner also does not dispute the liability of the petitioner for delay in handing over the possession. Thus, the provisions of Section 18 of the Act, as per undisputed

facts are attracted on the facts of the present case.

11. Section 71 of the Act, 2016 confers power upon an Adjudicating Officer to adjudge compensation under Sections 12, 14, 18 and 19. Sub-section (3) of Section 71 provides that if the Adjudicating Officer is satisfied that the person has failed to comply with the provisions of any of the sections specified in Sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. By the impugned order the Adjudicating Officer has awarded compensation and interest as provided under Section 71 of the Act, 2016 for breach of provisions of Section 18 of the Act, 2016. Thus, the impugned order is not without jurisdiction. Consequently, we do not find any merit in the submissions of the learned counsel for the petitioner and we hold that the impugned order passed by the Adjudicating Officer does not suffer from lack of jurisdiction.

12. Section 38(1) of the Act, 2016 confers power upon the **'Authority'** to impose **penalty or interest** in regard to contravention of obligations cast upon the promoters, the allottees and the real estate agents under the Act, Rules and Regulations. Power to award compensation or interest has been conferred under Section 71(1)/(3) of the Act, 2016 upon an Adjudicating Officer for adjudging compensation under Section 12, 14, 18 and Section 19 of the Act, 2016. Thus, the power to adjudge compensation has been conferred upon the Adjudicating Officer and not upon the Authority. Therefore, the impugned order passed by the Adjudicating Officer adjudging compensation is well within the four corners of the Section 71 of the Act, 2016.

13. The judgment of this Court in the case of Habitech Infrastructure Ltd. (supra) relied by the learned counsel for the petitioner is clearly distinguishable on facts. In the case of Habitech Infrastructure Ltd. (supra) the facts were that when the promoter failed to fulfill his obligation to handover the flats the allottee made an application for refund of the entire amount along with interest as the project was not completed by the promoter in time. The dispute in that case was confined to refund of amount deposited by the allottee with the promoter and award of interest. This court considering the provisions of Section 38 of the Act, 2016 found that the authority as defined in Section 2(i) of the Act has power to award interest. In the present case the Respondent Nos. 5 and 6 have not withdrawn the amount but they complained and asked for compensation and interest for delay in handing over the flat to them by the petitioner-promoter. Thus, the judgment of this Court in the case of Habitech Infrastructure Ltd. (supra) is clearly distinguishable on facts and does not support the submission of the learned counsel for the petitioner.

14. At this stage, learned counsel for the petitioner now submits that the petitioner may be relegated to remedy of appeal under Section 43(5) of the Act, 2016.

15. It is always open for the petitioner to avail the remedy of appeal under Section 43(5) of the Act in accordance with law, for which no order is required to be passed.

16. For all the reasons aforestated we do not find any merit in this writ petition.

Consequently, the writ is dismissed leaving it open for the petitioner to avail remedy of appeal under Section 43(5) of the Act, 2016. If the petitioner files an appeal before the Appellate Authority in accordance with law the Appellate Authority shall decide the appeal without being influenced by any of the observations made by this Court touching the merits of the case.

(2020)11ILR A373
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2020

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

WRIT - C No. 14488 of 2020

Vijay Sharma ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sumit Daga

Counsel for the Respondents:
A.S.G.I., Sri Ankit Gaur, Sri Chandra Prakash Yadav, Sri Satish Kumar Rai

A. Civil Law - Public Premises (Eviction of Unauthorised Occupants) Act, 1971 – Sections 4, 5 and 5A – Unauthorized Occupant – Demolition of Construction – No Notice – Colourable Exercise of Power – Authority has determined the petitioner's status as 'unauthrorised occupant' and has consequently directed the construction to be demolished without following the procedure contemplated under Sections 4 and 5 of the Act, which is subject to right to appeal under Section 9 of the Act – Once the law require a thing to be done in a particular manner, it has to be done in that manner alone and not otherwise – Held, Order passed by the authority under Section 5A(2) of the Act suffers from colourable exercise of power and cannot be sustained. (Para 15 and 21)

Writ Petition allowed (E-1)

Cases relied on :-

1. Cantonment Board & anr. Vs Church of North India, (2012) 12 SCC 573

2. Union of India through Defence Estate Officer & anr. Vs Shri Arun Saluza, 2015 (3) ADJ 594

3. Writ-C No. 40360 of 2015; Yogesh Agarwal Vs Estate Officer & 2 ors.

4. Taylor Vs Taylor, (1876) 1 Ch.D. 426

5. Smt. Manju Arora Vs Estate Officer, Meerut Cantonment & anr., 2018 (3) AWC 258

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Heard Sri Sumit Daga, learned counsel for the petitioner, Sri Chandra Preshrank Yadav for respondent nos. 1 and 3 and Sri Satish Kumar Rai for respondent no. 2.

2. This petition is directed against a notice dated 4.8.2016 and the consequential order dated 28.2.2020 (Annexures- 1 and 3 to the writ petition), whereby alleged constructions raised by the petitioner has been directed to be demolished. This order has been passed invoking the provisions contained in Section 5A(2) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as the Act of 1971). The order records that petitioner is an unauthorised occupant and has no semblance of right to remain in possession and, therefore, the constructions raised by him are unlawful.

3. The writ petition was heard on 6.10.2020 and following orders were passed:-

"One of the ground urged on behalf of petitioner is that in view of repeal

of the Cantonments Act,1924, the provisions of Public Premises Act itself will not be attracted upon the Cantonment property, inasmuch as by virtue of Section 2(e)(2)(viii) of the Act, the only property covered within the definition of Public Premises is one belonging to Cantonment Board under 1924 Act. Learned counsel for the parties require further time to examine this aspect of the matter.

Put up on 8.10.2020 in the additional cause list."

4. Sri S.K. Rai, learned counsel appearing for the Cantonment Board has invited attention of the Court to Section 360 of the Cantonments Act, 2006 (hereinafter referred to as the Act of 2006), which contains the repeal and savings clause in the Act of 2006. Sub-section 2 (a) of Section 360 of the Act of 2006 provides that notwithstanding the repeal of the Cantonment Act,1924, any appointment made or notification issued there under in so far as it is not inconsistent with the provisions of the Act of 2006 shall continue to remain in force and be deemed to have been made under the provisions of the Act of 2006. With reference to Section 3 of the 2006 Act learned counsel submits that cantonment with its boundary is specified by way of a notification, issued in the official gazette by the Central Government. A co-joint reading of the above two provisions, according to Sri Rai, makes it explicit that cantonment having been constituted by way of a notification issued under the Cantonment Act, 1924 it shall continue and would not stand repealed even under the Act of 2006. Reliance is placed upon para-17 of the Supreme Court judgment in Cantonment Board and another Vs. Church of North India, reported in (2012) 12 SCC 573, which is reproduced herein after:-

"Section 2(e) of the Public Premises Act defines "public premises." This section is split into two sub-sections. Sub-section (1) covers thereunder any premises belonging to or taken on lease or requisitioned by or on behalf of the Central Government. Sub-section (2) deals with premises belonging to or taken on lease or on behalf of various entities such as Government Companies, Universities, Major Ports etc. which are mentioned in that sub-section, and Cantonment Boards have come to be covered under sub-section (viii) by amendment with effect from 1.6.1994. The case of the respondent has been that the premises belong to Union of India, and, therefore, are public premises. The Estate Officer did have the jurisdiction over such premises. It is another matter that the premises of Cantonment Boards have also come under the definition of public premises since 1.6.1994. It cannot mean that the premises of Union of India which were always under the Public Premises Act, but under the Management of a Cantonment Board, since prior to this amendment, would not be covered under the Public Premises Act. This has been the plea of the appellants right from the beginning."

5. A division bench judgment of Delhi High Court in Jagat Singh Vs. The Estate Officer, Delhi is also relied upon to submit that the property in the management of cantonment since is otherwise vested in the Central Government as such the provisions of the Act of 1971 shall continue to apply even if the property is not a cantonment.

6. The submission advanced in that regard clearly has substance inasmuch as the cantonment notified under the Act of 1924 are clearly saved even under the Act

of 2006. Even otherwise 'public premises' defined in Section 2 (e) (1) of the Act of 1971, means any premises belonging to the Central Government, whether or not it is under the management of the Cantonment Board. Property of the Central Government would otherwise continue to be covered under the Act of 1971. A notification has otherwise been issued on 18.7.1978 in the Act of 1971 specifying the designated officer to act as the estate officer in respect of the premises under the administrative control of the Ministry of Defence.

7. In view of the above discussion, the objection raised on behalf of petitioner regarding applicability of the Act of 1971, in respect of the property in question, noticed in the order dated 6.10.2020 lacks merit and is rejected.

8. That demolition order is also assailed on the ground that exercise of power under Section 5A(2) of the Act of 1971 is impermissible in the facts of the case as the status of petitioner as an unauthorised occupant has not been determined under section 5 of the Act. Petitioner's right of appeal under Section 9 of the Act of 1971 has also been denied. It is submitted that in the facts of the present case the power under Section 5 of the Act has been impliedly invoked without following the procedure stipulated therein, and based thereon the power under Section 5A(2) of the Act has been exercised in such a manner that the petitioner's right of appeal is also denied.

9. Contention of the learned counsel for the petitioner, in this regard, is disputed by Sri S.K. Rai, learned counsel appearing for the respondent Cantonment Board.

10. In order to appreciate the contentions advanced, it would be appropriate to take note of the statutory scheme as it exists of the Act of 1971. Section 5 of the Act provides for eviction of unauthorised occupant. Sub section (1) of Section 5 of the Act provides that the estate officer after considering the cause shown pursuant to the notice under section 4 is satisfied that person is in unauthorised occupation, he can pass an order of eviction. Section 5 of the Act must precede a notice to the person concerned. The reply to notice needs to be considered where after a satisfaction has to be arrived at by the estate officer that the person is an unauthorised occupant. Such opinion of the estate officer is not conclusive under the Act but is subject to exercise of appellate jurisdiction in terms of Section 9 of the Act. The appeal lies before the District Judge of the concerned district. It is admitted that no notice has been issued to the petitioner under section 4 of the Act and determination of question whether the petitioner is an unauthorised occupant has not been made in the manner contemplated under the Act. In the event such determination was made a crucial right of appeal was also available which has not been provided to him.

11. Sri S.K. Rai, learned counsel for the Cantonment Board, on the other hand, submits that Section 5A (2) of the Act of 1971 contemplates an inquiry whether constructions have been raised in terms of the authority (whether by way of grant or by any other mode of transfer) under which the person was allowed to occupy such premises and would include the question as to whether such person is an unauthorised occupant? It is then urged that an unauthorised occupant since has no authority to remain in possession, therefore, the constructions raised by him are unlawful and can always be demolished in

exercise of jurisdiction under Section 5-A (2) of the Act of 1971. Reliance is placed upon a Division Bench judgment of this Court in Special Appeal No. 121 of 2015 (Union of India through Defence Estate Officer and another Vs. Shri Arun Saluza), reported in 2015 (3) ADJ 594, as also the Full Bench of this Court in Writ-C No. 40360 of 2015 (Yogesh Agarwal Vs. Estate Officer and 2 others).

12. Unlike Section 5 of the Act of 1971, which contemplates an inquiry in the nature of right of occupant to be in occupation of the property in question so as to determine his status as an unauthorised occupant, the power under Section 5A of the Act is distinct. Section 5 and 5A of the Act are reproduced:-

"5. Eviction of unauthorised occupants.--

(1) If, after considering the cause, if any, shown by any person in pursuance of a notice under section 4 and 1[any evidence produced by him in support of the same and after personal hearing, if any, given under clause (b) of sub-section (2) of section 4], the estate officer is satisfied that the public premises are in unauthorised occupation, the estate officer may make an order of eviction, for reasons to be recorded therein, directing that the public premises shall be vacated, on such date as may be specified in the order, by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction 1[on or before the date specified in the said order or within fifteen days of the date of its publication under sub-section (1), whichever is later,] the estate officer or any other officer duly authorised by the estate officer in this behalf 1[may, after the date so specified or after the expiry of the period aforesaid, whichever is later, evict that person] from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary.

5-A. Power to remove unauthorised constructions, etc:- *(1) No person shall:-*

(a) erect or place or raise any building or (any movable or immovable structure or fixture),

(b) display of spread any goods,

(c) bring or keep any cattle or other animal.

on, or against, or in front of, any public premises except in accordance with the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy such premises.

(2) Where any building or other immovable structure or fixture has been erected, placed or raised on any public premises in contravention of the provisions of sub-section (1), the estate officer may serve upon the person erecting such building or other structure or fixture, a notice requiring him either to remove, or to show cause why he shall not remove such building or other structure or fixture from the public premises within such period, not being less than seven days, as he may specify in the notice; and on the omission or refusal of such person either to show cause, or to remove such building or other structure or fixture from the public premises, or where the cause shown is not, in the opinion of the estate officer, sufficient, the estate officer may, by order, remove or cause to be removed the building or other structure or fixture from the public

premises and recover the cost of such removal from the person aforesaid as an arrear of land revenue.

(3) Where any movable structure or fixture has been erected, placed or raised, or any goods have been displayed or spread, or any cattle or other animal has been brought or kept, on any public premises, in contravention of the provisions of sub-section (1) by any person, the estate officer may, by order, remove or cause to be removed without notice, such structure, fixture, goods, cattle or other animal, as the case may be, from the public premises and recover the cost of such removal from such person as an arrear of land revenue."

13. Section 5A (1) of the Act provides that in the event any of the exigency specified in sub clauses (a), (b) and (c) occurs over any public premises inconsistent with the authority (whether by way of grant or by any other mode of transfer) under which the occupant was allowed to occupy such premises, then the structure so raised or offending action undertaken in terms of Sub clause (a), (b) and (c) could be removed. No remedy of appeal is contemplated in such exigency. The question is as to whether the estate officer can pass an order under Section 5A (2) of the Act solely on the ground that occupant is an unauthorised occupant even without holding him so in proceedings under Section 5 of the Act?

14. The statutory scheme is very clear. Determination of question with regard to the status of occupant as unauthorised occupant precedes an inquiry by issuing him notice under Section 4 of the Act and determination of his status after considering such reply, by the estate officer, subject to an order passed in appeal. Unlike the exigency dealt with under Section 5 of the Act, the power under Section 5A of the Act can be exercised in case of violation of Clauses (a), (b) and (c), in respect of public premises where the occupant is in possession of the premises pursuant to any grant or any other mode of transfer, where under he was allowed to occupy such premises, but the condition of such occupation has been breached. Section 5A(2) of the Act will not be attracted where exigency specified in Section 5A(1) of the Act is not attracted and the only allegation is that occupant is an unauthorised occupant. Unless the determination with regard to status of occupant as unauthorised occupant has been undertaken after following the procedure contemplated in Sections 4 and 5 of the Act, the direction to demolish construction under Section 5A(2) of the Act would not be permissible.

15. In the facts of the present case, the estate officer even without issuing notice under Section 4 of the Act and determination of petitioner's status as 'unauthorised occupant' has preceded against him on the ground that he is an unauthorised occupant. In case such a determination was to be made the petitioner had the remedy of filing appeal under Section 9 of the Act. Instead, what has been done is that without following the procedure contemplated under Sections 4 and 5 of the Act, which is subject to right to appeal under Section 9 of the Act, the authority has determined the petitioner's status as 'unauthrorised occupant' and has consequently directed the construction to be demolished. This clearly is a colourable exercise of power. Once the law require a thing to be done in a particular manner, it has to be done in that manner alone and not otherwise. *(see : Taylor Vs. Taylor, (1876) 1 Ch.D. 426)*

16. The Full Bench of this Court in the case of Yogesh Agrawal (supra)

examined the question as to whether an order passed under Section 5A of the Act is appealable under Section 9 of the Act of 1971 and whether the judgment in Sanjay Agrawal's case, which held it to be so, was correctly decided. While observing that right of appeal is a creature of statute observed that in the absence of any appeal stipulated against an order passed under Section 5A the remedy of appeal would not be available.It was also held that the judgment in Sanjay Agrawal's case does not correctly lay down the law. This judgment does not deal with the exigency that has arisen before this Court in the facts of the present case and, therefore, this judgment cannot be relied upon in support of the proposition urged.

17. So far as the judgment in case of Union of India through Defence Estate Officer and another Vs. Shri Arun Saluza (supra) is concerned, the question was with regard to the applicability of Section 5A of the Act. The Division Bench observed as under:-

"Now, it is in this background that we must construe the provisions of Section 5A. Sub-section (1) of Section 5A contains a prohibition on any person erecting or placing or raising any building or any movable or immovable structure or fixture; displaying or spreading any goods or bringing or keeping any cattle or other animal on, or against, or in front of, any public premises except in accordance with the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises.

In other words, what sub-section (1) of Section 5A does is to ensure, inter alia, that any erection or raising of a building or other immovable structure or fixture shall only be in accordance with the authority under which the person was allowed to occupy the premises. There is nothing in sub-section (1) of Section 5A to indicate that the provision shall not apply to those cases where the authority, whether by way of grant or by any other mode of transfer, under which a person was allowed to occupy the premises, was executed prior to 22 December 1980. The emphasis in sub-section (1) of Section 5A is on compliance with the provisions of the authority, whether by way of grant or any other mode of transfer, under which a person is allowed to occupy the premises by stipulating, inter alia, that no building shall be erected or raised except in accordance with that authority. Sub-section (2) of Section 5A allows the Estate Officer to issue a notice where any building or other immovable structure or fixture has been erected, placed or raised on any public premises in contravention of the provisions of sub-section (1), requiring the person erecting such a building, structure or fixture to either remove the structure or to show cause why it shall not be removed within a period which shall not be less than seven days. If the person either refuses to or omits to show cause or to remove the building, structure or fixture, or where the cause shown in the opinion of the Estate Officer is not sufficient, the latter has been empowered to pass an order for the removal thereof and for the recovery of the costs as arrears of land revenue."

18. It was observed by the Court that whether a person has been allowed to occupy the premises even prior to 22.12.1980 even then the provisions of Section 5A of the Act would be attracted though it was notified and make enforceable after 22.12.1980.

19. The fact that a valid permission exists in favour of the occupant to occupy

the premises, clearly indicates that the exigency contemplated under Section 5A (1) of the Act did arise in the facts of the that case. None of the two judgments relied upon by Sri S.K. Rai, learned counsel appearing for the respondent Cantonment Board comes to his rescue.

20. Sri Sumit Daga, learned counsel for the petitioner has placed reliance upon the judgment of this Court in Smt. Manju Arora Vs. Estate Officer, Meerut Cantonment and another, reported in 2018 (3) AWC 258. The case in Manju Arora is some what similar inasmuch as notice under Section 5A (1) of the Act of 1971 was issued to the occupant and the exercise of power under Section 5A (2) of the Act was based upon a finding that the occupant, in effect, is an unauthorised occupant. After noticing the rival contentions and upon an elaborate discussion on the question, this Court proceeded to observe as under:-

"51, In this regard, it is further to be noted that the Estate Officer, in the impugned order dated 05.02.2014 has referred to two inspection reports with the following description:-

"(iii) The site plan of B.No. 64, Church Road, Meerut cantt. Showing unauthorized constructions.

(iv) Inspection report dated 06.01.2011 of Sh. Ram Kumar, SDO-III & Shri S.C.Pant, SDO-II."

52. The date of the site plan showing unauthorized construction, referred to in the aforesaid order has not been disclosed. However, during the course of the argument Sri Mehta has stated that the site plan is the map annexed to the writ petition dated 2.2.2011. As discussed above, the said map does not support the allegations made in the show cause notice dated 3.2.2011. Some of the measurements of the 'offending structure' mentioned in the show cause notice are not to be found in the map measurements.

53. Also, the order refers to earlier inspection report dated 06.01.2011 of Sri Ram Kumar and Sri S.C. Pant which is not available with the petitioner and which has also not been brought on record by the respondent by choosing to not file counter affidavit in the present writ petition.

54. Thus, it emerges, while show cause notice was issued to the petitioner without confronting him with any adverse material and without giving him opportunity to rebut such material or information, the impugned order has been passed by relying on certain material which has in the first place been shown to be not supporting the fact allegation in the notice, inasmuch it cannot be said that the fact allegation made in the impugned order and/or the notice is supported by the inspection report and the map dated 2.2.2011. Also, at the same time, it cannot be said those fac allegations are supported by other inspection report dated 6.1.2011, as that report was neither supplied to the petitioner nor has been shown to this court.

55. Therefore, the impugned order cannot be allowed to stand on these facts and reason alone. The Estate Officer, howsoever right, it may claim to be and whatever be the bonafide of the action of that authority, he cannot be permitted to demolish a construction standing on a public premises without affording the noticee i.e. the petitioner a fair chance to defend the action. Demolition of structure, as has been rightly contended by Sri Arora would not only involve a financial loss to the petitioner but it would also render the petitioner homeless. Such serious consequences cannot be allowed to be visited upon any citizen without complete

fairness in procedure being followed by the authority vested with such powers."

21. This Court is in respectful agreement with the view taken in the case of Smt. Manju Arora (supra) and in light of what has been observed above, finds that the order passed by the authority under Section 5A(2) of the Act suffers from colourable exercise of power and cannot be sustained. The estate officer while passing such order has in effect usurped the jurisdiction which otherwise vested in the Statute by virtue of Section 5 of the Act and required a notice for such purposes to be issued under Section 4 of the Act. The consequence of the order passed is that the safeguards contemplated under Sections 4 and 5 of the Act have been ignored and the right of occupant under Section 9 of the Act of appeal has also been taken away. Since the authority competent is yet to adjudicate the status of petitioner with reference to the applicable provisions of law, therefore, this Court is not required to embark upon such inquiry at the first instance directly under Article 226 of the Constitution of India, as contended by Sri Rai, inasmuch as it would result in denial of statutory remedy of appeal etc.

22. Consequently, writ petition succeeds and is allowed. Order impugned dated 28.2.2020 passed by the Estate Officer, Meerut Cantt. Meerut, is hereby quashed. It shall, however, be open for the respondents to determine the question whether petitioner is an unauthorised occupant or not? The petitioner also undertakes not to raise any fresh construction or activity over the plot in question and would also not create any third party rights.

(2020)11ILR A380
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.09.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE VIVEK VARMA, J.

WRIT - C No. 14666 of 2020

Ramesh Chandra Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gaurav Tiwari, Sri Javed Khan

Counsel for the Respondents:
A.S.G.I., Sri Ashish Agrawal

A. Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Sections 13 and 17 – Auction of property – Alternative Remedy – Entertaining the writ petition granting interim relief have serious adverse impact on the right of bank and other financial institutions to recover their dues – Held, the petitioner has an alternative remedy before Debt Recovery Tribunal under Section 17 of the Act. (Para 9)

Writ Petition dismissed (E-1)

Cases relied on :-

1. United Bank of India Vs Satyawati Tandon & ors., (2010) 8 SCC 110

2. Authorized Officer, State Bank of Tranvancore & anr. Vs Mathew K.C. (2018) 3 SCC 85

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Vivek Varma, J.)

1. Heard learned counsel for the petitioner, Shri Ashish Agrawal, learned counsel for respondent nos.2 & 3 and the

learned Standing Counsel for the respondent no.1 and gone through the record.

2. By means of the present writ petition, the petitioner has invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India with the following prayer:

1. To issue a writ, order order or direction in the nature of certiorari for quashing the impugned notice dated 29.7.2020 issued by the respondent Bank;

2. To issue a writ, order or direction in the nature of mandamus restraining the respondent Bank from sale of the immovable property of the petitioner in pursuance to the impugned notice.

3. The submission of the learned counsel for the petitioner is that the impugned auction sale notice has been issued by the respondent Bank in an illegal manner without adopting the procedure prescribed under the Act which is nothing but to cause sheer harassment to the petitioner. It is further submitted that the impugned notice has been issued during pandemic of Covid-19 hence the auction of the respondent Bank requires interference in view of the fact that the vires of Section 2(o)(a) of the SARFAESI Act has been challenged by filing a Writ-C No.30846 of 2018. Despite the aforesaid fact, the respondent Bank has issued notice to the petitioner for auction of the immovable property of the petitioner.

4. Learned counsel for respondent nos.2 & 3 and the learned Standing Counsel for the respondent no.1 have refuted the submissions advanced by the learned counsel for the petitioner and contended that in terms of the E Auction Sale Notice, the date was fixed for auction on 19.8.2020. In view of Section 13(8) of the SARFAESI Act the petitioner is entitled to redeem the secured assets if he pays the entire amount before the sale/transfer of the secured asset. The petitioner was under legal obligation to pay the outstanding dues. It is further contended that the petitioner, even otherwise, can take all these objections before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. The language of Section 17 is wide enough to include any person who is aggrieved by the action taken under Sections 13(2) and 13(4) of the Act inasmuch as it uses the word 'any person (including borrower)'.

5. On perusal of the E Auction Sale Notice it transpires that the proceedings have been undertaken pursuant to steps taken under Section 13(2) & 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).

6. At this juncture, it would be appropriate to refer the decision of **United Bank of India Vs. Satyawati Tandon and others** reported in *2010 (8) SCC 110*, in which Hon'ble the Apex Court has observed that the writ petition ought not to entertain in view of the alternate statutory remedy available holding:-

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the

dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislation's enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

***

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

7. The aforesaid decision in **Satyawati Tandon *(Supra)*** has been reiterated and followed in various decision by the Hon'ble Apex Court. The reasons for not entertaining the petition where there is efficacious and alternative remedy available has been recently dealt with in extenso by the Hon'ble Apex Court in **Authorized Officer, State Bank of Travancore and another** reported in *2018(3) SCC85*, of which the relevant extract is reproduced as here under;

"9. The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for secularization and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

"10. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was held in Punjab National Bank vs. O.C. Krishnan and others, (2001) 6 SCC 569, that :-

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

8. Thus entertaining the writ petition granting interim relief have serious adverse impact on the right of bank and other financial institutions to recover their dues.

9. So far as the recovery of loan during lock down due to Covid-19 Pandemic is concerned, Reserve Bank of India has already announced certain moratorium on loan repayment. However, the moratorium is only deferral and not a waiver on payment of loan amount otherwise it would put the financial viability of banks at risk and depositors interest in jeopardy. The petitioner cannot be allowed to sit on the fence and wait and thereafter coming to the writ court for the redressal of his grievance.

10. In view of the aforesaid facts and circumstances, as the petitioner has an alternative remedy before the Debts Recovery Tribunal under Section 17 of the Act, we are not inclined to exercise our extraordinary jurisdiction in the matter. The impugned notice does not suffer from any error or illegality, hence the writ petition sans any merit is accordingly, dismissed.

(2020)11ILR A383
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

WRIT - C No. 14747 of 2020

Amit Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Kshitij Shailendra, Sri Vikrant Singh Parihar

Counsel for the Respondents:
C.S.C.

Useless Formality Theory-Contracts awarded by Department of Food Controller for certain centres cancelled for years 2020-21 ans 2021-22 and Petitioner blacklisted-as his mother was owner of rice mill-which was one of the disqualification-three days time granted to submit response-Petitioner instead replying sought three weeks time-impugned order passed-not illegal-mother being owner is admitted fact-false declaration given admitted-order cannot be illegal merely for being in violation of natural justice.W.P. dismissed.

Held, *It would be in such situation that' useless formality theory' may be pressed into if it would be reasonable to believe that a fair hearing would make no difference or that grant of a*

*fresh opportunity of hearing would not change the ultimate conclusion to be reached by the decision maker. In such situations, in our view, there would be no legal duty to grant a fresh opportunity of hearing and it may not be necessary to strike down the action and remit the matter back to the authority concerned to take a fresh decision.**(para 38)***

W.P. dismissed. (E-9)

List of Cases Cited:-

1. M/s. Vindhyawasini T. Transport Vs St. of U.P. & ors.,2018(4)ADJ 40 (DB)

2.M/s Erusian Equipment & Chemicals Ltd. Vs St. of W.B. & anr., (1975) 1 SCC 70

3.Raghunath Thakur Vs St. of Bihar & ors, (1989) 1 SCC 229

4.Mahabir Auto Stores & ors. Vs Indian Oil Corporation & ors., (1990) 3 SCC 752

5.Gronsons Pharmaceuticals (P) Ltd. & anr.Vs St. of U.P. & ors, AIR 2001 SC 3707

6.M/s. Kulja Industries Limited Vs Chief General Manager, W.T. Project, BSNL & ors.,(2014) 14 SCC 731

7.M/s Southern Painters Vs Fertilizers & Chemicals Travancore Ltd. & anr.,1994 Supp (2) SCC 699

8.Patel Engineering Ltd. Vs U.O.I., (2012) 11 SCC 257

9.B.S.N.Joshi & Sons Ltd. Vs Nair Coal Services Ltd. & ors,(2006) 11 SCC 548

10.Joseph Vilangandan Vs The Executive Engineer (PWD), Ernakulam & ors.,(1978) 3 SCC 36

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

1. Heard Sri Kshitij Shailendra, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. The present petition has been filed primarily seeking to raise a challenge to the order dated 21.07.2020 (annexure 1 to the writ petition) passed by the Divisional Food Controller, Kanpur Division, Kanpur (respondent no. 2) whereby the contracts awarded by the Department of Food and Civil Supplies, Uttar Pradesh, in favour of the petitioner, in respect of certain centres in District Farrukhabad, for the years 2020-21 and 2021-22 have been cancelled, and further the petitioner has been blacklisted by the department.

3. The principal ground sought to be canvassed in order to challenge the order dated 17.07.2020 is that the same has been passed in violation of the principles of natural justice and without affording a reasonable opportunity to the petitioner. It has been contended that the eligibility criteria prescribed under the government order dated 20.04.2018 is merely in the nature of a guideline and the contract granted to the petitioner could not be cancelled on the basis of the conditions prescribed therein. It is also sought to be argued that the order impugned has the effect of permanently blacklisting the petitioner which is not permissible under law. In this regard, reliance has been placed upon a judgment of this Court in **M/s. Vindhyawasini T. Transport Vs. State of U.P. and others**1.

4. Learned Standing Counsel appearing for the State respondents has supported the order by submitting that the award of handling and transport contracts by the Department of Food and Civil Supplies is governed by the policy guidelines contained under the government

order dated 20.04.2018 and the same are of a binding nature. It is submitted that the aforementioned guidelines contain a clear condition whereunder persons whose close relatives are wholesale dealers or *Aarhatiya* are ineligible for award of contracts. It is pointed out that along with the application submitted by the petitioner for award of contract, an affidavit had been filed stating that no near relative of the petitioner was a wholesale dealer or *Aarhatiya*. The aforesaid fact having been found to be incorrect inasmuch as upon a complaint the matter was inquired into and it was found that the petitioner's mother is an owner of rice mill; accordingly, a show cause notice was given to the petitioner, and in view of the undisputed fact that the petitioner was ineligible for the award of the the contract and that he had given a false declaration in his affidavit, the order impugned has been passed, which suffers from no illegality.

5. Rival contentions now fall for consideration.

6. A perusal of the material which has been placed on record indicates that the award of handling and transport contracts by the Department in Food and Civil Supplies Government of U.P. is governed in terms of the policy guidelines contained under a government order dated 20.4.2018. The eligibility conditions prescribed therein are contained under Clause 9 of the said policy guidelines, which is being extracted below :-

9-	आवेदन हेतु अनर्ह व्यक्ति/फर्म	1– आ 2– पारिवारिक जन तथा उनके निकटतम सम्बन्धी अथवा भागीदार ऐसे ठेकेदार जिसका पूर्व में भा0खा0नि0, खाद्य विभाग अथवा सम्बद्ध क्रय एजेन्सी से निलम्बित चल रहा हो अथवा ब्लैक लिस्ट हुआ हो, के सहभागिता की फर्म या कम्पनी आवेदन हेतु अर्ह नहीं होंगे। 3– ऐसा ठेकेदार जिसने विभाग से प्राप्त ठेका का कार्य करते समय किसी कालाबाजारी अथवा आपराधिक गतिविधियों में संलिप्त पाया गया हो अथवा उसने ठेके को किसी अन्य को सबलेट किया हो तथा ऐसा व्यक्ति जिसके विरूद्व आवश्यक वस्तु अधिनियम–1955 के उपबन्धों के अधीन दोष सिद्व हो, उसे आवेदन हेतु अनर्ह माना जायेगा।

7. In terms of a subsequent government order dated 25.5.2018 the conditions of eligibility under Clause 9 of the previous government order have been further clarified. Clause 2 of the subsequent government order dated 25.5.2018 is being extracted below :-

2– परिवहन एवं हैण्डलिग नीति के बिन्दू संख्या–09 में पारिवारिक जन तथा निकट संबंधी के अन्तर्गत निम्नवत सम्मिलित माने जायेगें:–

1.	Spouse
2.	Father
3.	Mother
4.	Son
5.	Son's wife
6.	Son's son
7.	Son's son's wife

8.	Son's daughter
9.	Son's daughter's husband
10.	Great grand son
11.	Great grand son's wife
12.	Daughter
13.	Daughter's husband
14.	Daughter's son
15.	Daughter's son wife
16.	Daughter's Daughter
17.	Daughter's Daughter's husband
18.	Grand Father
19.	Grand mother
20.	Great Grand Father
21.	Great Grand Mother
22.	Mother's Father/ mother
23.	Brother/ Sister
24.	Spouse of brother/ sister
25.	Spouse's father/mother
26.	Spouse's mother/ sister
27.	Spouse's father/ mother
28.	Spouse's brother/ sister
29.	Spouse of Spouse's brother/ sister
30.	Mother's brother/ sister and their spouse
31.	Father's brother/ sister and their spouse
32.	Grand father/ mother of spouse

8. The guidelines contained under government order dated 20.4.2018 also contain a proforma of the affidavit required to be submitted along with the application which clearly provides that in the event the applicant has made concealment of any fact, the candidature/contract would stand cancelled.

9. The petitioner has not disputed the fact that a show cause notice dated 17.7.2020 had been duly served upon him requiring him to submit his explanation by 20.7.2020 in respect of a complaint regarding his near relative being the owner of a rice mill and to explain as to why the aforesaid fact was concealed in the affidavit submitted by the petitioner at the time of participation in the tender proceedings. In terms of the show cause notice, the petitioner was required to submit an explanation for the same failing which he was to be blacklisted.

10. It appears that instead of submitting a specific response to the show-cause notice, the petitioner submitted an application on 20.7.2020 making a request for a further three weeks' time in order to submit his reply. Taking into consideration the fact that the Clause 9 of the guidelines under the government order dated 20.4.2018 prescribing the eligibility conditions for participation in the process of award of contract makes persons whose near relatives are mill owners or *Aarhatiya* as ineligible and the petitioner's mother having been reported to be owner of a rice mill on the basis of an inquiry made by the District Food Marketing Officer Farrukhabad, the affidavit submitted by the petitioner while participating in e-tender process, was found to be false, and accordingly in terms of the guidelines contained under the government orders dated 20.4.2018 and 25.5.2018, the contracts awarded to the petitioner have been cancelled and the petitioner has been blacklisted by the department.

11. The issue with regard to entitlement to a notice and a right to be

heard before blacklisting came up in the case of **M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr.**2 and referring to the powers of the State under Article 298 of the Constitution of India3 to carry on trade or business, it was held that the exercise of such powers and functions in trade by the State is subject to Part III of the Constitution and the State while having the right to trade has the duty to observe equality and cannot choose to exclude persons by discrimination. The relevant observations made in the judgment are as follows:-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

13. But for the order of blacklisting, the petitioner would have been entitled to participate in the purchase of cinchona. Similarly the respondent in the appeal would also have been entitled but for the order of blacklisting to tender competitive rates.

14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

16. In passing an order of blacklisting the Government department acts under what is described as a standardised code. This is a code for internal instruction. The Government departments make regular purchases. They maintain list of approved suppliers after taking into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations to warrant or if there is strong justification for believing that the proprietor or employee of the firm has been guilty of malpractices such as bribery, corruption, fraud, or if the

firm continuously refuses to return Government dues or if the firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servants. The petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending against the petitioners for alleged violation of provisions under the Foreign Exchange Regulations Act.

17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

12. The aforementioned proposition that no order of blacklisting could be passed without affording opportunity of hearing to the affected party was reiterated in the case of **Raghunath Thakur Vs.**

State of Bihar & Ors.4 wherein it was stated as follows:-

"4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order…"

13. The exercise of the executive power of the State or its instrumentalities in entering into a contract with private parties flowing from Article 298 of the Constitution including the power to enter or not into a contract came up for consideration in the case of **Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors.**5 and it was held that the decision of the State or any of its instrumentalities to enter or not into a contract being an administrative action the same would be open to a challenge on the ground of violation of Article 14 of the Constitution and would also be subject to the power of judicial review. The observations made in the judgment are as follows:-

"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar (1977) 3 SCC 457. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna Agarwal v. State of Bihar at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution,

and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3, Maneka Gandhi v. Union of India (1978) 1 SCC 248, Ajay Hasia v. Khalid Mujib Sehravardi (1981) 1 SCC 722, R.D. Shetty v. International Airport Authority of India (1979) 3 SCC 489 and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

x x x x x

18. ...we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

14. The requirement of grant of opportunity to show cause before blacklisting was restated in the case of **Gronsons Pharmaceuticals (P) Ltd. & Anr. Vs. State of Uttar Pradesh & Ors.**6 and it was held that since the order blacklisting of an approved contractor

results in civil consequences, the principle of *audi alteram partem* is required to be observed.

