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(2021)04ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.03.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Arbitration Appeal No. 6 OF 2019

NHAI ...Applicant
Versus
Ram Niranjan & Ors. ...Opp. Parties

Counsel for the Applicant:
Lavkush Pratap Singh, M.V. Kini, Ms. Samidha, Stuti Mittal

Counsel for the Opp. Parties:
Mayank Sinha, Anita Tiwari, Girish Chandra Sinha

A. Civil Law - Arbitration and Conciliation Act,1996 - Sections 33, 34(3), 37- acquisition of land-award-determination of limitation-the award was passed on 03.03.2017 and the application filed u/s 34 of the Act on 02.12.2017 ie. beyond the period of three months and 30 days- hence, court have no power to condone the delay in view of the law of the Apex Court in the case of Popular Constructions-limitation would commence from the date of receipt of the signed copy of the award, for three purposes-(a) the period of 30 days' for filing an application u/s 33 for correction and interpretation of the award, or additional award may be filed.,(b) the arbitral proceedings would terminate as provided by section 32(1) of the Act; (c) the period of limitation for filing objections to the award u/s 34 of the Act commences-issue regarding determination of limitation decided by the District Judge may not be in consonance with the settled provisions.(Para 1 to 39)

The appeal is dismissed.(E-5)

List of Cases cited:-

1. St. of Mah. & ors. Vs Ark Builders Pvt. Ltd., (2011) 4 SCC Page 616

2. Dakshin Haryanan Bijli vitran Nigam Ltd., Vs M/s. Navigant Technologies Pvt. Ltd., Civil Appeal No.791 of 2021 d

3. U.O.I .Vs M/s. Popular Construction Comp., (2001) 8 SCC 470

4. P. Radha Bai & ors. P. Ashok Kumar & ors., (2019) 13 SCC 445

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

1. The appellant, National Highway Authority of India has preferred the instant appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") against the judgment dated 14.05.2019 passed by the District Judge, Pratapgarh in Case M.N.R. No.127 of 2018, whereby the application of the appellant purportedly under Section 34(3) of the Act of 1996 seeking condonation of delay in filing the petition under Section 34(1) of the Act of 1996 has been rejected.

2 . Heard Shri Prashant Chandra, learned Senior Advocate assisted by Ms. Samidha, learned counsel for the appellant and Shri G.C. Sinha, learned counsel for the respondent No.1 as well as Ms. Anita Tiwari, learned counsel for the respondents No.2 to 9.

A. FACTUAL MATRIX

In order to appreciate the controversy involved in this appeal, the facts necessary for adjudication are being noted hereinafter.

3. A notification was issued for acquisition of land for the purposes of widening of National Highway 55 on the stretch of land 134.700 km. to 263.000 km., Sultanpur-Varansi Section. The land in question, under acquisition, fell in Village Sonpuri, Paragna & Tehsil Patti, District Pratapgarh. The said notification was issued under the National Highways Act, 1956 (for short, "the Act of 1956").

4. A further notification under Section 3-A(1) was issued on 07.09.2012, which was followed by publication of notice in the daily newspaper. The subsequent notification under Section 3-D(1) was issued on 29.07.2013 and thereafter considering the objections received from the land-owners/persons interested, the Competent Authority passed an award dated 18.09.2015 under Section 3(G) of the Act of 1956 by which compensation was determined for the land acquired for widening of National Highway 56 in Sultanpur-Varansi Section.

5 . The respondents herein, who were the land-owners had filed their objections against the award made by the Competent Authority, the same was registered as Case No.1 (Ram Niranjan and others vs. Union of India) and the same was decided by the Arbitrator by means of its award dated 03.03.2017.

6. The appellant, who was the respondent before the Arbitrator on 28.04.2017 made an application before the Arbitrator purportedly under Section 33 of the Act of 1996 on the premise that the award dated 03.03.2017 was ex-parte, hence, requested a fresh award be passed after considering the case as well as submissions of the appellant herein.

7. On the aforesaid application moved by the appellant, the Arbitrator issued notices to the land-owners, who filed their objections on 25.05.2017. The appellant submitted its reply thereof on 09.06.2017 and after hearing the parties, the Arbitrator by means of his order dated 28.07.2017 rejected the application filed by the appellant and the award dated 03.03.2017 was maintained.

8. The appellant being aggrieved against the award dated 03.03.2017 and the order dated 28.07.2017, sought permission from its Department to assail the award and finding that it did not have a signed copy of the order dated 28.07.2017, it made an application to the Arbitrator, who provided a signed copy of the order dated 28.07.2017 on 28.11.2017 and soon thereafter on 02.12.2017, the petition under Section 34 of the Act of 1996 along with an application under Section 34(3) of the Act of 1996 was preferred before the District Judge, Pratapgarh which was registered as M.N.R. No.127 of 2018.

9. The land-owners filed their objections which was considered by the District Judge, Pratapgarh and by means of the impugned order dated 14.05.2019 the said application under Section 34(3) of the Act of 1996 was rejected. Consequently, the petition under Section 34 of the Act of 1996 also stood dismissed.

10. The District Judge, Pratapgarh considered the documents which were filed by the parties and came to the conclusion that since the appellant had acknowledged the receipt of the award dated 03.03.2017 and 28.07.2017 in its letter dated 18.10.2017 marked as Paper No.11-C/3. Thus, it held that in any case the award was available with the appellant at any point prior to 18.10.2017 and as Section 5 of the Limitation Act is not applicable, consequently, it held the petition to be time barred.

B. Submissions of learned counsel for the parties:-

11. Learned Senior counsel for the appellant while attacking the order dated 14.05.2019 submits that the District Judge, Pratapgarh has completely misdirected itself on the issue of consideration of condonation of delay. It is urged that from the perusal of the impugned order, it would indicate that the court below has been influenced with the fact that the appellant had implied knowledge of the impugned award. However, it has failed to take note of the fact that insofar as the limitation for filing a petition under Section 34 of the Act of 1996 is concerned, the same is to be reckoned by referring to the provisions of Section 31 read with Section 34(3) of the Act of 1996 as that would determine the date from which the period of limitation commences.

11.1 It is further urged that having knowledge of the award is wholly immaterial rather it is the date on which a signed copy of the award is received by a party which is material and this aspect of the matter has been completely ignored.

11.2 It is further urged that it was specifically pleaded that the appellant had not received the signed copy of the award from the Arbitrator. It is only when the said award was made available on 28.11.2017 that the appellant soon thereafter preferred a petition on 02.12.2017 which as per the law would be within limitation and this aspect has not been considered by the District Judge.

11.3 Even otherwise if at all there was a delay, the same ought to have been condoned whereas the learned District Judge, Pratapgarh ignoring the aforesaid aspect of the matter and relying upon certain documents which could only indicate that the appellant had the knowledge of the award has based its reasons on the said letter by recording a finding that the appellant had implied knowledge and had acknowledged the receipt of the award dated 03.03.2017 and 28.07.2017 in its letter dated 18.10.2017.

11.4 Elaborating his submission, learned Senior Counsel further submitted that until and unless a signed copy of the award is not received by a party, the limitation to assail the award cannot commence. It then urged that the legal requirement of signing the arbitral award and delivering a copy to the parties is not an empty formality. Section 31(5) of the Act of 1996 enjoins upon the arbitrator to provide a signed copy of the arbitral award to the parties and this is of prime importance since from the date of receipt of the signed copy of the award the period of limitation for filing objections/petition under Section 34 of the Act of 1996 would commence.

11.5 It is further urged that in the instant case since the signed copy of the award dated 28.07.2017 was not provided to the appellant nor a signed copy of the award dated 03.03.2017 was provided hence it is when the appellant made an application to the arbitrator for providing a signed copy which was made available only on 28.11.2017, did the appellant prefer the petition under Section 34(1) of the Act of 1996 which otherwise was within time but in order to avoid any controversy as a matter of caution an application under Section 34(3) of the Act of 1996 was moved and in the circumstances as pleaded in the said application the delay ought to have been condoned.

11.6 Learned Senior Counsel has relied upon the decisions of the Apex Court in the case of (i) ***State of Maharashtra and***

Ors. vs. Ark Builders Pvt. Ltd., (2011) 4 SCC Page 616, and

(ii) Dakshin Haryana Bijli Vitran Nigam Ltd., vs. M/s. Navigant Technologies Pvt. Ltd., passed in Civil Appeal No.791 of 2021 decided on 02.03.2021.

12. Per contra, Shri G.C. Sinha, learned counsel for the respondent No.1 has submitted that the facts as pleaded would indicate that the arbitrator had passed an award on 03.03.2017. Thereafter, the appellant had moved an application under Section 33 of the Act of 1996 which came to be decided on 28.07.2017 as a consequence the award dated 03.03.2017 was affirmed.

12.1 It is further urged by Shri Sinha that for the purpose of reckoning the period of limitation and the date of its commencement there is a difference, where an award is assailed straightaway under Section 34 of the Act of 1996 and in a case where an award is subjected to the provisions under Section 33 of the Act of 1996.

12.2 Insofar as an award which is subjected an application under Section 33 of the Act of 1996 is concerned, a different limitation is provided and in view thereof the petition filed by the appellant was apparently time barred as the provisions of Section 5 of the Limitation Act is not applicable. In view of Section 34(3) of the Act of 1996 once the time prescribed therein stood elapsed, the Court did not have powers to condone the delay and rightly the District Judge, Pratapgarh rejected the application.

12.3 It has also been submitted by Shri Sinha that in the pleadings delivered before this Court it has nowhere been pleaded that the appellant did not receive a signed copy of the award dated 03.03.2017. The entire emphasis in this appeal is that the appellant did not receive the signed copy of the award dated 28.07.2017.

12.4 It has also been urged that in the given fact situation of the present case, it would indicate that there is no award dated 28.07.2017 rather the award is dated 03.03.2017 and it is the order of the rejection of the application under Section 33 of the Act of 1996 which is dated 28.07.2017.

12.5 It is also urged by Shri Sinha that what the learned Senior Counsel has urged that the limitation commences from the date a signed copy of the award is delivered to a party is in respect of those matters where an award is straightaway assailed under Section 34 of the Act of 1996 without preferring an application under Section 33 of the Act of 1996.

12.6 However, in the present case, since, the appellant moved an application under Section 33 of the Act of 1996 then the limitation would commence from the date of disposal of the application under Section 33 by the Tribunal and not from the date a signed copy of the award is received by the appellant as would be evident from Section 34(3) of the Act of 1996.

12.7 In the present case admittedly the said request was disposed of on 28.07.2017, thus, that would be the point of time which will be taken to be the point of commencement of limitation and admittedly three months and 30 days expired in the month of November, 2017 and the petition was filed on 02.12.2017, which apparently was time barred.

12.8 Once the Legislature has intentionally not conferred upon the Court, the power to condone the delay beyond a particular period and Section 5 of the Limitation Act not being applicable in such circumstances the dismissal of the application seeking condonation of delay and consequent rejection of the petition under Section 34 of the Act of 1996 is absolutely appropriate and proper which requires no interference from this Court.

13. Ms. Anita Tiwari learned counsel for the respondents No.2 to 9 has also adopted the submissions of Shri G.C. Shina.

C. DISCUSSION & ANALAYSIS

14. The Court has considered the rival submissions and also perused the record. However, in order to appreciate the submission of the learned counsel for the respective parties, the provisions of the Act of 1996 as applicable to the present controversy needs to be noticed.

*"**31. Form and contents of arbitral award.--(**1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an arbitral award on agreed terms under Section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.--The expression "current rate of interest" shall have the same meaning as assigned to it under

clause (b) of Section 2 of the Interest Act, 1978 (14 of 1978).]

[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31-A.]"

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***"33. Correction and interpretation of award; additional award**.--(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—*

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

***** ***** *****

"34. Application for setting aside arbitral award.-(**1) **

*(2) *****

(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."

15. It will also be relevant to notice the dictum of the Apex Court in the case of ***Ark Builders Pvt. Ltd***., (supra) and ***Dakshin Haryana Bijli Vitran Nigam Ltd. (supra)*** as cited by the learned Senior Advocate for the appellant.

16. In the case of ***Ark Builders Pvt. Ltd.***, (supra) the Apex Court noticing the provisions of Section 34(3) as well as Section 31(5) of the Act of 1996 held that the limitation prescribed under Section 34(3) would commence only from the date a signed copy of the award is delivered to the party making the application for setting aside the award.

17 . In the case ***of Dakshin Haryana Bijli Vitran Nigam Ltd.*** (supra) the Apex Court again had the opportunity to consider the issue regarding limitation and noticing the earlier decision including that of ***Ark Builders Pvt. Ltd.,*** (supra) it opined that there is only one date recognized by the law i.e. the date on which a signed copy of the final award is received by the parties from which the period of limitation for filing petition would commence.

18. It further held that the date on which the signed copy is provided to the parties is the crucial date in arbitration proceedings under the Act of 1996. It is from this date that the period of 30 days commences for filing an application under Section 33 for correction and interpretation of the award or additional award. From the said date the arbitral proceedings would stand terminated as provided under Section 32(1) of the Act of 1996. The said date would also be the date of commencement of the period of limitation for filing a petition to set aside the award under Section 34 of the Act of 1996.

19. Learned Senior Counsel for the appellant relying upon the aforesaid decisions has emphasized that since the period of limitation commences only when a signed copy of the award is made available which as pleaded by the appellant, the signed copy of the award dated 28.07.2017 was made available only on 28.11.2017, hence, the petition filed by the appellant on 02.12.2017 was within time and in any case was within the period as provided under Section 34(3) of the Act of 1996. Thus, the impugned order is bad.

20. Apparently, the submission of the learned Senior Counsel may sound attractive on the first blush, however, upon deeper consideration, the same is fallacious.

21. In the instant case what this Court finds is, that upon perusal of the material in the entire pleadings, there is no statement made by the appellant that it did not receive a signed copy of the award dated 03.03.2017. The entire thrust of the submission of the learned Senior Counsel for the appellant is that it did not receive a signed copy of the award dated 28.07.2017, which although is an order by which the application under Section 33 of the Act of 1996 filed by the appellant was rejected.

22. For the purposes of setting aside an award, the law provides for the limitation in Section 34(3) of the Act of 1996 which has been noted hereinabove first. Even Section 33 of the Act of 1996

provides certain time lines as mentioned in the Section itself which has also been noted hereinabove first.

23. From the conjoint reading of the aforesaid sections namely Sections 31, 33 and 34(3) of the Act of 1996, it would indicate that the form and contents of an arbitral award is provided under Section 31 of the Act of 1996. Section 31(5) of the Act of 1996 enjoins the responsibility on the arbitrator to deliver the signed copy of the award to each of the parties.

24. Section 33 of the Act of 1996 which relates to correction, interpretation or for passing of an additional award provides for a limitation of 30 days from the date of receipt of arbitral award or making the said application unless a contrary time period has been agreed by the parties. The said section also provides that the Arbitrator after hearing the parties shall correct the clerical or typographical error in the award within 30 days from the date of receipt of such request as provided under Section 33(2) of the Act of 1996.

25. Where the arbitral tribunal corrects an error which has been referred to in Clause (9) of sub-section (1) of Section 33, it can do so on its own initative within 30 days from the date of arbitral award, however, where a request has been made for an additional award, in terms of sub-section (4) of Section 33, the same can be done within 60 days from the date of receipt of such request as provided in sub-section (5) of Section 33 of the Act of 1996.

26. The arbitral tribunal also has powers to extend the said time lines as provided under sub-section (2) and (5) of Section 33 as shall be evident from sub-section (6).

27. Section 34(3) specifically states that an application for setting aside may not be made after three months have lapsed from the date of which the party making an application had received the arbitral award or, if a request has been made under Section 33 of the Act of 1996, from the date of which the request has been disposed of by the arbitral tribunal.

28. It is relevant to notice the language used by the Legislature while engrafting sub-section (3) of Section 34 of the Act of 1996. The aforesaid sub-section provides for two sitautions; (i) where an award has been passed and is challenged straightaway in terms of Section 34(1) then the same can be done within three months from the date on which the party making an application for setting aside the award has received the arbitral award. (referred by this Court as first situation)

29. The other situation relates to a challenge under Section 34(1) of the Act of 1996 where a party first makes a request in terms of Section 33 of the Act of 1996 and thereafter challenges the award then in such a case the limitation for assailing an award commences from the date when such request under Section 33 of the Act of 1996 has been disposed of by the arbitral tribunal. (referred by this Court as second situation)

30. Noticing this contrast in the language of the section and upon meaningful reading of the decision of the Apex Court in the case of ***Dakshin Haryana Bijli Vitran Nigam Ltd.*** (supra) as referred above, it would reveal that in such cases covered by the first situation, where the date on which the signed copy of the award is received by a party assumes significance. Since, no party can challenge

an award unless it receives a signed copy, consequently, it becomes a crucial date.

31. It will also be relevant to notice that a proviso has been appended to Section 34(3) of the Act of 1996 which confers the Court with powers to condone the delay of 30 days beyond 3 months from the date of receipt of the arbitral award and not thereafter. Thus, it can be seen that in any case the power to condone the delay as conferred upon the Court in terms of Section 34(3) of the Act of 1996 is limited and provisions of Section 5 of the Limitation Act does not apply. This has also been settled by the Apex Court in the case of ***Union of India vs. M/s. Popular Construction Company, (2001) 8 SCC 470.***

32. Thus, applying the aforesaid provisions and the principles as extracted above, it would indicate that in the present case, the limitation would be governed by (the second situation) of Section 34(3). Admittedly, after the award dated 03.03.2017 was passed, the appellant had moved an application under Section 33 of the Act of 1996 before the Arbitrator. Admittedly, the said application was duly contested and after hearing the appellant it came to be decided on 28.07.2017. Thus, once the award sought to be challenged had been put through the request under Section 33 of the Act of 1996 then the limitation as provided in the (second situation) of Section 34(3) will apply and the limitation will commence from the date of disposal of the application under Section 33 of the Act of 1996.

33. Once the appellant had made a request under Section 33 of the Act of 1996 for seeking correction / interpretation in the award dated 03.03.2017 and the said application came to be decided on 28.07.2017, thereafter the appellant cannot revert back to seek the benefit of limitation as prescribed in respect of such an award which is sought to be challenged straightaway without making a request in terms of Section 33 of the Act of 1996. The appellant cannot be permitted to take a vacillating stand in law.

34. This Court is fortified in its view in light of the decision of the Apex Court in the case of P***. Radha Bai & Ors. vs. P. Ashok Kumar & Ors., (2019) 13 SCC 445*** and the relevant portion reads as under:-

"32. Section 34(3) deserves careful scrutiny and its characteristics must be highlighted:

32.1. Section 34 is the only remedy for challenging an award passed under Part I of the Arbitration Act. Section 34(3) is a limitation provision, which is inbuilt into the remedy provision. One does not have to look at the Limitation Act or any other provision for identifying the limitation period for challenging an award passed under Part I of the Arbitration Act.

32.2. The time-limit for commencement of limitation period is also provided in Section 34(3) i.e. the time from which a party making an application "had received the arbitral award" or disposal of a request under Section 33 for corrections and interpretation of the award.

32.3. Section 34(3) prohibits the filing of an application for setting aside of an award after three months have elapsed from the date of receipt of award or disposal of a request under Section 33.

Section 34(3) uses the phrase "an application for setting aside may not be made after three months have elapsed". The phrase "may not be made" is from the UncitralModel Law ["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 award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the Arbitral Tribunal".] and has been understood to mean "cannot be made". The High Court of Singapore in ABC Co. Ltd. v. XYZ Co. Ltd. [ABC Co. Ltd. v. XYZ Co. Ltd., 2003 SGHC 107] held:

"The starting point of this discussion must be the model law itself. On the aspect of time, Article 34(3) is brief. All it says is that the application may not be made after the lapse of three months from a specified date. Although the words used are "may not', these must be interpreted as "cannot' as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst the drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three months' period as Article 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the Article alone, the absence of such a provision means the court has not been conferred with the power to extend time."

(emphasis supplied)

32.4. The limitation provision in Section 34(3) also provides for condonation of delay. Unlike Section 5 of the Limitation Act, the delay can only be condoned for 30 days on showing sufficient cause. The crucial phrase "but not thereafter" reveals the legislative intent to fix an outer boundary period for challenging an award.

*32.5. Once the time-limit or extended time-limit for challenging the arbitral award expires, the period for enforcing the award under Section 36 of the Arbitration Act commences. This is evident from the phrase "where the time for making an application to set aside the arbitral award under Section 34 has expired".["**36. Enforcement**.--Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."(emphasis supplied)] There is an integral nexus between the period prescribed under Section 34(3) to challenge the award and the commencement of the enforcement period under Section 36 to execute the award."*

35. The Apex Court in the case of ***Dakshin Haryana Bijli Vitran Nigam Ltd***. (supra) has categorically held as under:-

"(xvi) There is only one date recognised by law i.e. the date on which a signed copy of the final award is received by the parties, from which the period of limitation for filing objections would start ticking. There can be no finality in the award, except after it is signed, because signing of the award gives legal effect and finality to the award.

(xvii) The date on which the signed award is provided to the parties is a crucial date in arbitration proceedings under the Indian Arbitration and Conciliation Act, 1996. It is from this date that : (a) the period of 30 days' for filing an application under Section 33 for correction and interpretation of the award, or additional award may be filed; (b) the arbitral proceedings would terminate as provided by Section 32(1) of the Act; (c) the period of limitation for filing objections to the award under Section 34 commences."

36. Thus, what can be discerned from the decision of the Apex Court is that the limitation would commence from the date of receipt of the signed copy of the award, for three purposes as mentioned in the paragraph extracted above.

37. Admittedly, in the present case, the award was passed on 03.03.2017 and the application under Section 33 was preferred on 28.04.2017. This categorically changes the complexion of the submissions of the learned Senior Counsel for the appellant inasmuch as the award is now governed by the part of Section 34(3) providing commencement of the limitation from the date of the disposal of the request under Section 33 of the Act of 1996.

38. The application as noticed above was decided on 28.07.2017, hence, the limitation would commence from the said date and the period of three months would expire on 28.10.2017 and had the application under Section 34 of the Act of 1996 been filed beyond the aforesaid period but within 30 days thereafter, the said delay could be condoned by the Court concerned. However, admittedly, the application came to be filed on 02.12.2017 i.e. beyond the period of three months and 30 days as prescribed, hence, the Court did not have the power to condone the delay in view of the law of the Apex Court in the case of ***Popular Constructions (supra).***

CONCLUSION

39. From the aforesaid discussions as well as considering the relevant legal provisions and the law laid down by the Apex Court, if the impugned order passed by the District Judge, Pratapgarh is seen, it is true that the manner in which the issue regarding determination of limitation has been noticed and decided by the District Judge, Pratapgarh may not be in consonance with the settled provisions. However, this Court in exercise of appellate powers after delving into the matter and having taken a re-look on the issue of limitation, in view of the discussion aforesaid comes to the finding and conclusion that the petition filed by the appellant under Section 34 of the Act of 1996 is beyond three months and 30 days and consequently the delay could not have been condoned and for the said reason, this Court refrains from interfering in the order dated 14.05.2019 passed by the District Judge, Pratapgarh in M.N.R. No.127 of 2018.

40. For the reasons recorded, the appeal fails and is accordingly dismissed. However, in the facts and circumstance, there shall be no order as to costs.

(2021)04ILR A12
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Criminal Revision No. 744 of 2021

Smt. Aarti ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri A.K. Mishra, Sri Sati Shanker Tripathi

Counsel for the Opp. Parties:
A.G.A., Sri Sandeep Kumar

Criminal Law - Code of Criminal Procedure, 1973- Sections 204 & 319 - Applicant is sister in law of the deceased-was not arraigned in the charge sheet-but was summoned u/s 319Standard of sufficiency of evidence in summoning of an additional accused u/s319 Cr.P.C.-on much higher footing than summoning u/s 204 Cr.P.C.-but not of the same level of final adjudication -summoning order not illegal.

Revision dismissed. (E-7)

List of Cases cited:-

1. Brijendra Singh & ors.Vs St. of Raj., reported in 2017(7) SCC 706

2. Sartaj Singh Vs St .of Har. & Another etc.

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

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

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the revisionist, learned A.G.A. for the State and Sri Sandeep Kumar, learned counsel for the opposite party no. 2.

2. The instant revision has been preferred to set-aside the impugned order dated 18.02.2021 passed by the Addl. Sessions Judge/FTC-1, Mathura in Sessions Trial No. 127 of 2019 (State Versus Sanjaydeep and Others) arising out of Case Crime No. 1587 of 2018 under Section 498A, 304B I.P.C., Police Station Highway, District - Mathura whereby the application filed by the opposite party no. 2 under Section 319 Cr.P.C. has been allowed.

3. Factual matrix of the case are that with respect to dowry death of the daughter of the first informant, first information report has been lodged wherein husband, father-in-law, mother-in-law, brother-in-law (Jeth) and sister-in-law (Jethani) were roped in for committing crime of cruelty and harassment with the victim for demand of dowry. It is averred in the first information report that marriage of the daughter of the first informant was solemnized with Sanjaydeep on 30.11.2016 in which about Rs.50 Lakhs were expended but subsequently, the victim was harassed for additional dowry amounting to Rs.20 Lakhs. It is further averred that although with respect to harassment and cruelty for demand of dowry earlier one incident took place, the same was amicably settled after intervention of the elders in the family. Thereafter, the daughter of the first informant went to her matrimonial home along with her in-laws on 18.10.2018. He got information that his daughter had been admitted in Nayati Hospital, Mathura where she, subsequently, succumbed to injuries on 19.10.2018.

4. After due investigation, the investigating officer has submitted charge-sheet dated 5.2.2019 in which husband, father-in-law and mother-in-law were arraigned as accused. The present revisionist Smt. Aarti was not arraigned as accused in the charge-sheet. Feeling aggrieved, informant has moved an application (paper no. 41Kha) under Section 319 Cr.P.C. to summon the present revisionist and her husband Jaideep Saraswat, who are Jethani and Jeth, to face the trial along with three other o-accused against whom the charge-sheet was submitted. After going through the record, the trial court vide impugned order dated 18.2.2021 has allowed the application (paper no. 41Kha) under Section 319 Cr.P.C. and summoned the present applicant to face the trial along with other co-accused under Section 498A, 304B I.P.C. and Section 3/4 of the Dowry Prohibition Act.