15. The power to blacklist a contractor was held to be inherent in the party allotting the contract and the freedom to contract or not to contract was held to be unqualified in the case of private parties; however when the party is State, the decision to blacklist would be open judicial review on touchstone of proportionality and the principles of natural justice. The relevant observations made in this regard in the case of **M/s Kulja Industries Limited Vs. Chief General Manager, W.T. Project, BSNL & Ors.**7 are as under:-

"17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court."

16. The aforementioned judgment has taken note of the fact that the principle of *audi alteram partem* has been held to be applicable to the process that may eventually culminate in the blacklisting of a contractor in the earlier judgments in **M/s Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd. & Anr.**8**, Patel Engineering Ltd. Vs. Union of India**9**, B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. & Ors.**10**, and Joseph Vilangandan Vs. The Executive Engineer (PWD), Ernakulam & Ors.**11.

17. It was held that even though the right of the petitioner may be in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to the powers of judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. In this regard reference was made to earlier decisions in **Radha Krishna Agarwal & Ors. Vs. State of Bihar & Ors.**12**, E.P. Royappa Vs. State of Tamil Nadu & Anr.**13**, Maneka Gandhi Vs. Union of India & Anr.**14**, Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors.**15**, Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.**16 **and Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay**17**.**

18. The legal position governing blacklisting in USA and UK was also

considered and it was noticed that in USA the term "debarring" is used by the statutes and the courts and comprehensive guidelines have been issued in this regard. The observations made in the judgment in this respect are as follows:-

"21. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression "blacklisting" the term "debarring" is used by the statutes and the courts. The Federal Government considers "suspension and debarment" as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guidelines are, therefore, issued by the government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment:

(a) Conviction of or civil judgment for.--

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as.--

(1) A wilful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A wilful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) x x x x x

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

22. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing

and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

19. In **Patel Engineering Ltd. Vs. Union of India**9, referring to the authority of the State and its instrumentalities to enter into contracts in view of the power conferred under Article 298 of the Constitution it was taken note of that the right to make a contract includes the right to not to make a contract; however, such right including the right to blacklist which could be exercised by the State is subject to the constitutional obligation to obey the command of Article 14. The observations made in the judgment in this regard are being extracted below:-

"13. The concept of "blacklisting" is explained by this Court in Erusian Equipment & Chemicals Limited v. State of W.B. (1975) 1 SCC 70, as under: (SCC p.75, para 20)

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains."

14. The nature of the authority of State to blacklist persons was considered by this Court in the abovementioned case and took note of the constitutional provision (Article 298), which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel State to enter into a contract, everybody has a right to be treated equally when State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the judgment in Erusian Equipment case that the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons is called blacklisting. State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The

authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary--thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

20. The aforementioned legal position has been considered in a recent judgment of this Court in **M/s Baba Traders Vs. State of U.P. and others**18.

21. We may thus reiterate that the right to enter into a contractual relationship is inherent in every person capable of entering into a contract with a concomitant right also not to enter into a contract. The right to refuse to enter into a contract however does not vest with the State and its instrumentalities in the same manner as it vests with a private individual. The right to enter into a contract by the State flows from the power under Article 298 of the Constitution and together with it is the right not to enter into a contract and the choice to blacklist any particular person with whom the State does not wish to enter into a contract. This decision however in case it is taken by the State or any of its instrumentalities is to be made reasonably and in accord with the principles of natural justice.

22. An order of blacklisting has the effect of depriving a person of equality of opportunity in the manner of public contract and in a case where the State acts to the prejudice of a person it has to be supported by legality. The activities of the State having the public element quality must be imbued with fairness and equality.

23. The order of blacklisting involves civil consequences and has the effect of creating a disability by preventing a person from the privilege and advantage of entering into lawful relationship with the government therefore fundamentals of fair play would require that the concerned person should be given an opportunity to represent his case before he is put on the blacklist. A fair hearing to the party before being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The applicability of the principle of *audi alteram partem* and the necessity of issuance of show cause notice also become imperative before passing of any such order of blacklisting.

24. In the instant case, the petitioner was duly served with a show cause notice calling upon him to submit his explanation in respect of the eligibility conditions provided under the guidelines for award of handling and transport contracts under the relevant government orders and to clarify the statement of fact made in this regard in his affidavit filed along with his application which had been filed while participating in the e-tender.

25. Counsel for the petitioner apart from reiterating that the petitioner had been granted only three days' time to submit a response to the notice did not dispute the fact stated in the report which had been submitted by the District Food Marketing Officer Farrukhabad wherein it had been found that the petitioner's mother was the owner of a rice mill namely M/s. Amit Rice

Mill. Counsel for the petitioner also could not dispute the fact that under Clause 9 of the guidelines contained under the government order dated 20.4.2018 prescribing the eligibility criteratia, the petitioner would be ineligible. Further, it has also not been disputed that the statement of fact mentioned in the affidavit along with the application submitted by the petitioner at the time of participation in the tender process was incorrect and false, in view of the fact that the petitioner's mother was the owner of a rice mill.

26. The question which therefore now falls for consideration is as to whether any prejudice was caused to the petitioner by not allowing further time to him to submit his explanation and also as to whether grant of any further opportunity would have made any difference in the outcome or that the same would have been a mere formality.

27. The question as to whether the Court in exercise of powers under Article 226 is bound to declare an order of the government passed in alleged breach of principles of natural justice as void or whether the Court can refuse to grant relief on the ground that the facts of the case do not justify exercise of discretion to interfere or for the reason that *defacto prejudice* has not been shown fell for consideration in the case of **M.C. Mehta Vs. Union of India and others**19, and it was held as follows :-

"15. It is true that whenever there is a clear violation of principles of natural justice, the courts can be approached for a declaration that the order is void or for setting aside the same. Here the parties have approached this Court because the orders of the Department were consequential to the orders of this Court. The question however is whether the Court in exercise of its discretion under Article 32 or Article 226 can refuse to exercise discretion on facts or on the ground that no de facto prejudice is established. On the facts of this case, can this Court not take into consideration the fact that any such declaration regarding the 10.3.1999 order will restore an earlier order dated 30.7.1997 in favour of Bharat Petroleum Corporation which has also been passed without notice to HPCL and that if the order dated 10.3.1999 is set aside as being in breach of natural justice, Bharat Petroleum will be getting two plots rather than one for which it has no right after the passing of the latter order of this court dated 7.4.1998?

16. Courts are not infrequently faced with a dilemma between breach of the rules of natural justice and the Court's discretion to refuse relief even though rules of natural justice have been breached, on the ground that no real prejudice is caused to the affected party."

28. On the point as to whether breach of principles of natural justice is in itself sufficient to grant relief and that no further *de facto prejudice* need be shown, the decisions in the case of **Ridge Vs. Baldwin20** and **S.L. Kapoor Vs. Jagmohan**21 were considered and it was stated as follows:-

"20. It is true that in Ridge v. Baldwin it has been held that breach of the principles of natural justice is in itself sufficient to grant relief and that no further de facto prejudice need be shown. It is also true that the said principles have been followed by this Court in several cases but we might point out that this Court has not laid down any absolute rule. This is clear from the judgment of Chinnappa Reddy, J. in S. L. Kapoor v. Jagmohan. After stating

that 'principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed' and that 'non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary', Chinnappa Reddy, J., also laid down an important qualification as follows :

"As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

29. The contention that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the court need not issue a writ merely because there is violation of principles of natural justice and as to whether relief can be refused where the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is to be followed, was considered by referring to the judgments of **Malloch v. Aberdeen Corporation**22, **Glynn v. Keele University**23, and **Cinnamond v. British Airports Authority**24 where such a view had been held. In particular the observations made by **Straughton, L.J., in R. v. Ealing Magistrates' court ex p Fannaran**25 that there must be 'demonstrable beyond doubt' that the result would have been different, were referred to.

30. The observations made by **Lord Woolf** in **Lloyd v. McMahon**26, were also noticed on the point that refusal of discretion in certain cases of breach of natural justice may not be disfavoured. The observations made by **Megarry, J.**, in **John v. Rees**28 stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down and that merits are not for the court but for the authority to consider, were also referred to.

31. The application of the principles of 'useless formality theory' as an exception to the principles of natural justice was discussed and it was pointed out that even in cases where the facts are not all admitted or beyond dispute, there is considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed.

32. We may gainfully refer to the case of **Malloch v. Aberdeen Corporation**22 (supra) wherein considering a challenge to a resolution on the ground that the same had been passed in contravention of the principles of natural justice inasmuch as the Committee had refused to receive written representations or to afford to the appellant a hearing before they passed the resolution, the following observations were made by **Lord Wilberforce,J.**

"The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him 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."

33. A similar view was taken in **Cinnamond v. British Airports Authority**24 wherein considering a challenge on the ground of violation of principles of natural justice based on the contention that no opportunity to make a representation has been given, **Brandon LJ.** observed as follows :-

"If I am wrong in thinking that some opportunity should have been given, then it seems to me that no prejudice was suffered by the plaintiffs as a result of not being given that opportunity. It is quite evident that they were not prepared then, and are not even prepared now, to give any satisfactory undertakings about their future conduct. Only if they were would representations be of any use. I would rely on what was said in Malloch v. Aberdeen Corpn (1971) 1 WLR 1578, first by Lord Reid and secondly by Lord Wilberforce. The effect of what Lord Wilberforce said is that no one can complain of not being given an opportunity to make representation if such an opportunity would have availed him nothing."

34. The applicability of the 'useless formality test' or the 'test of prejudice' in the context of the nature, scope and applicability of the principles of natural justice has been explained in **Dharampal Satyapal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati and others**27 and it was held that there may be situations where 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 and it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirements in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. The observations made in this regard in the judgment are as follows :-

"38. ...While the law on the principle of *audi alteram partem* has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural

justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

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.*, 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* 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. In *ECIL v. B. Karunakar* (1993) 4 SCC 727, the majority opinion, penned down by Sawant, J., while summing up the discussion and answering the various questions posed, had to say as under qua the prejudice principle: (SCC pp. 756-58, para 30)

"30. Hence the incidental questions raised above may be answered as follows:

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(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the

ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice' which in itself is antithetical to justice."

44. At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in *ECIL* (1993) 4 SCC 727 itself in the following words: (SCC p. 758, para 31)

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

45. Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in *R.C. Tobacco (P) Ltd. v. Union of India* (2005) 7 SCC 725.

47. In *Escorts Farms Ltd. v. Commr.*(2004) 4 SCC 281, this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to

completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms: (SCC pp. 309-10, para 64)

"64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these appeals preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India."

35. The aforementioned view that in a case where the facts are admitted and no amount of explanation can change the ultimate result -- the same being a *fait accompli*, a Division Bench of this Court has in its recent judgment in **Krishna Nand Rai Vs. State of U.P. and others**28 held that no purpose would be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, inasmuch as the defect was incurable.

36. In the facts of the present case, the petitioner does not dispute the fact that he had been duly served upon with a notice calling upon him to submit an explanation with regard to his disqualification as per terms of the eligibility criteria prescribed under the guidelines contained in the relevant government order. The petitioner has also not disputed the fact that his mother was indeed the owner of a rice mill and accordingly as per terms of the eligibility criteria he was not eligible. It has also not been denied that the declaration made by him in the affidavit filed along with his application while participating in e-tender in this regard was not correct. In view of the aforesaid facts, the contention sought to be raised on behalf of the petitioner that the opportunity granted was not reasonable, is not tenable.

37. We may reiterate that in a case of a mere technical infraction of principles of natural justice where the facts are admitted and undisputed and no prejudice can be demonstrated, there is a considerable case law and literature for the proposition that relief can be refused if the Court thinks that the case of the petitioner is not one of 'real substance' or that there is no substantial possibility of his success or that the result would not be different, even if fresh opportunity is to be granted.

38. It would be in such situation that 'useless formality theory' may be pressed into if it would be reasonable to believe that a fair hearing would make no difference or that grant of a fresh opportunity of hearing would not change the ultimate conclusion to be reached by the decision maker. In such situations, in our view, there would be no legal duty to grant a fresh opportunity of hearing and it may not be necessary to strike down the

action and remit the matter back to the authority concerned to take a fresh decision.

39. In our view, every violation of a facet of natural justice may not always lead to the conclusion that order passed is always null and void. The validity of the order is to be tested on the touchstone of 'prejudice' and in a case where the petitioner is not able to demonstrate real likelihood or certainty of prejudice, this Court may refuse to exercise its discretionary jurisdiction to interfere in the matter.

40. As regards the question whether the blacklisting can be for an indefinite period, we may reiterate that though blacklisting or debarment is recognised as an effective tool for disciplining deviant contractors but the debarment is never to be a permanent nature. In this regard, we may refer to the observations made in the judgment of the **M/s Kulja Industries Limited vs. Chief General Manager, W.T. Project, BSNL & Ors.**7, which are as follows :-

"25. Suffice it to say that "debarment' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the "debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor."

41. The aforementioned legal position that blacklisting or debarment for an indefinite period was not permissible in law was reiterated in **B.C. Biyani Projects Pvt. Ltd. Vs. State of M.P. & Ors.**29 and also the judgments of this Court in **M/s. Vindhyawasini T. Transport Vs. State of U.P. and others**1 and **M/s Baba Traders Vs. State of U.P. and others**19.

42. Although, the order impugned in the present case does not provide for a specific time period for which the petitioner has been blacklisted, it is worthwhile to take notice of the fact that the disability or ineligibility of the petitioner to be awarded the contract in view of the undisputed fact that his mother is the owner of a rice mill would continue as long as there is no variation in the eligibility criteria contained under the policy guidelines issued in terms of the relevant government orders. In the event, the eligibility criteria are varied or modified at a subsequent point of time and the petitioner comes within the prescribed eligibility criteria, it would always be open to him to apply before the authority concerned for withdrawing the order of blacklisting.

43. Subject to the aforesaid observations, the petition stands dismissed.

(2020)11ILR A401
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2020

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

WRIT - C No. 14950 of 2020

Kriti Giri ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shree Prakash Giri, Sri Sujeet Sinha

Counsel for the Respondents:
C.S.C.

Petitioner's semester examination for 2019-2020 cancelled and she would appear in 2020-2021-charges of unfair means by general order for 194 candidates-without any indication that explanation of Petitioner was been considered-Fresh order to be passed-W.P. disposed.

Held, Having regard to the foregoing discussion,the necessary implication would be that a person proceeded against is to be informed about the material on the basis of which the allegations made against him are founded so that he may have an opportunity of furnishing his explanation and putting forward his version. Thereafter, it would be for the authority concerned to evolve its own procedure so as to afford an opportunity to the person concerned. The procedure may vary with the facts, circumstances and nature of the case but the authority would be required to accord consideration to the explanation furnished and to take a decision in a fair and nonpartisan manner. **(para 22)**

W.P. disposed. (E-9)

List of Cases cited:-

1.Triambak Pati Tripathi v The Board of High School and Intermediate Education,U.P., Allahabad, AIR 1973All 1

2.Board of High School & Intermediate Education, U.P., Allahabad & anr. v Bagleshwar Prasad & anr., AIR 1966 SC 875

3. Wiseman & anr. v Borneman & ors., (1969) 3 WLR 706

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

1. Heard Sri Sujeet Sinha, learned counsel for the petitioner, Sri Pratik Chandra, learned counsel for respondent nos. 2 & 3 and Sri Shailendra Singh, learned standing counsel appearing for respondent no.1.

2. The present writ petition has been filed principally seeking to raise a challenge to an order/office memorandum dated 06.08.2020 issued by the respondent no.3/Examination Controller of the university whereby the petitioner has been communicated that her semester examination for the session 2019-2020 has been cancelled and that she would appear in the said semester examination during the session 2020-2021.

3. Upon the writ petition being taken up on 13.10.2020, this Court noticed the facts of the case and passed an order in the following terms:-

"...It is contended that the petitioner is a student of L.L.B., IIIrd Semester and during the examination of Trust & Equity, she was found using unfair means. An explanation was sought by a letter of the Examination Controller of the concerned University on 26th February, 2020. The petitioner submitted explanation through E-mail on 05.12.2019 and through Registered Post on 09.12.2019 denying the charges of unfair means. By the order dated 06.08.2020, 194 students had been held guilty of using unfair means and petitioner is placed at serial no.182 of the said list which has been brought on record as Annexure No.7 to this writ petition.

It is contended that the Controller of Examination has not decided the explanation so submitted by the petitioner and by a general order the explanation of 194 students has been rejected as using of unfair means on 06.08.2020 along with list of the candidates.

Matter requires consideration.

Let a counter affidavit be filed by the concerned University within a week.

Put up this case as fresh on 22.10.2020."

4. Counter affidavit on behalf of respondent nos.2 and 3 has been filed by the Deputy Registrar (Legal) of the respondent university today which is taken on record.

5. Counsel for the petitioner submits that the relevant material is already on record alongwith the writ petition and that he does not wish to file a rejoinder affidavit.

6. With the consent of the parties the writ petition is taken up for final disposal.

7. As per the pleadings in the writ petition, charges of use of unfair means were levelled against the petitioner in regard to the paper of "Trust & Equity" of the L.L.B. 3rd semester examination. It is submitted that the petitioner had submitted a detailed representation by means of an email dated 05.12.2019 and also by registered post dated 09.12.2019 addressed to the Examination Controller of the respondent university. In the representation the petitioner had submitted her explanation and denied the allegation of use of unfair means.

8. Attention of this Court has been drawn to the office memorandum dated 26.02.2020, issued by the respondent no.3/Examination Controller of the University enclosing therewith a list of candidates against whom there were charges of use of unfair means and containing directions to the Principals of the concerned colleges to obtain the explanation of the candidates so as to ensure that before any action is taken the version of the candidates may be considered in consonance with the principles of natural justice. The office memorandum dated 26.02.2020 reads as under:-

"पत्रांकः
प्रो0रा0सि0वि0वि0 / प0नि0का0 / 589 / 2020
दिनांकः 26 फरवरी, 2020

कार्यालय–ज्ञाप

विश्वविद्यालय की विषम सेमेस्टर परीक्षा–नवम्बर, 2019 के दौरान जिन परीक्षार्थियों को व्यक्तिगत / सामूहिक रूप से अनुचित साधन प्रयोग करते हुए आरोपित किया गया है, उनको प्राकृतिक न्याय के अनुपालन में उचित कार्यवाही करने से पूर्व उनका पक्ष जानने के लिए सम्बन्धित परीक्षार्थियों की सूची प्रेषित की जा रही है।

अतएव संलग्न सूची में उल्लिखित परीक्षार्थियों तथा उनके महाविद्यालय के प्राचार्यों से मुझे यह कहने का निदेश हुआ है कि विश्वविद्यालय द्वारा उपलब्ध कराये गये अनुचित साधन प्रयोग में आरोपित परीक्षार्थियों को अपने स्तर से सूचित करें तथा 10 कार्य दिवसों के अन्तर्गत उनका स्पष्टीकरण विश्वविद्यालय के डाक / पत्र प्राप्ति कार्यालय में हार्डकापी अथवा विश्वविद्यालय की ई–मेलः coeasua@gmail.com पर उपलब्ध कराना सुनिश्चित करें, जिससे कि उनके प्रकरणों का समय से निस्तारण सुनिश्चित किया जा सके। सम्बन्धित परीक्षार्थियों की सूची विवरण सहित संलग्न ळें

संलग्नक– विषम सेमेस्टर परीक्षा–नवम्बर, 2019 में अनुचित साधन प्रयोग से सम्बन्धित परीक्षार्थियों की सूची।"

9. In response the petitioner submitted another reply dated 03.03.2020 reiterating the facts stated in the explanation furnished by her through email dated 05.12.2019 and registered post dated 09.12.2019.

10. Thereafter, the impugned order/office memorandum dated 06.08.2020 has been issued by the Incharge, Controller of Examination of

respondent university whereby the decision of the "unfair means committee" has been communicated to the candidates. The name of the petitioner finds mention at serial no.182 of the list appended to the aforesaid office memorandum and the decision of the unfair means committee reads as under:-

"छात्र/छात्रा की सत्र 2019–20 की विषम समेस्टर परीक्षा निरस्त की जाती है। वह सत्र 2020–2021 में सम्बन्धित विषम सेमेस्टर की परीक्षा में सम्मिलित होगा/होगी।"

11. The contention of the learned counsel for the petitioner is that the decision of the unfair means committee, as communicated in terms of the office memorandum dated 06.08.2020, does not indicate any reason for cancelling the 3rd semester examination of the petitioner and there is absolutely no consideration of the reply/explanation which had been furnished by the petitioner. It is submitted that the entire exercise by the respondent university is in violation of the principles of natural justice and cannot be legally sustained.

12. The aforementioned contention was noticed by this Court in its order dated 13.10.2020 and thereafter the respondent university was directed to file a counter affidavit. In response thereof the counter affidavit which has been filed today on behalf of respondent nos.2 and 3 states that the unfair means committee considered the case of 300 students and finally issued the order dated 06.08.2020 against 194 candidates while 106 candidates were found not liable by the unfair means committee. There is absolutely no whisper in the counter affidavit that the reply of the petitioner containing her explanation was considered by the unfair means committee before a final decision was taken. The counter affidavit merely reiterates the allegations in regard to which the petitioner had given her explanation by means of the e-mail dated 05.12.2019 and also vide letter dated 09.12.2019 sent by registered post.

13. The decision of the unfair means committee, which has been communicated to the petitioner by means of the office memorandum dated 06.08.2020 only states that the semester examination of the petitioner for the session 2019-2020 stands cancelled and that the petitioner would appear in the semester examination to be held for the session 2020-2021. Although the office memorandum contains a recital to the effect that the representations submitted by the candidates had been considered, the remark mentioned against the name of the petitioner in the list appended thereto does not contain any reason for the decision arrived at by the unfair means committee. The office memorandum contains a general order in respect of the list of 194 candidates appended therewith, without any indication that the explanation submitted by the petitioner wherein she had denied the charges of use of unfair means had been considered by the unfair means committee before coming to its decision.

14. No material has been placed on record to demonstrate that the directives contained in the earlier office memorandum dated 26.02.2020 issued by the Examination Controller of the respondent university with regard to consideration of the reply/explanation of the candidates concerned in accordance with the principles of natural justice while examining the charges of unfair means against them, has been followed.

15. Despite time having been granted to the respondent authorities of the

university to submit their version in respect of the contention of the petitioner that her reply/explanation had not been considered by the "unfair means committee" while holding her guilty of the charges, the counter affidavit which has been filed also does not refer to any material to show that the reply/explanation which had been called for by the respondent university itself in terms of its earlier office memorandum dated 26.02.2020, was considered by the unfair means committee while arriving at the decision under which the examination of the petitioner for the semester examination has been cancelled.

16. It is no doubt true that ordinarily the Court would not interfere in decisions taken by the educational authorities particularly with regard to a matter relating to examinations and that the standards and the purity of the examination process is to be maintained and with this objective in mind the action taken by the educational institutions in cases where unfair means have been adopted, is usually sustained.

17. At the same time, it cannot be denied that any action taken by the educational authorities in this regard is required to conform to standards of fairness and the action taken should be free from arbitrariness. This is moreso in a case where the consequence of any decision declaring a candidate as having used unfair means has the effect of tainting his/her academic career with a blot and has further adverse civil consequences. It is for this reason that before holding the examinee guilty of the charges of use of unfair means his/her explanation ought to be called for and accorded consideration.

18. This consideration of the explanation furnished by the candidate is required to be made in a manner which is *bona fide* and should not be an empty formality.

19. The applicability of the principles of natural justice in matters relating to an enquiry into the use of unfair means in examinations fell for consideration before a Full Bench of this Court in **Triambak Pati Tripathi v The Board of High School and Intermediate Education, U.P., Allahabad**1, and it was held that the essential principles which are to be observed in this regard include giving of notice of the charges and an opportunity to make a representation to explain the allegations and that the proceedings to be conducted by the authority should be in good faith and should not be biased.

20. A similar view had been taken in an earlier decision in **Board of High School and Intermediate Education, U.P., Allahabad and another *v* Bagleshwar Prasad and another**2, which was also a case in respect of charges of use of unfair means, and it was held that enquiries in this regard should be fair and students against whom charges are framed must be given adequate opportunity to defend themselves and principles of natural justice should be followed.

21. The principle that natural justice requires the procedure to be fair in all circumstances was emphasised in **Wiseman and another *v* Borneman and others**3 and it was stated by **Lord Morris of Borth-Y-Gest**, as follows:-

"The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only fair play in action."

22. Having regard to the foregoing discussion the necessary implication would be that a person proceeded against is to be informed about the material on the basis of which the allegations made against him are founded so that he may have an opportunity of furnishing his explanation and putting forward his version. Thereafter it would be for the authority concerned to evolve its own procedure so as to afford an opportunity to the person concerned. The procedure may vary with the facts, circumstances and nature of the case but the authority would be required to accord consideration to the explanation furnished and to take a decision in a fair and non-partisan manner.

23. In the present case no material has been placed on record by the respondents to demonstrate that the authorities have accorded consideration to the explanation furnished by the petitioner against whom an order having adverse civil consequences has been passed.

24. Sri Pratik Chandra, learned counsel appearing for respondent nos.2 and 3 has not disputed the aforesaid legal and factual position and fairly submits that the reply/explanation submitted by the petitioner would be duly considered by the respondent no.3 within a period of two months from today and a fresh order would be passed.

25. Having regard to the aforementioned facts and circumstances and as agreed to by the counsel for the parties, the writ petition is disposed of leaving it open to respondent nos.2 and 3 to pass an order after according due consideration to the reply/explanation submitted by the petitioner within a period of two months from the date of presentation of a copy of this order. The order/office memorandum dated 06.08.2020, in so far as it relates to petitioner, shall abide by the fresh order to be passed as aforesaid.

26. It is made clear that this Court has not expressed its view with regard to the merits of the claim of the petitioner.

(2020)11ILR A406
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE VIVEK VARMA, J.

WRIT - C No. 15581 of 2020

M/s. Rafiq Traders & Ors. ...Petitioners
Versus
D.M., Jalaun Place Orai & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vineet Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Satish Chaturvedi, Sri P.P. Srivastava

Civil Law- SERFAESI Act,2002-Section 13 (2) & 13 (4)- Proceedings against Petitioner u/s 13 (2) and 13 (4)-against which Writ filed-same was dismissed for availability of alternative remedy u/s 17(1) of the Act-Bank has instituted Suit for recovery of outstanding dues-is pending-meanwhile-District mgistrate passed an order u/s 14(1) of the Act for taking possession of property-There is no violation of natural justice-Petitioner not availed the alternative remedy and cocealed the same-no illegality in the order impugned.

W.P. dismissed. (E-9)

List of Cases cited:-

1. Harshad Govardhan Sondagar Vs International Assessts Reconstruction Company Limited & ors., (2014) 6 SCC 1

2. Kalyani Sales Company & anr. Vs U.O.I. & anr., 2006 AIR (Punjab) 107.

3. Dalip Singh Vs St. of U.P. & ors., (2010)2 SCC 114.

4. Assistant Commissioner, Commercial Tax Department Vs Shukla & brothers, (2010) 4 SCC 785.

5. Asit Kumar Kar Vs St. of W.B. & ors., 2009(2) AWC 1628.

6. Ghurahoo Prasad @ G. Prasad & ors. Vs St. of U.P. & ors., 2018 (10) ADJ 748.

7. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors., (1998)8 SCC 1.

8. Authorized Officer, State Bank of Travancore & anr. Vs Mathew K.C.

9. Jafar Ahmad Khan Vs St. of U.P. & ors. (Writ-C No. 33616 of 2018), decided on 14.12.2018.

10.U.O.I. Vs Satyawati Tandon, (2010) 8 SCC 110

11.I.TC Limited Vs Blue Coast Hotel, (2018) LW 492,

12.St. of Mah. Vs Digamber, 1995(4) SCC 683

13.ICICI Bank Ltd. Vs Umakanta Mohapatra, 2019(13) SCC 497

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Vivek Varma, J.)

1. Heard Shri Vineet Kumar Singh, learned counsel for the petitioners, Shri Satish Chaturvedi and Shri P.P. Srivastava, learned counsel for the respondent Nos. 2 and 3 and learned Standing Counsel representing respondent No. 1.

2. The instant petition has been filed by the petitioners under Article 226 of the Constitution of Indian seeking the following relief:

"1. Issue a suitable writ, order or direction in the nature of certiorari quashing the impugned order dated 13.8.2020 passed by the District Magistrate, Jalaun at Orai in Case No. 49 of 2020 (State Bank of India, Main Branch Orai Vs. M/s Rafiq Traders and others) and the impugned order dated 10.1.2020 passed by the District Magistrate, Jalaun at Orai in Case No. 46 of 2020 (State Bank of India Vs. Rafiq Traders and others) (Annexure Nos. 8 and 5 to the writ petition.

2. Issue a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the impugned orders referred to above.

3. Issue a suitable writ, order or direction in the nature of mandamus commanding the respondents to adjourn the proceeding initiated under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2020 against the petitioners until the decision in Original Suit No. 209 of 2018 (State Bank of India Vs. M/s Rafiq Traders and others), pending in the Court of Civil Judge (SD), Jalaun at Orai."

3. Proceeding has been undertaken against the petitioners pursuant to the steps taken under Section 13(2) and 13(4) of *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2020* (hereinafter referred to as the SARFAESI Act"). From the perusal of the record, it transpires that against the aforesaid proceeding, the petitioners had already approached this Court by filing Writ-C No. 12422 of 2019 (M/s Rafiq Traders Vs. State Bank of India and another) and a Coordinate Bench of

this Court, after considering the submissions of the learned counsel for the petitioners in that writ petition, dismissed the petition as not maintainable on the ground of availability of alternative remedy of filing application/appeal under Section 17(1) of the SARFAESI Act.

4. However, the petitioners have not availed the remedy of appeal under Section 17(1) of SARFAESI Act and again approached this Court for quashing of the impugned order which has been passed by the District Magistrate, respondent No. 1 in exercise of powers under Section 14(1) of SARFAESI Act. The petitioners also challenged the order whereby the recall/restoration application moved by the petitioners for recalling the order dated 10.1.2020 has also been rejected by the District Magistrate, Jalaun by order dated 13.8.2020.

5. This is how the petitioners have again approached this Court.

6. Learned counsel for the petitioners submits that without considering the objections of the petitioners and without giving any opportunity of hearing to the petitioners, the impugned order dated 10.1.2020 has been passed by respondent No. 1, which is absolutely unjust, illegal and arbitrary.

7. Learned counsel for the petitioners further contended that for the same cause, the respondent-bank has instituted a civil suit being Original Suit No. 209 of 2018 in the court of Civil Judge (SD), Jalaun seeking recovery of outstanding dues from the petitioners by way of attaching and subjecting the disputed property to auction proceeding, which is still pending for consideration. When the suit filed by the respondent-bank for recovery of the dues was pending, the District Magistrate has erred in passing the order which is in clear violation of the Principle of Natural Justice.

8. Learned counsel for the petitioners in support of his submissions, has relied upon the following decisions of Hon'ble Supreme Court as well as of High Courts:

1. **Harshad Govardhan Sondagar Vs. International Assessts Reconstruction Company Limited and others**, (2014) 6 SCC 1.

2. **Kalyani Sales Company and another Vs. Union of India and another**, 2006 AIR (Punjab) 107.

3. **Dalip Singh Vs. State of Uttar Pradesh and others**, (2010)2 SCC 114.

4. **Assistant Commissioner, Commercial Tax Department Vs. Shukla and brothers**, (2010) 4 SCC 785.

5. **Asit Kumar Kar Vs. State of West Bengal and others**, 2009(2) AWC 1628.

6. **Ghurahoo Prasad alias G. Prasad and others Vs. State of U.P. and others**, 2018 (10) ADJ 748.

7. **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others**, (1998)8 SCC 1.

9. Learned counsel for the petitioners has contended that in the above noted cases, the writ petitions have been entertained and the Hon'ble Apex Court has consistently held that alternative remedy is not a bar for the enforcement of fundamental right or when there is violation of principle of natural justice.

10. Learned counsel appearing on behalf of respondent Nos. 2 and 3 has refuted the contention of the learned

counsel for the petitioners and has submitted that there is no illegality or perversity in the order passed by the District Magistrate in initiating the proceeding in exercise of powers under Section 14 (1) of the SARFAESI Act for taking possession of the property in question. The Magistrate was well within his jurisdiction in passing the impugned order.

11. Learned counsel for the respondents further submits that the petitioners have not approached this Court with clean hands as is evident from the pleadings as the petitioner has earlier approached this Court against the proceeding initiated against them under Section 13(2) and 13(4) of the Act. At that stage, the petitioners had never replied to the notice issued under Section 13(2) by the Bank for the realization of the loan amount. If he would have filed the objection within stipulated period of 60 days, it could have been considered by the bank, but failure on the part of the petitioners to reply to the notice, the Bank has proceeded under Section 13(4) of the Act for taking possession of the property in question. Even, thereafter, the petitioners had an alternative remedy to approach the Bank, but on account of their failure to do so, the proceeding under Section 13(4) of the Act was initiated against them.

12. Being aggrieved by the said proceeding, the petitioners had filed writ petition, which too has been dismissed vide order dated 22.4.2019 directing the petitioners to avail alternative remedy as provided under Section 17(1) of the SARFAESI Act. The said remedy was not availed by the petitioners and now when the order has been passed by the District Magistrate on the application moved by the Bank-authority for initiating proceeding for taking possession of the property in question, the petitioners had made a futile exercise for moving an application for recall of the said order, which too has been rejected by respondent No. 1.

13. Learned counsel for the respondents No. 2 and 3 has relied upon the decision of Hon'ble Supreme Court **in Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C.** and the decision of this Court in J**afar Ahmad Khan Vs. State of U.P. and others (Writ-C No. 33616 of 2018)**, decided on 14.12.2018.

14. Hon'ble Apex Court in **Mathew K.C. (Supra)** has held that if alternative remedy is available, normally the writ petition under Article 226 of the Constitution of India ought not to be entertained. In the aforesaid case, Hon'ble Apex Court has relied upon various decisions, particularly, **Union Bank of India Vs. Satyawati Tandon**, (2010) 8 SCC 110.

15. Hon'ble Apex Court in **Satyawati Tandon (Supra)** has held as under:

"Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved persons and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind

that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

16. In similar circumstances, this Court in **Jafar Ahmad Khan (Supra)** dismissed the writ petition.

17. As the petitioners have alternative remedy of approaching the DRT, hence the petitioners do not deserve any indulgence by this Court.

18. We have considered the submissions advanced by the learned counsel for the parties and have gone through the case law relied upon by the learned counsel for the parties. The proceeding initiated against petitioner No. 1 by issuing demand notice dated 11.10.2018 under Section 13(2) to discharge in full its liabilities amounting to Rs. 8,78, 428/- within a period of 60 days. The aforesaid notice was also served upon the guarantors, who were arrayed as petitioners No. 2 to 4 to clear the outstanding dues of respondent-bank and on failure to pay the outstanding dues, the Bank has initiated proceeding under sub-clause (4) to Section 13 of the Act for taking symbolic possession of the disputed property by way of issuing notice dated 26.2.2019.

19. At this juncture, there is no pleading of the petitioners that they have filed any objections to the demand notice or to the possession notice, rather the petitioners have earlier approached this Court under Article 226 of the Constitution of India for quashing of the proceeding initiated by the Bank-authority. The said petition came to be dismissed on 22.4.2019 directing the petitioners to avail alternative remedy available by filing appeal under Section 17(1) of the SARFAESI Act. Again no reason was indicated in the pleading as to why the petitioners avoided to approach the DRT and it is also not the case of the petitioner No. 1 that he had made any attempt to approach the Bank for the repayment of his loan after the account of the petitioner No. 1 has been declared NPA and only when the respondent-Bank approached the District Magistrate for taking possession of the property in question and the District Magistrate has passed the order under Section 14 of the Act, the petitioner moved a recall application for recalling the order dated 10.1.2020 and for the first time a plea has been taken that the petitioner was not afforded any opportunity of hearing prior to passing of the aforesaid order.