5. Learned counsel for the revisionist has submitted that on the date of incident, the present revisionist was not present on the place of occurrence which is clearly evident from the report of CDR with respect to location of mobile numbers of Jaideep Saraswat and Smt. Aarti Saraswat which was considered by the Investigating Officer in submitting the chargesheet. He also submits that the statement of loco pilot, who was piloting the train, recorded under Section 161 Cr.P.C. has not been considered by the court below wherein he stated that on the date of incident he was piloting the train from Gangapur City to Tughlakabad and all of sudden one lady came on the mid of the truck and collided with the train. It is further submitted that on 17.10.2018 she left for her parental house and the said incident took place on 18.10.2019, therefore, the present appellant is not in a position to explain as to why and how such incident took place. It is submitted that the evidence which have been collected by the investigating officer during investigation have illegally been ignored by the trial court. There is no clinching and unimpeachable evidence on record to prove the complicity of the present appellants in the commission of crime, as mentioned in the FIR, beyond reasonable doubt. Learned counsel for the appellant has relied upon the judgement of the Hon'ble Supreme Court in the case of ***Brijendra Singh & others vs. State of Rajasthan, reported in 2017(7) SCC 706***.

6. Per contra, learned counsel for the opposite party no. 2 contended that with respect to cruelty and harassment for demand of dowry, earlier, one FIR was lodged by the opposite party no. 2 which was registered as case crime no. 1130 of 2019 under Section 498A, 323, 328, 506 I.P.C. and Section 3/4 of the Dowry Prohibition Act. In the aforesaid FIR, charge-sheet was submitted against all the accused as mentioned in the FIR namely, Sanjaydeep Saraswat (husband), Mohan Lal (father-in-law), Smt. Premwati (mother-in-law), Jaydeep Saraswat (Jet) and Smt. Aarti (Jethani), who is appellant herein. The aforesaid matter was amicably settled between the parties due to intervention of the elders in the family. After the settlement, when the victim went to her in-laws house she was again subjected to harassment and cruelty for demand of dowry which resulted in her dowry death and first information report has been lodged in this respect. It is further submitted that the husband and father-in-law both are the railway employees and they have manipulated the statement of

loco pilot, which has been relied upon by learned counsel for the appellant. During the course of argument, he has produced the communication dated 17.9.2019 made by Deputy Superintendent of Police, Railway, G.R.P., Agra addressed to the first informant in reply under the Right to Information Act, stating therein that no such information with regard to the alleged incident has been received in the department from the Station Master concerned as enquired by the first informant. Copy of the aforesaid letter, which has been provided by learned counsel for the revisionist, is taken on record. It is further submitted that evidence collected by the investigating officer during investigation are not required to be considered by the court below at the time of summoning the accused under Section 319 Cr.P.C. In support of the contention, learned counsel has relied upon a judgement of the Hon'ble Supreme Court dated 15.3.2021 passed in Criminal Appeal Nos. 298-299 of 2021, **Sartaj Singh vs. State of Haryana & Another etc**..

7. Sri Rupak Chaubey, learned A.G.A. contends that the statement of loco pilot recorded under Section 161 Cr.P.C. has got no much relevance at the stage of summoning the accused under Section 319 Cr.P.C. for facing the trial along with other co-accused. He further contends that the trial court has summoned the present appellant after considering the deposition made by P.W. 1 & P.W. 2 which clearly makes out a case for summoning the present revisionist to face the trial. It has also been contended that the CDR simply states the location of the mobile and not the location of the person and therefore, on the basis of the CDR, it cannot be said that the present appellant, who has been summoned by the trial court for facing trial, was not present at the place of occurrence. He further submits that for making out a case under Section 304B I.P.C. personal presence of the accused at the place of occurrence is not required under law.

8. A perusal of the order reveals that the Trial Court has given its finding after taking into consideration the documents available on record. Present revisionist was made accused in the F.I.R. with an allegation that she had beaten up the victim.

9. Deposition made by PW-1 & PW-2 who have been cross-examined by the defence have prima-facie corroborated the complicity of the present revisionists in the commission of crime. Case law of ***Brijendra Singh (Supra)*** cited by counsel for the revisionist is not applicable in the present matter. In the cited case, summoning order under Section 319 Cr.P.C. has been concurrently decided by the trial court as well as High Court in favour of the first informant by which accused persons were summoned to face trial along with other co-accused. Accused/appellant has taken plea of alibi. Certain documents had been discussed by the investigating office for not arraigning them as an accused in the charge-sheet. After considering the facts and circumstances of the case and the law cited, Hon'ble Supreme Court has observed that the evidence, recorded during trial, was nothing more than the statement which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. It was also observed that the trial court would be competent to exercise its power even on the basis of such statement recorded before it in examination-in-chief. However, it was also observed that the in case like the present one, which was

considered by the Hon'ble Supreme Court, several evidence were collected by the investigating officer during investigation which suggested otherwise.

10. The aforesaid cited case was arising out of criminal proceedings under Section 147, 148, 149, 323, 448 and 302/149 I.P.C. as well as Section 3, 3(ii)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, whereas in the present matter at hand is arising out of criminal proceedings under Section 304B and 498A I.P.C. wherein the burden of proof is dealt with in different manner. In several judgements, it has been held by Hon'ble Supreme Court that Section 304B I.P.C. is a stringent penal provisions which has been implemented for dealing with and punishing offence against married women. A conjoint reading of Section 304B I.P.C. and presumptive provisions of Section 113B of the Evidence Act, one of the essential ingredients, amongst others, is that the woman must have been soon before her death subjected to cruelty and harassment for demand of dowry. On the proof of essentials as mentioned in the aforesaid Section, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. It is clear that in case of dowry death, initial burden lies upon the prosecution to prove the ingredients of Section 304B I.P.C. by preponderance of probability. Prosecution is not required to prove ingredients beyond reasonable doubt, otherwise, it will defeat the purpose of Section 304B I.P.C. Once prosecution has discharged its initial burden, presumption of innocence of an accused would get replaced by deemed presumption of guilt of an accused. In these circumstances, burden would then be shifted upon the accused to rebut deemed presumption of guilt by proving his innocence beyond reasonable doubt.In the light of the conspectus discussed above with respect to scope of Section 304B I.P.C., I am of the view that case law of **Brijendra Singh (Supra),** which has been cited by learned counsel for the applicant, is not applicable in the present matter.

11. Law expounded by Hon'ble Supreme Court enunciating the scope of Section 319 Cr.P.C. in detail in the case of **Hardeep Singh Vs. State of Punjab and others, 2014 (3) SCC 92,** is still an important landmark judgement on this point. In the case of **Hardeep Singh(Supra)** Hon'ble Supreme Court has examined the following five questions:

"(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section

319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

The aforesaid questions have been answered in para 117 of judgement as under:

Question Nos. (i) and (iii)

A. In Dharam Pal and Ors. v. State of Haryana and Anr. 2004 (13) SCC 9, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. (ii)

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. (iv)

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No. (v)

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh".

12. I have very carefully examined the submissions advanced by the learned counsel for the parties and gone through the record. After examining the materials available on record, I find that no case is made out for interference by this Court, while exercising revisional jurisdiction.

13. Counsel for the revisionist has not been able to point out any such illegality or impropriety or incorrectness in the impugned order which may persuade this Court to interfere in the same. There is also no abuse of court's process perceptible in the same which appears to have been passed after due application of judicial mind. All the facts and circumstances of the case have been appreciated in right perspective and even the law point on the issue has been duly discussed. It is true that summoning of an accused under Section 319 Cr.P.C. cannot be resorted to in a cavalier or casual manner. The standard of sufficiency of evidence which may justify the summoning of an additional accused under Section 319 Cr.P.C. is on much higher footing than the sufficiency of evidence which may persuade the court to summon an accused under Section 204 of Cr.P.C. but it does not go to mean that the standard of sufficiency of evidence in order to justify the summoning of an additional accused under Section 319 Cr.P.C. should be of the same level which is required to be applied at the time of final adjudication on the point of guilt and innocence of an accused. The ratio and obiter as laid down by the Constitution Bench of Hon'ble Apex Court in the case of **Hardeep Singh v. State of Punjab and others, (2014) 3 SCC 92,** does not appear to have been ignored in this case.

14. The aforesaid judgment in fact lay down very clearly that power under Section 319 Cr.P.C. can be exercised by Court against a person not named in First Information Report or no charge sheet is filed by police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc. With regard to degree of satisfaction of Court for summoning the accused under Section 319 Cr.P.C., Court has said that test are same as applicable for framing charge.

15. In view of the above conspectus, I find no merits in the instant revision. There is no illegality or perversity in the impugned order in question which is hereby affirmed and the instant revision is dismissed.

(2021)04ILR A17
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.03.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Revision No. 1140 of 2016

Upendra Nath Chaubey ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Lok Nath Shukla

Counsel for the Opp. Parties:
A.G.A., Sri Manoj Yadav

Applicant claim of minor at the time of commission of incident-could not be place before the Court-but claimed after 20 years-claim rejected by court below-revision-if accused was juvenile-even when maintaining conviction-the matter shall be send to the Juvenile Board.

Revision allowed. (E-7)

List of Cases cited:-

1. Satya Deo @ Bhoorey Vs St. of U.P. 2020 10 SCC (Cri) 61

2. Amit Singh Vs St.of Mah.& anr. 011 0 Supreme(SC) 740

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

1— निगरानीकर्ता के विद्वान अधिवक्ता श्री लोक नाथ शुक्ला, विपक्षी सं0 2 के विद्वान अधिवक्ता श्री मनोज यादव एवं विद्वान अपर शासकीय अधिवक्ता उपस्थित हैं।

2— निगरानीकर्ता के विद्वान अधिवक्ता ने प्रत्युत्तरशपथपत्र दाखिल किया, इसे पत्रावली पर रखा जाय।

3— निगरानीकर्ता की ओर से यह दाण्डिक निगरानी, सत्र परीक्षण सं0 13 सन 2011, राज्य बनाम लल्लन चौबे आदि में अपर सत्र न्यायाधीश, कोर्ट सं0 1, बलिया द्वारा पारित आदेश दि0 18—5—2015 को अपास्त करने हेतु दायर की गयी है, जिसके द्वारा अभियुक्त/निगरानीकर्ता उपेन्द्रनाथ चौबे द्वारा उसे नाबालिग घोषित करने हेतु दिया गया प्रार्थना पत्र सं0 ख—56 एवं ख—91 निरस्त किया गया है।

4— निगरानीकर्ता के विद्वान अधिवक्ता का कथन है कि प्रस्तुत प्रकरण से संबंधित घटना दि0 28—1—1996 ई0 की है, उस समय निगरानीकर्ता की उम्र 11 वर्ष थी और वह नाबालिग था तथा उस समय अवर न्यायालय के अधिवक्ता द्वारा निगरानीकर्ता को नाबालिग होने के तथ्य को क्लेम नहीं किया जा सका, बाद में अवर न्यायालय के समक्ष अभियुक्त/निगरानीकर्ता उपेन्द्रनाथ चौबे की ओर से प्रार्थना पत्र ख—56 एवं ख—91 प्रस्तुत करके यह अनुरोध किया गया कि घटना के समय उसकी उम्र 11 वर्ष थी और वह नाबालिग था, ऐसी स्थिति में उसकी पत्रावली अलग करके जुवनाईल कोर्ट भेज दिया जाय। अपने कथन के समर्थन में अभियुक्त/निगरानीकर्ता की ओर से सरस्वती शिशु मन्दिर मठ नागा जी बलिया की मार्क शीट तथा प्रमाण पत्र प्रस्तुत किया गया, जिसमें उसकी जन्म तिथि 8—11—1985 अंकित है। टी0सी0 की सत्यापित प्रतिलिपि भी दाखिल की गयी, जिसमें कक्षा 2 में सन 1989 में नागा जी सरस्वती शिशु मन्दिर में दाखिला लिया जाना कहा गया है। सी0डब्लू0—1 के रूप में गोपालनरायन आचार्य नागा जी सरस्वती शिशु मन्दिर मठ नागा जी प्रस्तुत हुए हैं, जिन्होंने अपने बयान में कहा है कि दि0 18—7—89 को उपेन्द्रनाथ चौबे ने कक्षा—2 में सीधे दाखिला लिया था, अपनी जिरह में कहा है कि जन्म तिथि के बारे में कोई प्रमाण पत्र नहीं दिया था, उसके पिता द्वारा जुबानी ही जन्म तिथि बतायी गयी थी। हाई स्कूल की अंक तालिका भी प्रस्तुत की गयी, जिसमें अभियुक्त को 1999 में हाई स्कूल पास होना दिखाया गया है, इस प्रकार घटना के समय वह 11 वर्ष का था। अभियुक्त के उक्त आवेदन पत्र पर विद्वान अपर सत्र न्यायाधीश, कोर्ट सं0 1, बलिया द्वारा यह अभिमत व्यक्त किया गया कि '' **घटना के बाद अर्थात 1996 में ही अभियुक्त ने जुविनायल होने का आधार अपने रिमाण्ड के समय या जमानत के समय क्यों नहीं लि या गया''** आगे यह भी अभिमत व्यक्त किया गया कि **''घटना के 20 वर्ष बाद सन्देहास्पद स्कूली प्रमाण पत्र के आधार पर यह कहना कि अभियुक्त नाबालिग है, समीचीन प्रतीत नहीं होता। अभियुक्त की तरफ से इस बिन्दु का सन्तोषजनक उत्तर देना चाहिए था कि अभियुक्त के माता पिता ने, वर्ष 1996 में यदि अभियुक्त 11 वर्ष का था तो उन्होंने यह तथ्य सम्बन्धित न्यायालय के समक्ष क्यों नहीं उठाया था। अभियोजन के तर्क में बल प्रतीत होता है कि बिना किसी आधार के मय माफिया तरीके से प्राइमरी स्कूल में दाखिला के समय अभियुक्त की उम्र लिखा दी गयी थी जिसके पीछे कोई जन्म तिथि से सम्बन्धित प्रमाण पत्र नहीं था, ऐसी स्थिति में बिना किसी प्रमाण पत्र के लिखायी गयी जन्मतिथि अपने आप में सन्देहास्पद प्रतीत होता है।**'' विद्वान अवर न्यायालय द्वारा आगे यह भी अभिमत व्यक्त किया गया है कि **''अभियोजन के कई साक्षी परीक्षित हो चुके हैं फिर भी विचारण को विलम्ब करने की नियत से इतने विलम्ब से सोच समझकर जुवनाईल की प्ली ली गयी है, जिसका अब इस स्तर पर कोई औचित्य नहीं है, फिलहाल मेरी राय में अभियुक्त का प्रार्थना पत्र ख—91 स्वीकार किये जाने योग्य नहीं है**'' इस प्रकार विद्वान

अवर न्यायालय द्वारा अभियुक्त के उपरोक्त प्रार्थना पत्र निरस्त कर दिए गए।

5— निगरानीकर्ता के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि मान्नीय उच्चतम न्यायालय द्वारा अनेक निर्णयों में यह सिद्धान्त प्रतिपादित किया गया है कि अभियुक्त किसी भी स्तर पर जुविनायल होने का क्लेम कर सकता है। उसे जब भी जुविनायल होने के तथ्य को क्लेम करने की बात संज्ञान में आयी तब उसने जुविनायल होने का क्लेम किया, किन्तु विद्वान अवर न्यायालय द्वारा उसे अपने उपरोक्त वर्णित अभिमत के आधार पर निरस्त कर दिया गया तथा उन्होंनेइस प्रकार विद्वान अवर न्यायालय द्वारा मान्नीय उच्चतम न्यायालय द्वारा प्रतिपादित सिद्धान्तों पर विचार किए बिना, अभियुक्त/निगरानीकर्ता का प्रार्थना पत्र निरस्त करने में त्रुटि की गयी है, इसलिए प्रश्नगत आदेश अपास्त किए जाने योग्य है। इस प्रकार विद्वान अपर सत्र न्यायाधीश द्वारा पारित प्रश्नगत आदेश त्रुटिपूर्ण है एवं अपास्त किए जाने योग्य है। अपने तर्क के समर्थन में उन्होंने न्यायालय का ध्यान **Satya Deo @ Bhoorey Vs. State of Uttar Pradesh 2020 10 SCC (Cri) 61, Amit Singh Vs. State of Maharashtra & Anr. 011 0 Supreme(SC) 740** में प्रतिपादित सिद्धान्तों की ओर आकृष्ट किया।

6— विपक्षी सं0 2 के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता ने निगरानीकर्ता के तर्को का विरोध किया तथा कहा कि अवर न्यायालय द्वारा उभय पक्ष को सुनकर तथा पत्रावली पर उपलब्ध साक्ष्य का परिशीलन करने के पश्चात प्रश्नगत आदेश पारित किया है, जिसमें कोई त्रुटि नहीं है, इसलिए यह दाण्डिक निगरानी निरस्त कर दी जाय।

7— मैंने दोनों पक्षों के विद्वान अधिवक्ताओं के तर्को पर विचार किया तथा प्रश्नगत आदेश एवं पत्रावली पर उपलब्ध साक्ष्य का परिशीलन किया।

8— माननीय उच्चतम न्यायालय द्वारा **Satya Deo @ Bhoorey Vs. State of Uttar Pradesh 2020 10 SCC (Cri) 61** में उल्लिखित तथ्य निम्नवत् हैं :—

"Thus, in respect of pending cases, Section 20 authoritatively commands that the court must at any stage, even post the judgment by the trial court when the matter is pending in appeal, revision or otherwise, consider and decide upon the question of juvenility. Juvenility is determined by the age on the date of commission of the offence. The factum that the juvenile was an adult on the date of enforcement of the 2000 Act or subsequently had attained adulthood would not matter. If the accused was juvenile, the court would, even when maintaining conviction, send the case to the Board to issue direction and order in accordance with the provisions of the 2000 Act."

9— इसी **प्रकार Amit Singh Vs. State of Maharashtra & Anr. 011 0 Supreme(SC) 740** में उल्लिखित तथ्य निम्नवत् हैं :—

"After the judgment of the Constitution Bench in Pratap Singh (supra), this Court in the case of Hari Ram (supra) considered the above question of law in the light of Amendment Act 33 of 2006 in the provisions of the Act which substituted Section 2(l) to define a "juvenile in conflict with law" as a "juvenile who is alleged to have committed an offence and has not completed 18 years of age as on the date of commission of such offence". By way of Amendment Act 33/2006, Section 7A was inserted which reads as follows:-

"7A. Procedure to be followed when claim of juvenility is raised before any court.--(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall

record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect. "

It is clear from the above provision, namely, Section 7A the claim of juvenility to be raised before any court at any stage, even after final disposal of the case and sets out the procedure which the court is required to adopt, when such claim of juvenility is raised. Apart from the aforesaid provisions of the Act as amended, and the Juvenile Justice (Care and Protection of Children) Rules, 2007, (in short `the Rules') Rule 98, in particular, has to be read along with Section 20 of the Act as amended by the Amendment Act, 2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board could, either suo motu or on an application made for the purpose, review the case of juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for immediate release of the juvenile whose period of detention had exceeded the maximum period provided in Section 15 of the Act i.e. 3 years. All the above relevant provisions including the amended provisions of the Act and the Rules have been elaborately considered by this Court in Hari Ram (supra). "

10– निगरानीकर्ता के विद्वान अधिवक्ता के तर्को के परिप्रेक्ष्य में माननीय उच्चतम न्यायालय द्वारा उपरोक्त निर्णयों में प्रतिपादित सिद्धान्तों के दृष्टिगत, पत्रावली पर उलब्ध साक्ष्य को देखते हुए विद्वान अपर सत्र न्यायाधीश, कोर्ट सं0–1, बलिया द्वारा पारित प्रश्नगत आदेश दि0 18–5–2015 त्रुटिपूर्ण होना प्रतीत होता है।

11– अतः यह दाण्डिक निगरानी **स्वीकार** की जाती है तथा विद्वान अपर सत्र न्यायाधीश, कोर्ट सं0 1, बलिया द्वारा उपरोक्त वाद में पारित प्रश्नगत आदेश दि0 18–5–2015 अपास्त किया जाता है, एवं प्रकरण को उनके समक्ष इस निर्देश के साथ प्रतिप्रेषित किया जाता है कि इस आदेश में उल्लिखित किसी भी टिप्पणी के गुण–दोष से प्रभावित हुए बिना, पक्षकारों को सुनवाई का समुचित अवसर देते हुए एवं पत्रावली का सम्यक रूपेण अवलोकन करने के उपरान्त उचित आदेश पारित किया जाय।

12– कार्यालय को निर्देश दिया जाता है कि इस आदेश की एक प्रतिलिपि संबंधित न्यायालय को अविलम्ब भेजना सुनिश्चित करे।

(2021)04ILR A20
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 2541 of 2019

Ankur ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Rajiv Lochan Shukla, Sri J.B. Singh

Counsel for the Opp. Party:
A.G.A., Sri Nipun Singh

Criminal Law - Code of Criminal Procedure, 1973- Section 125 -. Challenged by husband-impugned order directing

maintainance to wife and daughter and house rent allowance- merely because wife is earning - not sufficient ground to refuse claim of maintainance-but rent allowance is not in consonance with the parameter of section 125 Cr.P.C.

Revision partly allowed. (E-7)

List of Cases cited:-

1.Bhuwan Mohan Singh Vs Meena & ors., (2015) 6 Supreme Court Cases 353

2. Shamima Farooqui Vs Shahid Khan, 4 [(2015) 5 Supreme Court Cases 705

3. Sunita Kachwaha & ors. Vs Anil Kachwaha, (2014)16 Supreme Court Cases 715

4. Farooq Ahmed Shala Vs Marie Chanel Giller, Crl Revision P. No. 855 of 2018

5. Bhuwan Mohan Singh Vs Meena & ors., (2015) 6 Supreme Court Cases 353

6.Farooq Ahmed Shala Vs Marie Chanel Giller, Crl Revision P. No. 855 of 2018

7. Shamima Farooqui Vs Shahid Khan, (2015) 5 Supreme Court Cases 705

8.Sunita Kachwaha & ors. Vs Anil Kachwaha, (2014)16 Supreme Court Cases 715

9. Amur Chand Agrawal Vs Shanti Bose & anr., AIR 1973 SC 799,

10.State of Orissa Vs Nakula Sahu, AIR 1979 SC 663

11. Akalu Aheer Vs Ramdeo Ram, AIR 1973 SC 2145

12.St. of Karn. Vs Appu Balu Ingele, AIR 1993 SC 1126=II (1992) CCR 458 (SC)

13. Pathumma & anr. Vs Muhammad, AIR 1986 SC 1436

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This Crl. Revision has been preferred by the revisionist being aggrieved with the judgement and order dated 29.4.2019 passed by the Principal Judge, Family Court, Gautam Budh Nagar in Case No. 120 of 2014 (Smt. Rachna Vs. Ankur Gupta) under Section 125 Cr.P.C., P.S. Sector-39 NOIDA, District Gautam Budh Nagar whereby the learned court below has been pleased to award Rs. 25,000/- maintenance each to the two minor daughters of the revisionist and Rs. 20,000/- as rent, cumulatively Rs. 70,000/- in exercise of powers under Section 125 Cr.P.C.

2. Brief facts of this case are that the opposite party No. 2 has filed an application against the revisionist under Section 125 Cr.P.C. which is registered as Misc. Complaint No. 120/2014 (Smt. Rachana Vs. Ankur Gupta) before the learned Principal Judge/Family Court, Gautam Budh Nagar on 26.4.2014.

3 . As per complaint, it has been stated by the opposite party No. 2 that her marriage was solemnized with the revisionist on 20.2.2008 and after their marriage both the revisionist and opposite party No. 2 were living together at Bangalore very happily and on 14.8.2009 a daughter-Aakansha was born to the opposite party No. 2 with the weedlock of revisionist. Later on, 17.2.2012 another daughter-Yashashwini was born to the opposite party No. 2, presently both the daughters are in the care and custody of the opposite party No. 2.

4. After marriage, revisionist as well as opposite party No. 2 moved to the Bangalore where the revisionist is an employee in IT Major Yahoo Software Development Corporation as Product Manager and the Opposite party No. 2 also got employment in NIFT Banglore as Assistant Professor.

5. It is further alleged in her complaint that during pregnancy of second daughter, revisionist solemnized marriage in USA with Ms. John NG and totally neglected the opposite party No. 2 so the opposite party No. 2 moved out to Bangalore and take shelter at her parent's house in NOIDA. Opposite party No. 2 with two daughters, residing with her parents since 17.3.2012 and she is now transferred to NIFT Campus, Haus Khas New Delhi and where she is working as Assistant Professor.

6. After filing the written objection and exchanging the affidavits, Principal Judge/Family Court, Gautam Budh Nagar directed the revisionist to deposit Rs. 20,000/- per month from the date of order to the opposite party No. 2 for interim maintenance of both daughters vide order dated 7.11.2014.

7. In pursuance of the order of family Court, he is regularly paying the money to the opposite party No. 2 from November till April 2019 and during pendency of this application, statement of opposite party No. 2 is recorded before the learned court below as PW1 on 16.2.2016 and 14.3.2016. In consequences of relevance of opposite party no. 2, revisionist has also filed a chief examination by means of an affidavit on 19th August, 2016 as DW-1.

8. During pendency of interim maintenance, revisionist also moved the application to quash and modify the order of interim maintenance but no any order has been passed and opposite party No. 2 filed the income tax return of the revisionist as well as her income tax for assessment year 2015 to 2019.

9. Learned Principal Judge/Family Court, Gautam Budh Nagar without applying his judicial mind and totally ignoring the materials and evidence on record passed the impugned judgement and order dated 29.4.2019 which is totally illegal and arbitrary.

10. Learned counsel for the revisionist submitted before the court that the property of House No. 122B, Sector Panchkula, House No. 450, Sector 2 Panchkula and House No. 403 Tower No. 6, Royal Estate Zirakpur Punjab are incorrect. It is further submitted that learned trial court while passing the impugned judgment and order has considered the economic status of the revisionist and passed the impugned judgement and order. Learned counsel further submitted that the learned court has misinterpreted the oral and documentary evidence and finding of the lower court is solely on the basis of income tax return of the previous year while the latest income tax return clearly shows that the revisionist was no longer employed and had a yearly income of Rs. 4.14 lacs. It is next submitted that in the month of July 2011, opposite party No. 2 left the house of her husband and went to her parental home and several efforts commits by the revisionist but opposite party No. 2 did not want to live with the revisionist. Opposite party No. 2 is living apart from the revisionist without any reasonable cause. Revisionist has also filed the Petition No. 112 of 2012 under Section 13 of Hindu Marriage Act for dissolution of marriage before the court of District Judge, Panchkula. When the opposite party No. 2 got knowledge of the

said divorce petition then he filed transfer petition in Apex Court and on the said transfer application of opposite party No. 2, the case was transferred from District Panchkula to District, Gautam Budh Nagar which is still pending before the Family Court, Gautam Budh Nagar. During pendency of this case, opposite party No. 2 also filed the case under Section 12 readwith Section 17, 19, 20, 21 & 22, Protection of Women from Domestic Violence Act, 2005 before Judicial Magistrate, Gautam Budh Nagar and also lodged the first information report bearing case crime No. 25 of 2014, under Sections 498A/323/504/506/406/494/420 IPC & Section ¾ Dowry Prohibition Act at police station Mahila Thana, District Gautam Budh Nagar and charge sheet was also submitted on 15.7.2014 by the Investigating Officer. However, further proceeding of aforesaid case has been stayed by this Hon'ble Court on 24.9.2014 passed in Crl. Misc. Application No. 41465 of 2014 and the said case is still pending before this Hon'ble Court. Except this, several litigations were pending before the parties. Learned trial court without considering the facts and circumstances of the case and evidence available on record, passed the impugned judgment and order on 29.4.2019 and prayed for quashing the impugned judgement and order dated 29.4.2019.