20. For ready reference, Section 14 of the SARFAESI Act is being reproduced herein under:

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets (within a period of thirty days from the date of application):

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons

beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

21. We are conscious of the settled law that discretionary power under Article 226 of the Constitution is not absolute and can be exercised judiciously in given facts of a case and in accordance with law. In view of the availability of statutory remedy available to the petitioners under Section 17(1) of the Act, the petition is liable to be dismissed at the threshold.

22. In **I.TC Limited Vs. Blue Coast Hotel,** (2018) LW 492, Hon'ble Apex Court was of the the view that debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief. In the aforesaid case, the Hon'ble Apex Court was of the view that non-compliance of sub-section 3(A) of Section 13 cannot be of any avail to the debtor whose conduct has been merely to seek time and not to repay the loan as promised.

23. In the case of **State of Maharashtra Vs. Digamber**, 1995(4) SCC 683, Hon'ble Supreme Court observed as under :

"Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is has cautioned time and again as to what particular rule of natural justice to be applied to a particular case must depends upon the facts and circumstances of that case. If some principle of nature justice has been contravened, the Court has to decide whether the observance of that rule is necessary on the just decision of the case for that reason, a person's entitlement for relief from a High Court under Article of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblame-worthy conduct of the person seeking relief, and the Court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blame- worthy conduct.

24. Hon'ble Supreme Court very recently in **ICICI Bank Limited Vs. Umakanta Mohapatra**, 2019(13) SCC 497 held as under:

" Delay condoned.
Leave granted.

Despite several judgments of this Court, including a judgment by Hon'ble Mr. Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are Non-Performing Assets (NPAs).

The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:-

"18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, observing:-

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside.

The appeals are allowed in the aforesaid terms.

Pending applications, if any, shall stand disposed of."

25. Hon'ble Apex Court has cautioned time and again as to what particular rule of natural justice to be applied to a particular case must depend to a great extent upon the facts and circumstances of that case. If some principle of nature justice has been contravened, the Court has to decide whether the observance of that rule is necessary for a just decision on the facts.

26. In the case in hand, the order passed by the District Magistrate cannot said to violative of Principle of natural justice. In fact, it is specifically observed that the petitioner No. 1 has neither paid any heed to the notice, which was issued under Section 13(2) of the Act nor filed any objection with respect to the demand for repayment of dues of the bank. Thus, it does not lie in the mouth of the petitioner to say that the District Magistrate has passed the order without assigning any reasons or opportunity of hearing ought to have been given to the petitioners.

27. The cases, which have been cited by the learned counsel for the petitioners are not at all applicable to the facts of the present case.

28. In **Harshad Govardhan Sondagar (Supra)** the case of the appellant before the Hon'ble Apex Court was dispossession of the premises under Section 14 of the Act was against the lessees of the borrowers and their claim was that they are entitled to remain in possession of the secured assets and in that light the order was passed to give opportunity of hearing to the appellant-lessees and the secured

creditor. In the said case it has been laid down by the Hon'ble Apex Court that merely filing of a suit by the secured creditor would not debar the bank to proceed under the SARFAESI Act.

29. **Kalyani Sales Company (Supra)** was a case related to pecuniary jurisdiction of the DRT and the recovery tribunal was directed to entertain and decide the appeal filed by the petitioner in accordance with law on payment of fixed court fee pursuant to the proceeding under Section 13(4) of the Act.

30. In **Dalip Singh (Supra)**, the Hon'ble Apex Court has imposed cost upon the petitioner, who had approached the Court under Article Article 136, 226 and 32 of the Constitution of India with unclean hand. It has been observed that If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

31. In **Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota (Supra)**, Hon'ble Apex Court reminded the High Courts that while exercising powers under Article 226 of the Constitution, there should be some reasoning recorded by the Court declining or granting relief to the petitioners as in the said case, it was a non-speaking order in just one paragraph and that is why the Hon'ble Apex Court interfered and remanded the matter.

32. The facts involved in **Asit Kumar Kar and Ghurahoo Prasad alias G. Prasad and others (Supra)** are also not applicable to the facts of the present case.

33. In **Whirlpool Corporation (Supra)** question of jurisdiction was involved, hence the writ petition was entertained even though there was an alternative remedy.

34. The second submission of the learned counsel for the petitioners is that the suit filed by the bank is pending and the District Magistrate has ignored this fact and proceeded to pass the order under Section 14(1) of the Act.

35. The answer to this question is Section 34 of the SARFAESI Act, which is extracted herein below:

*"**34. Civil court not to have jurisdiction.**--No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."*

36. From the perusal of second limb of Section 34 of the Act, it would reveal that no injunction can be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

37. In view of the above provision, the petitioner cannot derive any benefit of this objection also.

38. In the case in hand, the petitioners, who had earlier approached this Court, had an alternative remedy against

the proceeding under Section 13(2) and 13(4) to approach the DRT, but has not approached before the appropriate forum and there in no candid disclosure of the relevant material facts as to the reasons why they have not availed the alternative remedy, which clearly speaks in volume that they are not interested to repay the loan, which was taken by petitioner No. 1 by way back in the year 2018 and was trying to linger on repayment on one ground or the other.

39. The pleadings in the writ petition are very bald and the allegations of violation of principle of natural justice is rhetorical, as such the relief sought by the petitioners is highly misconceived. The writ petition is not instituted to show any bonafide from any remote corner but only to somehow install further action of the bank-secured creditor. It cannot be said that the orders passed by the District Magistrate are without jurisdiction or non-speaking. There is no illegality or infirmity in the impugned orders passed by the District Magistrate, which may call for any interference.

40. In view of what has been indicated herein above, we find no justification for invoking our extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petition sans any merit is accordingly dismissed.

(2020)11ILR A415
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2017

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE RAJIV LOCHAN MEHROTRA, J.

WRIT - C No. 63120 of 2014

Kaden Glen Edward Moore ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishnu Gupta, Sri B.K. Singh Raghuvanshi, Sri Chandan Sharma

Counsel for the Respondents:
C.S.C.

Civil Law- Right to Fair Compensation and Transperency in Land Acquisition, Rehabilitation and Resettlement Act,2013-Section 19-Lease was for 50 years-got determined on 3rd November,1958-not extended-no material placed-neither Petitioner nor his predecessors could claim any right of compensation as the land stood vested in State after determination of lease-W.P. dismissed.
(E-9)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J. & Hon'ble Rajiv Lochan Mehrotra, J.)

1. This writ petition has been filed praying for a mandamus commanding the respondents particularly the Collector, Allahabad to declare an award in terms of Section 11 read with Section 11(A) of the Land Acquisition Act, 1894 and now in terms of Section 19 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

2. The background in which this writ petition has been filed is that the land in relation to site no. 34 Civil Station, Allahabad was proposed to be acquired and proceedings were undertaken by issuing notifications under Sections 4 and 6 of the Land Acquisition Act, 1894. After acquisition of the land the same was handed over to the Allahabad Development Authority for development and its

utilization for purposes including commercial purpose. It is undisputed that the said land came to be developed and then was also negotiated and settled by the Allahabad Development Authority. The acquisition was, therefore complete and possession had also been taken.

3. The acquisition, according to the stand taken in the counter affidavit came to be challenged before this Court in Writ Petition No. 6071 of 1986 by the original lessee and some other persons claiming title over the property being Writ Petition No. 6697 of 1986. Both the writ petitions were dismissed, whereafter the possession of the property came to be delivered to the Allahabad Development Authority on 30th January, 1997.

4. Other writ petitions with regard to unauthorized constructions standing thereon that were filed came to be dismissed on 21st May, 1997.

5. Writ Petition No. 6697 of 1986 was filed by the predecessor in interest of the petitioner namely Mrs. Moira Lilian More, this writ petition remained pending till 2005. In between one Maha Lakshmi Trust filed Writ Petition No. 47912 of 2000 which was a third round of litigation in relation to the same property. An objection was taken in the said writ petition that the land had already been vested in the State and therefore, there was no occasion to acquire a land which had already vested in the State. The issue relating thereto was taken into consideration and the writ petition was dismissed on 22nd December, 2010, copy of the said order has been filed as Annexure No. 1 to the counter affidavit dated 24th February, 2015.

6. It is in this background that Writ Petition No. 6697 of 1986 filed by the predecessor in interest of the petitioner referred to hereinabove, came to be disposed of on 15th December, 2005 by the following directions.

" Heard the learned counsel for the appellant Sri Vishnu Gupta and learned counsel for the respondents Sri Ashok Mohilay.

The challenge of notification under Sections 4 and 6 of the Land Acquisition Act has been given up by the petitioner. Now it has been submitted by the learned counsel for the petitioner that no award u/s 11 and 11A has been passed. The same may be decided in accordance with law within a period of two months from the date of fling of certified copy of this order.

With the aforesaid direction, the writ petition is disposed of."

7. Since the said direction was not complied with, a contempt application was filed praying for taking action under the Contempt of Court Act. The contempt application was rejected on 1st September, 2011 being Contempt Application No. 4196 of 2011, copy of the order has been filed as Annexure No. 7 to the writ petition.

8. The petitioner has come up complaining that after the dismissal of the contempt application, since the petitioner had no remedy, and that no action had been taken by the respondents in proceeding to declare the award and pay compensation, therefore, the necessity arose to file the present writ petition.

9. The present writ petition was filed in the year 2014 in which affidavits were invited and the State has filed its counter affidavit through Dr. Basant Agrawal Special Land Acquisition Officer, Nagar

Mahapalika, Allahabad. Along with the said counter affidavit the lease deed of the property executed on 25th June, 1910 has been placed on record. The said lease deed extends the benefit of a lease of 50 years w.e.f. 4th November, 1908 till 3rd November, 1958.

10. The terms of the lease do not indicate any provision for extension of the lease beyond the period of 50 years with a power of reentry and a further rider that the occupant shall not claim any compensation or payment from the State in respect of any building erection fixture or any of them upon the said premises or any part thereof.

11. The stand, therefore, of the respondents is that once the lease stood determined with no extension after 1958, then the petitioner or the predecessors of the petitioner could not claim any right of compensation over the land as the land stood vested in the State free from all encumbrances. It is for the said reason that the procedure of compensation or declaration of award has not been made in the present case.

12. Having gone through the records and having perused the rejoinder affidavit filed by the petitioner to the aforesaid counter affidavit, we do not find any material that may establish a subsisting right in favour of the petitioner for claiming compensation or for even declaration of an award under Section 11 of 1894 Act. Consequently, in the absence of any right title or interest surviving in favour of the petitioner a mandamus as prayed for in the background aforesaid cannot be issued.

13. Learned counsel has urged that an application for renewal of the lease had been filed which is pending consideration. From the rejoinder affidavit, we find that the said application for renewal is dated 1st September, 1969, eleven years after the expiry of the tenure of lease. There is no order passed on the said application and even otherwise no right subsisted to enable the petitioner so as to claim renewal.

14. The writ petition, therefore being devoid of merits, is hereby **dismissed**.

(2020)11ILR A417
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.11.2020

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Bail No. 5384 of 2020

Abhishek Srivastava ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Pranjal Krishna, Pooja Mishra, Shivam Pandey

Counsel for the Opposite Party:
G.A.

Criminal Law – Code of Criminal Procedure,1973 -Section 167(2) -In these bail application involved an identical question of law – on the ground of default on the part of the prosecution to file the charge sheet under section 167(2) Cr.P.C.

Once the charge sheet was filed under section 167(2) Cr.P.C. would become inapplicable and the accused who failed to avail the right would stand deprived of claiming the benefit of default. (Para 19)

Investigation is complete with the filing of charge sheet, therefore, the limitation embodied under section 167(2) must be seen

on the date of filling of the charge sheet in the court and any other date suggesting completion of investigation is irrelevant and does not satisfy the requirement of law. (Para 32)

The right was very much alive when the charge sheet was filed in court on 05.05.2020 and survived thereafter. The applicant is entitled to be enlarged on bail. (Para 32) (E-2)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Pranjal Krishna, learned counsel for the applicant in Bail No. 5384 of 2020, Sri Sushil Kumar Singh, learned counsel for the applicant in Bail No. 5756 of 2020 and learned AGA for the State. Perused the record.

2. These two bail applications involve an identical question of law. In both the applications, the right of personal liberty embodied under Article 21 of the Constitution of India is pressed on the ground of default on the part of the prosecution to file the charge sheet within the statutory period as provided under Section 167(2) of Code of Criminal Procedure (Cr.P.C.).

3. Learned counsel for the applicants would contend that personal liberty of a citizen is fundamental and the same cannot be curtailed without following due procedure prescribed under law.

4. In the case of Abhishek Srivastava i.e. in Bail Application No. 5384 of 2020, the accused after arrest by the police was taken in judicial custody with the passing of remand order on 16.1.2020 whereafter the judicial custody continued from time to time and lastly the remand was extended on 11/12.3.2020 for a period of fourteen days i.e. upto 25.3.2020. Before the said date, nationwide lock-down was imposed and the functioning of the Courts stood obstructed rather completely closed except for the urgent work regulated as per the directives issued by Hon'ble the Chief Justice from time to time.

5. Due to closure of courts from 24.3.2020, the first/fresh remand cases were done and no remand orders could be passed from 25.3.2020 to 26.6.2020. This position was brought to the notice of this Court by the District Judge, Lucknow on 29.9.2020 pursuant to an order passed by this Court on 18.9.2020 which reads as under:

"This matter was heard at considerable length.

Having heard the learned counsel for the parties, it is desirable that a report may be called for from the District Judge, Lucknow clarifying the position of remand in case crime no. 368 of 2018 from 11/12.3.2020 to 16.6.2020.

The District Judge, Lucknow is expected to forward a clear report within ten days for the reason that the matter pertains to the freedom of life and personal liberty of the accused applicant.

List for further hearing on 30.9.2020."

6. The effect of lock-down was equally harsh on the litigants or detenues in jail who could not assert their rights of personal liberty through the process of law. The period of 90 days in Bail Application No. 5756 of 2020 expired on 14.4.2020 and in absence of any remand order since 25.3.2020, the applicant (Abhishek Srivastava) continued in jail till the filing of charge sheet on 1.5.2020 and thereafter until the rejection of default bail on 18.6.2020. The personal liberty of the

accused applicant oscillated without any attention either by prosecution or the guardian of justice i.e. courts. The duty on the part of the State to set the applicant free by apprising the court was given a complete go by to legitimize the default. Non performance of the judicial duty also owes its failure to the nationwide lock-down due to Pandemic Covid-19.

7. The magistrate notwithstanding the filing of charge sheet beyond the period of limitation, has nevertheless rejected the bail application treating the right of default bail to have extinguished on filing of the charge sheet and this position is evident from the order passed by the magistrate on 18.6.2020.

8. In the connected matter i.e. Bail Application No. 5384 of 2020, the initial remand order was passed on 31.1.2020 and the period of limitation for filing of charge sheet lapsed on 29.4.2020 whereafter the police report was filed on 5.5.2020. The order sheet merely endorsed "remand' on several dates and lastly on 29.4.2020. The default bail application was filed in the month of June which was rejected on 20.6.2020. In the counter affidavit filed by the State, a plea has been taken that the police report was ready on 29.4.2020 but the same could not be filed before the deadline i.e. 29.4.2020 due to the closure of court on account of lock-down.

9. The argument put forth by learned counsel for the applicants in both the cases is that the indefeasible right of default bail could not be denied to them by the State once the limitation for filing the police report ran out, therefore, irrespective of the fact whether the prayer for release was made or not, the duty had shifted upon the magistrate who ought to have streamlined and secured the personal liberty of the applicants in accordance with the mandate of Article 21 of the Constitution of India on suitable conditions as were necessary in the criminal administration of justice. It is also submitted that the personal liberty of the applicants could not be weighed any less than those cases where accused persons on executing personal bonds were enlarged on bail pursuant to the general directions issued by the apex court in suo motu case. Moreover, even the imposition of lock-down on account of which the courts were closed, cannot be allowed to legitimize the judicial custody in contravention of Article 21 of the Constitution of India read with the procedure prescribed in Section 167(2) Cr.P.C.

10. To buttress the submission put forth by learned counsel for the applicants, they have placed reliance upon a catena of judgements taken note of hereinafter.

11. Per contra, learned AGA who has appeared on behalf of the State has submitted that the right claimed by the applicants though guaranteed under Article 21 of the Constitution of India, can be curtailed by following due procedure of law and drawing support from the judgment rendered by the apex court in the case of ***Sanjay Dutt v. State through CBI, Bombay*** reported in ***(1994) 5 SCC 410,*** it is argued that upon filing of the police report before the court concerned, the right of default bail stands eclipsed and thus, the order passed by the trial court is wholly tenable in the eye of law and does not suffer from any illegality.

12. It is also submitted that the magistrate in the present case, had no occasion to offer the accused any suitable conditions for being set free on bail during

the lock-down period when the court was closed, therefore, there is no lapse on the part of the magistrate to grant default bail particularly when the police report in one of the present cases was ready on the deadline i.e. 29.4.2020 but could not be filed in the court due to closure.

13. **The larger question that arises for consideration before this Court is as to the sanctity of the right of personal liberty and whether such a right guaranteed under Article 21 of the Constitution of India would stand eclipsed under the lock-down directives issued by the Government or any directives issued by the High Court applicable on holidays contrary to the mandate embodied under Section 167(2) Cr.P.C.**

14. Before coming to the merits of the case, it would be apt to refer to the report of District Judge, Lucknow which was called for in Bail Application No. 5384 of 2020 so as to clarify the position of remand in relation to one of the applicants and the same is extracted below:

"..... In this regard, I called report from learned Special Chief Judicial Magistrate, Lucknow who has submitted report dated 24.09.2020 apprising the first remand of accused Abhishek Srivastava was granted on 16.01.2020 and thereafter same was extended on 29.01.2020, 12.02.2020, 26.02.2020 fixing 11.03.2020 but under Administrative Order of the District Judge, 11.03.2020 was declared holiday hence, the accused persons whose remands were due on 11.03.2020 were brought before the learned Magistrate on 12.03.2020 and on said date i.e. 12.03.2020, said accused was remanded up to 25.03.2020 and that is why on the last remand, date 11/12.03.2020 was written.

From 25.03.2020 onwards, there was complete lock-down throughout India consequently, Courts remained closed and due to above, no remand order could be passed till 16.06.2020. Meanwhile, on 01.05.2020, police submitted chargesheet before the Remand Magistrate.

It is worth to mention that Hon'ble High Court issued notice dated 25.03.2020 communicating the order of his lordship Hon'ble the Chief justice of High Court of Judicature at Allahabad informing that all the Courts subordinate to the Hon'ble High Court, Commercial Courts, Motor Accidental Claims Tribunals and Land Acquisition Rehabilitation and Resettlement Authoriteis across the State of Uttar Pradesh shall remain closed till further orders and remand and bails of accused persons shall be done as per holiday practice.

The said notice dated 25.03.2020 was followed by letter of Hon'ble Court bearing No. PS(RG)/52/2020: Allahabad dated May 02, 2020 referring notice dated 25.03.2020 apprising that Hon'ble Court has reiterated its previous Order dated 25.03.2020.

It is further submitted that as per holiday practice only first/fresh remand use to be done and that is why further remand of accused person Abhishek Srivastava could not carried out till 16.06.2020....."

15. The District Judge in his report has submitted that the last remand order was passed on 11/12.3.2020 and there was no remand from 25.3.2020 to 16.6.2020 due to closure of the courts pursuant to complete lock-down order of the

government. It is secondly mentioned that the charge sheet was filed on 1.5.2020 before the remand magistrate. It is thirdly mentioned that the courts were closed till further orders, therefore, remand and bails of accused persons were directed to be done as per holiday practice. It is lastly mentioned that as per holiday practice only first/fresh remand used to be done.

16. In view of the report extracted above, it is desirable to understand the holiday practice for dealing with the remand and bail matters. A direction was issued by the High Court, Allahabad on 25.3.2020 and the same is extracted below:

"As resolved by the Administrative Committee (telephonically), in supersession of all administrative notifications, circular etc., issued earlier, the Court work in the Allahabad High Court shall remain suspended with immediate effect till further orders. However, imminently emergent and urgent cases would be heard by the designated Division Bench/single Judge with prior approval of the Chief Justice. For Lucknow Bench, necessary approval for hearing of urgent cases shall be obtained from Hon'ble Senior Judge, Lucknow.

All the courts subordinate to the High Court to the High Court of Judicature at Allahabad and all commercial courts, Motor Accident Claims Tribunal and Land Acquisition Rehabilitation and Resettlement Authorities across the State of U.P. shall also remain closed till further orders. ***The remands and bails of arrested person shall be done as per holiday practice."***

17. The procedure on holidays is further gathered from Rule-186 of the General Rules (Criminal), 1977 as well as from a circular of the High Court, Allahabad i.e. C.L. No. 102/VIIb-47 dated 5th August, 1975 and the same are reproduced below:

"186. Work on holiday.

On a holiday a criminal court may dispose of such work of urgent nature like granting of bail or remand or do such other work that may with propriety be done out of court and it will not be proper to refuse to do any act or make any order urgently required merely on the ground of the day being a gazetted holiday."

"Circular No. 102/VIIb-47 dated 5th August, 1975

"I am directed to say that the Judicial Magistrates who are detained on duty for granting bails and remands and for the disposal of other urgent matters during holiday or on Sundays may kindly be asked to do this work in court at a fixed time duly notified and intimated to all concerned, including the Public Prosecutor. This will not only ensure the presence of the Public Prosecutor at the time of the orders are passed but will also facilitate the work of Judicial Magistrates concerned."

18. What is surprising is that the whole procedure seems to have been misinterpreted and misunderstood by the District-Session Judges/magistrates in the matter of remand and bail. The directive issued by the High Court on 25.3.2020 as reproduced above was clear enough, yet the Session Judges/magistrates do not appear to have proceeded as per the mandate of Rule-186 or the earlier circular issued on 5.8.1975 whereby the procedure applicable on holidays was succinctly defined. The District Judges were under a bounden duty to assign the remand duty to the courts of magistrate/Session Judge during the lock-down period and irrespective of the fact

that the courts were closed, the remand matters were bound to be taken up and wherever the indefeasible right of personal liberty accrued to an accused incarcerated in jail, he ought to have been offered default bail in the manner prescribed under Section 167(2) of the Cr.P.C.

19. Personal liberty of a person is an indefeasible right and this is what the apex court has opined in the case of Sanjay Dutt (supra) in paragraph 48 of the judgement. The rider which the apex court read was that the accused must avail the right before it stood eclipsed by filing of the police report. As per the apex court judgement, once the charge sheet was filed, Section 167 Cr.P.C. would become inapplicable and the accused who failed to avail the right would stand deprived of claiming the benefit of default.

20. The apex court yet in another decision reported in ***(2001) 5 SCC 453 (Uday Mohanlal Acharya v. State of Maharashtra),*** further propounded that once the application was filed by the accused in jail for the grant of default bail, mere filing of the police report would not frustrate the right and the ground of default would remain available for release. This judgement, however, reiterated the requirement of filing an application consequent upon the accrual of indefeasible right before the charge sheet was filed. The apex court in the case reported in ***(2017) 15 SCC 67 (Rakesh Kumar Paul v. State of Assam)*** dealing with the earlier decisions has further enlarged the scope of default bail in paragraph 40 as under:

"40. In the present case, it was also argued by learned counsel for the State (1996) 1 SCC 722 that the petitioner did not apply for "default bail' on or after 4th January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court - he made no specific application for grant of "default bail'. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail - such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for "default bail' or an oral application for "default bail' is of no consequence. The concerned court must deal with such an application by considering the statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail."

21. The position of law is reiterated by the apex court in the case of ***M. Ravindran v. Intelligence Officer, Directorate of Revenue, 2020 SCC OnLine SC 867***. The apex court in ***S. Kasi v. State through the Inspector of Police,***

2020 SCC OnLine SC 529, taking note of the lock-down situation during Pandemic Covid-19 has made certain observations in paragraphs 25 and 26 which may profitably be extracted as under:

"25. We, thus, are of the clear opinion that the learned Single Judge in the impugned judgment erred in holding that the lockdown announced by the Government of India is akin to the proclamation of Emergency. The view of the learned Single Judge that the restrictions, which have been imposed during period of lockdown by the Government of India should not give right to an accused to pray for grant of default bail even though charge sheet has not been filed within the time prescribed under Section 167(2) of the Code of Criminal Procedure, is clearly erroneous and not in accordance with law.

26. We, thus, are of the view that neither this Court in its order dated 23.03.2020 can be held to have eclipsed the time prescribed under Section 167(2) of Cr.P.C. nor the restrictions which have been imposed during the lockdown announced by the Government shall operate as any restriction on the rights of an accused as protected by Section 167(2) regarding his indefeasible right to get a default bail on non-submission of charge sheet within the time prescribed. The learned Single Judge committed serious error in reading such restriction in the order of this Court dated 23.03.2020."

22. This Court may also take note of a judgement rendered by the Delhi High Court in the case of ***Subhash Bahadur @ Upender vs The State (NCT Of Delhi)*** decided on 6 November, 2020 where the position of law has elaborately been considered and it is observed that the duty of the courts to offer default bail does not stand mitigated even when a regular bail application is under consideration.

23. In the light of decisions noted above, it is clear that the right of personal liberty is an indefeasible right which for the purposes of its enforcement remained unaffected during the lock-down period and the courts of law on account of closure pursuant to the directives issued by the Government or the High Court were nevertheless duty bound to deal with the remand matters as per the provisions of General Rules (Criminal), 1977 or circulars regulating holiday practice.

24. This Court is constrained to observe that non performance of duty owing to holidays is firstly a serious dereliction of duty on the part of the Session Judges/magistrates and secondly the remand matters could not be ignored selectively by attaching preference or priority to fresh/first remand cases in derogation of the procedure applicable on holidays. The report forwarded by the District Judge, Lucknow, extracted above, is alarming and the selective role which the courts have played from 25.3.2020 to 16.6.2020 deserves to be condemned.

25. There is a famous saying that injustice anywhere is a threat to justice everywhere. It is for this reason that the civil liberty movement worldwide changed the very ethos of the concept of justice to secure the right of personal liberty. The saying seeks to liberate the personal liberty of a citizen clamped in isolation and pain. It appeals and awakens the justice delivery system for the cause of freedom of life and personal liberty. A mass disaster or Pandemic may severely obstruct our life and governing systems in many ways but

the doors of the courts of law must remain open for the protection of Article 21 of the Constitution of India.

26. In order to serve the civil rights of the citizens, the Indian Parliament enacted two important legislations in the year 1981 and 1987 viz. Essential Services Maintenance Act, 1981 and Legal Services Authority Act, 1987. This Court may note that these legislations were made in the pursuit of objects embodied under Article 39 and 39A of the Constitution of India. The policy of the State having trammelled into law is binding upon the State and must offer adequate safeguards. Section 12(e) and 13(1) of the Legal Services Authority Act being relevant are reproduced below:

"12. Criteria for giving legal services.--*Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is*--

(a) .....;

(b) .....;

(c) .....

(d) .....

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster;"

"Section 13. Entitlement to Legal Services

(1) Persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend."

27. It is unfortunate to note that the legal services which the law contemplates as an essential service for victims was rendered inadequately by the State as well as by the legal services authorities during the Pandemic Covid-19. In absence of the services of legal practitioners, the State was under a bounden duty to activate legal aid authorities to deal with the situation and the benefit of default bail accruing anywhere ought to have been effectively taken up before the courts. The protection of rights within the ambit of Article 21 of the Constitution of India fully fell within the scope of Section 12(e) of the Act, therefore, no discrimination could be practiced between the accused persons entitled to be released on default bail as compared to the other accused persons released on personal bonds keeping in view the general directions of the apex court coupled with the satisfaction of the State. It is immaterial whether such persons during the lock-down period had applied for help under Section 13(2) of the Legal Services Authority Act or not.

28. It is also true that the default bail may at times become a futile plea when an accused is involved in more than one or a series of offences, yet he may claim the benefit of default in one case but the actual release for his involvement in some other offence may not bring, such a person, the benefit of setting him free.

29. The above situation is also experienced invariably besides the fact of delayed justice. This Court has no hesitation to put on record that the right under Article 21 of the Constitution of India is an enjoyable right for which the plea of default bail unfettered by procedure must yield immediate release. The procedural law has left a grey area which deserves to be dealt with in appropriate cases. However, the question framed in the present case for the reasons recorded above, obliges the courts to guard the rights

embodied under Article 21 of the Constitution of India in all circumstances.

30. Now coming to the two cases at hand, there is a clear dereliction of duty in Bail Application No. 5384 of 2020 (Abhishek Srivastava v. State of U.P.) and the position is amply evident from the report of the District Judge extracted above, hence a case for default bail is made out. The court of magistrate is accordingly directed to release the applicant **Abhishek Srivastava involved in Crime No. 0368 of 2018, under Section 420, 467, 468 and 471 IPC, Police Station Aliganj, Lucknow,** on furnishing bail bonds to the satisfaction of the court and it shall be open to the prosecution to act in accordance with law, provided the filing of charge warrants the accused applicant to be detained in judicial custody. The magistrate shall also satisfy himself that the plea of default bail was enforceable prior to the date of filing the charge sheet and being available is enforceable on the date of release which in the present case seems doubtless.

31. In the other Bail Application No. 5756 of 2020 (Sanjeev Yadav v. State), the prosecution has adopted a peculiar stand to justify the default. It is stated that the closure of court prevented them to file the charge sheet before the deadline i.e. 29.4.2020. The prosecution has taken a bald plea without showing any steps having been taken to file the charge sheet by approaching the court or through online service. The plea advanced is misleading and cannot be accepted particularly when the date of filing itself is shown during the lock-down period i.e. 5.5.2020. Moreover, as per the periodic guidelines during Pandemic, the courts were open for filing the reports under Section 173 Cr.P.C. The position emerging as a result of failure to sanction prosecution, in absence whereof cognizance cannot be taken, has been clarified in the case reported in ***(2013) 3 SCC 77 (Suresh Kumar Bhikamchand Jain v. State of Maharashtra and another),*** wherein failure to file the charge sheet has been laid down as the rule for default bail.

32. It is well settled that investigation is complete with the filing of charge sheet, therefore, the limitation embodied under Section 167(2) must be seen on the date of filing of the charge sheet in the court and any other date suggesting completion of investigation is irrelevant and does not satisfy the requirement of law. The right of default bail which undoubtedly accrued to the applicant became enforceable on 29.4.2020. This right was very much alive when the charge sheet was filed in the court on 5.5.2020 and survived thereafter. The applicant Sanjeev Yadav is thus entitled to be enlarged on bail at par with the case of Abhishek Srivastava.

33. Let the applicant **Sanjeev Yadav involved in Case Crime No. 78 of 2020, under Section 406, 409, 419, 420, 467, 468, 471 IPC, Section 67 Information Technology Act and Section 7/13(1)(c) Prevention of Corruption Act, Police Station Gola, District Lakhimpur Kheri,** be enlarged on bail on the same conditions and satisfaction of the court concerned as provided in the case of Abhishek Srivastava.

34. Since the mass disaster of Pandemic Covid-19 covered the meaning of Section 2(d) of the Disaster Management Act, 2005 is not over, therefore, it is desirable to issue notice to the National Legal Service Authority as well as the State Legal Services Authority through their

Member Secretaries who may apprise the Court as to how the applicants or like victims of mass disaster were or are being helped during Pandemic Covid-19. The Member Secretary, U.P. State Legal Services Authority shall appear before this Court in person on the next date of listing with all relevant details from the respective districts. Before any further order is passed on the dereliction of duty on the part of respective magistrates/Session Judges, the Senior Registrar of this Court, in the light of report forwarded to this Court on 29.9.2020 by the District Judge, Lucknow, is hereby directed to obtain the relevant details of magistrates/Session Judges from district Lucknow/Hardoi who have failed to pass remand orders from 25.3.2020 to 16.6.2020. The Senior Registrar of this Court shall also remain present in the Court when the case is listed next.

35. List on 10.12.2020.

(2020)11ILR A426
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2020

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Appeal No. 66 of 1987

Rajendra Singh ...Appellant (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri Y.S. Saxena, Sri Vinod Kr. Srivastava, Sri Vinod Kumar Sharma

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

Criminal Law – Indian Penal Code,1860 - Sections 363, 366, 368 and 376 - Criminal Appeal has been filed against the conviction.

QUANTUM OF SENTENCES :

Appellant is an old man, aged about 62 years. The fact and circumstances of the case and the substantive period already undergone by the appellant in this case and he has realized that 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. (Para 31)

The conviction of the appellant stands affirmed. The sentence is modified and the period already undergone by the appellant. (Para 32)

Appeal Partly allowed. (E-2)

List of Cases cited :-

1. B.G. Goswami Vs Delhi Administration,

2. Sattan Sahani Vs St. of Bihar & ors.

3. Bankat & anr. Vs St. of Mah.

4. Uthem Rajanna Vs St. of Andh. P.

5. Neelam Bahal & ors. Vs St. of U.P.

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

1. This criminal appeal has been preferred by the appellant, namely, Rajendra Singh against the judgment and order dated 16.12.1986 passed by Special Judge (E.C. Act), Budaun in Sessions Trial No. 24 of 1985 (State vs Rajendra and others) arising out of Case Crime No. 4 of 1984, under sections 363, 366, 368 and 376 IPC, police station Ughaiti, district Budaun, whereby the accused appellant-Rajendra Singh has been convicted and sentenced to four years' rigorous imprisonment under section 366 IPC.

2. However, by the same order, the learned Special Judge acquitted the co-accused persons, namely, Sukkhi, Smt. Ramkali and Room Singh under section 363 and 366 IPC and Sunder, Ram Bharosey, Chandra Pal, Smt. Tikola alias Ganga Devi, Gokil, Smt. Mallo and Smt. Lareti under section 368 IPC.

3. In short compass, the facts of the case as unfolded by the prosecution in the first information report lodged by the informant, Man Singh on 07.01.1984 at about 12.30 PM at the police station Ughaiti, Sahaswan district Budaun are that on 14.12.1983 at about 6.00 AM accused, Rajendra (present appellant), his father Sukkhi, Smt. Ramkali (first wife of Sukkhi and real mother of appellant Rajendra Singh), second wife of Sukkhi, who is known by the name of Thakurani, and Room Singh (son-in-law of Sukkhi) came to the house of the informant. Sukkhi stated that *Katha* would be recited at the house of his son-in-law Room Singh and requested the informant to permit his grand-daughter Km. Pravesh (herein-after referred to as "the prosecutrix") to accompany them to village Mahanagar. As the accused, Rajendra and his parents also resided in the same village and both the families had cordial relations, complainant-Man Singh allowed the prosecutrix, who was aged about 15-16 years, to go with them. The prosecutrix left the house along with the accused in the presence of witnesses Vijay Singh, Hardwari and Mahendra Singh. It was also mentioned in the FIR that when after 4-5 days accused Sukkhi along with his both the wives returned, he enquired from Sukkhi about the prosecutrix, who told him that she stayed in his relations and will come back in 2-4 days. However, when she did not return, he went to Mahanagar to search the prosecutrix, but in vain. He came to know that Rajendra and prosecutrix are not present in Mahanagar. Thereafter, first information report was lodged by the informant that his minor grand-daughter, aged about 15-16 years, has been enticed away by the accused-appellant, Rajendra Singh in collusion with the afore-mentioned persons.

4. On the basis of the aforesaid report, a case was registered against Rajendra Singh (present appellant), his father Sukkhi, Smt. Ramkali (first wife of Sukkhi and real mother of appellant Rajendra Singh), Thakurani (second wife of Sukkhi) and Room Singh (son-in-law of Sukkhi) at Case Crime No. 4 of 1984, under Sections 366 and 368 IPC.

5. After the registration of the FIR, the law set into motion and the case was entrusted to PW-7, S.I. Horam Singh Tyagi, who recorded the statements of witnesses and inspected the spot and prepared site plan. Thereafter, PW-7 proceeded on leave and investigation of the case was entrusted to S.I. Chhattar Singh. On 10.01.1984, S.I. Chhattar Singh arrested the accused Sukkhi and recorded his statement. On 11.01.1984, he recorded the statement of accused Rajendra Singh in the police station civil lines, who was detained there after his arrest. He also recorded the statement of the prosecutrix on the same day. On 12.01.1984 S.I. Chhattar Singh arrested accused Sundar and Ram Bharosey.

6. On 25.01.1984, the investigation of the case was again handed over to S.I. PW-7, Horam Singh, who after completion of investigation and necessary formalities, submitted the charge sheet on 03.02.1984 against accused, Rajendra Singh, Sukkhi, Room Singh, Sunder and Ram Bharosey,

which he proved as Ext. Ka-18, on 29.02.1984 against Smt. Ramkali and on 05.04.1984 against Chandrapal, Smt. Tikoli @ Ganga Devi, Gokil, Smt. Mallo and Smt. Lareti (Ext. Ka-20) for the offence under sections 366 and 368 IPC.

7. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions on 21.01.1985, where case was registered as Sessions Trial No. 24 of 1985 and learned Special Judge, (E.C. Act), Budaun vide order dated 27.05.1986 framed the charges against all the accused namely, Rajendra, Sukkhi, Smt. Ram Kali, Ram Bharosey, Room Singh, Sunder, Chandrapal, Smt. Tikoli alias Ganga Devi, Gokil, Smt. Mallo and Smt. Lareti under sections 363, 366, 376 and 368 IPC.

8. To bring home guilt of the appellant, the prosecution has examined as many as 7 witnesses, out of which PW-1, Man Singh, PW-3, Hardwari, PW-4 Vijay and PW-5 Km. Pravesh were the witnesses of facts and the remaining were formal witnesses.

9. PW-1, Man Singh is the informant and grand-father of the prosecutrix Km. Pravesh. He reiterated the versions mentioned in the first information report.

10. PW-2, Dr. P.K. Agarwal deposed that on 11.01.1984 she was posted as Medical Superintendent at District Women Hospital, Budaun. On that date, she has conducted the medical examination of the victim. As per medical report the prosecutix was aged about 19 years. In the opinion of the doctor, the prosecutrix was habitual of sexual intercourse. However, doctor further opined that as no fresh sign of rape was found, no opinion about rape can be given.

11. PW-3, Hardwari deposed that on the date of incident at about 6.00 in the morning, while he was standing in front of the house of Mahendra, he had seen the prosecutrix in the company of accused, Rajendra Singh, Sukkhi, Ramkali, Thakurani and Room Singh. He further deposed that on enquiry, Sukkhi told him that there is Katha in the house of her son-in-law and they are going there.

12. PW-4, Vijay deposed that on the date of incident at about 6.00 in the morning when he was coming from the forest, in front of the house of Mahendra, he saw that accused Sukkhi, Rajendra Singh and Sukkhi's both wives Ram Kali and Thakurani were going along with the prosecutrix. Hardwari was also present there. On enquiry by Hardwari, Sukkhi told him that they are going to Maha Nagar to hear *Katha* in the house of his son-in-law.

13. PW-5, Km. Pravesh is the victim of the case. She has fully supported the prosecution version. She deposed that on the date of incident accused Ram Kali, Thakurani, Rajendra and Room Singh came to her house and requested her grand-father to allow her to go with them to hear *Katha*, which has been arranged in the house of Room Singh at Maha Nagar. Her grand-father acceded to their request and allowed her to go with them. However, when she reached there, she noticed that no *Katha* was organized there. The accused kept her in the night in the house of Room Singh under strict vigilance. Next day, she was taken to an advocate at Budaun by the accused Sukkhi, Room Singh, Gokil and Rajendra, where she was forced to sign certain papers on the point of pistol and knife. Thereafter, she was taken to several places and was kept under strict vigilance. She further deposed that accused Rajendra

committed rape on her against her wishes before he was arrested.

14. PW-6, Constable Anand Dhiani is the scriber of the first information report. He deposed that in January, 1984 he was posted as Clerk-Constable at the police station Ughaiti. On 07.01.1984 at about 12.30 PM, he has written the report on the diction of the first informant, Man Singh, which he proved as (Ext. Ka-1). He also deposed that he made necessary entries in the G.D., which he proved as Ext. Ka-7.

15. The evidence of PW-7, Horam Singh Tyagi has already been discussed above.

16. After the closure of the prosecution evidence, the statements of the accused were recorded under Section 313 Cr.P.C., in which they denied the charges levelled against them and claimed to be tried.

17. Learned Special Judge, (E.C. Act), Budaun after hearing the learned counsel for the parties and after scrutinizing and assessing the evidence on record, convicted and sentenced the appellant Rajendra Singh to four years' rigorous imprisonment under Section 366 IPC and acquitted the others accused- persons.

18. Feeling aggrieved, the accused-appellant has come up before this Court in appeal.

19. Heard Mr. Vinod Kumar Sharma, learned counsel for the appellant, learned Additional Government Advocate representing the State and perused the judgment and order as well as record of the present case.

20. At the very outset, Mr. Vinod Kumar Sharma, 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.

21. Learned Additional Government Advocate representing the State has stated that he has no objection if the Court considers the mitigating circumstances.

22. Since the learned counsel for the appellant has given up challenge to the findings of conviction and there is ample evidence including evidence of the prosecutrix and eye-witness account to base conviction, accordingly, the conviction of the appellant for the aforesaid offence stands affirmed.

23. However, on the quantum of sentence, learned counsel for the appellant has argued that the appellant is not a previous convict, he is the sole bread-earner of his family and that he is an old man aged about 62 years.

24. Learned counsel for the appellant further submits that the appellant was awarded rigorous imprisonment of four years and that he has already undergone 17 days before conviction and 21 days after conviction, meaning thereby that he has undergone about 38 days of the awarded sentence.

25. 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."

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

27. In the case of *Bankat and another vs State of Maharshtra*, 2004(50) ACC 953 (SC), accused were convicted under section 326 IPC and sentenced to one year imprisonment with fine. The Apex Court reduced the sentence to the period already undergone on the ground that the parties have settled the dispute outside the court and 10 years have elapsed from the date of incident.

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

29. In the case of ***Neelam Bahal and another vs State of Uttarakhand***, 2010 (2) SCC 229, the accused was convicted and sentenced to undergo seven years' rigorous imprisonment under section 307 IPC. The Apex Court has convicted the accused under section 326 IPC and reduced the sentence to the period already undergone, i.e. almost one year, on the ground that the incident happened in the year 1987, when the accused was of young age of 25 years.

30. In the present case, offence is related to the incident dated 14.12.1983, i.e. almost 37 years from date. Appellant was

convicted by the trial court on 16.12.1986 and instant appeal is pending before this Court since 1987. As such appellant has already suffered the regours of protracted trial and mental agony due to long pendency of criminal proceedings against him. Therefore, no useful purpose would be served in sending appellant back to jail after 37 years of the incident. Appellant has re-built his roots in the society as a law abiding person. In this background, it would be unjust to uproot him at this belated stage.

31. 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 an old person 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 his better contribution to the society to which he belongs to.

32. Consequently, the conviction of the appellant stands affirmed. The sentence is modified and the period already undergone by the appellant in this case, i.e. 38 days is taken as his substantive sentence under Section 366 IPC.

33. The appeal stands partly allowed.

34. The appellant is on bail. His bail bonds are cancelled and sureties discharged.

35. Office is directed to transmit a copy of this order to the learned Sessions Judge, Budaun.

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

37. It is directed that in case certified copy of this judgment is not issued due to COVID-19 pandemic, the copy of the judgment downloaded from the official website of the Allahabad High Court shall be acted upon.

(2020)11ILR A431
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.11.2020

BEFORE

THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 75 of 2002

Ram Shanker & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Jai Singh Chauhan, Dilip Pandey, Shishir Pradhan

Counsel for the Respondent:
Govt. Advocate

Criminal Law – Indian Penal Code,1860 - Sections 498-A, 304B, 120B -. **Dowry Prohibition Act., 1961 -Section ¾ -** Criminal appeal has been filed against conviction.

Evidence Law -Evidence Act, 1872 - Section 113-B - Indian Penal Code,1860 Section 304-B, 498-A - Dowry Prohibition Act., 1961 - Section 2 are discussed: -

Meaning of soon before death – does not mean just before death or immediately before death of the deceased. It was subjected to

torture, cruelty or harassment by the her in-laws due to demand of dowry. (Para 23)

Physical Cruelty – Actual beating or causing pain and harm to the person of a woman. (Para 25)

Mental Cruelty – It can be verbal and emotional like insulting or ridiculing or humiliating a woman. (Para 25)

We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before". (Para 25)

Delay in lodging the F.I.R. depends upon facts and circumstances of the each case – It cannot be treated fatal to the prosecution story. (Para 39)

Impugned Judgment and order passed by the Trial Court is to be affirm. (Para 45)

Appeal Dismissed. (E-2)

List of Cases Cited:-

1. Kans Raj Vs St. of Punj. (2000) 5 SCC 207

2. Rajindar Singh Vs St. of Punj., AIR 2015 SC 1359

3. Surindra Singh Vs St. of Har., (2014) 4 SCC 129

4. Sher Singh Vs St. of Har., (2015) 3 SCC 724

5. Dinesh Vs St. of Har., (2014) 12 SCC 532

6. Sher Singh Vs St. of Har., 2015 (1) SCALE 250,

7. Dinesh Vs St. of Har., 2014 (5) SCALE 641

8. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

9. Preet Pal Singh Vs St. of U.P., AIR 2020 SC 3995

10. Tara Singh & ors. Vs St. of Pun., AIR 1991 SC 63

11. St. of M.P. Vs Saleem @ Chamaru, AIR 2005 SC 3996

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

1. This appeal has been preferred against the judgment and order dated 19.01.2002 passed by Additional Sessions Judge, Fast Track Court-II, Rai Bareli in Sessions Trial No.188/95 arising out of Case Crime No.63/95 under Sections-498-A, 304B, 120B I.P.C. and Section ¾ Dowry Prohibition Act 1986 (in short D.P. Act), Police Station-Lalganj, District-Rai Bareli, whereby the appellants-Ram Shankar and Kamlesh Kumar have been convicted and sentenced for the offence under Section 304B I.P.C. for seven years rigorous imprisonment, for the offence under Section 498A I.P.C. for two years rigorous imprisonment and fine of Rs.1000/- each and for the offence under Section 4 D.P. Act for one year rigorous imprisonment and fine of Rs.1000/- each. It has further been directed that the appellants have to go undergo three months imprisonment in default of payment of fine for offence under Section 498A I.P.C. and three months imprisonment in default of payment of fine for offence under Section 4 D. P. Act. All the sentences have been directed to run concurrently.

2. The prosecution story, in brief, is that the deceased, Dhanpati, daughter of Lal Bahadur (P.W.-1) (informant), was married to the appellant-Kamlesh Kumar in the year 1992. On 25.02.1995 at 6:30 a.m. Lal Bahadur (P.W.-1) lodged first information report (in short F.I.R.) (Ext. Ka-1) at P.S.-Lalganj, District-Raibareli

alleging that after her marriage the appellant was asking Rs.20,000/- and a motorcycle as a dowry and on account of non-fulfillment of dowry, the appellant-Kamlesh Kumar, his sister-Ram Payari (co-accused) and his father, the appellant-Ram Shankar (since deceased) used to harass and torture the deceased and had forcibly taken her all the jewellery. It is further stated in the F.I.R. that on 24.02.1995 the appellant-Kamlesh Kumar, co-accused (Ram Pyari) and the appellant-Ram Shanker (since deceased) caused death of the deceased, Dhanpati, aged about 22 years, by setting her on fire.

3. On the said information (Ext. Ka-1), chik report (Ext.-Ka-3) was registered as Crime No.63/95, under Section 498-A, 304-B & Section ¾ D.P. Act against the appellant-Kamlesh Kumar, co-accused-Ram Pyari and the appellant-Ram Shankar (since deceased) and the same was entered into General Diary (Ext. Ka-4) by Head Constable, Ram Sharma (P.W.-4). Investigation was handed over to Dy. S. P., Rajendra Kumar Pandey (P.W.-6).

4. Sri Ram Das (P.W.-5), Executive Magistrate/Tehsildar was deputed to conduct the inquest of the deceased, who reached the place of occurrence on 25.02.1995, conducted the inquest proceeding, prepared inquest report (Ext.-Ka-5) on 25.02.1995 at about 10:00 a.m., sealed the dead body of the deceased, prepared relevant police papers (Ext.-Ka-6 to Ext.-Ka-10) and sent it for post-mortem examination to District Hospital, Raibareli.

5. Dr. R. P. Verma (P.W.3) and late Dr. S. K. Singh jointly conducted the post-mortem examination of the deceased-Dhanpati @ Dhanno, prepared post-mortem report (Ext.-Ka-2) and found the following anti-mortem injuries on her body :-

(I) Superficial to deep burn injuries on whole body containing red color riges.

(ii) Bloody froth was coming out from both nostrils.

6. In internal examination, it was found that brain including its membrane, lungs trachea were conjugated, both side of heart was full of blood, stomach was swollen containing 150 gm. liquid material.

7. According to him (P.W.-3), the deceased had died due to shock, caused by anti mortem burn injury, at any time in the morning of 24.02.2005.

8. Dy. S. P. Rajendra Kumar Pandey (P.W.-6), during investigation, visited the place of occurrence, prepared the site plan (Ext.-Ka-11), recorded the statement of witnesses, perused the inquest report as well as post-mortem report and filed charge sheet (Ext.-Ka-12) against the appellant Kamlesh Kumar, co-accused-Ram Pyari and the appellant Ram Shanker (since deceased) before the concerned Magistrate, who after providing the copy of relevant police papers as required under Section 207 of Criminal Procedure Code, 1973 (hereinafter referred to as Code) to the appellant and other co-accused, committed the case to Sessions Judge, Raibareli for trial.

9. The charges were framed against the appellant-Kamlesh Kumar, co-accused-Ram Pyari and the appellant-Ram Shankar (since deceased), who denied the charges and claimed for trial.

10. The prosecution, in order to prove its case, examined the Lal Bahadur (P.W.-1), Harsh Bahadur (P.W.2), Dr. R. B. Verma (P.W-3), Head Constable, Ram Sharma (P.W.-4), Executive Magistrate Ram Das (P.W.-5) and Investigating Officer, Rajendra Kumar Pandey (P.W.-6).

11. After the prosecution evidence, the statements of the appellants and other co-accused were recorded under Section 313 of the Code, who admitted that deceased had died due to burn injury, inside their house, within three years of her marriage but denied the prosecution story and stated that they have been falsely implicated. The appellant-Kamlesh Kumar stated that the deceased-Dhanpati wanted to go with him to Mumbai but he refused as his mother was disabled and due to his refusal, the deceased committed suicide by setting herself on fire. He further stated that he had given information of the said occurrence on same day at police station. The appellant-Ram Shanker (since deceased) further stated that after death of the deceased, her father and brother asked money from him and due to his refusal, he had been falsely implicated in this case.

12. To controvert the prosecution story, the appellants in their defence examined Mohd. Jarmish Khan (D.W.-1), Ram Baran (D.W.-2) and H.C.P.-Sri Ram Sharma (D.W.-3).

13. The trial Court, after hearing the learned counsel for the appellants as well as counsel appearing for the State and considering the material available on record, convicted and sentenced the appellant-Kamlesh Kumar and the appellant-Ram Shanker (since deceased) and acquitted the co-accused, Ram Pyari vide impugned judgment and order. Aggrieved with the said judgment, this appeal has been preferred by the appellants.

14. During the pendency of the appeal, the appellant, Ram Shanker died and his appeal has been abated vide order dated 03.05.2018.

15. Heard Sri Shishir Pradhan, learned counsel for the appellant and Sri G. D. Bhatt, learned A.G.A. for the State.

16. Learned counsel for the appellant has submitted that the appellant is innocent and has been falsely implicated in this case. Learned counsel further submitted that there was no demand of dowry from the side of the appellant as no complaint was made by the informant to any authority in this regard prior to this occurrence and no cruelty or harrasment was caused to the deceased soon before her death. The appellant was doing job in Mumbai and at the time of occurrence he had come to see his ailing mother. Learned counsel further submitted that the deceased was insisting to go Mumbai with the appellant but due to low income of the appellant, he advised the deceased to stay at his house with the mother for her service. Learned counsel further submitted that due to denial of the appellant, the deceased in frustration had committed suicide by setting her on fire inside in a room. Learned counsel further submitted that in order to save the deceased, the appellant, his family members and other co-villagers had broken and pulled down the door by axe and spade but could not save the deceased as she had died by burn injuries. Learned counsel further submitted that thereafter the appellant informed the concerned police station on same day in the evening and also informed his father-in-law (P.W.-1). Learned counsel further submitted that

F.I.R. was lodged by delay of more than 24 hrs without any explanation by P.W.-1 after due consultation to extract money from appellants. Learned counsel further submitted that the impugned judgment and order passed by trial Court is against the settled principle of law as well as evidence available on record, which is is liable to be set aside and the appeal be allowed.

17. Per contra, learned A.G.A. vehemently opposing the submission of learned counsel for the appellant, submitted that the prosecution has successfully proved its case beyond reasonable doubt. Learned A.G.A. further submitted that at the time of occurrence the appellant was sleeping with the deceased and had caused the death of the deceased due to demand of dowry. Learned A.G.A. further submitted that the information given by the appellant at police station after 12 hours of the occurrence, was in order to create a false story in his defence. Learned A.G.A. further submitted that deceased had died inside the house of the appellant and as the informant (P.W.-1) got information, he lodged F.I.R., therefore there is no delay in lodging the F.I.R. Learned A.G.A. further submitted that the fact that the appellant, who was present at the time of occurrence with the deceased and his version that deceased died due to suicidal burn injury is totally false as no sign, symptoms or evidence of suicide was found from the place of occurrence. Learned A.G.A. further submitted that neither any inflammable articles such as match box, kerosene oil etc. was found nor recovered from the place of occurrence by the Investigating Officer. Learned A.G.A. further submitted that the ocular evidence is supported with the medical evidence and there is no illegality in the impugned judgment and order passed by trial Court and the appeal is liable to be dismissed.

18. I have heard the rival submissions advanced by learned counsel for both the parties and perused the record.

19. Before considering the evidence available on record, led by both parties, in the light of argument advanced by the learned counsel for the parties, it is necessary to refer the relevant provision of law relating to the offence in question i.e. Section 304-B and Section 498-A I.P.C., Section 113-B of Indian Evidence Act and Section 2 Dowry Prohibition Act, 1961 which are as under:-

Section 304-B (1) *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.*

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Section 498-A *Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.--*

For the purpose of this section, "cruelty" means

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

***Section 113-B of Indian Evidence Act**-Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code.*

***Section 2 of Dowry Prohibition Act-**Definition of "dowry'. In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person."

20. The above provision, related with dowry death, clearly shows that if the death of any women is caused within seven years of her marriage by burn "or otherwise than under normal circumstances" and it is shown that if soon before the death of such women, she was subjected to cruelty or harassment by her husband or any relative of her husband, in connection with demand for dowry and if the prosecution succeeds to prove the above ingredient, such death shall be called as dowry death. In addition to above, Section 113-B of Indian Evidence Act further provides that in such cases, if it is shown that such women was subjected, soon before her death by the accused, to cruelty or harassment for in or connection with any demand for dowry, the Court shall presume that such accused had caused the dowry death.

21. Admittedly the appellant is husband of deceased-Dhanpati, who had died inside the house of the appellant within seven years of her marriage. This fact has been admitted by the appellant in his statement under Section 313 of the Code and also stated by Ram Baran (D.W.-2), who in his examination-in-chief has specifically stated that on the day of occurrence at about 7:00 a.m. he, upon hearing the noise and seeing the smoke coming out from the house of the appellant, reached at the house of the appellant. He further stated that Nanhe, Sukhdin, Ram Murat and so many villagers had also reached there. He further stated that the appellant-Kamlesh Kumar was trying to cut the door and they had also tried to cut that door but could not succeed as the handle of axe was broken. Thereafter they pulled down the door by spade and saw that the deceased, wife of the appellant-Kamlesh Kumar, had been burnt.

22. Thus it has only to be seen whether any cruelty or harassment was caused to deceased soon before her death due to demand of dowry or not.

23. The term *"soon before death"* used in Section 304-B I.P.C. and 113-B of Evidence Act has neither been explained nor defined either in I.P.C. or in Evidence Act and the term *"it is shown"* that soon before her death the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand of dowry, as condition precedent for dowry death, shows that the factum of cruelty or harassment by the appellant with the deceased soon before death of deceased is not required to be proved by prosecution beyond reasonable doubt. This fact may be proved by the prosecution by showing the facts and circumstances soon before death of deceased. In addition to above the term *"soon before death"* does not mean just before death or immediately before death of deceased, she was subjected to torture, cruelty or harassment by her in-laws due to demand of dowry.

24. Hon'ble Supreme Court while discussing the object and purpose of Section 304-B I.P.C. and the scope of relevancy and meaning of phrase *"soon before death of deceased"* contained therein, in ***Kans Raj vs. State of Punjab (2000) 5 SCC 207*** has held as under :

"15. It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.

16. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty and harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not

too late and not too stale before the date of death of the woman. The reliance placed by the learned counsel for the respondents on Sham Lal v. State of Haryana [(1997) 9 SCC 759 : 1997 SCC (Cri) 759] is of no help to them, as in that case the evidence was brought on record to show that attempt had been made to patch up between the two sides for which a panchayat was held in which it was resolved that the deceased would go back to the nuptial home pursuant to which she was taken by the husband to his house. Such a panchayat was shown to have been held about 10 to 15 days prior to the occurrence of the case. There was nothing on record to show that the deceased was either treated with cruelty or harassed with the demand of dowry during the period between her having taken to the nuptial home and her tragic end. Such is not the position in the instant case as the continuous harassment to the deceased is never shown to have settled or resolved."

25. In ***Rajindar Singh vs. State of Punjab, AIR 2015 SC 1359***, three Judges Bench of Hon'ble Supreme Court while placing reliance on the law laid down in ***Kans Raj (Supra)***, affirming the law laid down in ***Surindra Singh vs. State of Haryana, 2014 (4) SCC 129*** and ***Sher Singh vs. State of Haryana, (2015) 3 SCC 724*** and partly overruling the law laid down in ***Dinesh vs. State of Haryana, (2014) 12 SCC 532*** has held as under :

".....We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 *of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Coming now to the other important ingredient of Section 304B- what exactly is meant by "soon before her death"?*

21. This Court in Surinder Singh v. State of Haryana *(2014) 4 SCC 129, had this to say:*

"17. Thus, the words "soon before" appear in Section 113-B *of the Evidence Act, 1872 and also in* Section 304-B *IPC. For the presumptions contemplated under these sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words "soon before" is, therefore, important. The question is how "soon before"? This would obviously depend on the facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, "soon before" is a relative term. In matters of emotions we*

cannot have fixed formulae. The time-lag may differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to the judgment of this Court in Kans Raj v. State of Punjab *[(2000) 5 SCC 207 : 2000 SCC (Cri) 935] where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222- 23, para 15) "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."*

Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on the facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

22. In another recent judgment in ***Sher Singh v. State of Haryana, 2015 (1) SCALE 250,*** *this Court said:*

"We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304 *or the suicide under* Section 306 *of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt." (at page 262)*

23. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B *would make it*

clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under Section 304B.

24. At this stage, it is important to notice a recent judgment of this Court in Dinesh v. State of Haryana, 2014 (5) SCALE 641 in which the law was stated thus:

"The expression "soon before" is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straight jacket formula can be laid down by fixing any time of allotment. It can be said that the term "soon before" is synonyms with the term "immediately before". The determination of the period which can come within term "soon before" is left to be determined by courts depending upon the facts and circumstances of each case." (at page 646)

25. ***We hasten to add that this is not a correct reflection of the law. "Soon before" is not synonymous with "immediately before"."***

(Emphasis supplied)

26. Lal Bahadur (P.W.-1), father of the deceased, in his examination-in-chief, stating that the deceased-Dhanpati was married to the appellant-Kamlesh Kumar in May, 1992, the appellant-Ram Shankar (since deceased) was her father-in-law whereas the co-accused-Ram Pyari was her sister-in-law (nand), has stated that he had given sufficient dowry and gift at the time of marriage of his daughter. He further stated that the appellant used to harass and torture his daughter by demanding Rs.20,000/- and one motorcycle as a dowry. He further stated that since he could not succeed to fulfill the said demand of dowry, the appellants had snatched the ornaments of the deceased and used to beat her. He further stated that the deceased was killed by setting her on fire in her matrimonial house within three years of her marriage. He, in his cross-examination, further stated that his daughter was not happy and again stated that after one year of her marriage the appellant-Kamlesh Kumar had asked him for Rs.20,000/- and one motorcycle as dowry. He further stated that the deceased had also told this fact when he had gone to her matrimonial house to take her back (Bidai). He further stated that when the appellant-Kamlesh Kumar had come to his house to take the deceased back (Bidai) he again put demand of said dowry. Harsh Bahadur (P.W.-2), brother of the deceased has also stated the fact of aforesaid demand of dowry as stated by Lal Bahadur (P.W.-1). Thus, it is clear that the appellants were continuously demanding Rs.20,000/- and one motorcycle as a dowry from the deceased as well as her father, Lal Bahadur (P.W.-1) and due to its non-fulfillment they used to torture and harass her soon before her death.

27. At this juncture it is also pertinent to note that in most of the cases the dowry death of deceased is caused inside the house of the accused persons and all the relevant facts as well as incriminating evidence are only in the knowledge of the accused persons but they do not come forward to disclose the fact, happened to the deceased soon before her death. So the prosecution cannot be blamed to produce such evidence which is not in the possession and knowledge of prosecution witnesses.

28. In ***Trimukh Maroti Kirkan vs. State of Maharashtra 2006 (10) SCC 681***

where accused was charged for committing murder of his wife for want of dowry and it was established by the prosecution that shortly before the offence, he was seen with his wife inside his house where he and his wife were normally used to reside. Hon'ble Supreme Court has held as under :

*"**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 placed 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.** In Nika Ram v. State of Himachal Pradesh 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 'khokhri' 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. In Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 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 to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. **The mere denial of the prosecution case coupled with absence of any explanation were 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.** In State of U.P. v. Dr. Ravindra Prakash Mittal 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 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. **In State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 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.**"*

(Emphasis supplied)

29. Coming again to the fact of this case, where the prosecution has successfully proved all the ingredients of Section 304-B I.P.C. Now a question arise as to whether the appellant, who was present at the time of occurrence with

deceased has succeeded to rebut the presumption of law, as provided under Section 113-B of Evidence Act, by producing any cogent and reliable evidence.

30. The appellant-Kamlesh Kumar, in his statement under Section 313 of the Code, has specifically stated that he had given information of the occurrence to the concerned police station that the deceased had committed suicide in frustration due to denial of appellant to carry her Mumbai and she could not be saved as door of the room was locked by her. To prove this fact neither the appellant nor any member of his family, who was present at place of occurrence, was examined by him before the trial Court. Jarmish Khan (D.W.-1), record keeper of police office Raibareli and H.C.P.-Sri Ram Sharma (D.W.-3), who were produced by the appellant, have proved Ext.-Kha-1 G. D. Report No.30 dated 24.02.1995 at 18:10 p.m. H.C.P.-Sri Ram Sharma (D.W.-3) has stated that on 24.02.1995 he was posted at Kotwali, Lalganj, District-Raebareli and at that time the appellant-kamlesh Kumar had filed a written information showing that his wife, Smt. Dhanpati had committed suicide by setting her on fire. He further stated that he had entered the contents of the said information in Ext.-Kha-1 and informed the Police Inspector-Pritam Singh.

31. From perusal of the Ext.-Kha-1, it is clear that the appellant-Kamlesh Kumar had also mentioned in his information that in the intervening night of the occurrence the appellant and deceased were sleeping together on one bed, the deceased had arisen in the morning but the appellant continued to sleep. It is further mentioned that at about 7:00 a.m. appellant's sister saw the burn smoke, awoke the appellant and raised alarm. Thereafter he, his sister-Ram Pyari (co-accused) and co-villagers-Ram Murti, Nanhe and so many villagers appeared there and saw that the room where the deceased was burning, was locked from inside. It is also mentioned in the said information that all the persons, who were present on the spot, had tried to cut and tore the door but could not succeed as handle of axe was broken. Thereafter they pulled down the door by spade and saw that the deceased had been completely burnt and died. It is further mentioned in Ext.-Kha-1 that information was sent to his in-laws through his uncle.

32. Now the question arises whether the aforesaid explanatory evidence produced by the appellant to rebut the presumption of dowry death, is reliable and trustworthy. The appellant has not produced his uncle through whom he had sent information to the informant (P.W.-1). According to Dr. R. B. Verma (P.W.-3) the deceased was completely burnt but he in his cross-examination had denied the presence of any smell of kerosene oil. Investigating Officer, Rajendra Kumar Pandey (P.W.-6) who visited the place of occurrence did not find any inflammable materials such as Kerosene oil, match box, dibri etc. He had also not found the broken handle of axe whereby the appellant and other persons were trying to cut the door. The appellant in his statement, recorded under Section 313 of the Code has also not explained the necessity of giving information to the concerned police station by mentioning exculpatory story if he had already sent his uncle to inform the informant (P.W.-1).

33. In addition to above, site plan (Ext.-Ka-11) shows that the deceased was burnt at 'X' place which is pucca room. The

appellant had not produced any evidence that how many rooms were in his house and also not pointed out the place where he was sleeping with the deceased whereas from perusal of site plan (Ext.-Ka-11) it transpires that most portion of the appellant's house is surrounded by thatched roof (chhappar). Lal Bahadur (P.W.-1) in his cross-examination has stated that the place where the deceased was burnt is pucca room having door and window situated in northern side of the house. This witness has also stated that one side of the appellant's house was raw (kachha) whereas one side was pucca and another side was damaged.

34. It is also pertinent to note at this juncture that the said occurrence was happened in the month of February having approximately temperature of 18 degree celsius in the night. The appellant and deceased were young married couples at the time of occurrence and were sleeping on same bed in the night of the occurrence. It may be presumed that young couple of rural area in the month of February would sleep together at place having morality and secrecy and if there was only one pucca room in the house of the appellant it would be expected that they would not sleep outside the room where the co-accused and other family members/relatives were sleeping. In addition to above, Ram Baran (D.W.-2) in his cross-examination has also admitted that in the evening of the occurrence the appellant and the deceased had quarreled together. In such circumstances the defence of appellant that the deceased was sleeping with him in the night but she had committed suicide in another room, is not reliable. Further, the explanation of appellant that he was sleeping inside his house with the deceased and she awoke due to frustration, went into pucca room, bolted the door from inside and set herself on fire but she could not be saved and rescued by the appellant, his family members and co-villagers as she was completely burnt, is also neither trustworthy nor believable because if woman was burning inside the house of the appellant where the appellant and his family member were present, but they failed to experience bad smell caused by burning of the deceased, smoke or her cry and noise in the beginning of the said occurrence and also failed to make effective efforts to save her. Further more, the said occurrence was happened at or before 7:00 a.m. on 24.02.1995 but no information was given by the appellant to concerned police till 6:10 p.m. The conduct of appellant shows that during this period of twelve hours he was creating and manufacturing false evidence in his defence.

35. In addition to above, the written information/application filed by the appellant at concerned police station has neither been produced nor proved by the appellant before the trial Court. Mohd. Jarmish Khan (D.W.-1) and Ram Sharma (D.W.-3) proved an extract of General Diary (Ext.-Kha-1) wherein extract of information, given by appellant was entered by D.W.-3. Non production of said written information before the trial Court amounts suppression of important fact which is fatal to explanation of appellant. Thus, in the light of law laid down by Hon'ble Supreme Court in ***Trimukh Maroti Kirkan (supra)*** explanatory evidence produced by the appellant is not reliable and trustworthy to rebut the statutory presumption of Section-113-B of Evidence Act and failure to produce the reliable evidence further strengthen the prosecution case.

36. So far as the submission of learned counsel for the appellant that since the informant (P.W.-1), father of the deceased had not made any complaint regarding demand of dowry and harassment caused by the appellants to any police authority prior to this occurrence, the prosecution story becomes doubtful, is concerned, the record shows that Lal Bahadur (P.W.-1) was illiterate person and belongs to a rural area. He has further stated that the appellants were well known to him earlier to the marriage of the deceased, as they were his old relatives, therefore there was no discussion on the point of dowry.

37. It is often seen that in rural areas where the bride groom's family is well known to the family of the bride earlier to their marriage settlement, the bride and her parents do not agitate some problem and issues occurred between them with family of bride groom after her marriage as they believe that due to lapse of time the problem whether it is related to demand of dowry or otherwise, may be subsided or pacified in future. Parents of bride do not want to interfere in such disputes. The poor and helpless father of the bride used to prefer to remain as a silent spectator in such disputes and avoid to complain to police authorities because he believes that such step may deteriorate the relationship of his daughter with her husband and in-laws. Failure to take any legal step in such disputes against the in-laws of the deceased does not mean that neither dowry was demanded nor harassment or cruelty was committed to the deceased soon before her death.

38. Recently in ***Preet Pal Singh vs. Sate of U.P., AIR 2020 SC 3995*** where Allahabad High Court had suspended the sentence of the appellant, convicted for the offence of dowry death, on the ground that no complaint for demand of dowry was made earlier by the father of the deceased, Hon'ble Supreme Court, setting aside the impugned order passed by this Court, has held as under :

"42. From the evidence of the Prosecution witnesses, it transpires that the Appellant had spent money beyond his financial capacity, at the wedding of the victim and had even gifted an I-10 car. The hapless parents were hoping against hope that there would be an amicable settlement. Even as late as on 17.6.2010 the brother of the victim paid Rs. 2,50,000/- to the Respondent No. 2. ***The failure to lodge an FIR complaining of dowry and harassment before the death of the victim, is in our considered view, inconsequential. The parents and other family members of the victim obviously would not want to precipitate a complete break down of the marriage by lodging an FIR against the Respondent No. 2 and his parents, while the victim was alive.*** (Emphasis supplied)

39. So far as the next submission made by learned counsel for the appellant that the F.I.R. was lodged by delay of 24 hours and without any explanation, is concerned, the record shows that Lal Bahadur (P.W.-1) was not present at the place of occurrence. He had come at the place of occurrence on 24.02.1995 at about 7:00 p.m. and lodged F.I.R. on the next day i.e. 25.02.1995 at about 6:30 a.m. The distance of place of occurrence from the concerned police station as shown in Ext.-Ka-3 is 8 kms. No time limit has been prescribed for lodging the F.I.R. either in Evidence Act or in the Code. The delay caused in lodging the F.I.R. depends upon facts and circumstances of the each case

and if such delay is natural and reasonable, it cannot be treated fatal to the prosecution story. Hon'ble Supreme Court, on delay caused in lodging the F.I.R., in ***Tara Singh and others vs. State of Punjab, AIR 1991 SC 63*** has held as under :-

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the" report. *Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully.* ***However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay.*** *These are all matters for appreciation and much depends on the facts and circumstances of each case."*

(Emphasis supplied)

40. Coming to the facts of this case again, Lal Bahadur (P.W.-1) (informant), in his cross-examination, stating that after receiving the information of the occurrence, has stated that he had reached the place of occurrence at 7:00 p.m. He further stated that he had gone to concerned police station on next day with one Devtadin ; he is not so educated and he got the information written by Devtadin because he could not write due to weak sight. This witness is father of the deceased. Looking to the brutal death of deceased, it might be possible that he would have become numb and so puzzled that he would not be in a position to take further step and if in such situation he could not reach the concerned police station to lodge the F.I.R. in the night, it cannot be said that the delay caused for lodging the F.I.R., is fatal to the prosecution.

41. Thus the prosecution has succeeded to prove that the deceased had died within seven years of her marriage due to burn injuries inside the house of the appellant and she was subjected to cruelty and harassment by the appellant due to demand of dowry soon before her death. The appellant has failed to produce any reliable evidence in his defence to rebut or explain the prosecution evidence in view of the statutory presumption as provided under Section 113-B of Evidence Act. Learned trial Court has elaborately discussed the evidence led by the prosecution in the light of argument advanced by learned counsel for both the parties. The impugned judgment is well discussed, well reasoned, it requires no interference and liable to be affirmed.

42. Now coming to the question of sentence whether sentence passed by the Trial Court, is just and proper or not.

43. Appellant has been convicted for the offence under Section 304-B and 498-A

I.P.C. and under Section 4 of D. P. Act. He has been sentenced only for seven years rigorous imprisonment for the offence under Section 304-B I.P.C., for 2 years rigorous imprisonment and fine of Rs. 1,000/- for the offence under Section 498-A I.P.C. and for one year rigorous imprisonment and fine of Rs.1,000/- for the offence under Section 4 of D. P. Act. It has been further directed that all the sentences have to run concurrently. Thus the maximum sentence, awarded against the appellant, is seven years.

44. It is settled principle of sentencing and penology that undue sympathy in awarding the sentence with accused is not required. The object of sentencing in criminal law should be to protect the society and also to deter the criminals by awarding appropriate sentence. In this regard Hon'ble Supreme Court has observed in ***State of Madhya Pradesh vs. Saleem @ Chamaru, AIR 2005 SC 3996*** which is as under:-

"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".

45. Looking into the nature and gravity of the offence, I am of the view that the punishment awarded by the Trial Court is just and appropriate and requires no interference. Appeal is liable to be dismissed and impugned judgment and order passed by the learned Trial Court is liable to be affirmed.