11. It has been pointed out by the learned counsel for the opposite party No. 2 that the revisionist submitted that he has intimate relationship with Ms John NG in USA since 2014 and further submitted that the revisionist is highly qualified having post graduate degree from IIT, Khadagpur and management course from Howard University and due to intimacy with Ms John NG, revisionist abandoned the opposite party No. 2 and he did not care the daughters and due to compelling circumstances opposite party No. 2 leave Bangalore and came under the shelter of her old aged parents and since then, respondent is residing in parental home since 17.3.2012. After leaving, Bangalore respondent joined NIFT Campus, New Delhi as Assistant Professor and after deduction, her salary is only Rs. 41,000/-.

12. Learned counsel for the opposite party No. 2 further submitted that the revisionist admit his relationship with Ms John NG and execution of will is in his favour. It also alleged that the loan of Rs. 2.50 lacs US Dollar, which according to the revisionist he allegedly borrowed for education loan. Respondent successfully established by way of documentary evidence about the details of property possessed by the revisionist and learned family court rightly awarded the maintenance amount to her daughters of Rs. 25,000/- each and Rs. 20,000/- as house rent allowance. It is further submitted that the applicant is working in Hauj Khas and no property is available on such house rent in New Delhi. It is further submitted that the welfare of their daughters is not only responsibility of the opposite party No. 2 but the same is also equal, rather more responsibility of revisionist to look after the welfare. Cost of living in NCR is too much higher and it is not possible to hire any accommodation. Hence amount of Rs. 20,000/- is quite justified legal and also liable to be upheld by this Court. Revisionist has no right to challenge the amount of maintenance awarded by Family Court. Apart from house property this is also admitted fact that the revisionist has so many properties, admitted income from the

dividends and shares of various companies and, rental income. It is further submitted that ample evidence available on record, which itself proves that revisionist has wilfully neglected and refused to maintain the minor daughters and the court below after considering the statement accounts as well as the previous income tax return has come to a right conclusion in awarding maintenance. It is also submitted that in order to escape from his responsibility, revisionist intentionally and deliberately filed the return for the Assessment Year 2018-2019 and 2019-2020 showing his annual income @ 4,13,000/- However, intentionally the income tax return of previous year were not filed by the revisionist and the same were brought on record by the answering respondent. Lastly learned counsel for the respondent submitted that the criminal revision is devoid of merit and is liable to be dismissed subject to imposition of heavy cost upon the revisionist.

13. Learned counsel for the opposite party No. 2 relied upon the judgements of Hon'ble Apex Court reported in ***[(2015) 6 Supreme Court Cases 353 (Bhuwan Mohan Singh Vs. Meena and others)]; [(2015) 5 Supreme Court Cases 705 (Shamima Farooqui Vs. Shahid Khan)]; [(2014)16 Supreme Court Cases 715 (Sunita Kachwaha and others Vs. Anil Kachwaha)],*** and the judgment passed by Hon'ble Delhi High Court on 1st July, 2019 in ***Crl Revision P. No. 855 of 2018 (Farooq Ahmed Shala vs. Marie Chanel Giller)***

14. I have considered the rival submissions made by the learned counsel for the parties and the written submissions filed on behalf of the revisionist.

15. The provisions of Section 125, Cr.P.C. is to provide for a social justice falling within the swim of Articles 15 (3) and 39 of the Constitution of India, which have been enacted to protect the weaker section of the society like women and children. It is in the form of secular safeguard irrespective of personal law of the parties. The object is to compel a man to perform moral obligations towards the society in respect of maintaining his wife, children and old parents so that they may not face destitution and become the liability of the society or may be forced to adopt a life of vagrancy, immorality and crime for their subsistence or go astray. The proceedings are summary in nature and provide for a speedy remedy against starvation of a deserted wife, children or indigent parents. To enforce the substantial issues of civil law, the only remedy available is in Civil Court, therefore, findings recorded in proceedings under Section 125, Cr.P.C. are not final and parties are always at liberty to agitate their rights in Civil Court. Order under Section 125, Cr.P.C. does not finally determine the status, rights and obligations of the parties and it only provides for maintenance of indigent wives, children and parents.

16. In ***[(2015) 6 Supreme Court Cases 353 (Bhuwan Mohan Singh Vs. Meena and others)]*** Hon'ble Supreme Court observed as under:

".....2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to

lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. 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...."

17. In ***Crl Revision P. No. 855 of 2018 (Farooq Ahmed Shala vs. Marie Chanel Giller)*** decided on 1st July, 2019, Delhi High Court observed as under:-

"..... 21. Petitioner has a legal, social and moral responsibility to not only maintain his wife but also his children. Even if assuming that the respondent is earning, the same cannot be a reason for the petitioner to avoid the responsibility and duty of maintaining his minor daughters.

22. A child for her upbringing does not only require money. A lot of time and effort goes in upbringing of a child. It would be incorrect to hold that both the parents are equally responsible for the expenses of the child. A mother who has custody of a child not only spends money on the upbringing of the child but also spent substantial time and effort in bringing up the child. One cannot put value to the time and effort put in by the mother in upbringing of the child. No doubt, mother, if she is earning, should also contribute towards the expenses of the child but the expenses cannot be divided equally between the two....."

18. In ***[(2015) 5 Supreme Court Cases 705 (Shamima Farooqui Vs. Shahid Khan)]*** Hon'ble Supreme Court observed as under;

"...15. While determining the quantum of maintenance, this Court in Jasbir Kaur Sehgal Vs. District Judge, Dehradun has held as follows:-

"8.....The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning. ..."

19. In ***[(2014)16 Supreme Court Cases 715 (Sunita Kachwaha and others Vs. Anil Kachwaha)]*** Hon'ble Supreme Court in observed as under:-

".....8. The learned counsel for the respondent submitted that the appellant-wife is well qualified, having post graduate degree in Geography and working as a teacher in Jabalpur and also working in Health Department. Therefore, she has income of her own and needs no financial support from respondent. In our considered view, merely because the appellant-wife is a qualified post graduate, it would not be sufficient to hold that she is in a position to maintain herself. Insofar as her employment as a teacher in Jabalpur, nothing was placed on record before the Family Court or in the High Court to prove her employment and her earnings. In any event, merely because the wife was earning something, it would not be a ground to reject her claim for maintenance...."

20. The case requires to be considered not only bearing in mind the aforesaid proposition of law but also considering that the powers of Revisional Court against such an order are very limited for the reason that in revisional jurisdiction the Court satisfies itself as to the correctness, legality and propriety of any finding, sentence or order and as to the regularity of the proceedings of the inferior Criminal Court.

21. In ***Amur Chand Agrawal v. Shanti Bose and Anr., AIR 1973 SC 799***, the Hon'ble Supreme Court has held that the revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice.

22. In ***State of Orissa v. Nakula Sahu, AIR 1979 SC 663***, Hon'ble Supreme Court, placing reliance upon a large number of its judgments including ***Akalu Aheer v. Ramdeo Ram, AIR 1973 SC 2145***, held that the power, being discretionary, has to be exercised judiciously and not arbitrarily or lightly. The Court held that "judicial discretion, as has often been said, means a discretion which is informed by tradition methodolised by analogy and discipline by system".

23 . In ***State of Karnataka v. Appu Balu Ingele, AIR 1993 SC 1126=II (1992) CCR 458 (SC),*** Hon'ble Supreme Court held that in exercise of the revisional powers, it is not permissible for the Court to reappreciate the evidence. In ***Pathumma and Anr. v. Muhammad, AIR 1986 SC 1436***, the Apex Court observed that High Court "committed an error in making a re-assessment of the evidence" as in its revisional jurisdiction it was "not justified in substituting its own view for that of the learned Magistrate on a question of fact".

24. If the instant case is examined in view of the aforesaid settled legal propositions, it is not permissible for the Court to reappreciate the evidence. More so, there is nothing on record to show that the findings of facts recorded by the Family Court are perverse, based on no evidence or have been arrived contrary to the evidence on record.

25. In the case of maintenance, the Court has to see whether the wife has

refused to live with her husband without any sufficient reason and it is also to be seen whether the husband has neglected to maintain his wife, without any valid reason. In the present case, admittedly, the parties are living separately from July, 2011 and the reason for living separately is physical and mental cruelty meted out to the wife and one of the just ground for refusal of wife to live with her husband is that her husband is in extra marital relationship with another woman.

26. The monetary relief granted under section 125 Cr.P.C. shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

27. Merely, because wife is capable of earning, is not sufficient ground to refuse claim of maintenance granted by Court to the minor daughters of the opposite party No. 2.

28. Plea advanced by the husband is that he does not have the means to pay or he does not have job or his business is not doing well, these are only the bald excuses and in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in the position to support himself, thus, he is under the legal obligation to support his minor children and her wives. So in these circumstances, the order of the learned family court to award the maintenance to the minor daughters of the revisionist is appropriate, just and legal.

29. So far as regard the house rent allowance awarded by the family court, is not just and proper. It is admitted fact that the respondent No. 2 is an Assistant Professor in NIFT and as per income tax return of assessment year 2018-2019, the annual gross total income of the opposite party No. 2 is Rs. 13,73,902/-. This is also an admitted fact that the opposite party No. 2 is presently living at her parental house alongwith her two daughters and as per salary slip, she also get the house rent allowance.

30. Since the opposite party No. 2 have already got the house rent allowance so, in my opinion, house rent allowance is not permissible under the maintenance allowance. Hence, the judgement and order of the family court regarding Rs. 20,000/- as rent allowance is liable to be quashed. It is also pertinent to mention that the rent allowance is also not come in the purview of maintenance allowance under section 125 Cr.P.C. So the award of maintenance allowance to the minor children (opposite party Nos. 3 and 4), does not suffer from any illegality, impropriety, perversity or jurisdictional error. Finding of the court below for awarding maintenance to her minor daughter of Rs. 25,000/- each, is just and proper but Rs. 20,000/- as a house rent allowance is not inconsonance with the parameter of Section 125 Cr.P.C.

31. Under these facts and circumstances, revision is ***partly allowed*** with the observation that the children of opposite party No. 2 & the revisionist who are living with opposite party No. 2, will receive maintenance allowance of Rs. 25,000/- as awarded by the learned revisional court but so far as regard the house rent allowance which is awarded to the opposite party No. 2, is liable to be ***quashed.***

32. With the aforesaid direction/observation, this revision is ***disposed of***.

(2021)04ILR A28
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2021

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Revision No. 3392 of 2015

Ram Sakhi & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri Pradeep Kumar, Sri Akhilesh Singh, Sri B.M. Pandey, Sri Shivam Yadav

Counsel for the Opp. Parties:
A.G.A., Sri Santosh Shukla, Sri Kalpdeo Mishra

Criminal Law - Code of Criminal Procedure, 1973- Section 306 - Revisionist challenging impugned summoning order u/s 306 Cr.P.C.-alleges that the wife of the deceased and her maternal family members have been roped-for property gain -have no specific roles-nor named in the FIR-court can only see prima facie case-nothing on record to conclude that the order impugned is illegal.