46. In the light of above discussion, the appeal lacks merit and is hereby ***dismissed***. The impugned judgment and order dated 19.01.2002 passed by Additional Session Judge/Fast Track Court-II, Raibareli in Sessions Trial No. 188 of 1995 (State vs. Ram Shankar and others), is maintained and affirmed.

47. The appellant-Kamlesh Kumar is on bail. His bail bond is cancelled. He is directed to surrender before the concerned Court forthwith to serve out the aforesaid sentence.

48. Let a copy of this judgment along with lower court record be sent to the concerned Court for necessary information and compliance.

(2020)11ILR A446
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 264 of 1989
and
Criminal Appeal No. 95 of 1989

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

Counsel for the Appellant:
Sri Ram Niwas Sharma, Sri Anuj Srivastava, Sri Atul Tej Kulshrestha, Sri Mohit Singh, Sri Ravendra Singh, Sri Vinay Singh

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

Criminal Law – Code of Criminal Procedure,1973 -Section 203/204 - Criminal appeals have been filed against the conviction under section 302/34 I.P.C. and 201 I.P.C.

Hostile Witness The effect of the hostile witness cannot be discarded as whole - relevant parts are admissible, can be used by prosecution or the defence. (Para83)

2. Evidence Law-Evidence Act, 1872 - Section 106 - Fact especially within knowledge of accused – Accused / Appellants failed to discharge the burden in terms of section 106 of Evidence Act – No explanation of facts given by them which were in their special knowledge. (Para 33) In this case, presence of the accused persons is fixed at the time of occurrence, place of occurrence and their participation cannot be ruled out and accused persons were failed to discharge their burden under section 106 of Evidence Act. (Para 38)

The present appeals lacks of merit.

Appeals Dismissed. (E-2)

List of Cases cited:-

1. C. Muniappan & ors. Vs St.of T.N., (2010) 9 SCC 567

2. Trimukh Maroti Kirkan Vs St. of Mah., (2006) 10 SCC 681

3. Shambhu Nath Mehra Vs St. of Ajmer: AIR 1956 SC 404

4. St. of W.B. Vs Mir Mohammad Omar & ors., (2000) 8 SCC 382

5. C. Muniappan & ors. (Supra)

(Delivered by Hon'ble Samit Gopal, J.)

1. These two criminal appeals have been filed against the judgment and order dated 05.01.1989 passed by the IXth Additional Sessions Judge, Meerut in Session Trial No. 6 of 1987 (State of U.P. Vs. Risal and others) whereby the accused appellants Kalloo, Krishan and Risal have been convicted and sentenced under Section 302/34 IPC for life imprisonment and the appellant Smt. Suresh has been convicted and sentenced under Section 201 IPC to one year rigorous imprisonment.

2. In Crl. Appeal No. 264 of 1989 accused-appellant Kalloo is the sole appellant whereas in the connected Criminal Appeal No. 95 of 1989 Krishan, Risal and Smt. Suresh are the appellants. In so far as the appellants in the connected Criminal Appeal No. 95 of 1989 are concerned, all the three appellants have died and their appeal stands abated vide order dated 26.09.2019.

3. Accused Kalloo in Criminal Appeal No. 264 of 1989 is the sole surviving accused whose appeal is before the Court to be adjudicated against his conviction and sentence by the trial court.

4. The prosecution case as per the First Information Report lodged by Photu PW-1 is that Risal his elder brother is living separately and he along with his two other brothers live in a joint family. Risal has four sons Rajendra, Bhopal, Kalloo and Krishan. Smt. Urmila wife of Bhopal lives with her children along-with Rajendra. Kalloo, Krishan and Risal live in a joint family. Risal had about 11½ bigha of land, out of which, he had sold about nine bighas around two years back, the remaining 2½ bighas of land was agreed by him to be sold to Rajendra, for which, an agreement was entered into between them and he had taken

Rs. 10,000/- from Rajendra and the remaining money was to be paid by Rajendra. Rajendra was in discussion with his father Risal for getting the said 2½ bigha land by way of a sale deed and used to say that the nine bighas land which was sold had his share and as such the money of his share be adjusted in the land he was proposing to purchase and the sale deed be executed, to which Risal was not ready. They used to enter into quarrel often regarding the same, on which, relatives and neighbours used to intervene and council both the persons. A day prior to giving of the application for lodging of the First Information Report, a dispute between the said two persons arose, on which, the first informant and other persons intervened and got the issue subsided at that moment. Around 8:00-9:00 P.M., the first informant Photu, his younger brother Chandra Bhan after councilling both the persons came out of the house and suddenly they heard Rajendra shouting to save him and he said that he has been assaulted, on which, the first informant Photu and his brother ran inside the house of Risal where a kerosene lamp was burning which was spreading light wherein they saw Risal and Krishan catching hold of Rajendra while being on the floor and Kalloo who was armed with a *phawda* with an intention to kill Rajendra cut his neck which was also being witnessed by Smt. Urmila from a grill who was also shouting that "he has been killed, save him". The door of the house of Smt. Urmila was bolted from outside. It is further stated that the first informant reached near the place of occurrence and saw Rajendra to be dead, on which, he said to Risal as to what he has done, and in reply, Risal stated that if he would tell it to anyone then he would also meet the same fate. It is further stated that due to fear, the first informant remained silent. Risal, Kalloo and Krishan then while leaving the house, were saying that if anyone follows them then he will also meet the same fate. It is then stated that due to fear, the persons remained near the dead body and were crying. It is stated that the first informant gathered courage after assurance of villagers that the police has to be informed, on which, he has lodged the present First Information Report.

5. An application dated 08.01.1986 was given by Photu (PW-1) to the police of which Mahaveer Singh is the scribe, the same is marked as Ex. Ka-1 to the records. On the basis of the said application, a First Information Report was registered on 08.01.1986 at 08:30 A.M. at Police Station Chandi Nagar, District Meerut as Case Crime No. 2 of 1986, under Section 302 IPC having Risal, Krishan and Kalloo as the accused therein. The said First Information Report which is marked as Ex. Ka-15 to the records.

6. Rajendra son of Risal is the deceased. His postmortem examination was conducted on 08.01.1986 at 04:00 P.M. by Dr. R.S. Puri (PW-3) which is marked as Ex. Ka-2 to the records. The ante-mortem injuries found on the body of the deceased read as under:

(i) Incised wound 10cm x 3cm into bone deep on the right side of forehead. 6 cm for the middle upto upper end of the right ear oblique in direction.

(ii) Incised wound 8cm x 1.5cm into bone deep on the transverse upper eye lid just below the eyebrow, upto the cheek bone right side.

(iii) Incised wound 11cm x 1.5cm into bone deep transverse on the right side of face from the right nostril to wound right cheek.

(iv) Incised wound 23cm x 3cm into bone deep transverse along the lower side of mandible from left angle of

mandible towards the right angle of mandible bone, mandible bone is cut.

(v) Incised wound 15cm x 4cm into bone deep transverse on the front of neck extending from the left to right side upper part, 3cm below the chin.

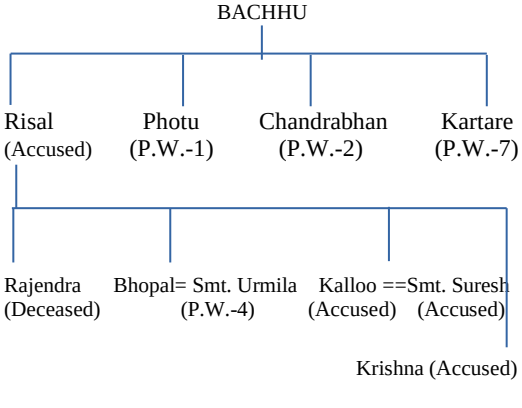
The cause of death has opined by the doctor is shock and haemorrhage as a result of ante-mortem injuries.

7. During investigation Smt. Suresh was also included as an accused in the case.

The investigation concluded and a charge sheet dated 27.01.1986 was submitted against Risal, Krishan and Kalloo under Section 302 IPC and against Smt. Suresh under Section 201 IPC, the same is Ex. Ka-16 to the records.

8. The trial court framed charges against Risal, Krishan and Kalloo under Section 302 IPC read with Section 34 IPC and against Smt. Suresh under Section 201 IPC vide its order dated 12.03.1987. The accused persons pleaded not guilty and claimed to be tried.

9. In the present case, the accused persons, the deceased and the witnesses are close relatives of each other. The pedigree of the family of Bachhu is given herein-below which would show the relationship between them:



10. The prosecution in order to prove its case produced three eye witnesses being Photu as PW-1 who is also the first informant and uncle of the deceased, Chandra Bhan as PW-2 who is another uncle of the deceased being the younger brother of PW-1 and Smt. Urmila as PW-4 who is the wife of Bhopal who is the brother of the deceased. Amongst the formal witnesses Gajey Singh PW-5 was produced and examined as a witness of the recovery of *phawda*, Lahri Singh PW-6, the constable took the dead body for post-mortem examination, Kartare (PW-7) who saw Smt. Suresh hiding the *phawda* which was said to have been used in the assault, Sri Madan Mohan, the Judicial Magistrate Economic Offences, Meerut PW-8 who recorded the statements under Section 164 Cr.P.C. of Photu, Gajey Singh, Smt. Urmila and Chandra Bhan and lastly Mahipal Singh, Sub-Inspector as PW-9 who was the Investigating Officer of the case upto 14.01.1986 after which the investigation was handed over by him to Rajveer Singh Rathore, the S.H.O. of the same police station. The accused Risal, Krishan and Smt. Suresh in their statements under Section 313 Cr.P.C. denied the occurrence and pleaded ignorance as to the reason of their implication in the present matter. Accused Kalloo claimed false implication due to enmity. No defence evidence was led.

11. The trial court after considering the entire evidence on record, initially came to the conclusion that since the three eye witnesses have denied their witnessing the occurrence, as such the present case now does not remain to be a case of eye witness account but is now a case based on circumstantial evidence and as such the Court has to look into the other related circumstances in the light of the statement

of the said witnesses. It finally came to the conclusion that looking to the circumstances of the case and the fact that PW-1, PW-2 and PW-5 have been declared hostile, still there is sufficient evidence to show that the murder of Rajendra has been committed with a *phawda* by Risal, Kalloo and Krishan and Smt. Suresh had tried to conceal the said *phawda* and thus convicted the accused persons.

12. As has already been stated above, the accused Krishan, Risal and Smt. Suresh died during the pendency of the appeal filed by them and their appeal stands abated. Thus, the appeal of Kalloo only survives as of now.

13. We have heard Sri Anuj Srivastava and Sri Mohit Singh, learned counsels for the appellant, Sri Gaurav Pratap Singh, learned brief holder for the State of U.P. and have perused the record.

14. Learned counsels for the appellant made the following submissions:

(i) The three alleged eye witnesses namely Photu PW-1, Chandra Bhan PW-2 and Smt. Urmila PW-4 have not supported the prosecution case and have been declared hostile and as such there is no eye witness to the present incident.

(ii) Gajey Singh PW-5 who is a witness of the recovery of *phawda* has also been declared hostile and as such the recovery of the *phawda* is also a manipulation and a false recovery has been shown. Kalloo the accused appellant has been assigned the role of assaulting the deceased with *phawda* and cutting his neck but since the witness of the recovery of *phawda* has been declared hostile even the corroboration of use of the said *phawda* is missing.

(iii) The recovery of *phawda* as alleged by the prosecution is from the possession of Smt. Suresh as is evident from the recovery memo Ex. Ka- 4 which cannot in any manner be linked and associated to have been used by the appellant Kalloo as the same has not been recovered either from his possession or from his pointing out.

15. On the other hand, learned brief holder for the State opposed the submissions of the learned counsels for the appellant on the ground that although the four witnesses including the three eye witnesses have been declared hostile but manner in which PW-1 Photu and PW-2 Chandra Bhan have been declared hostile clearly shows that they were at some point of time won over and they had thus changed their version before the trial Court. It is further argued that PW-5 has admitted his signing on papers and has also stated to have been a witness of the recovery of a blood stained *phawda* but has stated that he had signed on a blank paper. It is argued that at least the evidence of PW-1 Photu, PW-2 Chandra Bhan and PW-5 Gajey Singh can be used in drawing the conclusion that the present incident occurred as stated by the prosecution at the date, time and place of occurrence by the accused persons named therein. It is argued that the appeal lacks merit and be dismissed.

16. PW-1 Photu is the first informant and Chacha of the deceased. He was for the first time produced before the Court on 24.08.1987 for recording of his examination-in-chief, he stated regarding the inter-se relationship between the parties. For the motive of the incident, he stated that Risal had 11½ bigha agricultural land. Rajendra was a bachelor and used to live with Bhopal and his family. About 1½, years back, Risal had sold 9 bighas of the land. The said land was ancestral. Risal did

not give the share of Rajendra out of the sale proceeds. About 2½ months back, Risal had executed an agreement to sell in favour of Rajendra for the remaining 2½ bighas of land on receiving Rs. 10,000/- for it. Rajendra used to ask Risal to execute the sale deed in his favour for the said land, on which, Risal used to ask for the remaining money for it. Rajendra used to tell Risal that he had sold 9 bighas of land and the money of his share in the sale proceeds may be adjusted in the transaction of his purchase of 2½ bighas of land and the sale deed be executed, on which, there used to be fights between them. PW-1, his brother Chandra Bhan and neighbours used to intervene at the time of fights between them.

17. On the fateful day, at about 07:00 P.M. Risal and Rajendra were having a quarrel, on which, PW-1 and Chandra Bhan went there and pacified both of them. At about 08:30-09:00 P.M., when PW-1 and Chandra Bhan returned from the house of Risal, some villagers told them that Risal and Rajendra have again started fighting. He and Chandra Bhan went there and saw Smt. Urmila locked in her portion of the house and the dead body of Rajendra was lying in the house. He states that he did not see as to who assaulted Rajendra and how he died in the house. The wife of Kalloo was also present and after his reaching the place, many other villagers also came there. They cried and were there for the whole night. Then he went to the police station and on instruction of people, got a report transcribed by Mahaveer. The said witness was then recalled on 20.10.1987 and he stated that he does not know as to whether Mahaveer had transcribed what he had dictated to him or not. He states to be an uneducated person. He states that the said application was not read out to him. It is further stated that Inspector, Mahaveer and many people were present at the police station who were dictating the report. He had orally informed the police personnel present. He states that the report shown to him is the same which he had got transcribed but denies the fact that he has seen the assailants. He identifies his thumb impression on the said application which was marked as Ex. Ka-1. Then he was declared hostile and was allowed to be cross examined by putting leading questions to him. He then denies the version as stated in the First Information Report regarding Krishan and Risal catching hold of the deceased while he was lying on the floor and assault by Kalloo with a *phawda* on him. He states that he does not know as to how Mahaveer has written the same. He also denies the presence of the kerosene lamp at the place of occurrence but later on states that it was present there. He states that he has given his statement under Section 161 Cr.P.C. to the Investigating Officer but states that the same has been recorded as per the First Information Report. He further states that he has told the Investigating Officer not to write such statement, to which, he had stated that he may give his correct statement in Court. On a suggestion that he has been won over by his relatives, he denies it. He was again recalled on 03.06.1988 and was confronted with his statement recorded under Section 164 Cr.P.C., to which, he states that although he had given the statement which was recorded but the Investigating Officer had told him to give the statement which he had given. He states that the Investigating Officer was not present in the court at the time when his statement was being recorded but he was standing outside the Court. While being cross examined on behalf of the accused, he states that he was

made to give his statement under Section 164 Cr.P.C. forcibly by the Investigating Officer and resiles from the said statement.

18. PW-2 Chandra Bhan is the uncle of the deceased and brother of PW-1. He has also stated that regarding the inter-se relationship between the parties. He has stated that there was a dispute between Risal and Rajendra with regards to execution of the sale deed for land. He further states that for the same dispute, there used to be discussions often between them, in which, he also used to go and get the said dispute settled at that point of time. In so far as, the day of the present incident is concerned, he has stated that he and many other villagers heard that some fight is going on in the house of Risal, on which, he went there and intervened between them at about sometimes at dawn. He states that later on in the late night being around early morning, he came to know that Rajendra has died in the house of Risal, on which, he went there and saw Rajendra lying dead. Risal and others were not present. Many people were present there. Smt. Urmila was present in her house and was crying. He states that he did not see Risal, Krishan and Kalloo murdering Rajendra. At this stage, he was declared hostile and was allowed cross examination.

19. In the cross examination, he denies his giving statement under Section 161 Cr.P.C. to the Investigating Officer that as soon as he came out of the house, he heard the shriek of Rajendra to save him, on which, he and Photu rushed to the house of Risal wherein they saw in the light of kerosene lamp that Risal had caught hold of Rajendra on the floor and Kalloo armed with *phawda* cut the neck of Rajendra. He states that he does not know as to how the Investigating Officer has recorded the statement. On a suggestion that there has been a settlement with Risal and others he is not speaking the truth he denies the same. The said witness was recalled later on and was confronted with his statement recorded under Section 164 Cr.P.C., to which, he states that the same was given by him on the instructions of the Investigating Officer. On being cross examined, he states that the Investigating Officer had threatened him and as such he had given the said statement and the statement which he has been given in Court is correct and true statement. His statement recorded under Section 161 Cr.P.C. is an incorrect statement.

20. PW-4 Smt. Urmila is the wife of Bhopal who is the brother of the deceased Rajendra and accused Kalloo and Krishan and son of accused Risal. She in her statement recorded in Court states that after having her food she went out for sleep and on hearing shouts and shriek, woke up and saw that her house was bolted from outside. She denies having seen anyone committing the murder of Rajendra. She further states that on the shouts, she knocked her door for being opened which after sometime was opened by Chandra Bhan. Regarding Chandra Bhan PW-2 and Photu PW-1 she states that they had reached about an hour after the incident. She further states that she then lit the lamp and saw Rajendra lying dead and blood was oozing out. She further states that on seeing him, she became unconscious. At this stage, she was also declared hostile and the prosecution was permitted to cross examine her. In the cross examination, she denies giving any statement to the Investigating Officer and also denies that she has disclosed any name of any accused to him and states that she does not know as to how he has written the same. She further states that Rajendra

deceased used to even have his meals at the house of Risal and even sometimes in her house. She states that there were no differences between Risal and Rajendra for land but often there are disputes in a house. She denies the fact of weapon used for the assault of Rajendra and also states that she did not see any weapon with the accused persons. On a suggestion that she is giving a false statement just for the reason to save her father-in-law and *devar*, she denies it. She was subsequently recalled and confronted with her statement recorded under Section 164 Cr.P.C, on which, she initially states that the Investigating Officer had got her thumb impression affixed on the same, later on, she says that she had given the said statement and then again she states that no statement was recorded by the Magistrate but only thumb impression was affixed.

21. PW-5 Gajey Singh has been examined as a witness of recovery of *phawda*. He states that the Investigating Officer had recovered a *phawda* from the house of Risal which was blood stained. He had signed a paper there only to which Kartare is also the signatory. He further states that the said paper was a blank paper and it was not written on it as to from whose possession *phawda* was recovered. At this stage, the prosecution was permitted to cross examine the said witness though, he was not formally declared hostile. In the cross examination, he admits his signature on the said paper. On being confronted with his statement under Section 164 Cr.P.C, he states that he was called by the Investigating Officer from his house and was instructed to give the said statement. He further states that the Investigating Officer at the time of recording of his statement was not present in Court but was standing outside the Court. To a suggestion to him that he has colluded with the accused persons and giving a false statement, he denies the same. On cross examination, he states that the statement which he has given today in Court, is correct and his statement recorded earlier, is false. It has further stated that he was threatened by the Investigating Officer that if he does not give the statement as instructed by him he will be challaned.

22. PW-7 Kartare who is the brother of the first informant and accused Risal and uncle of the deceased has stated that the Investigating Officer inquired from him about the whereabouts of Smt. Suresh, to which, he stated that she has taken the *phawda* and kept it somewhere in another room, on which, he went along with the Investigating Officer, they saw Smt. Suresh concealing the *phawda* in a room which was immediately recovered by the Investigating Officer, on which, Smt. Suresh stated that her husband Kalloo had instructed her to conceal it before police arrives. He states that the said *phawda* had blood stained on both its side.

23. In the present matter, the statement of Photu, Gajey Singh, Smt. Urmila and Chandra Bhan have been recorded by the PW-8 under Section 164 Cr.P.C, the same are marked as Ex. Ka-19 to 22 respectively of the records.

24. The motive as stated for committing the murder of Rajendra by the accused persons is the dispute regarding the distribution of money of the 9 bighas of land sold by Risal and further the purchase of the remaining 2½ bighas of land by Rajendra from Risal, for which, he had been continuously telling to Risal to adjust the price from his share in the sale consideration of the 9½ bighas land sold by

him. An agreement to sell is also stated to have been executed between Risal and the deceased Rajendra for the remaining 2½ of bighas of land for which Rs. 10,000/- has been stated to have been given as advance. In so far as PW-1 Photu, Chandra Bhan PW-2 and Smt. Urmila PW-4 are concerned, they have been declared hostile. PW-5 Gajey Singh who has not supported the prosecution case although has not been formally declared hostile but would be treated as a hostile witness.

25. The law regarding the appreciation of evidence of a hostile witness is well settled and very clear. The Hon'ble Apex Court in the case of **C. Muniappan and others Vs. State of Tamil Nadu: (2010) 9 SCC 567** has in para 81 to 83 summarised the same and has held as follows:

"Hostile Witness:

81. It is settled legal proposition that:

"6..... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine 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 that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana: (1976) 1 SCC 389; Rabindra Kumar Dey v. State of Orissa: (1976) 4 SCC 233; Syad Akbar v. State of Karnataka: (1980) 1 SCC 30; and Khujji v. State of Madhya Pradesh: (1991) 3 SCC 627).

82. In State of U.P. v. Ramesh Prasad Misra & Anr.: (1996) 10 SCC 360, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.: (2006) 2 SCC 450; Sarvesh Naraian Shukla v. Daroga Singh & Ors.: (2007) 13 SCC 360; and Subbu Singh v. State, (2009) 6 SCC 462.

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

26. The *phawda* stated to be used by Kalloo for murdering Rajendra was recovered by the Investigating Officer on 08.01.1986, for which, a recovery memo was prepared which is marked as Ex. Ka- 4 to the records. Gajey Singh PW-5 is one of the witnesses of the said recovery memo. Although he admits his signature on a paper which he states to be blank, as a result of which, the prosecution was permitted to cross examine him but he also in his statement states the fact that the *phawda* was recovered in his presence by the Investigating Officer. The said *phawda* was sent along with other articles to the chemical analyst for examination and the report of the chemical analyst which is Ex. Ka- 17 to the records shows the *phawda* was marked as an article at item no. 1 and in the report of examination, the said analyst has opined that human blood was

found on the same. In so far as, the test for the identification of the group of blood was concerned, the same was found to be unfit.

27. The present case is a case in which there are three eye witnesses produced by the prosecution being PW-1 Photu, Chandra Bhan PW-2 and Smt. Urmila PW-4. Although in court, all the said three eye witnesses have been declared hostile but the fact that they are relatives of the deceased and accused and also the fact that they have in their statements recorded under Section 164 Cr.P.C, given their statements as being ocular witnesses to the incident, cannot be lost sight of. PW-1 Photu is the first informant of the present case, he admits the fact of his lodging of the First Information Report. He even admits the fact of quarrel between Risal and the deceased Rajendra preceding to the murder of Rajendra, in which, he states to have intervened along with Chandra Bhan and had got them pacified. He admits his thumb impression on the application for lodging of the First Information Report. PW-2 Chandra Bhan though has also been declared hostile, is the brother of accused Risal, Chacha of accused Kalloo, Krishan and deceased Rajendra, and although has also been declared hostile but in the same manner of deposition of PW-1 has stated about fight between Risal and Rajendra preceding the murder of Rajendra.

28. The admitted case of the prosecution is of the dead body of Rajendra lying in the house of Risal and also being found at the same place by the Investigating Officer at the time of inquest. There is no explanation whatsoever coming forth from the accused appellant as to how he died at the place where his body was found. Risal, Kalloo and Krishan are stated to be living together.

29. It is not the case of the defence that the dead body as found at the place, is incorrect and the death of the deceased had occurred at some other place. There is no explanation by the accused persons as to how the deceased died at that place where his body was found. The Investigating Officer has recovered blood stained mud and plain mud from the place of occurrence, for which, a recovery memo has been drawn which is Ex. Ka-12, the same has not been disputed by the defence. Even the sale of nine bighas of land by Risal, his retaining the sale consideration with him is also admitted by the appellant Kalloo while giving his answer to a specific the question put to him in his examination under Section 313 Cr.P.C. The fact of Risal, Kalloo and Krishan and Smt. Suresh living together, is also admitted by the appellant in his examination under Section 313 Cr.P.C. The appellant has in his statement under Section 313 Cr.P.C stated that the present case has been initiated against him due to enmity. Except for this he has not stated anything else in his defence.

30. From the entire prosecution evidence and the statement of the eye witnesses, it is clear that the accused persons were present at the time of the incident in the same house when the incident took place. No explanation whatsoever is coming forth from their side in discharge of their burden. Admittedly Risal, Kalloo, Krishan and Smt. Suresh were living together. Burden upon the accused under Section 106 of the Indian Evidence Act, 1872 is to be discharged specially under the circumstances when it has been proved from the statements of the witnesses that the accused persons were present there along with the deceased just preceding the time of murder.

31. The law regarding under Section 106 of the Indian Evidence Act, 1872 is well settled. The unnatural death of Rajendra took place in the house, in which Risal, Kalloo, Krishan and Smt. Suresh were residing.

32. As per the requirement of Section 106 of the Indian Evidence Act 1872, the accused were required to give plausible and convincing explanation about the circumstances, in which, the deceased was found dead in their house. They have even not stated as to where they were when the murder took place. Where an offence like murder is committed inside the house, the initial burden to establish the case would undoubtedly be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases. The burden would be of a comparatively lighter character.

33. In view of Section 106 of the Indian Evidence Act, 1872, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how crime was committed. The inmates of the house cannot keep away by simply keeping quite and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer any explanation. In the case of **Trimukh Maroti Kirkan Vs. State of Maharashtra: (2006) 10 SCC 681** the Hon'ble Apex Court whilst applying provisions of Section 106 of the Indian Evidence Act, observed in paras 14 and 15 reads as under:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. *(See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab Vs. Karnail Singh (2003) 11 SCC 271).* The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act 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 inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

34. On the interpretation of Section 106 of the Indian Evidence Act, 1872 in the case of **Shambhu Nath Mehra Vs. State of Ajmer: AIR 1956 SC 404** in paragraph 9 it was observed by the Hon'ble Apex Court thus:

"9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

35. In the case of **State of West Bengal Vs. Mir Mohammad Omar and others: (2000) 8 SCC 382**, the Hon'ble Apex Hon'ble Court has observed in paras 31 to 33 as under:

"31. The prestine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

36. The trial judge in the judgment and order of conviction against which the present appeals have been filed has erroneously come to her own conclusion that since the eye witnesses have denied witnessing the incident as such the result would be that the present case would not be a case of ocular evidence but would be a case based on circumstantial evidence. The said conclusion of the trial judge is incorrect.

37. The present case rests on the testimony of eye witnesses. In the event, the eye witnesses do not support the prosecution case and are declared hostile or are permitted to be cross examined without being declared as hostile there status would be of a hostile witness but there testimony cannot be washed away and has to be looked into as per the settled principles of law and the law as enumerated in the case of **C. Muniappan and others (Supra)**. Moreso, opinion of the trial judge to this effect would have no bearing on the final outcome of the matter as the same in no manner would prejudice the accused. Even no argument has been raised on this pretext and no objection has been taken by the learned counsels appearing on behalf of the appellant. This Court is under a bounden duty to look into even this aspect in spite of the situation whether the same is argued and raised or not.

38. In the result, it is apparent that the murder of Rajendra has been committed as stated by the prosecution and as enumerated in the first Information Report at the date time and place as mentioned therein. The presence of the accused persons is fixed at the time of occurrence, place of occurrence and their participation cannot be ruled out. The dead body was found in the house occupied by Risal, Kalloo, Krishan and Smt. Suresh. The accused persons were under a bounden duty to discharge their burden under Section 106 of the Indian Evidence Act, 1872 IPC which they failed to do.

39. In the result, this Court comes to the conclusion that the prosecution has succeeded in proving its case beyond all reasonable doubts against the appellant. The conviction and sentence as awarded by the trial court is hereby upheld. The present appeal lacks merit and is accordingly **dismissed**.

40. The appellant is stated to be in jail since 28.08.2019 in pursuance of the order dated 25.07.2019 by which non-bailable warrants were issued against him by this Court. He is directed to serve out the sentence as awarded to him by the trial court.

41. Let the lower court record and copy of this judgment be sent to the trial court forthwith for necessary information and its compliance.

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

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

44. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2020)11ILR A459
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Criminal Appeal No. 1247 of 2000

Shri Kant Pandey & Ors.
...Appellants (In Jail)
Versus
The State of U.P. ...Respondent

Counsel for the Appellants:
Sri R.M. Pandey, Sri Rajesh Kishore Srivastava (A.C.), Sri Pankaj Dwivedi, Sri Shriprakash Dwivedi, Sri I.K. Chaturvedi

Counsel for the Respondent:
A.G.A., Sri Rajeev Kumar Saxena, Sri Virendra Kumar Yadav, Sri Jitan Tiwari, Sri Damodar Padney

Criminal Law – Indian Penal Code,1860 - Section 302 readwith 34 - Appeal has been filed against the conviction under

Testimony of Interested Witness:- Can alone from the basis of conviction but scrutining by court must careful test whether it is free from suspicion and whether the substratum of the story narrated by the witness which is consistent with the other evidence on record.

Motive : The role of motive in assessing the credibility of prosecution case - absence of strong motive may not be fatal to the prosecution case but where there is an occasion to suspect the prosecution testimony motive acquires some significance regarding the probability of the prosecution case. (Para 38)

Ocular Witnesses – Whether the Ocular Evidence is wholly reliable, and is not in the absolute conflicted and is not absolute conflicted with the medical evidences so as to render it completely unreliable, the Ocular Witness would prevail over the medical evidence. (para54)

Prosecution has failed to discharge its burden to prove the charge against accused beyond the pale of doubt. (Para 62)

Appeal Allowed. (E-2)

List of Cases cited:-

1. Jalpat Rai Vs St. of Har., (2011) 14 SCC 208

2. (vide Sheo Shankar Singh Vs St. of Jhark., (2011) 3 SCC 654, para 15)

3. (vide Alagupandi Vs St, of T.N., (2012) 10 SCC 451, para 29)

4. (vide St. of U.P. Vs Hari Prasad, (1974) 3 SCC 673, para 2)

5. Badam Singh Vs St. of M.P., (2003) 12 SCC 792,

6. Budhwa @ Ram Charan & ors.Vs St. of M.P., 1991 Supp (1) SCC 9 (para 5)

7. Ram Bilas Vs St. of MP, (1997) SCC (Cri) 1222

8. Budhwa @ Ram Charan & ors. Vs St. of M.P. (supra)

9. Lakshmi Singh Vs St. of Bihar, (1976) 4 SCC 394,

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

1. This appeal assails the judgment and order dated 26.05.2000 passed by the IVth Additional District & Sessions Judge, Mirzapur in Sessions Trial No. 66 of 1997 by which the appellants Sri Kant Pandey (A1); Ram Kant Pandey (A2); and Amar Jeet Pandey alias Babboo (A3) have all been convicted under sections 302 read with Section 34 I.P.C. and sentenced to undergo imprisonment for life and fine of Rs. 5,000/- each with default sentence of six months rigorous imprisonment.

INTRODUCTORY FACTS INCLUDING THE PROSECUTION CASE

2. The prosecution case as per the first information report (FIR) (Ex. Ka-1), which was lodged on 29.01.1997 at 9:30 am at P.S. Kotwali Dehat, District Mirzapur by Manoj Kumar Pandey (P.W.1), is to the effect that in the morning of 29.01.1997, at about 8 am, while the deceased (Vijay Shyam Pandey), the uncle of P.W.1, was sitting with P.W.1 near the fireplace to ward off winter chill, the accused Sri Kant Pandey (A1); Rama Kant Pandey (A2); and Amar Jeet Pandey (A3) came with spear *(Ballam)* in their hands shouting and exhorting each other to finish off the deceased Vijay Shyam Pandey as he had been doing *pairvi* (pursuing of cases) in pending court cases. Upon hearing them, the deceased ran towards the door of his house but by the time could reach there, all the three accused surrounded him and stabbed him with *Ballam*. P.W.1 (the informant) raised alarm. On hearing his cries, Radhey Shyam Pandey (PW.2, the father of the informant and brother of the deceased); Sanjay Kumar Pandey (PW.3, another brother of the deceased); Mool Chand Gaur (not examined); Kamla (not examined) and others, who were all not examined, arrived and challenged the accused, as a result, all three accused escaped with their respective *Ballam*. Whereafter, the deceased was rushed to the District Hospital, Mirzapur where, upon arrival, the doctor (P.W.4) declared him dead.

3. The written report (FIR) was scribed by Surendra Bahadur Singh Yadav (not examined) on dictation of P.W.1, but was, allegedly, lodged by P.W.1

4. The inquest was held at the mortuary of the district hospital. It commenced at about 11 am and was over by 12:30 pm. The inquest report (Ex. Ka-7), amongst others, is witnessed by PW1 but not by P.W.2 and P.W.3, and the other inquest witnesses have not been examined in the trial.

5. The post-mortem examination was conducted at about 3:45 pm, on 29.01.1997, by Doctor S.P. Singh (P.W.5) who prepared and proved the post-mortem report (Ex. Ka.3). According to the autopsy report, following ante-mortem injuries were found on the body of the deceased : (i) stab wound, left side of chest 14cm below and backward to left nipple, measuring 2cm x ½ cm x cavity deep; (ii) stab wound 2cm x 1 cm over right side of abdomen 25 cm below right nipple and cavity deep; (iii) stab wound over back on right side of vertebral column, 38 cm below root of neck measuring 1 ½ cm x ½ cm x muscle deep; and (iv) stab wound over right side of thigh 23 cm above knee joint measuring 2 cm x ½ cm x muscle deep. Margins of stab wounds were clear.

6. Internal examination revealed that abdominal aorta was ruptured coinciding with track of injury no.2. Stomach was empty though small intestine contained partially digested food material and gases whereas large intestine had faecal matter and gases. According to the opinion of the doctor, the death was due to haemorrhage and shock as a result of ante-mortem injuries.

7. On external examination of the body, it was observed: *"Average built. Muscular body. Rigor mortis present in both upper and lower limbs. Face pale eyes half closed. Putrefaction not set."*

8. The time since death was estimated about one-half day.

9. The investigation was conducted and completed by Kapil Dev Tripathi (P.W.7) who, allegedly, recovered the murder weapon, a blood stained *Ballam*, from the spot and prepared its fard (recovery memo) (Ex. Ka-18). Collected blood stained earth and plain earth from the spot, prepared its fard (Ex. Ka 19). The blood on *Ballam* and blood stained earth was sent for chemical examination. The chemical report (Ex. 21) confirmed presence of human blood though the sample was not found fit to determine blood group. Soil comparison report (Ex.Ka 22) confirmed that the plain earth and the blood stained earth had same soil characteristics. After recording statement of witnesses, PW7 prepared and submitted charge sheet (Ex. Ka 20) against all the three appellants. After taking cognisance on the police report, the case was committed to the Court of Session. Upon committal, charge of an offence punishable under Section 302 read with Section 34 I.P.C. was framed against all the three accused i.e. appellants. The accused denied the charges and claimed for trial.

10. During the course of trial, seven prosecution witnesses were examined. PW-1 (Manoj Kumar Pandey-informant); PW-2 (Radhey Shyam Pandey, father of the informant and brother of the deceased); and PW-3 (Sanjay Kumar Pandey, brother of the deceased) were the eye-witnesses of the incident. PW-4 Dr. K.K. Jain proved that the deceased was brought dead to District Hospital, Mirzapur by Manoj Kumar Pandey (P.W.1) at about 8:35 am in the morning of 29.01.1997. PW-5 Dr. S.P. Singh, who conducted the post-mortem, proved the post-mortem report. PW-6 Suryabhan Singh, who was posted as Head Moharir at P.S. Kotwali Dehat on 29.01.1997, proved the registration of the FIR, the Chik FIR and the GD entry thereof. He also deposed that special report of the registration of the FIR was sent and GD entry of its return (Ex. Ka 6) was made at 17:25 hours on the same day. PW-7 Kapil Deo Tripathi, the then Station House Officer of Kotwali Dehat, who conducted the investigation, proved various stages of the investigation including the documents connected therewith as also the site plan (Ex. Ka 17).

11. The incriminating circumstances emanating from the prosecution evidence were put to the accused under Section 313 Cr.P.C. The accused challenged the prosecution evidence as false and claimed that the incident occurred in the night; the deceased had several enemies; and that they have been falsely implicated. The defence, however, led no evidence.

12. The trial court found the prosecution evidence reliable and that the charge was proved beyond reasonable doubt. Hence, all the three accused were convicted under Section 302 read with Section 34 I.P.C. and sentenced accordingly, as already noticed above.

13. We have heard Sri I.K. Chaturvedi, learned senior counsel, assisted by Sri Pankaj Dwivedi and Sri Prakash Dwivedi, for the appellants; Sri Ankit Srivastava, learned A.G.A. for the State; and Sri Virendra Kumar Yadav, learned counsel for the informant.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

14. Challenging the judgment and order of the trial court, the learned counsel for the appellants submitted as follows:-

(a) That there was no strong motive for the crime. Initially, the motive was attributed only to Sri Kant Pandey (A-1) as the person who threatened the deceased to withdraw case against his master, Prem Sao, but, later, it was improved to suggest that all the three accused were interested in the land that was subject matter of dispute between the deceased and Prem Sao. No evidence was led to demonstrate as to how the accused would get the land by withdrawal of the case when the land had already been sold to Prem Sao.

(b) That the incident occurred in the night, much before the time of the incident put up by the prosecution, and in some other manner, which is borne out from the following circumstances:

(i) The post-mortem of the deceased was completed by 3:45 pm on 29.01.1997. As per autopsy report estimated time since death was one-half day which is confirmed by presence of *rigor mortis* on both upper and lower part of the body as also by the presence of semi-digested food material in the small intestine; and faecal matter in the large intestine.

(ii) The body of the deceased was brought to the hospital at 8:35 am and was declared already dead by PW.4. The distance of the hospital from the place of occurrence is 10 km. As per the testimony of P.W.1 and P.W.3, the tractor of Panna Lal Bind was used for carrying the body to the hospital. Panna Lal Bind, as per the statement of P.W.1, resided 10-11 km away. Therefore, if the tractor of Panna Lal Bind was utilised, it would have taken at least an hour or about to arrive at the spot and another 30 to 45 minutes to reach the hospital. Hence, if the body reached the hospital by 8.35 am, the murder must have taken place prior to 7 am in the morning.

(c) There is material improvement in the prosecution case from that taken in the first information report lodged by P.W.1, alleged eyewitness of the incident. This improvement is contrived either with a view to hide the truth or to fill the gap in the prosecution story as a blood-stained Ballam was found by the police. Whereas as per the FIR all the three accused came with *Ballam* in their hands and after inflicting injuries upon the deceased escaped with their respective *Ballam*.

(d) The ocular evidence of all three eye-witnesses with regard to the mode, sequence and manner in which the three accused inflicted injuries on the victim is so identical and parrot-like that it gives an impression that they did not at all witness the incident but were just spinning a story to explain the murder of the victim. Further, presence of PW.2 and PW.3 is highly doubtful on the spot at the time of the incident as their presence is neither reflected in medical papers nor the inquest report. More over, in cross examination, PW-1 admitted that his father had built a *Pucca* house about two furlongs away.

(e) The external dimensions of the injuries found on the body of the deceased were similar so as to suggest that they could be from one weapon. This probability gets fortified from the circumstance that the Ballam allegedly recovered from the spot had blood stain up to a length of five hand-span when, otherwise, none of the injuries was through and through the body. Blood to this extent could be found only if the Ballam was used multiple times to inflict deep injuries or the Ballam was kept in an upright position resulting in dripping of blood from the top. But since the Ballam was found lying on the ground, possibility of over implication, out of enmity, is hightly probable.

(f) The investigation of the case has not been fair as, firstly, the recovery of the *Ballam* from the spot appears contrived; secondly, it was tampered so much so that the pointed metallic portion of the *Ballam* was dismembered from the stick portion and only the metallic portion was kept and sealed; and, thirdly, the finger prints available on the Ballam, if any, were neither lifted nor sent for forensic examination to ascertain whether *Ballam* found on the spot was used by the accused Sri Kant Pandey. The recovery of the Ballam from the spot appears doubtful, because it was shown lying next to the place where the deceased was assaulted whereas in the FIR it was stated that all the accused had escaped with their Ballam. The error, if at all, in the FIR cannot be inadvertent as the Ballam was lying on the spot. Whereas, the Ballam had blood up to a length of five hand-span which is much more than the depth of human body. More so, when none of the injuries was through and through. This clearly suggests that Ballam was hidden some where in an upright position letting the blood drip across its length. But when it was found, the prosecution story improved in conspiracy with the I.O. to save the guilty.

(g) The deceased had no issue. His wife had left him, probably, after legal proceeding. On his death, his property came to the informant's side. Further, the deceased was made accused in a murder case and suggestion was put to P.W.2 that he had evil eye on other persons' wife therefore his own wife had left him. All of which suggest that the deceased had several enemies. That apart, suggestion was given to P.W.2 and P.W.3 that they got him murdered to grab his property. Thus, there was strong motive for the informant side to spin a false story not only to save their own skin but also to implicate the appellants who were allegedly eyeing the land for which the informant side had been litigating.

15. In a nutshell, the submission of the learned counsel for the appellants is that the deceased was killed in the night hours either by persons with whom he had enmity or by his own family comprising his brothers and nephew which gets probabilized by discovery of the murder weapon in the house and to save their own skin, the informant side, with the help of the police, developed a case that the appellants committed murder. This theory gets credence from the circumstance that when the police discovered the murder weapon in the house, the case was improved to show that the appellant no.1 had left the murder weapon while fleeing. This theory gets further support from the circumstance that the police to help the informant side, dismembered the murder weapon into two parts. The stick portion, which could have carried finger prints, was not kept, whereas the metallic portion was kept as a material exhibit, and, deliberately, finger prints available on the stick portion of the *Ballam*, allegedly left by Sri Kant Pandey, were not lifted and compared with those of the accused.

16. In addition to above, it was submitted on behalf of the appellants that absence of injury on any of the prosecution witnesses of fact, against whom the motive, if any, was equally strong, being rival claimants to the land, suggests that they were either not present on the spot or they are hiding the truth. Further, there is no recovery of either blood stained clothes or the murder weapon or any incriminating material on the pointing out, or from the possession, of the appellants. Thus, there is no corroboration to the prosecution case

which flows from highly interested witnesses. Lastly, it was urged, the prosecution produced no independent witness of the incident though, as per allegation, witnesses had arrived upon hearing the cries. All this leaves a ring of doubt around the prosecution case thereby entitling the accused-appellants the benefit of doubt.

SUBMISSIONS ON BEHALF OF THE PROSECUTION

17. Per contra, the learned A.G.A. and the learned counsel for the informant submitted that the motive for the crime has been proved. Even if the motive was not so strong, that cannot be a ground to acquit the accused against whom the guilt has been established by cogent and reliable ocular evidence which stood the test of cross examination and is not in conflict with, rather corroborated by, medical evidence . The doctor (PW-5), who conducted post-mortem examination had clearly suggested that death could have taken place within 12 hours, which suggests that the incident could have occurred at the time put by the prosecution. Nothing much turns on the use of Tractor of Panna Lal Bind to carry the deceased to the hospital because no question was put to the prosecution witnesses as to whether the tractor of Panna Lal had to be called or it was already available. On the issue that the ocular evidence was not specific with regard to the exact role of each of the three accused, it was submitted that absence of such particulars would not discredit the testimony, particularly, when it is deposed that all the accused came armed with *Ballams* and, after exhorting each other, surrounded the victim, inflicted fatal injuries, thereby exhibiting a common intention to finish off the victim. On the issue of improvement in the prosecution case from that taken in the FIR, it was contended that omission in the FIR was explained by PW-1 by stating that while dictating the FIR he may have inadvertently missed out mentioning that fact. Moreover, that omission was corrected at the earliest opportunity, that is while recording statement under section 161 CrPC. Hence, non mention in the FIR that one of the accused persons left the murder weapon while fleeing is inconsequential. It was submitted that the prosecution evidence is reliable and is corroborated by medical evidence, therefore the trial court rightly held that the prosecution was successful in proving the guilt of all the three accused beyond the pale of doubt. Hence, the appeal is liable to be dismissed.

18. Having noticed the rival submissions and having perused the record, before we proceed to test and analyse the submissions against the weight of evidence on record, it would be apposite to find out whether the eyewitnesses fall in the category of interested witnesses. If so, then what precautions are to be taken while appreciating and evaluating their testimony.

WHETHER THE WITNESSES OF FACT FALL IN THE CATEGORY OF INTERESTED WITNESS

19. In this regard it be noticed that PW1 is nephew of the deceased. PW2 is father of PW1 and brother of the deceased; and PW3 is the brother of the deceased. Except these three witnesses no other witness of fact has been examined. As per the prosecution case, victim's family including the above three witnesses and the three accused, who are real brothers, come from a common ancestor. One Shitla Prasad, coming from that ancestry, sold

ancestral land to one Prem Sao. Accused Sri Kant Pandey (A-1) was under employment of Prem Sao. It is the case of the prosecution that the sale made by Sheetla Prasad in favour of Prem Sao was challenged by the victim's family including the three witnesses in civil court. In that case, arguments were heard a day before the incident. *Pairvi* on behalf of victim's family, in that case, was being done by the deceased. According to the prosecution, as taken in the FIR, accused Sri Kant Pandey (A-1), as an employee of Prem Sao, was threatening the deceased to withdraw the case. Later, to attribute motive to all the three accused, the prosecution case was improved to suggest that all the three accused were interested in that land as it was appurtenant to their house. Thus, viewed from any angle, the three eye witnesses are not only related to the deceased but also interested in the conviction of the accused persons as they perceive that the accused had an eye over the land for which they had been litigating with Prem Sao. Hence, in our view, the three eye-witnesses fall in the category of an interested witness.

LAW WITH REGARD TO EVALUATION OF TESTIMONY RENDERED BY AN INTERESTED WITNESS.

20. In ***Hari Obula Reddy v. State of A.P.***, **(1981) 3 SCC 675,** a three-judge Bench of the apex court, with regard to the care and caution with which the testimony of an interested witness is to be appreciated and assessed, in paragraph 13 of the judgment, as reported, had observed as follows:

"..... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source. Since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and exaggerations, however true in the main, the court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from

independent evidence, circumstantial or direct, before finding the accused guilty on the basis of his interested testimony. We may again emphasise that these are only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations." Emphasis Supplied

21. In ***Jalpat Rai v. State of Haryana,* (2011) 14 SCC 208,** after reiterating the general principles as noticed above, in paragraph 42 of the judgment, as reported, the apex court cautioned the courts of the stark reality that where there is rivalry, hostility and enmity there is a tendency to over implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. In that context, it was observed as follows:

"42..... But it is a reality of life, albeit unfortunate and sad, that human failing tends to exaggerate, over implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. Cases are not unknown where an entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime.

22. Prior to that, in paragraph 41 of the judgment, with regard to the mode to be adopted by the court to assess the worth of the testimony of interested witnesses, it was observed:

"41.....To find out the intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record."

23. Thus, the law is clear that though testimony of an interested witness can alone form the basis of conviction but before acting on it the court must carefully test whether it is free from suspicion, embellishment and exaggeration and whether the substratum of the story narrated by the witness is such which is consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case so that it carries conviction with a prudent person.

EVIDENCE LED BY THE PROSECUTION

24. Now, we shall proceed to notice the evidence brought on record by the prosecution. For the sake of convenience and better understanding of the case, the evidence led by prosecution is being split into multiple parts. First part is in respect of the relationship, status and place of living of the accused and the witnesses of fact including the location of the place from where blood stained soil and blood stained Ballam was recovered. Second part is with regard to the motive for the crime. Third part is in respect of the incident including the sequence of events, pre and post the incident. Fourth is the medical evidence in respect of the ante mortem injuries and the approximate time of death.

Evidence in respect of the relationship, status and place of living of the accused and the witnesses of fact including the location of the place from where blood stained soil and blood stained *Ballam* was recovered.

25. The evidence led in respect of relationship, status and place of living of the accused and the witnesses of fact would

go to show that the victim and the accused had common ancestry. As per the site plan (Ex. Ka 17), prepared and proved by the I.O., the accused, the deceased and the witnesses had their place of residence in close proximity with each other. The deceased and his brothers' house block is shown towards north with three rooms and multiple exit points, opening in different directions, suggestive of separate exit points for the inmates of the house. The house of the accused lies separately towards south of the house of the deceased and his brothers. The house of one of the *Pattidars*, namely, Sheetla Prasad, lies south to the house of the victim and towards west of the house of the accused. The fire place where the deceased was allegedly sitting with PW1 is on extreme north at about 14-15 paces from the northern door of the deceased's house. Blood stained earth, where the deceased was allegedly assaulted, is towards north, next to the door of deceased's house, and just by its side is the place where the *Ballam*, allegedly, left by accused Sri Kant Pandey (A-1), was found.

26. In paragraph 8 of his cross examination, PW1 admitted that his father had two *pucca* quarters built near the road which were at a distance of two furlongs from the place of occurrence but at the time of the incident those quarters had no electricity supply.

27. As regards their status, all the three eye-witnesses examined by the prosecution are literate. PW1 is B.A. 1st year student with Political Science, Sociology and Ancient History as his subjects (vide paragraph 6 of his statement recorded on 10.11.1998). PW2, who is father of PW1, is a teacher in an Inter College; whereas, PW3 is a student appearing privately for intermediate examination (vide statement of PW3 made during his cross examination on 22.4.1999). Interestingly, according to PW2 (vide paragraph 15 of his cross-examination), the deceased was least literate. He had been educated upto class 2 or 3 but could sign. It has come in the evidence that though the deceased was married but his wife had left him after court proceedings and he was single with no issues. It has also come in the evidence that on his death, his property had come to the informant's family.

28. With regard to the antecedents of the deceased, it has come in the evidence that he had been implicated in a murder case. As regards the antecedents of the accused nothing much has come though it has come that they are all married with family.

Evidence in respect of motive for the crime

29. In respect of motive for the crime, in the FIR the motive shown is that a *Pattidar* of the victim's family, namely, Sheetla Prasad Pandey, had sold his land to one Prem Sao for whom Sri Kant Pandey (A-1) was working. The victim's family had questioned that sale in court in connection with which, on behalf of informant's side, the deceased was doing *pairvi*. In that proceedings, a day before the incident, arguments were heard. It has been alleged that Sri Kant Pandey (A-1) had threatened the victim not to do *pairvi* and to withdraw the case. Thus, in the FIR motive was limited to accused Sri Kant Pandey (A-1). Later, there was improvement. According to which, the accused were *Pattidars* of the informant side. Another Pattidar, Sheetla Prasad Pandey, while leaving the village,

sold his house with appurtenant land to Prem Sao. Victim's family (informant side) had interest in that land, as a result, they challenged the sale in court. The land fell towards south of informant's house and towards west of accused persons' house. Therefore, all the accused were themselves interested in that land. And Sri Kant Pandey was putting pressure upon the deceased to withdraw the case.

30. However, no evidence was led to show as to how the accused persons would get that land by killing the victim. Further, there is no evidence that on any previous date or otherwise any incident of altercation or fight, on any issue, occurred between the accused and the victim which may have driven them to take a decision to finish off the deceased in the manner in which he was.

Evidence in respect of the incident including the sequence of events pre and post the incident

31. **PW1 (Manoj Kumar Pandey)** (the informant) in his testimony has deposed that, in the morning, when he woke up, he found the deceased sitting next to the fire-place located about 14 paces away from the door of the house of the deceased. After easing himself i.e. attending nature's call, he joined the deceased. At about 8 am, the accused persons (A1, A2 and A3), each armed with *Ballam* (spear), arrived exhorting each other to finish off the deceased as he was taking too much interest in the litigation. Upon hearing their shouts, the deceased stood up and ran, about 14 paces, towards the door of his house but was surrounded by all the three accused who assaulted him with *Ballams*, as a result, the deceased fell on the spot. On the alarm raised by PW.1, PW-2 and P.W3 including Mool Chand and Kamla Gaur, amongst others, arrived. They challenged the accused. The accused persons got worried and escaped. However, while escaping, accused Sri Kant Pandey (A1), dropped his *Ballam*. Immediately, thereafter, P.W.1 and others took the deceased to the hospital on a tractor of Panna Lal Bind, who resides 10-11 km away. It took them 30 to 45 minutes to reach the hospital. There, at the hospital, the doctor declared the deceased dead. After the deceased was declared dead, PW1 stayed at the hospital for about one-half hour and during that period he dictated the first information report to Surendra Bahadur (not examined); thereafter, he took the report and lodged it at the police station. He stated that his father (PW2) had accompanied him to the hospital but did not accompany him to the police station. At the police station, the investigating officer (I.O.) recorded his statement and, thereafter, the I.O. took him to the place of occurrence. He showed the place of occurrence to the I.O. The I.O. left two police officers there and from there he, along with the I.O., went to the hospital. At the hospital, inquest proceedings were held.

In his cross-examination,at paragraph 21, P.W.1 stated that when he went to the spot with the I.O. he had shown the *Ballam* to the I.O. The I.O. took that *Ballam* in his possession and, thereafter, he and the I.O. went to the Hospital where inquest was conducted and statements of PW2 and PW3 were recorded.

In respect of the place from where he watched the incident, PW1 stated that he witnessed the incident sitting next to the fire-place. When question was put to him as to why he himself did not escape seeing the accused coming and exhorting each other, he stated in paragraph 16 of his

cross-examination that there was no reason for him to run. On question whether he made effort to save the deceased, he stated that he made no effort because he was alone and the accused were three. He could not tell whose blow hit first or who hit where and as to how the accused were locationally positioned qua the deceased. He just stated that all the three accused exhorted each other to finish off the deceased, thereafter, they surrounded the deceased and inflicted multiple blows. Some of the blows landed on the wall of the house though he could not tell whose blow landed on the wall. Interestingly, in paragraph 17 of his cross-examination, he stated that the accused had assaulted the deceased for about 5-6 minutes.

Upon a specific question as to why he did not mention in the report that Sri Kant Pandey (A-1) had left his *Ballam*, he stated that he might have missed out, inadvertently, due to panic, while dictating the report. He refuted the suggestion that the incident was of night; perpetrated by unknown person; that he had not witnessed the incident; and that false story has been spun to implicate the accused. He also refuted the suggestion that PW2 and PW3 were not on spot. In his cross-examination, however, PW1 admitted that on death of Vijay Shyam (the deceased), his property, comprising house and 2-4 Bigha land, came to his family.

32. **PW2 (Radhey Shyam Pandey) and PW3 (Sanjay Kumar Pandey)** both deposed that when they heard cries of PW1 they came out, witnessed the incident and challenged the accused upon which they ran away. While they were running away, Sri Kant Pandey (A-1) dropped his *Ballam* whereas the other two accused ran away with their *Ballam*. These two witnesses state that they along with PW1 took the deceased to the Hospital on a tractor where the doctor declared him dead.

In his cross examination PW2 stated that the tractor used for going to the hospital was of Surendra Bahadur whereas PW3 stated that the tractor was of Panna Lal Bind.

In respect of his location at the time of hearing the cries of PW1, PW2 stated that he was at the Dallan of his own house which is at a distance of about 20-22 paces from the house of the accused. He also stated that the house of the accused could easily be seen from that spot. He stated that from the outer portion of his house, the accused could be noticed if they move out of their house. However, on the date of the incident, he didn't see them coming but did hear faint noises of their exhorting each other to finish off the deceased and soon thereafter he heard cries of his son upon which he came out but had nothing for defence. He could not tell as to which accused was in the front and who was at the back as also who was on which side of the deceased. He could not tell as to who hit the deceased where.

PW2 stated that he was with PW1 at the hospital but as PW1 was going to lodge the report he remained at the hospital though he was not part of the inquest which took place at the hospital. He refuted the suggestion with regard to the false implication of the accused as also that he was not present at the spot as well as at the hospital therefore he was neither a witness to the inquest nor had gone to lodge the report.

Similar is the statement of PW3 who also, allegedly, came out with PW2 at the spot upon hearing the cries. He too could not tell which accused was where and who inflicted what injury and where.

Defence suggestion to PW2, inter-alia, was that the deceased was a

person with criminal antecedents, had been involved in murder of Kajhanchi Kunbi; that he used to have evil eye on other women therefore his own wife had left him; and that he had an evil eye on the wife of PW3. It was also suggested that they (informant's side) had themselves finished him off in the night to grab his property as he had no other heir.

The suggestion that the informant side had planned his murder to grab his property was denied but the suggestion that the deceased was implicated in a murder case and that his wife had left him was not denied.

Similar suggestion was given to PW3. Apart from that, though he denied, it was suggested to him that the accused were falsely implicated to ensure that they are forced to flee so that their entire land in the village could be grabbed.

33. **PW4** (Dr. K.K. Jain) deposed that at about 8.35 am PW1 had brought body of the deceased to the hospital. He kept the body at the mortuary and sent report (Ex Ka 2), in respect of receiving a dead body with injuries, to police station Kotwali City. Ex Ka 2, the report sent by PW4, is an information that a dead person (description given) with injuries was brought to the hospital by Manoj Kumar Pandey (PW1).

34. **P.W.6** (Surya Bhan Singh) deposed that he was the Head Clerk at P.S. Kotwali Dehat (where the FIR was lodged) and was posted as such on 29.01.1997 when the first information report was lodged. He stated that on his instruction, Chik FIR was prepared by Assistant, Munna Ram (not examined), whose signature he recognises. Thereafter, GD entry of the report was made by him in his own hand and signature as Entry No. 11 at 9.30 am on 29.01.1997. He stated that special report was prepared by him and dispatched within one hour. Its return was entered by him on the same day as Entry No. 23 at 15:25 hours.

In his cross-examination, he specifically stated that the informant arrived at the police station at 9.30 am and, at that time, when he had prepared the GD entry of the report, the I.O. was present. Immediately after making entry of the report, he handed over copy of the Chik FIR, copy of the report and other papers to the I.O. Whereafter, the I.O., after taking the papers, left the police station with a Sub-Inspector, four constables and home-guard for the Sadar Hospital and the place of occurrence of which time, entered in the G.D. entry, is 9.30. am. He stated that the return of the I.O. on the same day is not entered in the GD. He could not tell as to when the I.O. returned though he could guess that he might have returned in the next two or three days. He admitted that on 29.01.1997 no other report of cognizable offence was entered in the GD. He, however, refuted the specific suggestion that the GD remains with the police and as per convenience and need entries are made.

35. **P.W.7** (Kapil Deo Tripathi), the Investigating Officer, stated that after GD entry of the FIR, statement of the person, who made entry in the GD of the FIR, and statement of the informant was recorded and then he left for the hospital where inquest was done. At the hospital, on the same day, he recorded the statement of Radhey Shyam Pandey (P.W.2) and Sanjay Kumar Pandey (P.W.3) and, thereafter, went to the spot with the informant. He stated that distance of hospital from the place of occurrence is about 10 km and the distance of the police station from the place of occurrence is 9 km. He stated that he

reached the hospital at about 10:30 am and stayed there till 12:30 pm, that is when the body was handed over for post-mortem. He stated that on 30.1.1997 he recorded statements of Vidyawati, Phool Chandra Gaur and Kamla Gaur. On 31.1. 1997, he recorded statement of Sub-Inspector Lotai Ram and the inquest witnesses. On 1.2.1997, he recorded statement of constable and home guard who got the post mortem conducted. On 3.2.1997, he recorded the statement of accused and, on 4.2.1997, forwarded the charge sheet. On the discovery of *Ballam* on the spot, he stated that it was found lying just about one and half feet away from the spot where blood was found on the ground.

In his cross examination, inter alia, question was put to him whether he properly investigated the alleged motive for the crime, particularly, when the land had already been sold. To which he replied by stating that Sri Kant Pandey (A-1) was working for Prem Sao and therefore that aspect was not investigated further.

Suggestion was given to the I.O. that the first information report was prepared on his suggestion and that he falsely showed recovery of the murder weapon as abandoned by one of the accused at the spot and deliberately did not lift finger prints available thereon for comparison because the murder weapon carried no finger prints of Sri Kant Pandey (A1). The I.O. refuted the suggestion by stating that as there was ocular evidence that Sri Kant Pandey had left that *Ballam*, he did not consider it necessary to lift finger prints for comparison.

Medical evidence in respect of ante mortem injuries and the approximate time of death

36. **PW 4** (Dr. K.K. Jain) before whom the deceased was brought by informant (P.W.1) stated that the deceased was brought dead before him at 8:35 pm. He, however, was silent as regards the approximate time of death of the deceased.

37. **P.W.-5** (Dr. S.P. Singh), who conducted the post-mortem and prepared report on 29.01.1997 at 3.45 pm, proved the report and deposed that all injuries found on the body of the deceased could be from a *Ballam* and that the deceased could have died within 12 hours of the post-mortem.

In his cross-examination, he stated that death could have occurred around 3:45 am and if 6 hours variance is taken, it could also be around 10 pm of the previous night. On the presence of semi-digested food and gases in the small intestine, P.W.5 stated that the incident could have occurred three hours after food intake. He stated that faecal matter found in the large intestine could be of the food intake taken much before the last meal. He stated that injury no.2 and 3 could not be from one blow. He stated that none of the wound found on the body was through and through. He stated that injury no.3 was from back whereas the rest of the injuries were from the front; and that injury no. 2 alone was sufficient to cause death.

ANALYSIS OF THE PROSECUTION EVIDENCE

38. At this stage, before we proceed to analyse the evidence, it would be useful to notice the law with regard to the role of motive in assessing the credibility of prosecution case. In this regard, it be observed that it is trite law that non-existence of motive would by itself not have a material bearing on the prosecution case, particularly, based on direct ocular

evidence if the ocular account is otherwise reliable and trustworthy ***(vide Sheo Shankar Singh v. State of Jharkhand,* (2011) 3 SCC 654, para 15)**. Moreover, motive is something which a person has in his mind and it is not always easy to tell as to what motivated the accused to commit the act for which he is put to trial. However, though existence of a motive for committing a crime is not an absolute requirement of law but is a relevant factor which is to be taken into consideration by the courts for assistance in analysing the prosecution evidence and determining the guilt of the accused ***(vide Alagupandi v. State of T.N.,* (2012) 10 SCC 451, para 29)**. Similarly, where the crime is alleged to have been committed with a particular motive, it would be relevant to inquire whether the pattern of the crime fits in with the alleged motive ***(vide State of U.P. v. Hari Prasad,* (1974) 3 SCC 673, para 2)**. Further, in ***Badam Singh v. State of M.P.,* (2003) 12 SCC 792**, the apex court, upon finding that the prosecution evidence was suspect and the deceased was a history sheeter and, therefore, could have had multiple enemies, whereas the prosecution had failed to prove motive against the accused put on trial, while giving benefit of doubt to the accused, in para 20 of the judgment, as reported, observed:

".....Even though the existence of motive loses significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case."

Thus, although absence of strong motive may not be fatal to the prosecution case but where there is an occasion to suspect the prosecution testimony, motive acquires some significance regarding the probability of the prosecution case.

39. Now, we shall proceed to analyse the evidence in detail. But before that, it would be useful to draw a broad picture of the prosecution case as borne out from the prosecution evidence noticed above. On the issue of motive for the crime, as we have already noticed, the prosecution has not come out with any clinching evidence to show that all the accused had strong motive to finish off the deceased, particularly, in the manner in which the prosecution narrates the incident. As per the prosecution case, the deceased, the witnesses and the accused, all resided in close proximity with each other. Therefore, if the accused had planned the murder of the deceased, they would not come out in the open and let themselves be noticed. Ordinarily, such dare devil murder, as narrated by the prosecution, takes place where the accused party is either infuriated or is in such a dominant position that it knows that regardless of the resistance they would be able to finish off the job. In that context, (a) there is no evidence to show that any such event had taken place which would have infuriated all the three accused, and, (b) there is also no evidence that all the three brothers had planned any such attack on the deceased. The only evidence that has come is with regard to accused Sri Kant Pandey (A-1) threatening the deceased, on behalf of his employer, Prem Sao, to withdraw the case. But no such extension of threats have been attributed to the other two accused. As to whether the accused were in such a dominant position that they feared no one, there is not much evidence with regard to criminal antecedents of the accused. Rather, they are stated to be persons having their respective families. Moreover, their alleged conduct

of running away and getting so nervous, that one of them left his *Ballam* on spot in the process of fleeing, when challenged by unarmed PW2 & PW3 and others, belie the devil may care attitude attributed to them by the prosecution.

40. We are conscious that each person reacts differently to a given situation and therefore what has been stated above by itself is not sufficient to discard the prosecution story but it does puts us on guard to meticulously test the prosecution evidence.

41. At this stage, we would like to remind ourselves that though it is settled legal position that non-existence of motive would by itself not have material impact on a case based on direct ocular evidence but where the prosecution evidence appears to be suspect, the existence or absence of motive acquires some significance regarding the probability of the prosecution case as has been held by the apex court in ***Badam Singh (supra)***.

42. When we meticulously examine the prosecution evidence, we find that the prosecution case improves during the course of investigation. In the FIR the prosecution case attributes no motive to the two brothers of Sri Kant Pandey (A-1). There the motive is attributed only to Sri Kant Pandey, as a person who used to threaten the deceased to withdraw the case filed against his master, Prem Sao. Later, story was developed that all the accused were themselves interested in that land which was subject matter of litigation with Prem Sao. But, interestingly, the I.O. did not test the veracity of this story and we fail to understand, in absence of any evidence, as to how the accused would get the land by withdrawal of the case against Prem Sao who had become its owner consequent to its purchase by him. The other improvement during investigation was that in the FIR it was specifically stated that all the three accused, after inflicting injuries, fled with their respective *Ballams*, but, later, it was stated that Sri Kant Pandey had dropped his *Ballam* while fleeing from the spot. This improvement in ordinary circumstances might be inconsequential because an FIR need not be an encyclopaedia. But what is important is that the ocular evidence is general all throughout with respect to the role of each accused but all of a sudden it becomes specific. This puts us on guard so as to examine whether this improvement is contrived with ulterior purpose, on the prompting of the I.O., after the I.O. found the *Ballam*, to make the eye witness account consistent with the position on spot, or it was spontaneous at the time of recording the statement under Section 161 Cr.P.C. For this, we would have to examine whether the statement of PW1, PW2 and PW3, under section 161 CrPC, was recorded before or after the visit of the I.O. to the spot.

43. In that regard, it be noticed that with regard to the sequence of action by the I.O., post registration of the first information report, there is discrepancy between the statement of I.O. and P.W.1. According to P.W.1, post registration of the first information report, he along with the I.O. and other police personnel went to the spot. The I.O. saw the spot, took the *Ballam* into his possession and, thereafter, proceeded to the hospital to carry out inquest, etc. Whereas, according to P.W.7 (I.O.), after registration of the first information report, he proceeded straight to the hospital, conduced inquest proceeding, recorded the statement of P.W.2 and P.W.3

and, thereafter, proceeded to the spot. Both, PW7 and PW1, however, are consistent in their stand that statement of PW1, under section 161 CrPC, was recorded at the police station immediately after registration of the FIR. In that context, PW7 states that first he recorded the statement of the person who prepared the Chik FIR and, thereafter, he recorded the statement of the informant (PW1). The case diary sequence suggests that first the statement of Munna Ram (the person who prepared the Chik FIR), second the statement of Surya Bhan Singh (PW.6 - the person who made GD entry of the FIR) and third the statement of the informant was recorded. But, according to P.W.6, no sooner the FIR was registered at 9:30 am, the I.O. took the papers and left the police station at 9:30 am itself, for visiting the hospital and the spot, which fact is corroborated by the G.D. Entry as would be clear from the statement of PW6. Further, P.W.6 does not say that after registration of the FIR the statement of the person who prepared the Chik FIR, or his own, or of the informant, was recorded by the I.O. Thus, a serious doubt arises with regard to the recording of the statement of the informant immediately after lodging of the FIR and the sequence of events noticed above generates a strong probability that it was recorded after the I.O. had visited the spot. Further, this improvement does not appear to be natural as the prosecution testimony against all three accused is so general throughout that making it specific against one, in respect of dropping the weapon, appears to be contrived either to hide the truth or to make the testimony consistent with the position on spot. This possibility gets credence from the circumstance that, according to the prosecution witnesses of fact, admittedly, PW2 and PW3 had been with PW1 at the hospital and remained there in the hospital till inquest was over, therefore, as the FIR, according to PW1, was dictated by him at the hospital, the possibility that PW1 inadvertently omitted to state that *Ballam* was left by accused Sri Kant Pandey (A-1) appears highly improbable as he would then have been corrected by the other two witnesses of fact, namely, PW2 and PW3, who were with him.

44. Once that is the position, a serious doubt arises with regard to the genuineness of the prosecution version taken in the FIR thereby throwing possibility of the FIR version being contrived, may be on the basis of strong suspicion or for some other reason, which, upon discovery of the murder weapon on spot by the I.O., to offer explanation, was improved.

45. Another interesting feature of the case emerges when we notice the memorandum of recovery of the weapon of assault, dated 29.01.1997, which was marked Ex. Ka-18 on the basis of the statement of the I.O. (PW7). The memorandum is in vernacular. It reads as under:

"फर्द लेने कब्जा पुलिस आला कत्ल एक अदद बल्लम खून आलूदा।

समक्ष गवाहान सर्व श्री सत्येन्द्र यादव S/o राम जतन यादव व सोहन लाल यादव ध्व श्याम सुन्दर निवासीगण ग्राम जिगनौडी थाना कोतवाली देहात मिर्जापुर सम्बन्धित मु0अ0सं0 21/97 धारा 302 IPC थाना कोतवाली देहात मिर्जापुर के घटनास्थल पर पडे हुए मुल्जिम श्रीकान्त पाण्डेय S/o सुखदेव पाण्डेय निवासी भरपट्टी द्वारा हत्या में प्रयुक्त बल्लम निम्नलिखित हुलिया का कब्जा पुलिस में लिया गया।

एक बांस की लाठी जिसमें 14 गाँठ व 14 पोर है के एक तरफ करीब 10 अंगुल लम्बा लोहे की पोपली लगी है जिसमें चूडी में करीब 2 वालिस्त 2 अंगुल लम्बा लोहे का बल्लम लगा है।

वल्लम के अग्रभाग करीब 5 बालिस्त तक खून लगा है। बल्लम मय लोहे की पोपली लाठी से तोडकर अलग करके बल्लम को एक कपडें में रखकर सर्व मुहर किया गया। नमूना मुहर बनाया गया। फर्द मौके पर लिख पढकर सुनाकर गवाहान के हस्ताक्षर बनवाये जा रहे हैं।

ह0– सत्येन्द्र यादव
ह0–अप0
ह0–सोहन लाल यादव
S.O
प्रदर्श क–18
29.01.97"

46. The witnesses of the recovery are Satyendra Yadav and Sohan Lal Yadav. Neither of them has been examined. The interesting part of this recovery memorandum is that the stick part of the *Ballam* was separated from the metallic part, which was bloodstained. The metallic part was kept in a sealed cover whereas there is no statement that the stick part was separately sealed and kept. Moreover, we have not been shown that it was separately kept and sealed.

47. When a *Ballam* is used by a person, he holds the *Ballam* from its stick part because holding it from the metallic part may expose its holder to the risk of injury. The finger print of its user would therefore be available on the stick part. Interestingly, the memorandum of recovery states that the stick part was separated from the metallic part and the metallic part was sealed which suggests that the stick part of the *Ballam* was not sealed for being made a material exhibit. This throws a serious doubt on the credibility of the investigation as to whether there was an attempt to hide the truth. Hence, a specific suggestion was put by the defence to the I.O. that the finger print on the *Ballam* was not got matched with that of Sri Kant Pandey, who had allegedly used the *Ballam*, because he knew that it did not carry his finger prints. The investigating officer very cleverly dodged the suggestion by stating that as there existed an eye-witness account, he did not consider it necessary to get the finger prints matched.

48. No doubt, lapses on the part of an investigation officer may not by itself be fatal to the prosecution case but where the lapses are such that it generates suspicion as to whether there is an effort to hide the truth and it hampers the discovery of truth by the court or seriously prejudice the defence of the accused, in the facts of a case, it may give rise to an inference that the investigation was with a view to cover up the truth thereby causing serious dent to the credibility of the prosecution case.