Revision disposed. (E-7)

List of Cases cited:-

1. R.R. Kapur Vs St.of Punj. AIR 2 of 4 1960 SC 866

2. St. of Har.Vs Bhajan Lal, 1992 SCC(Cr.) 426

3. St. of Bihar Vs P.P.Sharma, 1992 SCC(Cr.) 192

4. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr. (Para-10) 2005 SCC (Cr.) 283

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

1— निगरानीकर्तागण के विद्वान अधिवक्ता श्री अखिलेश सिंह, विपक्षी सं0 2 के विद्वान अधिवक्ता श्री संतोष शुक्ला के सहयोगी अधिवक्ता श्री कल्पदेव मिश्रा एवं विद्वान अपर शासकीय अधिवक्ता श्री विकास गोस्वामी को सुना तथा पत्रावली का परिशीलन किया।

2— निगरानीकर्तागण की ओर से यह दाण्डिक निगरानी, मु0अ0सं0 723 सन 2011, अन्तर्गत धारा 306 भा0दं0वि0, थाना कोतवाली, जिला औरैया से उद्भूत सत्र परीक्षण सं0 36 सन 2013, राज्य प्रति रागिनी एवं 1 अन्य में अपर सत्र न्यायाधीश, कोर्ट नं0 3, औरैया द्वारा पारित आदेश दि0 18—8—2015 को अपास्त करने हेतु दायर की गयी है, जिसके द्वारा वादी विश्वजीत द्वारा प्रस्तुत प्रार्थना पत्र 27—ख स्वीकार किया गया है एवं अभियुक्तगण/निगरानीकर्तागण को धारा 306 भा0दं0वि0 के दण्डनीय अपराध में आहूत किया गया है।

3— निगरानीकर्ता के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि वादी मुकदमा द्वारा अंकित करायी गयी प्राथमिकी में समस्त अभियुक्तगण को नामित नहीं किया गया है, मृतक द्वारा अपनी पत्नी की प्रताड़ना के कारण स्वयं फॅासी लगाकर आत्महत्या करने की बात कही गयी है जबकि वह अपने मायके में रहती थी, विपक्षी सं0 2 द्वारा अभियुक्तगण/निगरानीकर्तागण की कोई विशिष्ट पहचान न तो विवेचनाधिकारी के समक्ष प्रस्तुत की गयी और न ही अवर न्यायालय के समक्ष। उनका यह भी कथन है कि निगरानीकर्ता बृजभान सिंह बी0एस0एफ0 का कर्मचारी है, हरिओम सिंह एम0पी0 पुलिस में कार्यरत है, राम नरेश सिंह यू0 पी0 पुलिस में कार्यरत है एवं विधायक उर्फ पप्पू उर्फ सुखपाल सिंह आर्मी में कार्यरत है तथा ये सब अपनी—अपनी ड्यूटी में व्यस्त रहते हैं और बाहर रहते हैं, इनके द्वारा मृतक का उत्पीड़न करने का कोई औचित्य नहीं है तथा विद्वान अवर न्यायालय ने सत्र परीक्षण में अभियोजन साक्षी सं0 1 के बयान एवं मुख्य परीक्षा पूर्ण होने के बाद, वादी विश्वजीत द्वारा मुकदमा विलम्बित करने के उद्देश्य से एवं मृतक की जमीन हड़पने के लिए मृतक की पत्नी एवं अन्य अभियुक्तगण को तलब करने हेतु आवेदन पत्र प्रस्तुत किया जिसे स्वीकार करके अभियुक्तगण/निगरानीकर्तागण को आहूत करने में त्रुटि की गयी है, इसलिए प्रश्नगत आदेश अपास्त किए जाने योग्य है।

4— विपक्षी सं0 2 के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता ने निगरानीकर्तागण के तर्को का विरोध करते हुए तर्क प्रस्तुत किया कि न्यायालय द्वारा मात्र अभियोजन साक्षी सं0 1 का बयान एवं प्रतिपरीक्षा पूर्ण होने के बाद, वादी के आवेदन पत्र अन्तर्गत धारा 319 दं0प्र0सं0 पर उभय पक्षों को सुनवाई

का अवसर देने एवं उस पर प्राप्त आपत्ति पर विचारोपरान्त अभियुक्तगण/निगरानीकर्तागण को आहूत करने संबंधी आदेश पारित किया है, चूँकि न्यायिक उद्देश्य की प्रतिपूर्ति के लिए न्यायालय को विचारण के दौरान किसी भी स्तर पर अभियुक्तगण को आहूत करने का पूर्ण अधिकार है। प्रश्नगत आदेश बिल्कुल सही पारित किया गया है, उसमें कोई त्रुटि नहीं है।

5— मैंने दोनों पक्षों के विद्वान अधिवक्ताओं के तर्को पर विचार किया तथा पत्रावली पर उपलब्ध साक्ष्य का परिशीलन किया।

6— वादी विश्वजीत द्वारा अवर न्यायालय के समक्ष प्रार्थना पत्र अन्तर्गत धारा 319 दं0प्र0सं0 प्रस्तुत करते हुए संक्षेप में कथन किया गया कि उसके द्वारा श्रीमती रागिनी, रामसखी, हरिओम, बृजभान, बेटा सिंह, विधायक उर्फ पप्पू, वसुधा, महाबली सिंह, सुनीता, पदम सिंह, छोटी बिट्टी एवं रामनरेश को प्रथम सूचना रिपोर्ट में नामित किया था। दि0 23—10—2013 को उसने सशपथ बयान में उपरोक्त व्यक्तियों को घटना में शामिल होना बताया था, इसके अतिरिक्त मृतक दीपेन्द्र प्रताप सिंह द्वारा उल्लिखित सुसाइड नोट प्रदर्श क—3 को भी शामिल किया था, मृतक भाई के हस्ताक्षर में साबित किए थे। अतः वादी द्वारा शेष अभियुक्तगण रामसखी, हरिओम, बृजभान, विधायक उर्फ पप्पू, वसुधा, महाबली सिंह, सुनीता, पदम सिंह, छोटी बिट्टी एवं रामनरेश को तलब किए जाने की प्रार्थना की है।

7— उक्त आवेदनपत्र के विरूद्ध अभियुक्तगण/निगरानीकर्तागण की ओर से आपत्ति 28 ग प्रस्तुत करते हुए संक्षेप में कथन किया गया कि उपरोक्त सत्र परीक्षण में अभियोजन साक्ष्य दि0 23—10—2013 को पी0डब्लू0—1 वादी विश्वजीत सिंह की मुख्य परीक्षा हुयी। दि0 21—11—2013 को प्रतिपरीक्षा समाप्त हुयी। प्रथम अभियोजन साक्षी की साक्ष्य के पश्चात अभियोजन पक्ष द्वारा जानबूझकर मुकदमा टालने के उद्देश्य से अन्य साक्षी प्रस्तुत नहीं किए और इसी बीच वादी मृतक की जमीन हडपने के लिए मृतक की पत्नी रागिनी एवं प्रथम सूचना रिपोर्ट में नामित तथाकथित अभियुक्तगण को न्यायालय में तलब कराने की धमकी देकर मृतक की जायदाद छोड़ने व रूपयों की मांग कर सौदेबाजी करता रहा, जब कामयाब नहीं हुआ तो यह प्रार्थना पत्र बड़े लम्बे समय बाद न्यायालय में प्रस्तुत किया गया, इसलिए अभियुक्तगण/निगरानीकर्तागण द्वारा वादी का प्रार्थना पत्र अन्तर्गत धारा 319 दं0प्र0सं0 निरस्त किए जाने की प्रार्थना की गयी।

8— अभिलेखों के अवलोकन से इस स्तर पर यह नहीं कहा जा सकता कि अभियुक्तगण/निगरानीकर्तागण के खिलाफ कोई अपराध गठित नहीं होता है। निगरानीकर्तागण की ओर से जो तर्क प्रस्तुत किए गए हैं वे विवादित ताथ्यिक प्रश्न से संबंधित हैं, चूँकि उक्त ताथ्यिक प्रश्नों का विनिश्चय विचारण न्यायालय द्वारा ही साक्ष्य आने के बाद किया जा सकता है। इस संबंध में माननीय उच्चतम न्यायालय द्वारा **R.R. Kapur vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal, 1992 SCC(Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC(Cr.) 192 and Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283** में दिए गए निर्णयों में यह अवधारित किया गया है कि इस स्तर पर केवल प्रथम दृष्टया ही केस देखा जाना है। मुलजिमान का जो विवादित बचाव कथन है उस पर इस स्तर पर विचार नहीं किया जा सकता है।

9— मामले के समस्त तथ्यों एवं परिस्थितियों के दृष्टिगत, उपलब्ध संपूर्ण अभिलेख का परिशीलन करने एवं उभय पक्ष के विद्वान अधिवक्ताओं के तर्को पर सम्यक रूपेण विचारोपरान्त, मेरी दृष्टि में अवर न्यायालय द्वारा पारित प्रश्नगत आदेश में कोई अनियमितता, अवैधानिकता या प्रक्रिया या क्षेत्राधिकार संबंधी त्रुटि परिलक्षित नहीं होती है तथा उसमें हस्तक्षेप करने का कोई औचित्य नहीं प्रतीत होता है। किसी मामले का संज्ञान लिए जाने के स्तर पर संबंधित न्यायालय को केवल यह देखना होता है कि मुलजिमान के खिलाफ प्रथम दृष्टया कोई मामला बनता है या नहीं तथा उसे परीक्षण हेतु आहूत किया जाता है, इस स्तर पर मुलजिमान के विवादित बचाव कथन पर विचार नहीं किया जा सकता है और इस स्तर पर यह नहीं कहा जा सकता कि मुलजिमान के खिलाफ कोई आपराधिक मामला नहीं बनता है। निगरानीकर्तागण की ओर से निगरानी में जो अनुतोष चाहे गए हैं वे ताथ्यिक प्रश्न से संबंधित हैं, जिसका विनिश्चय इस न्यायालय के द्वारा नहीं किया जा सकता है। इसलिए वर्तमान आवेदन पत्र में वांछित अनुतोष प्रदान किए जाने का अनुरोध अस्वीकृत किया जाता है।

10— इस स्तर पर निगरानीकर्तागण के विद्वान ने अनुरोध किया कि निगरानीकर्तागण दूसरे शहरों में रहकर सेवारत हैं एवं अपने—अपने परिवार का भरणपोषण कर रहे हैं, इसलिए उनके जमानत आवेदन पत्र का शीघ्र निस्तारण करने का निर्देश दे दिया जाय।

11– मामले के तत्यों एवं परिस्थितियों के दृष्टिगत, संबंधित अवर न्यायालय को यह निर्देशित किया जाता है कि यदि निगरानीकर्तागण संबंधित अवर न्यायालय में आज से 45 दिन के अन्दर आत्मसमर्पण करते हैं और जमानत के लिए प्रार्थना करते हैं तो उस पर शीध्रतापूर्वक विचार करते हुए उसका निस्तारण त्वरित रूप से कर दिया जाय। आज से 45 दिन की अवधि तक या निगरानीकर्तागण के अवर न्यायालय में उपस्थित होने तक ;जो भी पहले होद्ध निगरानीकर्तागण के खिलाफ कोई प्रपीडक कार्यवाही नहीं की जायेगी, परन्तु यदि निगरानीकर्तागण निर्धारित अवधि के अन्दर विचारण न्यायालय में उपस्थित नहीं होते हैं तो ऐसी स्थिति में विचारण न्यायालय उनके खिलाफ न्यायालय में उनकी उपस्थिति सुनिश्चित करने के लिए नियमानुसार कानूनी प्रपीडक कार्यवाही कर सकता है।

12– उक्त के सम्बन्ध में यह भी स्पष्ट किया जाता है कि अधीनस्थ न्यायालय को यह आदेश निगरानीकर्तागण को जमानत देने हेतु बाध्य नहीं करता वरन् अधीनस्थ न्यायालय निगरानीकर्तागण के जमानत प्रार्थना पत्र को उसके गुण–दोष के आधार पर निस्तारित करने हेतु स्वतंत्र है।

13– उक्त निर्देशों के साथ यह दाण्डिक निगरानी **अन्तिम रूप से निस्तारित** की जाती है। अन्तरिम आदेश यदि कोई हो तो उसे समाप्त समझा जाय।

(2021)04ILR A30
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2021

BEFORE

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

Crl. Misc. W.P. No. 16202 of 2019

Pavan @ Pavan Singhal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anant Ram Gupta

Counsel for the Respondents:
A.G.A.

A. Externment Order - Cause of Action - Uttar Pradesh Control of Goondas Act, 1970 - Section 3(2), 3(3) - Every person presumed to be an honorable and respectable man, unless that presumption is dislodged on accordance with law. Therefore, labeling some citizen as a goonda and externing him under the Act of 1970, is an act that would afford a cause of action to the person who suffers that order. (Para 8)

B. Constitution of India - Article 21 - Fundamental Right - Right to Life includes Right to Reputation

An externment order, which, thus, works, as an innate declaration about the man externed being a goonda, is irreversibly ruinous of his reputation. The physical consequences of an externment order that last only for a period of six months, with the limited effect of abridgment of some liberty, are trivial when compared to the timeless consequences of ruining a reputation. (Para 14)

It does not appear from a perusal of the materials available on record that the petitioner, either by himself or in association with the gang, habitually commits offences punishable under Chapter XVI, XVII and XXII of the Penal Code. Since there is no repetitive indulgence discernible on the petitioner's part in the specified kind of offences, so as to attract the provisions of Section 2(b) of the Act of 1970. (Para 19)

C. Practice & Procedure - Valid Notice - the notice drawn under Section 3(1) of the Act should disclose the "general nature of material allegations". If a person is sought to be proceeded with against on ground that he is a goonda under Clause (a) of Section 3(1), the general nature of material allegations may, for instance, indicate the number of acts that he has habitually committed, abetted or attempted, that constituted commission, attempt or abetment of an offence punishable under Section 153-B of the Penal Code, over a specified period of time, in a particular locality or part of the town. The notice must say something about the act, which the person put under notice has done, rather than listing the cases registered against him. (Para 31)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Rishav Raghav (Minor) Vs St. of U.P. & 2 ors. 2015 SCC OnLine All 8978

2. Subramanian Swamy Vs U.O.I., Ministry of Law & ors. (2016) 7 SCC 221

3. Om Prakash Chautala Vs Kanwar Bhan & ors. (2014) 5 SCC 417

4. Sumpuranand Vs St. of U.P. & ors. 2018 (11) ADJ 550

5. Imran @ Abdul Quddus Khan Vs St. of U.P. & ors. 2000 CrLJ 1323

6. Harsh Narain @ Harshu Vs District Magistrate Allahabad & anr. 1972 SCC OnLine All 146

7. St. of Gujarat & anr. Vs Mehbub Khan Usman Khan & anr. AIR 1968 SC 1468

8. Ramji Pandey Vs St. of U.P. & ors. 1981 SCC OnLine All 305

9. Bhim Sain Tyagi Vs St. of U.P. through D.M. Mahamaya Nagar Criminal Misc. Writ Petition No. 461 of 1998

10. Ballabh Chaubey Vs A.D.M. (Finance), Mathura & anr. 1997 SCC OnLine All 1111

11. Subas Singh @s Subhash Singh Vs District Magistrate, Ghazipur (1997) 35 ACC 262

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

The petitioner questions an order of Ms. Selva Kumari J., the then District Magistrate, Firozabad, dated 13.03.2019, ordering him to be externed under Section 3(3) of the Uttar Pradesh Control of Goondas Act, 19701. The petitioner also challenges an appellate approval of the externment order by the Commissioner, Agra Division, Agra, vide his order dated 23.05.2019, passed in Case No. 00719 of 2019.