49. In the instant case, according to the prosecution, there were three assailants, each armed with *Ballam*. Only one Ballam was found on spot whereas no effort was made to recover the other two *Ballams*. The *Ballam* that was found was not got connected with any of the accused by getting the finger prints thereon matched. Rather, the stick portion, where finger prints might have been available, was dismembered and separated from the metallic part, which alone was sealed. No effort was made to recover blood stained clothes either of the witnesses or of the accused. Further, no effort was made to even investigate the motive for the crime against the other two accused. Charge sheet was admittedly submitted by 4th of February 1997, that is within a week of the incident. All this leaves us to wonder whether the investigation was with a view to find out the truth or to frame the accused thereby throwing various possibilities, as suggested by the defence to the prosecution witnesses of fact and to the I.O., that it was

a night incident where some of the enemies of the deceased might have done the job and nobody could witness the incident and, later, on the basis of suspicion, story was weaved, or, the perpetrator of the crime was some one from within and therefore to hide the truth, not only the story was weaved but the murder weapon was falsely shown to have been recovered from the spot and dismembered by severing that portion which could have carried the finger prints. All these doubts get pronounced when we notice that the prosecution had failed to disclose any strong motive for the accused to commit the crime.

50. In respect of the medical evidence with respect to the approximate time of death, doctor K.K. Jain (P.W.4), before whom the deceased was brought by informant (P.W.1), stated that the deceased was brought dead before him at 8:35 am. He remains silent as regards the approximate time of death of the deceased. One thing is clear from his statement that the deceased was brought dead at the hospital at 8.35 am. There is no corroboratory material (i.e. blood-stained clothes, etc. of witnesses) to suggest that a profusely bleeding person was carried to the hospital. Therefore, in absence of any corroboratory material, whether it was a dead corpse brought at the hospital is anybody's guess. Further, P.W.-5 (Dr. S.P. Singh), who conducted the post-mortem, though in his statement in chief stated that the deceased might have died within 12 hours of the post-mortem but in cross-examination stated that death could have occurred at about 3:45 am and if 6 hours variance is taken, it could also be around 10 pm of the previous night. On the basis of presence of semi-digested food and gases in the small intestine, P.W.5 stated that the incident could have occurred three hours after food intake. It is noteworthy, that the prosecution case is not that the deceased had consumed anything in the morning just before the incident though it is the prosecution case that the deceased had eased himself by attending nature's call in the morning, yet faecal matter was found in the large intestine. Though, with regard to the presence of faecal matter in the large intestine, the doctor clarified that even if a person had relieved himself in the morning it is still possible that some faecal matter is left in the large intestine but when the entire medical evidence is taken into account the probability of death having taken place much earlier than the time put by the prosecution, is quite high.

51. No doubt, medical evidence cannot estimate the exact time of death with precision but it does serve as a probability and can be taken into consideration with other pieces of evidence to find out as to whether there is a ring of truth or doubt surrounding the prosecution case.

52. In the instant case, one thing is clear that the medical evidence does not rule out the possibility of death of the deceased having taken place in the night hours or at least in the wee hours of the morning, much prior to the time of death put the prosecution, which, as per the statement of P.W.1, is about 8 am in the morning.

53. In this regard, at this stage, it would be useful to notice another piece of oral testimony which, coupled with medical evidence, gives rise to a strong probability that the incident occurred much earlier than what has been put by the prosecution. Before noticing that testimony, it be noted that in the prosecution evidence it has come

that the distance of the hospital from the place of occurrence is about 10 km. The body of the deceased was brought to the hospital on a tractor at about 8.35 am. P.W.1 in his cross-examination disclosed that the tractor used for carrying the body of the deceased was of Panna Lal who resided 10-11 kms away. The above statement of P.W.1 was recorded on 08.12.1998. On the same day, when the statement of P.W.2 was recorded he admitted that deceased was taken on a tractor to the hospital but he did not disclose whose tractor it was. Later, on 09.12.1998, during his cross-examination, P.W.2 cleverly disclosed that the tractor was of Surendra Bahadur. Surendra Bahadur, allegedly, resided nearby. He was the person to whom the FIR was dictated by PW1 (the informant) but he was not examined. The reason for PW2 to state that the tractor of Surendra Bahadur was used was perhaps to show that the tractor was brought from the neighbourhood and not from a far off place. Because if Panna Lal Bind's tractor had been used, who resided 10-11 kms away, the tractor coming from that far and then reaching the hospital, would not have been possible within 35 minutes of the incident. Hence, keeping in mind that PW2 is literate and is stated to be a teacher, there appears to be a deliberate improvement by him over the testimony of PW1. But, interestingly, the statement of PW1, with regard to the tractor being of Panna Lal Bind, is corroborated by PW3. Hence, it could be concluded that the tractor of Panna Lal Bind was used in carrying the deceased to the hospital. Though no specific question has been put to the prosecution witnesses as to whether the tractor was available then and there or had to be called but when we take this piece of evidence/circumstance in conjunction with the deliberate attempt of PW2 to show that tractor of a neighbour was used, suspicion arises as to whether the prosecution is hiding true facts and when we take it conjointly with the medical evidence, it suggests that the death could have occurred much earlier than 8 a.m. This probabilizes the defence suggestion that the incident took place much earlier than that stated by the prosecution and that it occurred in the night or wee hours of the morning, more so, when there is no link evidence to suggest that a bleeding human body was carried to the hospital.

54. However, as it is well settled that where the ocular evidence is clear, specific and wholly reliable, and is not in absolute conflict with the medical evidence so as to render it completely unreliable, the ocular evidence would prevail over the medical evidence, we would now proceed to weigh the ocular evidence, keeping in mind the analysis already made above.

55. As far as the ocular evidence is concerned, there are three prosecution witnesses of fact, namely, P.W.1 (the informant), who is the nephew of the deceased, P.W.2 (father of P.W.1), who is the brother of the deceased, P.W.3, who is another brother of the deceased. The accused are brothers inter se. According to the prosecution witnesses, the accused were interested in the same land in respect of which, according to the prosecution case, there was litigation between informant's side and one Prem Sao, whose servant was the appellant no. 1 (Sri Kant Pandey). Under the circumstances, as we have already found, the prosecution witnesses would fall in the category of an interested witness. Hence, their testimony would have to be meticulously examined and tested with a view to find out whether it is free from suspicion and is wholly reliable and

trustworthy. In addition to that, we would have to rule out possibility of over implication.

56. The testimony of the prosecution witnesses of fact, in nutshell, is that while the deceased and PW1, both having attended nature's call, were sitting next to the fireplace, the accused-appellants came with *Ballam* in their hand and exhorted each other to finish off the deceased as he was doing *pairvi* in the civil litigation; upon which, the deceased ran towards the door of his house, where he was surrounded and inflicted blows with *Ballams* by all the three accused, some of the blows even fell on the wall of the house; seeing all that, P.W.1 raised alarm. On his cries, P.W.2 and P.W.3 as well as others arrived, they challenged the assailants, as a result, the assailants fled away. While fleeing, one of the assailants, namely, Sri Kant Pandey (A1), dropped his *Ballam* on the spot whereas, the remaining two ran away with their respective *Ballams*. This ocular account of the incident narrated by P.W.1 is reiterated by P.W.2 and P.W.3.

57. The interesting part of the ocular testimony is that when specific questions were put to these eye-witnesses as to which accused inflicted what injury and where and as to who inflicted the first injury, as also who stood where qua the victim including who was ahead and who was behind, none of the eye-witnesses, who are literate persons, could answer. No doubt, where a large number of persons surround the victim and inflict him with multiple blows it might be difficult to particularise the role of an individual accused as held in ***Budhwa @ Ram Charan and others v. State of M.P., 1991 Supp (1) SCC 9 (para 5)***, where there were 15 accused inflicting blows on the deceased. But, in the instant case, firstly, the alleged group of assailants is not that large which may block the view completely, secondly, amongst four injuries, there were three from the front and one from the back and, amongst those four, just two were cavity deep, therefore, the person who inflicted those injuries could, in all probability, be noticed, thirdly, the three eye witnesses were allegedly watching the incident from different angles, as would be clear from the site plan, hence, they had every opportunity to witness the blows separately, and, fourthly, these witnesses are literate and were not father, son or wife of the deceased, or persons who received injuries in the incident, as to entitle them the allowance of being in complete shock. Thus, statement of these three witnesses rendered in a parrot-like manner, that all the three accused exhorted each other, surrounded the deceased and inflicted blows, could be considered tutored or contrived, as has been observed by the apex court in **Ram Bilas V. State of MP, 1997 SCC (Cri) 1222**, and made with a view to avoid the travails of a close cross-examination. On this aspect, we are fortified by the note of caution put by the apex court in ***Budhwa @ Ram Charan and others v. State of M.P. (supra)*** while holding that in a melee where several people are giving blows at one and the same time it is quite impossible to particularise the blows. In para 5 of that judgment, as reported, the apex court had observed as follows:

"In a melee where several people are giving blows at one and the same time it will be impossible to particularize the blows. If any witness attempts to do it, his veracity is doubtful. But it cannot be forgotten that it is simpler to make an omnibus statement that all the accused assaulted with their weapons because that obviates close cross-examination."

(Emphasis Supplied)

58. Another noticeable feature of the case is that the deceased suffered no injury on his hands, though he suffered as many three stab wounds from the front. Ordinarily, when a person is awake and multiple attempts are made to stab him he would use his hands to stop the infliction of blows and in the process might receive injuries on his hands unless hands are tied or caught hold by any of the accused. Absence of injury on the hands does throw a possibility that either the deceased's hands were held or he was taken by surprise. The prosecution evidence does not show that his hands were held and, admittedly, as per prosecution case, the deceased tried to run away, hence, the element of surprise is ruled out. Thus, lack of specific description of the manner and mode of assault becomes all the more relevant to throw a doubt whether the eye witnesses actually witnessed the incident or have proceeded to implicate the accused on strong suspicion or there was something else, particularly, when we notice it from the angle that the deceased was single, with past record of being implicated in a murder case and that on his death his property came to the informant's family. More so, when only a solitary murder weapon was found on the spot.

59. Another important feature of the case is that though, according to PW1, the deceased was surrounded by the three accused and assaulted for as long as 5-6 minutes and, in the process, multiple blows were inflicted, some of which fell on the wall, but ante mortem injuries found were only four. Importantly, the ante-mortem injuries found on the body were all of similar dimensions, though depth was different, which could be from one weapon. Admittedly, except for one *Ballam*, which as per prosecution case was lying on spot, no other weapon was recovered. Further, from a perusal of the memorandum of recovery of that *Ballam*, we find that up to 5 hand-span *(Ballisht)* from the top the *Ballam* had blood. Noticeably, according to the doctor (PW5), none of the injury was through and through. Hence, if blood is found on the top of the *Ballam* up to an extent of two feet or more, the use of that *Ballam* for inflicting more blows than one gets probabilized unless that *Ballam* is kept in an upright position so as to let the blood trickle down by gravity. But, according to the prosecution case, the *Ballam* was found lying on the ground. Thus, even though four ante mortem injuries were found as against three assailants, the possibility of over implication cannot be ruled out, particularly, when we notice that initially motive was attributed only to accused Sri Kant Pandey as a person who used to threaten the deceased on behalf of his master Prem Sao.

60. At this stage, we may observe that though it is well settled that in a case where there appears over implication it is open to the court to sift the grain from the chaff and convict that accused against whom the evidence is found reliable but that exercise would not be permissible here. Because the prosecution case against all the three accused is so inextricably mixed that if we separate one the entire case would fall. Hence, if we have to extend benefit of doubt to any of the three accused, it would have to be extended to all. In this regard it would be useful to notice the decision of the apex court in ***Lakshmi Singh v. State of Bihar,* (1976) 4 SCC 394**, where, in paragraph 17 of the judgment, as reported, it was observed:

"17.... This is a case where it is not possible to disengage the truth from falsehood, to sift the grain from the chaff.

The truth and falsehood are so inextricably mixed together that it is difficult to separate them. Indeed if one tries to do so, it will amount to reconstructing a new case for the prosecution which cannot be done in a criminal case."

SUMMARY OF OUR ANALYSIS AND THE CONCLUSIONS DERIVED THEREFROM

61. On over all assessment of the evidence and circumstances analysed above, we summarise our analysis with conclusions as follows:

(a) The motive for the crime though feeble, at the time of lodging the FIR, was attributed only to the accused Sri Kant Dubey (A-1) and not to his two brothers, by stating that he (A-1) wanted the deceased to withdraw the case instituted against his master (Prem Sao) questioning the sale of property/ land made by Sheetla Prasad, a *Pattidar*, and for that end had been threatening the deceased. Later, the prosecution story improved so as to attribute motive to all the three accused, who are real brothers, by claiming that they all were interested in that land. But as this land was admittedly sold to Prem Sao and the litigation of the deceased was with Prem Sao therefore burden was on the prosecution to show as to how the other two brothers would gain if the litigation ends, which the prosecution failed to discharge. We are thus of the view that the prosecution has not been able to prove any serious motive for the accused persons to have committed the murder in the manner alleged by the prosecution.

(b) The prosecution case improved during the course of investigation from that taken in the FIR not only to explain an important discovery, that is the murder weapon, but also to attribute motive to all the accused, which is suggestive of the prosecution story being contrived.

(c) The investigation was perfunctory. No effort was made to test whether all the three accused had motive to commit the crime in the manner alleged. No effort was made to connect the murder weapon allegedly found on the spot with the accused to whom its use was attributed. And, inexplicably, it was tampered so much so that the stick portion of the murder weapon *(Ballam)* was separated from the metallic portion and the metallic portion alone was sealed. This act of the I.O. hampered the discovery of truth as also prejudiced the defence of the accused because the concerned accused was deprived of the opportunity to apply for comparison of the finger prints available on the stick portion, if any. Further, no effort was made to recover the other two *Ballams* as well as blood stained clothes of either the accused or the informant or any member of the victim's family to confirm their participation or presence at the time of the incident. The investigation was rather hastily concluded and charge-sheet forwarded within just 7-8 days. All that leads us to infer that the investigation was not with a view to discover the truth but to complete a formality or may be to hide the truth.

(d) The medical evidence as regards probable time of death, the time by which the body reached the hospital, the distance of the hospital from the place of occurrence and the distance of the place of occurrence from the place of residence of the person whose tractor was used for carrying the body to the hospital, suggest that death of the deceased had taken place much earlier than the time of the incident put by the prosecution thereby probabilizing the defence suggestion that it

occurred in the night hours, which seriously dents the prosecution story.

(e) The ocular evidence rendered by all the three witnesses of fact is totally general and parrot-like in respect of role of all the three accused even though the three witnesses, allegedly, had opportunity to witness the incident from different angles and, therefore, if they had really witnessed the incident they could have particularised the role of each accused. But they miserably failed in that regard, despite specific questioning. Interestingly, however, to explain the discovery of murder weapon, all of them became specific to state that it was left by Sri Kant Pandey though, in the FIR, the allegation was that all three ran away with their *Ballams*. Keeping in mind that all the witnesses of fact are literate, not father/ son/ wife of the deceased, and they suffered no injury in the incident, their parrot-like statement that all three accused exhorted each other, surrounded the deceased and inflicted multiple blows, without specifying their role on material counts, despite specific questioning, leads us to infer that they have either not witnessed the incident which might have occurred in the night, as suggested by the defence, or they have contrived a story on strong suspicion, or for some other reason, may be because there was involvement of someone from within, either to grab the property of the deceased who was alone, as he was left by his wife and had no issue, or for some other reason, as also suggested by the defence. Thus, on overall assessment, keeping in mind the other conclusions/ inferences enumerated above, we are of the firm view that the prosecution case is not free from suspicion and the ocular evidence is not reliable and trustworthy.

(f) There is also a strong possibility of over implication generated by following circumstances: (i) a solitary murder weapon was recovered, that too on spot, with blood stains found up to a length which was much in excess of the depth of any of the injuries found on the body of the deceased, suggestive of its multiple use; and (ii) the external dimension of the injuries, other than its depth, found on the body of the deceased was similar. Possibility of overimplication derives strength from the improvement made during the course of investigation to attribute the use of the murder weapon discovered on the spot specifically to Sri Kant Pandey (A-1). All of this, coupled with the fact that the prosecution has failed to prove any cogent motive to the two brothers of Sri Kant Pandey to commit the crime, while keeping in mind that there is always a possibility of over implication, particularly, when the prosecution case flows from an interested witness, the probability of false implication of at least two accused (i.e. A-2 & A-3) is very high. But, as the case against all the three accused is so inextricably mixed that it is impossible to sift the grain from the chaff, all the three accused are entitled to the benefit of doubt.

62. In view of the foregoing analysis and conclusions, we are of the considered view that the prosecution has failed to discharge its burden to prove the charge against all the three accused beyond the pale of doubt. Hence, the benefit of doubt must go to all the accused. Consequently, the conviction and sentence order passed by the trial court is liable to be set aside.

63. Accordingly, the appeal is **allowed**. The judgment and order dated 26.05.2000 passed by the IVth Additional District & Sessions Judge, Mirzapur in Sessions Trial No. 66 of 1997 is set aside.

All the appellants are acquitted of the charge framed against them. It be noted that all the appellants were, earlier, on bail pending this appeal. But, subsequently, on non-appearance of their counsel, non-bailable warrants were issued against them. Although there is no report that non bailable warrants were executed but according to the learned counsel for the appellant the non bailable warrants have been executed and the appellants are now in jail. In view of the above, it is directed that if the appellants are in jail, they shall be released forthwith, unless wanted in any other case, subject to compliance of the provisions of Section 437 A CrPC before the trial court below. In case the non-bailable warrants have not been executed, they shall stand withdrawn and if the appellants are not in jail they need not surrender, subject to compliance of the provisions of Section 437-A as directed above.

64. Let a copy of this order be sent to the trial court for compliance.

(2020)11ILR A482
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2020

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 2867 of 2012

Ram Khilari ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Akhilesh Srivastava, Sri Noor Mohammad, Sri Ray Sahab Yadav, Sri Sushil Kumar, Sri Vijay Bahadur Yadav

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

Criminal Law – Indian Penal Code,1860 - Sections 307, 504, 506 – Scheduled Class/Scheduled Tribes Act, 1989 – Section 3(2) -Criminal appeal has been filed against conviction under section 307, 504, 506 I.P.C. and 3(2)V S.C./S.T. Act

Criminal Law – Indian Penal Code,1860 - Exception 4 of 300 I.P.C. – Culpable homicide is not murder if it is committed without premeditation in sudden fight – Absence of grave and sudden provocation, provocation is self induced by the appellant. (Para 23)

There is no material contradiction of the occurrence appearing in the testimony of two eye witnesses. (Para 24)

Prosecution has successfully proved its case beyond all reasonable doubt against the appellant. Judgment of Trial Court upheld (Para 29)

Appeal dismissed. (E-2)

List of Cases cited:-

1. Khuman Singh Vs St. of M.P. & anr., reported in 2019 (3) JIC 420 (SC)

2. Khuman Singh Vs St. of M.P. & anr.

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Noor Mohammad, learned counsel for the appellant, learned A.G.A. for the State and perused the material brought on record.

2. The instant criminal appeal has been preferred by the appellant - Ram Khilari son of Phulwari Yadav, resident of

Village - Deenapur, Police Station - Palimukeempur, District - Aligarh, against the judgment and order dated 09.07.2012 passed by Additional Sessions Judge, Court No. 6, Aligarh, in Session Trial No.450 of 2006, arising out of Case Crime No.126 of 2004 (State vs. Ram Khilari and another), under Sections - 307, 504, 506 I.P.C. and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "S.C./S.T. Act"), Aligarh, whereby the appellant has been convicted with the sentence of ten years rigorous imprisonment under Section - 307/34 I.P.C. coupled with fine Rs. 10,000/- with default clause to suffer additional rigorous imprisonment for one year. Similarly, one year rigorous imprisonment has been imposed under Section 504 I.P.C., coupled with fine Rs. 500/- with default clause for three months additional rigorous imprisonment, two years rigorous imprisonment under Section - 506 I.P.C., coupled with fine Rs.5,000/- with default clause to suffer six months additional rigorous imprisonment and life imprisonment under Section 3(2)(v) S.C./S.T. Act, coupled with fine Rs. 20,000/- with default clause to suffer two years additional rigorous imprisonment. All the sentences were directed to run concurrently.

3. Necessary and relevant facts, as gathered from the record, which led to the conviction of the appellant, appear to be that an F.I.R. was lodged by one Hardwari son of Kewal Singh Jatav on 12.11.2004 at Police Station - Palimukeempur at Case Crime No. 126 of 2004, under Sections - 307, 504, 506 I.P.C. and Section 3(2)(v) S.C./S.T. Act, with the allegations that the informant along with his nephew Satyaveer son of Ajuddi Prasad, were celebrating the festival of *Deepawali* at their home, when Ram Khilari son of Phulwari Yadav and Maloda son of Om Prakash Yadav, arrived at the house of the informant in drunken position at around 05:00 p.m. Both the persons were possessing country-made guns in their hands. They started abusing and demanded Rs. 100/- from the informant. On refusal to meet the demand, scuffle started on the spot and in the meanwhile, Ram Khilari with the intention to kill, fired upon the nephew of the informant, which fire hit the left temple and passed through and through. The incident was witnessed by the villagers Tara Chand and Charan Singh. Both the accused made their escape good from the spot, threatening of dire consequences in case any report is lodged to the ambit that their lives will not be spared. Request was made for lodging the report and taking action. Report is dated 12.11.2004, and the same is Ext. Ka.1.

4. On the basis of the contents of the written report, Check F.I.R. was prepared under the aforesaid sections of I.P.C. at aforesaid case crime number at police station - Palimukeempur, at aforesaid date and time. The Check F.I.R. is Ext.Ka-5 and the relevant General Diary entry at report no.29 at 6:20 p.m. on 12.11.2004, whereby the case was registered at the police station under the aforesaid sections of I.P.C. and the S.C./S.T. Act, respectively, is Ext.Ka-6.

5. The investigation was entrusted to P.W.-7, R.C. Gupta, Deputy Superintendent of Police, who took cognizance of the Check F.I.R. and the written report, G.D. Entry etc. and recorded statement of the police witnesses, and also recorded the contents of the F.I.R. in the Check F.I.R. Later on, he inspected the spot on 14.11.2004, recorded statement of the persons present over there. The spot map

was prepared by him, which is Ext. Ka-7. The Investigating Officer also prepared memo of blood-stained earth from the spot, which is Ext. Ka-8.

6. The record further reflects that the medical examination of the injured Satyaveer was conducted by Dr. Jamal Ajmat P.W.-3, who examined him on 12.11.2004 at 8:30 p.m. at J.N. Medical College, Hospital, Aligarh Muslim University Aligarh and found the following two injuries viz. lacerated entry wound in the measurement of 3 x 3 c.m. on the upper portion of left cheek, and the second wound was described as lacerated exit wound behind the back of the head left side below the ear. This report has been proved as Ext. Ka-2 by this witness (P.W.3). It was stated that the nature of the injuries was serious and can be caused by gunshot. P.W.4 is C.O. Mansha Ram Gautam, who took over investigation on 28.01.2005 from the first Investigating Officer and he also recorded statement of the accused Ram Khilari on 18.02.2005. P.W. 5, V.S. Mishra is the third Investigating Officer of this case. He also carried out the left over investigation on 29.03.2005. He, after recording the statement of several persons filed, charge-sheet against Ram Khilari, which is Ext. Ka-4 on record.

7. Pursuant thereto, the Additional Sessions Judge, Court No.2, Aligarh heard both the sides on point of charge and was prima-facie satisfied with the case against the accused-appellant, accordingly, framed charges under Sections **307/34, 504, 506 I.P.C. and 3(2)**(v) S.C./S.T. Act. Charges were read over and explained to the accused-appellant who abjured the charges and opted for trial.

8. The prosecution, in order to prove guilt of the appellant examined as many as seven witnesses, a brief sketch of them is *ut infra* :-

9. P.W.-1 Hardwari is the informant and the eye witness of the occurrence. P.W.-2 Satyaveer is the injured eye witness. P.W.3 is Dr. Jamal Azmat. P.W.4, Mansha Ram Gautam, P.W.-V.S. Mishra and P.W.7 R.C. Gupta are the three Investigating officers of this case, whereas P.W.6 Nihal Singh has taken down the contents written report in the Check F.I.R. and has proved the same as Ext. Ka-5.

10. Except as above, no other testimony was adduced by the prosecution. Consequently, evidence for the prosecution was closed and statement of the accused was recorded under Section 313 Cr.P.C., wherein he claimed to have been falsely implicated in this case on account of enmity.

11. In turn, the defence produced D.W.1 Rewati Singh-the scribe of the first information report and D.W.2 Tara Chand.

12. Thereafter, evidence for the defence was closed and the case was posted for arguments and as a sequel to that arguments concluded.

13. After appreciating the evidentiary value and considering the attendant facts and circumstances of the case, the trial court recorded finding of conviction and passed the aforesaid sentence under the respective sections of I.P.C. and the S.C./S.T. Act, as above.

14. Resultantly, this appeal.

15. Sri Noor Mohammad, learned counsel for the appellant has assailed the merits of this case on several counts and has vigorously contended that no offence, whatsoever, has been committed in this case and no evidence has been tendered by the prosecution which can prove case of the prosecution beyond reasonable doubt. That way, to prove the ambit of Section 3(2)(v) S.C./S.T. Act to the effect that the accused committed the crime, knowing it well that the victim is a member of and belonged to schedule caste and schedule tribe, thus applicability of Section 3(2)(v) S.C./S.T. Act is elaborated with the pre-requisite that the crime was committed in such state of mind knowing it well that the victim is a member of and he belonged to the S.C./S.T. community and in case that element is missing, then no conviction can be recorded by the trial court under Section 3(2)(v) of the S.C./S.T. Act. In support of his argument, learned counsel for the appellant,, has placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Khuman Singh Vs. State of M.P. and Another, reported in 2019 (3) JIC 420 (SC)*** wherein the sentence awarded under Section 3(2)(v) S.C./S.T. Act was severely assailed on that count. Next contended that the present case in hand is under Section 307 I.P.C. The incident took place all of a sudden out of grave and sudden provocation because the qurrel arose on the spot and it was not premeditated and was never intended in pre- planned manner to commit the crime. The investigation was not conducted fairly and the trial court overlooked the clinching testimony of the defence witnesses that the F.I.R. was written at the police station. That way, the F.I.R. is as a result of deliberation with the police. The scribe was examined as D.W.1 and he has clarified fact that the F.I.R. was dictated at the instance of *'Daroga Ji'* at the police station and that fact creates doubt about the very genuineness of the first information report itself. There are patent and inherent contradictions in the testimony of the prosecution witnesses both facts and formal witnesses. They are improving and vacilating and their testimony is full of embellishments and can not be believed. Lastly, contended sentence awarded is too harsh.

16. Learned A.G.A. has submitted that each and every aspect of the case has been duly considered and the charges have been proved beyond reasonable doubt. Insofar as the present case is concerned, the case of ***Khuman Singh (supra)*** referred to by the learned counsel for the appellant as above, the same is highly distinguishable on fact, because in that case (aforecited), the dispute arose all of a sudden, when the assailants tried to graze their cattle on the field of the deceased who drove away the cattle/buffaloes of the accused from his field, when some wordy altercation took place on the spot, followed by assault being caused on the deceased and that was considered to be outcome of grave and sudden provocation, and not a premeditated plan to assault the deceased because he was a member and belonged to the Scheduled Caste community. That being so, the facts of this case in hand are entirely different, therefore the ratio as laid down in the case of ***Khuman Singh (supra)*** is very much distinguishable from the facts of this case and not helpful to the appellant.

17. We have considered the rival submissions. The moot point that arises for consideration relates to fact whether the prosecution has been able to bring home various charges aforesaid against the accused-appellant beyond all reasonable doubt ?

18. In that context, upon careful consideration of the entire merits, we observe that the incident, as emanating from the F.I.R., indicates that the occurrence took place in the evening of the *Deepawali* festival, when the victim was sitting in his home, where the assailants came and demanded Rs. 100/-, which on refusal by the victim resulted into assault being caused to the victim/informant.

19. The money was being demand for purchasing liquor/alcohol. While demanding money, the informant was vituperated in the name of caste. Insofar as the time of the incident is concerned, it is stated to have occurred around 5:00 P.M. The incident was reported at the police station on 12.11.2004 around 6:20 P.M. The description of the occurrence further states that on refusal to give the money, some scuffle took place followed by wordy altercation with the accused. In the meanwhile, Ram Khilari with the intention to kill fired upon the nephew of the informant (Hardwari), which hit and passed through and through from the left temple of the victim. The incident was witnessed by Tara Chand and Charan Singh- the inhabitants of the same village.

20. In the backdrop of the aforesaid allegations/averments, the testimony of the injured witness as well as the informant becomes relevant. The testimony of the injured victim- Satyaveer P.W.2, indicates that he has supported the version of the F.I.R. that the incident took place around 5:00 P.M. when he was celebrating the festival of Deepawali at his home. His uncle Hardwari was also present at that time, when the accused Maloda and Ram Khilari arrived at his home and extended abuses in the name of caste and demanded Rs.100/- for purchasing alcohol. On refusal to give money by his uncle that he is unable to give the money, both the accused, who were possessing *'tamancha'* in their hands started scuffling and came on the *'khadanja'* path. At that time, he was playing with fire-works under the *'sheesham'* tree and at that point of time, Ram Khilari fired on his uncle with the intention to kill him, but it instead hit him (P.W.2). In the meanwhile, Tara Chand and Charan Singh arrived on the spot. After the shot hit this witness (P.W.2-Satyaveer), he became unconscious. Thereafter, he was taken to the medical college for treatmennt. He has testified that the gun shot scar was still visible on his face.

21. We upon careful perusal of the record also find that this witness (P.W.2) was medically examined by Dr. Jamal Azmat P.W.3 at J.N. Medical College Hospital Aligarh Muslim University, Aligarh on 12.11.2004 around 8:30 P.M., wherein two injuries were found on his person viz., lacerated entry wound 3 x 3 c.m. on left cheek which was grievous in nature and lacerated exit wound with ragged margins with visible bony passing through and through to the back of head left side. This injury report has been proved by P.W.3 Dr. Jamal Azmat as Ext. Ka-2. Both the gun shots have been stated to be of grievous in nature. The doctor witness has further testified in his cross examination that the fire was shot from a certain distance, therefore, there was no blackening, charring and tattooing. The specific testimony of the doctor witness that this injury could have been caused by the gun shot has not been put to any challenge, whatsoever, by the defence. Here, the testimony of P.W.1 Hardwari also corroborates testimony of P.W.-2 Satyaveer in material particular, regarding the occurrence and in the absence of any

specific challenge to the gun shot injury being caused by the accused upon the injured Satyaveer, the occurrence stands proved by the prosecution beyond reasonable doubt.

22. Learned counsel for the appellant has vehemently argued on the strength of case of ***Khuman Singh versus State of M.P. And another*** as referred to hereinabove and has submitted that at the time of commission of the offence, the accused must commit the offence knowing it well that the person belonged to the scheduled caste community and it being so, the offence was committed. Any conviction recorded under Section - 3(2)(v) of S.C./S.T. Act in the absence of any specific proof by the prosecution on that pariticular aspect would render the conviction illegal. But the aforecited case does not come to the rescue of the appellant on the ground that the facts of the present case are entirely different from the one as were juxtaposed in the above referred case of *"Khuman Singh vs. State of M.P. And another"*. The reason being that in that case, the Hon'ble Apex Court apparently found that it was a case of sudden provocation which was extended by the informant side itself when the informant/victim drove away the cattle of the accused from his field, which led to assault being caused on the victim, thus causing his death. Here, in the abovecited case, the conviction was initially recorded under Section - 302 I.P.C. but it was altered and modified and confined to Section 304 Part-II I.P.C. on account of fact that it was not a premeditated murder the incident occurred in a spur of moment on the spot and it was a case of grave and sudden provocation, thus falling within one of the exceptions of Section - 300 I.P.C. The cause of action arose on the spot.

23. Here, in this case in hand, argument has been advanced by learned counsel for the appellant that the incident took place all of a sudden, but the argument is casual and does not carry any substance, for the reason that both Satyaveer and Hardwari were celebrating the festival of *Deepawali* at their home in the evening around 5:00 P.M., when the assailants appeared/arrived on the spot and forcefully demanded Rs. 100/- for taking liquor. On refusal being made, scuffle followed which led to the firing by the appellant, thus causing injury upon P.W.-2 Satyaveer. There is no point that any sort of provocation was given or extended by the injured or the informant to the accused. Refusing to give money would not be treated to be any sort of provocation in this case (in hand). Therefore, the aforecited case is not helpful to the appellant. Here, there is absence of grave and sudden provocation. Here the provocation is self induced by the appellant.

24. Insofar as the finding on the other aspects of the case as recorded by the trial court are concerned, the same is consistent and justified. It is per-chance that the injured was saved, but the seat of injury is the head- the vital part of body and nature of injury has not been challenged specifically by the defence. There is no material contradiction in the description of the occurrence as appearing in the testimony of the two eye-witnesses of fact - say P.W.-1 Hardwari and P.W.-2 Satyaveer. Their testimony on the whole inspires confidence.

25. We also notice that two defence witnesses have also been examined in this case. D.W.1 Rewati Singh, is scribe of the F.I.R. and he has testified in his examination-in-chief that some quarrel took place between Hardwari and other villagers. Hardwari asked him to accompany him to the police station and at the police station *'Daroga Ji'* dictated the F.I.R., which was scribed by this witness. He has categorically stated that Hardwari did not dictate the F.I.R. and there is enmity between the accused and the

informant side and due to this *'Daroga Ji'* had involved the accused in this case. However, in his cross examination, he has categorically stated that Hardwari is resident of his village and he has admitted fact that it was dictated by Hardwari. He has categorically stated that *"मुझसे तहरीर लिखवाई थी"* however he has denied the suggestion that it is incorrect to say that the report, which he scribed was dictated by Hardwari. Although he has further denied suggestion that it is incorrect to say that he did not write the F.I.R. at the instance of *'Daroga Ji'*. In the last paragraph of his testimony, he has denied the suggestion that he wrote the F.I.R., at the instance of Hardwari.

26. In this regard, we also come across the testimony of the Police Constable P.W.6 Nihal Singh. He has categorically stated regarding the fact of lodging of the F.I.R. that on 12.11.2004, when he was posted at Police Station - Palimukeempur as Head Muharrir, he prepared the Check F.I.R. on the basis of written report (Ext. Ka-1) and has proved the F.I.R. as Ext. Ka-5. He has further testified that on the basis of the entry made in the Check F.I.R., he made a reference of the same in the General Diary at Rapat No. 29 at 6:20 P.M. on 12.11.2004 and has proved the concerned General Diary as as Ext. Ka-6. He has been cross examined, wherein he has testified to the ambit that Hardwari was accompanied by the injured-Satyaveer, Pappu, Charan Singh, etc. and the written report was brought at the police station and he had seen the injuries of the injured at that point of time. He has been suggested only to the ambit that it is incorrect to say that at the instance of S.O., he lodged an ante-time F.I.R. The testimony of P.W.-6 as above would indicate that the testimony of D.W.-1 is absolutely false and it appears that he was initially a prosecution witness and has been won over by the accused, therefore, he is not telling truth. No suggestion has been made to P.W.6 by the defence that the written report Ext. Ka-1 was in fact written at the dictation of *'Daroga Ji '* by D.W.1 at the police station. The another defence witness is D.W.-2 Tara Chand. He is stated to be an eye witness of the occurrence in the F.I.R., but he did not name the accused to have seen him on the spot, at the time of the occurrence. He says that when he came out of his house, the assailants had fled away. Therefore, his testimony also does not create any doubt regarding the occurrence. The presence of both the injured witness and the informant on the spot is most natural.

27. The testimony of P.W.-1 and P.W.-2 is most clinching, consistent and inspiring confidence and it corroborates the occurrence in material particulars leaving aside element of doubt.

28. The site-plan prepared by the Investigating Officer Ext.Ka-7 is also indicative of fact as to the very place, where the occurrence took place and the crime was committed and it fixes with certainty the other places specifically marked as the place of presence of the informant at place-B where the informant was stated to be standing and the victim was standing under the *'sheesham'* tree at place marked by word "X". This site plan has also not been challenged specifically by the defence. Therefore, the very place of commission of crime is satisfactorily proved by the prosecution.

29. After considering the entirety of this case, we unhesitatingly hold that the prosecution has successfully proved its case

beyond all reasonable doubt against the present appellant- Ram Khilari and the testimony of the prosecution witnesses - both fact and formal is consistent and clinching and inspires confidence. The trial court took correct view of the entire occurrence and has properly scrutinized, appraised and analyzed facts and law in right perspective.

30. It is established principles of criminal jurisprudence that the prosecution is required to prove its case beyond all reasonable doubt and the burden of proof to establish the charge is always on the prosecution and in this case the prosecution has successfully prove the charges against the appellant beyond all reasonable doubt and the appellant was rightly convicted under aforesaid charges and was sentenced condignly.

31. Accordingly, the judgment and order dated 09.07.2012 passed by Additional Sessions Judge, Court No. 6, Aligarh, in Session Trial No.450 of 2006, arising out of Case Crime No.126 of 2004 (State vs. Ram Khilari and another), under Sections - 307, 504, 506 I.P.C. and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, is hereby upheld. Consequently, the instant appeal lacks merit and the same is ***dismissed***.

32. In this case, the appellant is in jail, he shall serve out the sentence as awarded by the trial court.

33. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

(2020)11ILR A489

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2020

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 3658 of 2002
connected with
Criminal Appeal No. 3917 of 2002
connected with
Criminal Appeal No. 3960 of 2002

Udai Bhan ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri K.D. Tiwari, Sri Sunil Kumar, Sri Sunil Singh, Sri Vikas Sharma Amicus

Counsel for the Opposite Party:
A.G.A., Sri Sanjay Tripathi

Criminal Law – Indian Penal Code,1860 - Sections 147, 148, 302/149 - Criminal appeals have been filed against the conviction under

Criminal Conspiracy
Offence of criminal conspiracy is agreement between two or more persons to do an illegal act. (Para 40)

There are neither any circumstantial evidence nor any prior meeting of mind of accused proved, nor any action individual or in concert, proved against the appellant.

Conviction and sentence of the appellant by the trial court set aside. (Para44)

Appeal Allowed. (E-2)

List of Cases cited:-

1. John Pandian Vs State represented by Inspector of Police,Tamil Nadu, reported in (2010) 14 SCC 129

2. Baliya @ Bal Kishan Vs St. of M.P., reported in (2012) 9 SCC 696,

3. State (Government of NCT of Delhi Vs Nitin Gunwan Shah, reported in (2016) 1 SCC 472

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

1. The present criminal appeals have been preferred against the judgment and order dated 5.9.2002 passed by 1st Additional Sessions Judge, Mahoba in S.T. No.16 of 2001 (Case Crime No.220 of 2000), Police Station Ajnar, District Mahoba convicting and sentencing the appellants, namely, Hukum Singh and Kalyan Singh under Section 147 I.P.C. for one year R.I., under Section 148 I.P.C. for two years R.I.and under Section 302/149 I.P.C. for life imprisonment and fine of Rs.2000/- each and in default of payment of fine, six months additional imprisonment to each of the appellants, wheres appellant, namely, Udai Bhan has been convicted and sentenced for life imprisonment under Section 302/120-B I.P.C. and fine of Rs.2,000/- and in default of payment of fine, six months simple imprisonment.

2. The accused, namely, Hukum Singh and Kalyan Singh who have preferred Crl. Appeal Nos. 3917 of 2002 & 3960 of 2002 have died during the pendency of their appeals and their appeals have already been ordered to be abated by this Court vide orders dated 9.9.2020 14.11.2018 respectively, hence, the Court proceeds to hear the criminal appeal filed by the appellant Udai Bhan being Crl. Appeal No.3658 of 2002 against whom the only charge is for conspiring the murder of the deceased along with the two accused Hukum Singh and Kalyan Singh.

3. The prosecution case, as has been set out in the F.I.R. by the informant Sohan Lal, is that the house of the informant is at a distance of 150 yards from the house of his cousin brother, namely, Jagat Singh.There was some dispute between Jagat Singh and one Hukum Singh and others of his village with respect to land, on account of which in the night of 25.10.2020 accused Hukum Singh, Kalyan Singh along with 2-3 unknown persons entered in the house of of his cousin brother Jagat Singh with lathi, farsa, axe and country-made pistol and assaulted them. On hearing the alarm being raised by his cousin brother Jagat Singh, his wife Mannu and daughter Km. Anita for rescue, the informant Sohan Lal, Jai Hind, Prithvi Raj, Sughar Singh, Basanta and other persons of the village reached at the place of occurrence in the night at about 1:30 a..m. and they in the torch light saw the accused, namely, Hukum Singh, Kalyan Singh and 2-3 unknown persons along with them who were indulged in marpeet and were uttering that if any person would come in between, would be dealt in the same manner. The accused have killed his brother Jagat Singh, his wife Smt. Mannu and daughter Km. Anita with lathi, farsa and fled away towards the village. While the accused were fleeing from the place of occurrence, the informant and others had seen the accused Hukum Singh and Kalyan Singh with 2-3 unknown persons and identified them and further the unknown person could be identified by them if they were brought before them.The incident has been conspired by the by the brother of Hukum Singh, namely, Udai Bhan. When the informant and others reached on the spot, they saw the dead body of Jagat Singh lying in the courtyard of his house and that of his wife Smt. Mannu on the roof of the house, whereas the dead body of his

daughter Km. Anita was lying on the way towards the west side near the house of one Bal Kishan.

4. The F.I.R. of the incident was lodged on the basis of written report submitted by the informant Sohan Lal against the accused persons, namely, Hukum Singh, Kalyan Singh, Udai Bhan and 2-3 unknown persons on 25.10.2000 at 6.30 a.m. at Police Station Ajnar, District Mahoba being Case Crime No.220 of 2000, under Sections 147, 148, 302, 149 & 120B I.P.C.

5. The investigation of the case was entrusted to the Station Officer, namely, Surendra Singh, who after conclusion of the investigation, submitted charge sheet against the three accused persons, namely, Hukum Singh, Kalyan Singh and Udai Bhan.

6. The case was committed to the Court of Sessions and charges were framed against the accused for the offence under Sections 147, 148, 302/149 & 120B I.P.C. by the trial Court.

7. The accused were put to trial. The accused denied the charges and claimed their trial.

8. The prosecution in support of its case has examined PW1-Sohan Lal, PW2-Prithvi Raj, PW3-Basanta, PW-4 Dr. T.R. Sarsaiya, PW5-Head Constable Daya Shankar Tiwari, PW6-S.I.Surendra Singh and PW7-Jai Hind

9. PW1-Sohan Lal has deposed before the trial Court reiterating the prosecution case, as has been stated by him in the F.I.R. He proved the written report Ext.Ka.1 to be in his hand writing and signature. He stated that he reached at the place of occurrence on the alarm raised by the deceased Mannu and had seen the accused Hukum Singh and Kalyan, who were armed with axe, coming out from the house of deceased Jagat Singh along with 2-3 unknown persons.The unknown persons were armed with farsa, country-made pistol and lathi. He saw the incident in the torch light and identified the accused. This witness further deposed that along with him Prithvi Raj, Jai Hind and Basanta were also present. The accused had also threatened them for dire consequence.The deceased Jagat Singh wanted to give his landed property to his daughter Km. Anita whose marriage he had fixed in Village Lamhora. Prior to the incident, there was a quarrel between the deceased Jagat Singh and accused Hukum Singh and Kalyan Singh with respect to giving of his landed property to his daughter Km. Anita, for which a report was also lodged by the deceased Jagat Singh. In the murder of the three deceased, there was a conspiracy of Kalyan Singh, Hukum Singh and Udai Bhan.

10. In his evidence, this witness further deposed that the accused Udai Bhan was also present at the time of incident, but in his cross-examination he denied the presence of the accused Udai Bhan and has only deposed that he conspired along with other accused persons for murdering the deceased Jagat Singh and his family.

11. PW2-Prithvi Raj who is also an eye witness of the occurrence, has deposed before the trial Court that he too reached at the place of occurrence on hearing the fire shot and on the alarm raised by Smt. Mannu for rescue. He saw the accused Hukum Singh, Kalyan Singh and three unknown persons coming out from the house of the deceased Jagat Singh. He had

also seen the accused and identified them in the torch light. After the accused had gone away, he visited the house of Jagat Singh and saw that that the doors of the house was broken and the dead body of the deceased Jagat Singh was lying in the courtyard of the house, that of Smt. Mannu on the roof whereas the dead body of his daughter Km. Anita was lying on the way near the house of one Bal Kishan.

12. This witness further deposed that more than one month or so prior to the present incident at about 9 hrs. during day time he heard from the courtyard of his house which is adjacent to the side of pathway accused Udai Bhan, Hukum Singh and Kalyan Singh talking to each other that they be killed otherwise the entire property of Jagat Singh would be taken by the in-laws of Km. Anita and when the said conversation was going on, at that time accused Udai Bhan had come to the village. All the three accused have conspired the murder of the three deceased.This witness is also the witness of panchayatnama of the three deceased and on the inquest report/panchayatnama he had also signed. This witness is also the witness of certain recoveries such as blood stained lathi, which he had signed and proved as paper no.9 Ka-1 and further the police had recovered the three empty cartridges and prepared fard recovery memo as paper no.9Ka-2 and in his presence blood stained earth and plain earth were recovered and sealed in different boxes, which has been marked as paper no.9ka-3, 9Ka-4 & 9Ka-5 and also signed the same.

13. This witness further stated that after 6-7 days of the incident, accused, namely, Kalyan Singh was arrested by the police and on his pointing out the weapon of assault, i.e., axe was recovered in his presence behind the house from the bushes of Besharm plant, which was blood stained and the said recovery was marked as paper no.17Ka-1.

14. PW3-Basanta who is also an eye witness of the occurrence, has deposed before the trial Court that he is brother-in-law (Sala) of the deceased Jagat Singh and on the day of the incident he had come to the house of deceased Jagat Singh. On the night of the incident he was sleeping at the flour mill of Prithvi Raj and at about 1:30 a.m. in the night he heard the alarm of his sister Mannu from the house of the deceased Jagat Singh for rescue, he reached on the spot and in the torch light he saw that accused Hukum Singh and Kalyan Singh were assaulting his sister Mannu with axe on the roof of the house of deceased Jagat Singh and thereafter he saw both the accused who were armed with axe in their hands and three unknown persons who were armed with countrymade pistol, farsa and lathi coming out from the house of deceased Jagat Singh. He further deposed that the murder of the three deceased was pre-planned/ conspired by the accused Udai Bhan. The murder of Km. Anita was committed at the door of one Bal Kishan and of Jagat Singh in the courtyard of his house.

15. PW7-Jai Hind who is also an eye witness of the occurrence examined by the trial Court, has stated that in the intervening night of 24/25.10.2000 at about 1:30 a.m. on hearing noise of fire shot and alarm raised, he reached at the house of Jagat Singh where he saw that the accused Hukum Singh, Kalyan Singh and three unknown persons were coming out of the house of Jagat Singh. Accused Hukum Singh and Kalyan Singh were armed with axe, whereas three unknown persons were

armed with country-made pistols. The dead body of Km. Anita was lying in the lane at the door of the house of one Bal Kishan and that of Jagat Singh in the courtyard whereas Smt. Mannu was at the roof of the house of Jagat Singh. He saw the accused in the torch light and identified them. Besides him, the incident was witnessed by Prithvi Raj, Sughar Singh, Sohan Singh, Basanta and others.

16. This witness further deposed that the accused Udai Bhan one month prior to the incident had come to the Village Mavaiya from Lucknow and he heard the accused Udai Bhan, Hukum Singh and Kalyan Singh talking together that the marriage of Km. Anita may not be solemnized and prior to it all the three persons be murdered, so that the property would come to them (accused). He heard the said conversation of the accused from the door of the house which was in lane and at the time of witnessing the incident he had a torch which he had given in the supurdagi of the Investigating Officer and fard recovery/supurdaginame has also been prepared as paper No.31 Ka which he had signed and proved as material Ext. 14.

17. PW4-Dr. T.R.Sarsaiya in his examination before the trial Court has stated that he conducted the post mortem of the three deceased, namely, Jagat Singh, Smt. Mannu wife of Jagat Singh & Km. Anita daughter of Jagat Singh in the District Hospital, Mahoba on 26.10.2000 at 12:00 Noon, 1:00 p.m. and 2:00 p.m. respectively and in the opinion of the doctor all the three deceased died on account of ante mortem injuries which were found on their person.This witness has proved the post mortem report as Ext. Ka3, Ka.4 & Ka.5 respectively. He further stated that the three deceased died on 25.10.2000 at 1:30 a.m. in the night.

18. PW5-Head Constable Daya Shankar Tiwari has deposed before the trial Court that he was posted as Head Constable on 25.10.200 at Police Station Ajnar. On the said date, on the basis of written report of the informant Sohan Lal he registered the First Information Report of Case Crime No.220 of 2000, under Sections 147, 148, 149, 302 and 120B I.P.C. against Hukum Singh and others and proved the F.I.R. as paper No.4Ka in his hand writing and signature, which has been marked as Ext. Ka.6 and on the same day he also endorsed the F.I.R. in G.D. No.10 at 6.30 a.m. and proved the same as Ext. Ka.7.

19. PW6-S.I. Surendra Singh has deposed before the trial Court that on 25.10.2000 he was posted as Station House Officer at Police Station Ajnar, in his presence the F.I.R. was registered and he took over the investigation of the case. He further prepared the inquest report of the three deceased, namely, Jagat Singh Smt. Manni @ Mannu, wife of Jagat Singh and Km. Anita, daughter of Jagat Singh and completed all the formalities of inquest etc. and got the dead body of the three deceased sealed and sent the same for post mortem. He recorded the statement of the informant Sohan Lal under Section 161 Cr.P.C. and further prepared the site plan of the place of occurrence, recovery memo and proved the same as Ext. Ka.8 to Ka.28. He further recorded the statement of Prithvi Raj, Jai Hind and Basanta and further got the recovery of axe at the pointing of accused Kalyan Singh and proved the same as Ext. Ka.29. He further took into custody the torches which were handed over by the witnesses, namely, Sohan Lal, Jai Hind and prepared the material exhibit regarding the

same and proved the same as Ext. Ka.30 & 31.

20. This witness further stated that statement of one of the accused, namely, Munir Khan was recorded by S.I. Brij Mohan Sharma under Section 161 Cr.P.C. and also sent the case property for examination to the Forensic Science Lab at Agra as per orders of C.J.M. concerned. The papers which were prepared and signed by Brij Mohan as paper no.29 Ka was proved by him as Ext. Ka.32. S.I. Brij Mohan Sharma after concluding the investigation on 22.01.2001 submitted charge sheet against the accused Hukum Singh and two others and proved the same as Ext. Ka.33. This witness further stated that S.I. Brij Mohan Sharma was admitted in hospital at Jhansi as he met with an accident in which he received injury and was unable to move.

21. The accused in their statements recorded under Section 313 Cr.P.C. have denied the prosecution case excepting relationship of the three deceased with each other and further relationship between the accused. They categorically stated in their statements under Section 313 Cr.P.C. that the motive which has been suggested for the commission of the crime, is absolutely false and incorrect and further denied the deposition of the eye witnesses against them and further the investigation which has been carried out against them, was also denied by them. Accused Udai Bhan has categorically stated in his statement under Section 313 Cr.P.C. that for the last several years he was living at Lucknow and doing Government job but he has been falsely implicated in the present case along with his family members.

22. The trial Court after examining the prosecution evidence and the defence version given by the accused in their statements under Section 313 Cr.P.C. found the prosecution case proved against the accused and has convicted and sentenced them for the offence in question. Being aggrieved by the same, the accused have preferred the instant appeals before this Court.

23. Heard Sri Sunil Kumar Singh, learned counsel for the appellant, Ms. Archana Singh, learned A.G.A. appearing for the State and perused the lower court record.

24. It has been contended by learned counsel for the appellant that admittedly as per the prosecution case, the appellant Udai Bhan is said to have hatched conspiracy with his brother Hukum Singh and father Kalyan Singh for committing the murder of the three deceased, namely, Jagat Singh, his wife Smt. Mannu and daughter Km. Anita. He further submitted that the motive which has been suggested, for committing the crime by the accused persons, is absolutely false as few days prior to the present incident, i.e., 10-15 days before, the deceased Jagat Singh, had executed a "will deed' in favour of his sister Smt. Gyan Devi, his wife Mannu and daughter Km. Anita of his landed property and after the incident, Mulayam Singh, son of Gyan Devi had filed an application for mutation of the property of the deceased Jagat Singh in favour of his mother before the competent authority. The deceased had also called Basanta who is his brother-in-law at Gulpahar in this regard. PW3 Basanta has stated before the trial Court that he was the witness of the said "will deed' of the deceased Jagat Singh, thus, it was argued that the deceased Jagat Singh along with his wife and daughter might have been killed by Mulayam Singh in order to grab the property of Jagat Singh.

25. He next argued that the appellant Udai Bhan for the last several years was living at Lucknow and doing a Government Job, hence, he has no concern with the incident which has taken place in his native village.The prosecution has led evidence against the appellant Udai Bhan for conspiring the murder of the three deceased and in this regard there is evidence of PW2-Prithivi Raj and PW3-Basanta who have also deposed against the appellant Udai Bhan with respect to conspiracy for the murder of the three deceased.

26. Learned counsel for the appellant has drawn the attention of this Court towards the statement of PW2 Prithvi Raj who has stated before the trial Court that prior to one month before the incident, he heard the accused Udai Bhan, Hukum Singh and Kalyan Singh at 9 a.m. in the day talking together from the courtyard of his house close to the side of a pathway saying that all the three be killed otherwise Jagat Singh would give all his landed property to the in-laws of Km. Anita. He further stated that the accused Udai Bhan was working at Lucknow but when this conversation was going on, Udai Bhan had come to the village and Udai Bhan had planned the murder of the three deceased with Hukum Singh and Kalyan Singh. Similarly, PW7 Jai Hind has also reiterated the same version as has been given by PW2 Prithvi Raj before the trial Court against the appellant Udai Bhan in his evidence. So far as evidence of PW1 Sohan Lal and PW3 Basanta is concerned, it is submitted that they have also deposed before the trial Court with respect to conspiring the murder of the three deceased by the appellant Udai Bhan along with other co-accused.

27. It was further urged that so far as the evidence of PW2 Prithvi Raj and PW7 Jai Hind is concerned, their evidence is not sufficient and reliable to convict and sentence the appellant Udai Bhan for conspiring the murder of the three deceased. He submitted that no specific date has been stated either by PW2-Prithivi Raj or PW7-Jai Hind and only vague statements have been made by them that one month or so the appellant Udai Bhan had conspired the murder of the three deceased with his father Kalyan Singh and brother Hukum Singh for the motive which has been suggested by the prosecution. Besides the same, there is no other evidence even that too of circumstantial in nature to show that the appellant Udai Bhan conspired the murder of the three deceased.

28. It has been further argued by learned counsel for the appellant that PW1-Sohan Lal who claims himself to be an eye witness of the occurrence, has initially in the F.I.R. has stated that it was the appellant Udai Bhan who conspired the murder of the three deceased, but in his evidence before the trial Court he stated that the appellant Udai Bhan also committed the murder of the three deceased with is father Kalyan Singh and brother Hukum Singh and in his cross-examination he admitted the fact that the appellant Udai Bhan was not present at the place of occurrence.

29. It was further argued by the learned counsel for the appellant that in the statement under Section 313 Cr.P.C. the appellant Udai Bhan has categorically taken the plea that he was falsely implicated in the present case though for the last several years he was living at Lucknow and doing a Government job, but then too he was falsely implicated in the present case along with his family members.

30. He next argued that the trial Court has misread the evidence on record and has wrongly convicted the appellant Udai Bhan along with other co-accused for conspiring the murder of the three deceased, which is against the evidence on record and is liable to be set aside by this Court and the appellant Udai Bhan be acquitted.

31. *Per contra*, Ms. Archana Singh, learned A.G.A. appearing for the State has vehemently opposed the arguments of learned counsel for the appellant and submitted that three persons of a family were murdered by the father Kalyan Singh and brother Hukum Singh of the appellant Udai Bhan who has conspired the murder of the three deceased for grabbing the landed property of deceased Jagat Singh who wanted to give the same to his daughter Km. Anita after marriage, which was objected by him.

32. She further submitted that no doubt the accused Kalyan Singh and Hukum Singh have been assigned the active role for murdering the three deceased with axe along with 2-3 unknown persons who were armed with lathi, farsa and countrymade pistal and all of them received several injuries on their person i.e., lacerated wound, incised wound, firearem wound etc. and the incident was witnessed by the informant PW1 Sohan Lal who is the cousin brother of the deceased Jagat Singh, PW2 Prithvi Raj, PW7 Jai Hind and PW3 Basanta who is brother-in-law of the deceased Jagat Singh, the ocular testimony corroborates the medical evidence.The evidence of PW2 and PW7 who have deposed before the trial Court regarding conspiracy of murder of the three deceased by the appellant Udai Bhan for the motive suggested by the prosecution, is sufficient enough for convicting and sentencing the appellant Udai Bhan in the present case by the trial Court, the same does not suffer from any infirmity or error in law and be up-held by this Court. The appeal of the appellant Udai Bhan is devoid of merits and be dismissed.

33. We have considered the respectful submissions advanced by learned counsel for the parties and have gone through the impugned judgement and the entire record of the trial Court.

34. The three accused persons, namely, Kalyan Singh and his two sons, namely, Hukum Singh and Udai Bhan were named in the F.I.R. which was lodged by PW1 Sohan Lal after the incident on the next day at 6:00 a.m., i.e. on 25.10.2000 at Police Station Ajnar which is 6 Kms. away from the place of occurrence for the murder of the three deceased, i.e., Jagat Singh, his wife Smt. Mannu and daughter Km. Anita.

35. The prosecution case as emerges out from the F.I.R. is that the accused Kalyan Singh and Hukum Singh along with 2-3 unknown persons have committed the murder of the three deceased in the night of 25.10.2000 at 1:30 a.m. on account of the fact that deceased Jagat Singh wanted to give his entire landed property to his daughter Km. Anita after her marriage which he had fixed in the Village Lamhora, which was being objected by the accused persons. The eye witnesses of the occurrence, namely, PW1-Sohan Lal who is cousin brother of the deceased Jagat Singh, PW2 Prithivi Raj who is an independent witness, PW3 Basanta who is brother-in-law of the deceased Jagat Singh and PW7 Jai Hind who is another independent witness, have categorically stated that it was the accused Kalyan Singh and his son Hukum Singh who were armed

with axe had assaulted the three deceased in their house and dead body of Jagat Singh was lying in the courtyard, that of Smt. Mannu on the roof of the house and that of Km. Anita in the lane of the house of one Bal Kishan.

36. In the F.I.R. as well as in the evidence which has been led by the prosecution against the appellant Udai Bhan is that a conspiracy is said to have been hatched by him along with two co-accused for the murder of the three deceased.

37. In order to adjudicate the case of the appellant Udai Bhan for conspiring the murder of the three deceased, the evidence led by prosecution of PW2 Prithvi Raj and PW7 Jai Hind is to be scrutinized by this Court, which is reproduced here-in-below:-

''पी0डब्लू–2 पृथ्वीराज– इस घटना से पहले करीब 1 सवा माह पहले मुल्जिमान उदयभान, हुकुमसिंह कल्याणसिंह को करीब 9 बजे दिन में अपने मकान के ऑगन से लगी रास्ते के किनारे बाते करते सुना था। ये लोग आपस में कह रहे थे। मुल्जिमान हुकुम सिंह, उदयभान व कल्याणसिंह आपस में कह रहे थे कि इन लोगो को मार डालो नहीं तो जगत सिंह की सारी जायजाद कु0 अनीता के ससुराल वाले ले जायेगें। यह बात मैंने, जयहिंद व सुघर सिंह ने की सुनी थी। मुल्जिम उदयभान लखनऊ में नौकरी करता है जब बातचीत हो रही थी तो मुल्जिम उदयभान गॉव आया था। मुल्जिम उदयभान ने हुकुमसिंह व कल्यानसिंह ने इस हत्या की योजना बनायी थी।

पी0डब्लू–7 जयहिन्द– उदयभान अभियुक्त लखनऊ में नौकरी करता है। वह घटना के एक माह पहले गॉव मवैया आया था। मैंने अपने कानों से सुना था कि अभियुक्त गण उदयभान हुकुम कल्याण सिंह आपस में बातें कर रहे थे कि अनीता की शादी न हो पावे इसके पहले ही तीनों लोगों को मार डालों ताकि इनकी जायदाद हमें मिल जावे। यह तीनों मुलजिमान यह बातचीत अपने घर में कर रहे थे। मैंने यह बात उनके मकान के दरवाजे गली से सुनी थी। उस समय मेरे साथ सोनसिंह व पृथ्वीराज भी थे।''

38. From the above evidence of the aforesaid two witnesses, it is apparent that no specific date has been stated by either of the witnesses on which the appellant Udai Bhan along with his father Kalyan Singh and brother Hukum Singh is said to have conspired the murder of the three deceased. Further, it is also not apparent from the evidence of PW2 that he saw the appellant Udai Bhan along with his father and brother for conspiring the murder of the three deceased and it was only stated by PW2 that he heard the appellant Udai Bhan from the courtyard of his house talking to each other along with the other co-accused persons to kill them otherwise deceased Jagat Singh will give all his landed property to the in-laws of his daughter Km. Anita.

39. Similarly, from the evidence of PW7 it is apparent that he had also not seen the appellant Udai Bhan having conversation with his father Kalyan Singh and brother Hukum Singh for the murder of the three deceased but only heard the conversation from the door of the house which was in the lane. Thus, the evidence of conspiracy led by the prosecution of PW2 Prithvi Raj and PW7 Jai Hind against the appellant Udai Bhan is not sufficient enough to prove beyond reasonable doubt that the appellant Udai Bhan has conspired the murder of the deceased along with two co-accused.

40. The most important ingredient of conspiracy is agreement between two or more persons to do an illegal act. In a criminal case the onus lies on the prosecution to prove affirmatively that accused was directly and personally

connected with the acts and omission attributable to the crime committed by him. It is settled proposition of law that act or action of one of the accused cannot be used as evidence against the other. To attract applicability of Section 10 of the Evidence Act the Court must have reason to believe that two or more persons have conspired together for committing an offence.

41. The Apex Court in the case of **John Pandian Vs. State represented by Inspector of Police,Tamil Nadu, reported in (2010) 14 SCC 129** in paragraph nos.107, 108, 109, 110, 111, 112, 113, 114, 115 & 116 has laid down the law regarding criminal conspiracy, which are reproduced here-in-below:-

"107. The law on conspiracy has been stated time and again by this Court. In Major E.G. Barsay v. State of Bombay [AIR 1961 SC 1762 : (1961) 2 Cri LJ 828] , Subba Rao, J. observed: (AIR p. 1778, para 31)

"31. ... The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act."

108. In Halsbury's Laws of England [4th Edn., Vol. 11, p. 44, para 58] the definition of conspiracy is as under:

"58. Meaning of conspiracy.--Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law.…

The essence of the offence of conspiracy is the fact of combination by agreement.The agreement may be express or implied, or in part express and in part implied. ... and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be."

109. In American Jurisprudence, 2nd Edn., Vol. 16, p. 129, the following definition of conspiracy is given:

"A conspiracy is said to be an agreement between two or more persons to accomplish together a criminal or unlawful act or to achieve by criminal or unlawful means an act not in itself criminal or unlawful... The unlawful agreement and not its accomplishment is the gist or essence of the crime of conspiracy."

110. Lastly, in the celebrated case of Kehar Singh v. State (Delhi Admn.) [(1988) 3 SCC 609 : 1988 SCC (Cri) 711] it was observed by Jagannatha Shetty, J.: (SCC p. 731, para 271)

*"271. ... "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.' [**Ed.**: As observed in Russell on Crime, 12th Edn., Vol. I, p. 202.]*

(emphasis ours)

111. In the celebrated judgment of State v. Nalini [(1999) 5 SCC 253 : 1999 SCC (Cri) 691] S.S.M. Mohd. Quadri, J. relying upon Van Riper v. United States [13 F 2d 961 (2nd Cir 1926)] observed [Ed.: State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 at p. 687, para 90.] :

"When men enter into an agreement for an unlawful end, they become ad hoc agents for one another and have made a partnership in crime."

112. Other celebrated decisions on the question of conspiracy are Yash Pal Mittal v. State of Punjab [(1977) 4 SCC 540 : 1978 SCC (Cri) 5] as also State of H.P. v. Krishan Lal Pardhan [(1987) 2 SCC 17 : 1987 SCC (Cri) 270] . It has been held in Mohd. Khalid v. State of W.B. [(2002) 7 SCC 334 : 2002 SCC (Cri) 1734] and in Mohd. Usman Mohd. Hussain Maniyar v. State of Maharashtra [(1981) 2 SCC 443 : 1981 SCC (Cri) 477] that the agreement amongst the conspirators can be inferred by necessary implication. All these cases together came to be considered in State (NCT of Delhi) v. Navjot Sandhu [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] where even the celebrated judgment of V.C. Shukla v. State (Delhi Admn.) [(1980) 2 SCC 665 : 1980 SCC (Cri) 561] came to be considered wherein it was observed by Fazal Ali, J.: (V.C. Shukla case [(1980) 2 SCC 665 : 1980 SCC (Cri) 561] , SCC pp. 669-70, para 8)

"8. ... in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence."

(emphasis supplied)

113. It is significant at this stage to note the observations in V.C. Shukla [(1980) 2 SCC 665 : 1980 SCC (Cri) 561] wherein it was laid that in order to prove criminal conspiracy, there must be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. It was further held that there must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of the offence and where the factum of conspiracy is sought to be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

114. Relying on V.C. Shukla case [(1980) 2 SCC 665 : 1980 SCC (Cri) 561] , Pasayat, J. in Esher Singh v. State of A.P. [(2004) 11 SCC 585 : 2004 SCC (Cri) Supp 113] observed that: (Esher Singh case [(2004) 11 SCC 585 : 2004 SCC (Cri) Supp 113] , SCC p. 607, para 38)

"38. ... the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied on for the purposes of drawing an inference should be prior in point of time than the actual commission of the offence in furtherance of the alleged conspiracy."

(emphasis supplied)

115. In Esher Singh case [(2004) 11 SCC 585 : 2004 SCC (Cri) Supp 113] this Court held that the conspiracy was proved between the nine accused. A systematic role played by each accused was highlighted. Pasayat, J. in that judgment also considered the decision in Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra [AIR 1965 SC 682 : (1965) 1 Cri LJ 608] and observed that (Esher Singh case [(2004) 11 SCC 585 : 2004 SCC (Cri) Supp 113] , SCC p. 606, para 37) "[t]here

is no difference between the mode of proof of the offence of conspiracy and that of any other offence". The other decisions in State of Maharashtra v. Som Nath Thapa [(1996) 4 SCC 659 : 1996 SCC (Cri) 820 : JT (1996) 4 SC 615] , Ajay Aggarwal v. Union of India [(1993) 3 SCC 609 : 1993 SCC (Cri) 961] as also Mohd. Usman case [(1981) 2 SCC 443 : 1981 SCC (Cri) 477] and Yash Pal Mittal [(1977) 4 SCC 540 : 1978 SCC (Cri) 5] were considered in that decision. The law laid down in Ajay Aggarwal case [(1993) 3 SCC 609 : 1993 SCC (Cri) 961] was reiterated and it was held that: (Esher Singh case [(2004) 11 SCC 585 : 2004 SCC (Cri) Supp 113] , SCC p. 610, para 45)

"45. ... "8. ... It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished.' [As observed in Ajay Aggarwal v. Union of India, (1993) 3 SCC 609, p. 617, para 8.] "

These decisions were thereafter considered in Navjot Sandhu case [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] .

116. In K.R. Purushothaman v. State of Kerala [(2005) 12 SCC 631 : (2006) 1 SCC (Cri) 686] a specific observation was made (SCC p. 631d-e) to the effect that all conspirators need not take active part in the commission of each and every conspiratorial act but, mere knowledge, even discussion, of the plan would not constitute conspiracy. It was further observed that (SCC p. 631e-f) each one of the circumstances should be proved beyond reasonable doubt and such circumstances proved must form a chain of events from which the only irresistible conclusion is about the guilt of the accused which can be safely drawn and no other hypothesis of the guilt is possible. We respectfully agree with the law laid down in Navjot Sandhu case [(2005) 11 SCC 600:2005 SCC (Cri) 1715] and K.R. Purushothaman case [(2005) 12 SCC 631 : (2006) 1 SCC (Cri) 686] ."

42. Similarly, in the case of **Baliya alias Bal Kishan Vs. State of Madhya Pradesh, reported in (2012) 9 SCC 696**, the Apex Court has also reiterated the law regarding criminal conspiracy in paragraph nos.15, 16 & 17, which are reproduced here-in-below:-

15. The offence of "criminal conspiracy" is defined in Section 120-A of the Penal Code whereas Section 120-B of the Code provides for punishment for the said offence. The foundation of the offence of criminal conspiracy is an agreement between two or more persons to cooperate for the accomplishment/performance of an illegal act or an act which is not illegal by itself, through illegal means. Such agreement or meeting of minds create the offence of criminal conspiracy and regardless of proof or otherwise of the main offence to commit which the conspiracy may have been hatched, once the unlawful combination of minds is complete, the offence of criminal conspiracy stands committed. More often than not direct evidence of the offence of criminal conspiracy will not be forthcoming and proof of such an offence has to be determined by a process of inference from the established circumstances of a given case.

16. The essential ingredients of the said offence, the permissible manner of proof of commission thereof and the approach of the courts in this regard has been exhaustively considered by this Court in several pronouncements of which, illustratively, reference may be made to E.K. Chandrasenan v. State of Kerala [(1995) 2 SCC 99 : 1995 SCC (Cri) 329] , Kehar Singh v. State (Delhi Admn.) [(1988) 3 SCC 609 : 1988 SCC (Cri) 711] , Ajay Aggarwal v. Union of India [(1993) 3 SCC 609 : 1993 SCC (Cri) 961] and Yash Pal Mittal v. State of Punjab [(1977) 4 SCC 540 : 1978 SCC (Cri) 5] . The propositions of law which emanate from the above cases are, in no way, fundamentally different from what has been stated by us hereinabove.

17. The offence of criminal conspiracy has its foundation in an agreement to commit an offence or to achieve a lawful object through unlawful means. Such a conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn. Naturally, in evaluating the proved circumstances for the purposes of drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused".

43. The Apex Court in the case of **State (Government of NCT of Delhi Vs. Nitin Gunwan Shah, reported in (2016) 1 SCC 472** has further enunciated the proposition of law as has been laid down by the Apex Court in its earlier pronouncements on the issue of criminal conspiracy.

44. Thus, this being the settled proposition of law, the evidence of PW2 Prithvi Raj and PW7 Jai Hind does not qualify the set criteria, as has been settled by the Apex Court in *catena* of decisions where the allegation is for conspiring the murder against the accused. On the other hand, the other two eye witnesses, i.e., PW1 Sohan Lal and PW3 Basanta who have only given vague and ambiguous evidence regarding conspiracy being hatched by the appellant Udai Bhan for the murder of the three deceased, which too does not inspire any confidence in order to convict and sentence the appellant Udai Bhan. Further, there appears to be no circumstantial evidence also to show that the appellant Udai Bhan conspired the murder of the deceased or there were meeting of minds of all the accused including the appellant Udai Bhan to commit the crime in question. In the instant case, neither there was any prior meeting of minds of accused proved, nor was any action individually or in concert, proved against the appellant Udai Bhan.

45. Thus, the contention of learned counsel for the appellant that the appellant Udai Bhan who was working in Lucknow for the last several years and doing the Government job, but he has been falsely implicated in the present case along with his father Kalyan Singh and brother Hukum Singh and further the prosecution evidence of PW2 Prithvi Raj and PW7 Jai Hind is not sufficient enough to convict and sentence the appellant Udai Bhan, the same has substance.The trial Court though has

scanned the evidence of eye witnesses, i.e. PW1 Sohan Lal, PW2 Prithvi Raj, PW3 Basanta and PW7 Jai Hind with respect to the participation of the co-accused Kalyan Singh and Hukum Singh who were the main assailants, for the murder of the three deceased and has convicted and sentenced them for the offence in question by the impugned judgment and order but has also convicted the appellant Udai Bhan for the offence under Section 302 read with Section 120B I.P.C. without there being any legal evidence against him for conspiring the murder of the three deceased along with the two co-accused, does not appear to be sound and reasonable one as it failed to appreciate the evidence of PW2 Prithvi Raj and PW7 Jai Hind in the light of the established proposition of law as has been held by the Apex Court in various pronouncements. Thus, the trial Court has erred in convicting and sentencing the appellant Udai Bhan.

46. In view of the foregoing discussions and considering the entire material on record and the pronouncements of the Apex Court to connect a crime with two or more persons, the conviction and sentence of the appellant Udai Bhan cannot be sustained in the eyes of law by the trial Court. Hence, the conviction and sentence of the appellant Udai Bhan by the trial Court is liable to be set aside by this Court. It is, accordingly, set aside and the appellant Udai Bhan is acquitted of the charges.The appeal stands **allowed**.

47. The appellant is stated to be in jail since 19.8.2019, he shall be released forthwith unless otherwise wanted in any other criminal case.

48. It is further directed that the accused appellant Udai Bhan 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.

49. Let the lower court record be transmitted to the trial Court concerned for its information and compliance forthwith.

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

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

52. 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.