2. This petition was presented on 07.06.2019, and came up for admission before this Court, for the first time, on 11.06.2019. On the said date, after hearing learned counsel for the petitioner in support of motion to admit the petition, and the learned A.G.A. in opposition, the cause was adjourned to 04.07.2019. On 04.07.2019, the learned A.G.A. was granted four weeks' time to file a counter affidavit, and the petitioner, a rejoinder, within another two weeks. It appears that no counter affidavit was filed, and by the order dated 10.09.2019, two weeks and no more time was granted to the State to file a counter affidavit. Again, on 17.10.2019, further three weeks' time was granted, with a repetition of the stop order. Subsequently, on 10.09.2020 and 24.09.2020, the matter was adjourned on the request of learned counsel for the petitioner. The case again came up on 07.10.2020. On the said date, this Court took note of the fact that there was no return filed on behalf of the State. The petition was admitted to hearing and heard forthwith. Judgment was reserved.

3. It was urged as a preliminary objection on behalf of the State by the learned A.G.A. that this petition has become infructuous, inasmuch as the life of the externment order impugned had come to an end. The externment order was effective for a period of six months, and apparently, its operation was not suspended. The externment order is one dated 13.03.2019, and by a reckoning of the calendar, the learned A.G.A. submits that it has outlived itself. The learned

counsel for the petitioner, on the other hand, says that the order of externment adversely impacts his reputation in society, and, therefore, notwithstanding the fact that it has outlived its term of operation, the petitioner is entitled to question its validity and ask this Court to quash it. Learned counsel for the petitioner, in support of his submission, has relied on a decision of this Court in **Rishav Raghav (Minor) v. State of U.P. & 2 Others2**. In that decision, the externment order had outlived its life, pending appeal, which had become infructuous, and yet this Court proceeded to examine the merits of the externment order and its affirmation in appeal. The orders were quashed on merits, bearing in mind the fact that if left undisturbed, would affect the petitioner's career, who, in that case, was a student and had to do a follow up of his studies and apply for a job. There are remarks in **Rishav Raghav** *(supra)* to the following effect :

21. The learned Counsel for the petitioner argued that appeal of the petitioner was dismissed by the respondent No. 2, who did not passed any order on the stay application and allowed the appeal to become infructuous.

22. Learned Counsel for the petitioner further submits that present petition may be decided on merits after examining the records as the applicant is a student and his entire career would be spoiled, which would also affect his future, if the externment orders is not quashed, as he is a student and has to follow up studies and to get a job, under these circumstances the Court proceed to hear the matter on merits.

4 . The learned A.G.A., on the other hand, says that the decision in **Rishav Raghav** was indicated not to serve as a precedent by the court, when it was specifically remarked :

30. .....The Court has interfere in this matter in a peculiar facts and circumstances of the case and it is made clear that the present case shall not be treated as a precedent, for challenging the order passed in the appeals which have become infructuous, due to unavoidable circumstances.

5. This Court has considered the matter, so far as the preliminary objection is concerned. It is true that this Court in Rishav Raghav said that the decision would not serve as a precedent, for the purpose of challenging orders passed in appeal, that have become infructuous, but the question is whether a person, who is externed under the Act of 1970, is entitled to question the order of externment, after it has outlived its life. Apart from the decision in **Rishav Raghav**, none of the parties placed any authority that may serve as guidance on the point.

6. To the understanding of this Court, the fact that the Act of 1970 is a preventive measure to exclude from a locale, persons who are found to be goondas or anti-social elements, in order to maintain public order or prevent them from committing certain crimes, does not make externment a benign or inert measure, which attracts no stigma. The object of the Act of 1970 and its scheme as a whole, clearly shows it to be a statute that is designed to be applied against persons who are desperados or habitual offenders, and who threaten peace and tranquility of the society by their repeat involvement in certain specific crimes or their general predisposition as desperate and dangerous persons.

7. Considering the scheme and object of the Act of 1970, an order of externment cannot be compared to a preventive detention under the National Security Act, 1980, which may cast no stigma, or be explained consistent with a person's upright character. Once a person is proceeded with against under the Act of 1970, and externed under Section 3(3), classifying him as a goonda, the order is certainly stigmatic. It is for this reason also that an order of externment envisages provision of opportunity to show cause, under Section 3(2). This is not to say that the provision for opportunity is engrafted in the Statute, for the reason alone of its stigmatic effect; it is also there because an order of externment is a serious inroad on a citizen's liberty.

8. It was suggested during the hearing on behalf of the State that the decision in **Rishav Raghav** was rendered in the context of the petitioner there being a young student, who had a career before him, which is not the case here. This Court must remark that the petitioner is not a convict so far, and every man has a right to his reputation and good name in society. Every person is presumed to be an honourable and respectable man, unless that presumption is dislodged in accordance with law. Therefore, dubbing some citizen as a goonda and externing him under the Act of 1970, is an act that would afford a cause of action to the person who suffers that order, which enures beyond its physical consequences. In the opinion of this Court, it would not be a sound legal proposition to say that a man may suffer the slur of being called a *goonda*, because he could not bring the order of externment passed against him to test within the term of its life. In the opinion of this Court, the petitioner is entitled to question the externment order, notwithstanding that order outrunning its life.

9. The right to one's reputation is now unquestionably regarded as a facet of the Right to Life, guaranteed under Article 21 of the Constitution. The horizon of the right guaranteed under Article 21 has been given its true meaning and content over the years that our polity has flourished under the constitutional umbrella. Right to Life has long been expanded to mean immensely more than mere physical, animal or biological existence. It has been interpreted by the Supreme Court and the High Courts over the years, to bring within its fold, all that it means and requires to elevate the mere physical existence of an individual to the position of a human being, who has all opportunity and facility to realise his potential to its fullest. In the quest to realise the wholesome guarantee of life in its varied facets, the right to one's reputation has been regarded as an inseperable part.

10. In **Subramanian Swamy v. Union of India, Ministry of Law & Others3** challenge was laid to the vires of Section 499 and 500 of the Indian Penal Code, 18604 and Section 199 of the Code of Criminal Procedure, 1973 on ground that these Statutes negated the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. The validity of the provisions was upheld by their Lordships of the Supreme Court on varied parameters, but one of these was the right of an individual to his reputation. The Right to Reputation was regarded as a concomitant of the Right to Life guaranteed under Article 21 of the Constitution. In was held in **Subramanian Swamy** *(supra)* thus:

132. .....Personal liberty, as used in Article 21, is treated as a composition of rights relatable to various spheres of life to confer the meaning to the said right. Thus perceived, the right to life under Article 21 is equally expansive and it, in its connotative sense, carries a collection or bouquet of rights. In the case at hand, the emphasis is on right to reputation which has been treated as an inherent facet of Article 21. In Haridas Das v. Usha Rani Banik[Haridas Das v. Usha Rani Banik, (2007) 14 SCC 1 : (2009) 1 SCC (Cri) 750] , it has been stated that a good name is better than good riches. In a different context, the majority in S.P. Mittal v. Union of India[S.P. Mittal v.Union of India, (1983) 1 SCC 51 : AIR 1983 SC 1] , has opined that man, as a rational being, endowed with a sense of freedom and responsibility, does not remain satisfied with any material existence. He has the urge to indulge in creative activities and effort is to realise the value of life in them. The said decision lays down that the value of life is incomprehensible without dignity.

133. **[Ed.: Para 133 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2016 dated 4-8-2016.]** In Charu Khurana v. Union of India [Charu Khurana v.Union of India, (2015) 1 SCC 192 : (2015) 1 SCC (L&S) 161] , it has been ruled that dignity is the quintessential quality of a personality, for it is a highly cherished value. Thus perceived, right to honour, dignity and reputation are the basic constituents of right under Article 21. The submission of the learned counsel for the petitioners is that reputation as an aspect of Article 21 is always available against the high-handed action of the State. To state that such right can be impinged and remains unprotectedinter se private disputes pertaining to reputation would not be correct. Neither can this right be overridden and blotched notwithstanding malice, vile and venal attack to tarnish and destroy the reputation of another by stating that the same curbs and puts unreasonable restriction on the freedom of speech and expression. There is no gainsaying that individual rights form the fundamental fulcrum of collective harmony and interest of a society. There can be no denial of the fact that the right to freedom of speech and expression is absolutely sacrosanct. Simultaneously, right to life as is understood in the expansive horizon of Article 21 has its own significance.

11. In **Om Prakash Chautala v. Kanwar Bhan & others5**, the right to a person's reputation, being a part of his fundamental right guaranteed under Article 21 of the Constitution, was exposited by their Lordships with reference to earlier authority, thus :

21. Another facet gaining significance deserves to be adverted to, when caustic observations are made which are not necessary as an integral part of adjudication and it affects the person's reputation--a cherished right under Article 21 of the Constitution. InUmesh Kumar v. State of A.P. [(2013) 10 SCC 591 : (2014) 1 SCC (Cri) 338] this Court has observed: (SCC p. 604, para 18)

"18. ... Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. Therefore, it has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. The International Covenant

on Civil and Political Rights, 1966 recognises the right to have opinions and the right to freedom of expression under Article 19 is subject to the right of reputation of others."

22. In Kiran Bedi v. Committee of Inquiry [(1989) 1 SCC 494] this Court reproduced the following observations from the decision in D.F. Marion v. Davis [217 Ala 16 : 114 So 357 : 55 ALR 171 (1927)] : (Kiran Bedi case [(1989) 1 SCC 494] , SCC p. 515, para 25)

"25. ... "The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property.'"

23. In Vishwanath Agrawal v. Sarla Vishwanath Agrawal [(2012) 7 SCC 288 : (2012) 4 SCC (Civ) 224 : (2012) 3 SCC (Cri) 347] , although in a different context, while dealing with the aspect of reputation, this Court has observed that: (SCC p. 307, para 55)

"55. ... reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

24. In Mehmood Nayyar Azam v. State of Chhattisgarh [(2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449] this Court has ruled that: (SCC p. 6, para 1)

"1. ... The reverence of life is insegregably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle', or "a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence'. When a dent is created in the reputation, humanism is paralysed."

25. In Port of Bombay v. Dilipkumar Raghavendranath Nadkarni [(1983) 1 SCC 124 : 1983 SCC (L&S) 61] , while dealing with the value of reputation, a two-Judge Bench expressed thus: (SCC p. 134, para 13)

"13. ... The expression "life' has a much wider meaning. Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures. In this context one can recall the famous words of Chapter II of Bhagwad Gita:

"Sambhavitasya cha kirti marnadati richyate'"

The aforesaid principle has been reiterated in State of Maharashtra v. Public Concern for Governance Trust[(2007) 3 SCC 587].

12. The justiciability of the right to one's reputation and its inextricable link to a person's fundamental right under Article 21 of the Constitution, also engaged the attention of this Court in **Sumpuranand v. State of U.P. & others6**. That was a case where the issue arose in the context of the right to consideration for appointment of fair price shop dealers on compassionate grounds, which the kin of the deceased dealer had, under a certain Government Order dated 17.08.2020. Clause 10 (JHA) inter-alia provided that the good reputation of the deceased fair price shop dealer was a condition precedent for appointment of his kin as a fair price shop dealer, on compassionate grounds. The clause in the Government Order that cast a disentitling shadow on the son's right to compassionate appointment as a fair price shop dealer, if the deceased dealer did not enjoy a good reputation, was held to be discriminatory and violative of Articles 14, 15 and 21 of the Constitution. It was in that context the Court made a searching analysis of the Right to Reputation and traced its source to a person's Right to Life, guaranteed under Article 21 of the Constitution. In Sumpuranand (supra) there are some very illuminating remarks about the Right to Life and its connection to Article 21 of the Constitution, which read :

30. The resolve to create the Constitution was the collective will of the people of India. The promise of the Constitution is to every individual citizen of India. Part III of the Constitution is anchored in the individual and revolves around the individual citizens. The simple word "life" in Article 21 of the Constitution of India presented a complex jurisprudential problem to the courts. The simple word "life" did not disguise for long the profound intent of the constitution framers. The approach of the courts to the provision in the Constitution progressed from tentative to visionary, the interpretation of the provision advanced from literal to prophetic.

31. What was the meaning of life for the people of India on the morrow of our independence? If life meant physical existence and mere survival, Indian people had shown remarkable resilience to live through the vicissitudes of history. The people of India have lived in servitude, survived famines, lived in an iniquitous social order often dominated by prejudice, penury and illiteracy. Trackless centuries are filled with the record of survival of the people of India. Surely life of the Indian people could not remain the same after the dawn of independence of India. Surely the meaning of life for the people of India had to change after the advent of the Republic of India. The founding fathers, had the audacity to dream of transforming the meaning of life for the people of India. The courts in India had the vision and the courage to make the dreams a reality. Life had to embrace all the attributes which made life meaningful and all the pursuits which made life worth living.

34. The courts in India, knew early on that understanding the significance of life was the key to providing the security of justice. While interpreting Article 21 of the Constitution of India, the Hon'ble Supreme Court, embraced life in all its breadth and profundity and eschewed a narrow interpretation. The law laid down by the Hon'ble Supreme Court while construing Article 21 of the Constitution of India brought a citizen's reputation within its sweep.

44. The right to reputation inheres in the right to life and it has been embedded

in Article 21 of the Constitution of India, by consistent judicial authority. Reference can be made with profit to the judgments of the Hon'ble Supreme Court rendered in the case of Port of Bombay Vs. Dilip Kumar Raghuvendranath Nadkarni, reported at (1983)1 SCC 124. In Gian Kaur Vs. State of Punjab, the Hon'ble Supreme Court confirmed that the right to reputation is a natural right.

13. In the context of how the Right to Reputation is viewed by the law, it would be almost preposterous to suggest that the physical consequences of an externment order having come to an end, no cause of action survives to the petitioner to assail it. An externment order, under the Act of 1970, has clearly two facets. One is that which relates to the tangible consequence of forbidding the person proceeded with against, from entering the district for a certain period of time. This consequence of the externment order is indeed preventive in nature, and, may be, of immense importance in a given case to the maintenance of public order. So far as the person against whom the order of externment is made is concerned, it certainly does curtail his liberty, by preventing his movement in a defined territory. But, the inconvenience stemming from the abridgment of liberty, that comes in the wake of an externment order, prohibiting entry in the district, is of trivial consequence to the one externed, if this consequence were to be weighed against the harm that it brings to the individual's reputation.

14. The order of externment proceeds on an innate declaration that the person externed is a *goonda.* A *goonda* has been defined under the Act of 1970, and otherwise also, has an understandable connotation in ordinary parlance. A *goonda* is the anti-thesis of what a respectable or honourable man is. An externment order, which, thus, works as an innate declaration about the man externed being a goonda, is irreversibly ruinous of his reputation. It has been said time over again that reputation once lost can never been redeemed. The physical consequences of an externment order that last only for a period of six months, with the limited effect of abridgment of some liberty, are trivial when compared to the timeless consequence of ruining a reputation, that can perhaps never be regained. In this view of the matter, this Court does not find any force in the objection raised by the learned A.G.A., that the cause of action does not survive, and that this petition has become infructuous. In the opinion of this Court, this cause requires determination on merits.

15. It has been pointed out by Mr. Anant Ram Gupta, learned counsel for the petitioner, that the petitioner, who is a resident of Firozabad, is a respectable citizen, a businessman and an income tax payee. It is urged that he is, by no means, a goonda, within the meaning of Section 2(b) of the Act of 1970. It is urged that a solitary case, being Case Crime No. 648 of 2016, under Sections 364A, 302, 404, 201, 120B IPC, was registered against him on 24.08.2016, at Police Station - Tundla, District - Firozabad, whereafter, there was a consequential implication in Case Crime No. 841 of 2016, under Section 2/3 of The Uttar Pradesh Gangsters and Anti-social Activities (Prevention) Act, 19867, which is not a substantive offence. Subsequently, the Police have implicated him in N.C.R. No. 504/506, under Section 506 IPC, which is based on beat report no. 59 dated

15.11.2017. It is argued that the two matters are contemporaneous implications and the third a dress-up, based on the beat information engineered by the Police. It is also pointed out that in Case Crime Nos. 648 of 2016 and 841 of 2016, the petitioner has been granted bail by this Court. He has not been convicted of any offence so far. It is, particularly, pointed out that the beat information was *mala fide* engineered by Pradeep Mittal, who is the informant of Case Crime No. 648 of 2016, and the uncle of the victim of the crime in that case. This beat information was lodged deliberately, in order to secure cancellation of bail granted to the petitioner in Case Crime No. 648 of 2016 by this Court, vide order dated 22.07.2017, passed in *Criminal Misc. Bail Application No. 40678 of 2016*. Learned counsel for the petitioner, by referring to these facts, has attempted to impress upon the Court that prior to registration of Case Crime No. 648 of 2016, there was absolutely nothing against the petitioner to show that he is, in any way, habitually into commission of offences of any kind. Rather, the learned counsel for the petitioner has drawn the Court's attention towards the educational testimonials of the petitioner and his income tax returns, in an attempt to show that the petitioner is a respectable man, engaged in business.

16. It has also been argued by the learned counsel for the petitioner that quite apart from the fact that the petitioner is not a goonda, within the definition of Section 2(b) of the Act of 1970, the orders impugned are flawed, because the notice issued under Section 3(1) of the Act of 1970 does not conform to the requirements of the Statute. It is urged that the said notice does not carry the "general nature of material allegations" against him, in respect of matters enumerated in Clauses (a), (b) and (c) of sub-Section (1) of Section 3 of the Act last mentioned. Learned counsel for the petitioner has taken this Court through notice dated 17.01.2018, issued under Section 3(1) of the Act of 1970. He submitted that once this notice does not conform to the essential requirements of the Act of 1970, all subsequent proceedings founded on it would stand vitiated. The externment order and its affirmation in appeal would be bad in law and liable to be quashed.

17. Learned A.G.A., on the other hand, has defended the orders impugned and says that the proceedings taken are strictly in accordance with the requirements of the Act of 1970, and no exception can be taken to the orders impugned, passed by the two Authorities below.

18. It must be remarked here that since there is no return on behalf of the State, which they have not put in despite time being granted, the allegations in the writ petition have to be accepted as unrebutted.

19. This Court has keenly considered the submissions advanced by the learned counsel. So far as the first part of the submission is concerned, it does not appear from a perusal of the materials available on record that the petitioner, either by himself or in association with a gang, habitually commits offences punishable under Chapter XVI, XVII and XXII of the Penal Code. This is relevant because the petitioner has been proposed to be proceeded with against as a goonda, in terms of the notice dated 17.01.2018, on the ground that he habitually commits offences punishable under Chapter XVI, XVII and XXII of the Penal Code, and that his general reputation is that of a person

who is desperate and dangerous to the community. What the word "habitually" means for the purpose of Section 2(b)(i) of the Act of 1970, is a person who is habitually into commission of offences. It has been held to be distinguishable from a single or solitary act. "Habitually" postulates repeated or persistent indulgence in the specified kind of offences. Here, that inference has been drawn on account of the petitioner's involvement in Case Crime No. 648 of 2016, which is still pending trial. The other offence, being Case Crime No. 841 of 2016, is not a substantive offence, but a case registered under the Act of 1986, on account of the petitioner's implication in Case Crime No. 648 of 2016. The registration of an offence under the Act of 1986, shortly after his implication in Case Crime No. 648 of 2016, does not, ex-facie, show the petitioner to be a man who habitually commits offences of the specified kind. The last reference to the beat information no. 59, on the basis of which N.C.R. No. 504/506, under Section 506 IPC has been registered, also appears to be part of an ongoing strife between members of the victim's family in Case Crime No. 648 of 2016, and the petitioner. This Court does not, in the least, mean to say that the petitioner is involved or not in Case Crime No. 648 of 2016, but apparently, there is no repetitive indulgence discernible on the petitioner's part, so as to attract the provisions of Section 2(b) of the Act of 1970.

20. So far as the other limb to invoke the provisions of the Act of 1970 is concerned, there is no tangible material referred to in the orders impugned, on the basis of which, an inference may be drawn that the petitioner is a person who is desperate and dangerous to the community. These inferences have been drawn by the two Authorities below, merely on the basis that the crimes under reference have been registered against the petitioner, and the Police have expressed some opinion. On the mere registration of a crime or expression of an opinion by the Police in the report, sans any tangible material to conclude that the petitioner is a person who is desperate or dangerous to the community, the satisfaction of the Authorities below about the petitioner being a goonda would be vitiated for lack of consideration of relevant material. The manner in which the two Authorities below have proceeded to conclude that the petitioner is a goonda, merely because two crimes, contemporaneous in point of time, have been registered against him, besides a beat report, renders the conclusions no more than an ipse dixit of the Officers writing the orders impugned. The question what "habitually" means under Section 2(b) of the Act of 1970, fell for consideration of a Division Bench of this Court in **Imran *alias* Abdul Quddus Khan v. State of U.P. & Others8.** It has been held :

11. Ex facie, a person is termed as a 'goonda' if he is a habitual criminal. The provisions of Section 2(b) of the Act are almost akin to the expression 'anti social element' occurring in Section 2(d) of Bihar Prevention of Crimes Act, 1981. In the context of the expression 'anti social element' the connotation 'habitually commits' came to be interpreted by the apex Court in the case of Vijay Narain Singh v. State of Bihar, (1984) 3 SCC 14 : AIR 1984 SC 1334. The meaning put to the aforesaid expression by the apex Court would squarely apply to the expression used in the Act, in question. The majority view was that the word 'habitually' means

'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. Even the minority view which was taken in Vijay Narain's case (supra) was that the word 'habitually' means 'by force of habit'. It is the force of habit inherent or latent in an individual with a criminal insteinct with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under the specified chapters of the Code, he should be considered to be a 'anti social element'. There are thus two views with regard to the expression 'habitually' flowing from the decision of Vijay Narain's case (supra). The majority was inclined to give a restricted meaning to the word 'habitually' as denoting 'repetitive' and that on the basis of a single act cannot be said to be forming the habit of the person. That is to say, the act complained of must be repeated more than once and be inherent in his nature. The minority view is that a person in habitual criminal who by force of habit or inward disposition inherent or latent in him has grown accustomed to lead a life or crime. In simple language, the minority view was expressed that the word 'habitually' means 'by force of habit'. The minority view is based on the meaning given in Stroud's Judicial Dictionary, Fourth Ed. Vol. II-1204 - habitually requires a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day. Thus, the word 'habitual' connotes some degree of frequency and continuity.

21. Again, about the exercise of powers under the Act of 1970, bearing in mind reference to who is a *goonda*, it has been held in **Imran** *(supra)* thus :

14. Expressions like 'by habit' 'habitual' 'desperate' 'dangerous' and 'hazardous' cannot be flung in the face of a man with laxity or semanitics. The Court must insist on specificity of facts and a consistent course of conduct convincingly enough to draw the rigourous inference that by confirmed habit, the petitioner is sure to commit the offence if not externed or say directed to take himself out of the district. It is not a case where the petitioner has ever involved himself in committing the crime or has adopted crime as his profession. There is not even faint or feeble material against the petitioner that he is a person of a criminal propensity. The case of the petitioner does not come in either of the clauses of Section 2(b) of the Act, which defines the expression 'Goonda'. Therefore, to outright label a bona fide student as 'goonda' was not only arbitrary capricious and unjustified but also counter productive. A bona fide student who is pursuing his studies in the Post Graduate course and has never seen the world of the criminals is now being forced to enter the arena. The intention of the Act is to afford protection to the public against hardened or habitual criminals or bullies or dangerous or desperate class who menace the security of a person or of property. The order of externment under the Act is required to be passed against persons who cannot readily be brought under the ordinary penal law

and who for personal reasons cannot be convicted for the offences said to have been committed by them. The legislation is preventive and not punitive. Its sole purpose is to protect the citizens from the habitual criminals and to secure future good behaviour and not to punish the innocent students. The Act is a powerful tool for the control and suppression of the 'Goondas'; it should be used very sparingly in very clear cases of 'public disorder' or for the maintenance of 'public order'. If the provisions of the Act are recklessly used without adopting caution and descretion, it may easily become an engine of operession. Its provisions are not intended to secure indirectly a conviction in case where a prosecution for a substantial offence is likely to fail. Similarly the Act should not obviously be used against mere innocent people or to march over the opponents who are taking recourse to democractic process to get their certain demands fulfilled or to wreck the private vengeance.

22. The decision of the Division Bench in **Imran** shows that powers under the Act of 1970 are not required to be exercised, because someone has been reported to the Police in connection with a serious crime. It is also not to be exercised because that man has been admitted to bail. It has to be exercised against a person who, on the basis of tangible material on record before the Authorities under the Act of 1970, can be classified as a goonda, under one or the other clauses of Section 2(b) of that Act. It must also be borne in mind that the Act of 1970, being one that seriously abridges liberty, no clause of the Statute can be liberally construed. It has to be strictly construed in favour of the citizen.

23. In the present case, a reading of both the orders passed by the Authorities below, that is to say, the externment order made by the District Magistrate and the Appellate order passed by Commissioner, betray a very casual approach and an utter lack of application of mind to the relevant material on record. These do not show conclusions that accord with the requirements of Section 2 and 3 of the Act of 1970. Both the orders virtually betray a mechanical and nonchalant approval to what the Police have proposed in their report. The Authorities below have shown scant regard to their duty to find out whether the petitioner's act can, indeed, qualify him as a goonda, under the Act of 1970, given the material appearing against him. It is, therefore, inevitably to be held that, on a perusal of the record and the two orders impugned, there is nothing to show or reasonably infer that the petitioner is a goonda, within the meaning of Section 2(b) of the Act of 1970.

24. Now, the other contention advanced by the learned counsel for the petitioner that the notice issued under Section 3(1) does not conform to the essential requirements of the Statute, is also required to be tested. This is particularly so, for the reason that if the notice dated 17.01.2018, issued under Section 3(1) of the Act of 1970, does not conform to the mandatory requirements of the Statute, all proceedings, including the orders impugned, have to fall. The material part of the notice dated 17.01.2018, issued under Section 3(1) of the Act of 1970 reads thus :

चूंकि मेरे सामने रखी गयी सूचना के आधार पर मुझे यह प्रतीत होता है कि –

(क) पवन आत्मज श्री ललित मोहन जो सामान्यतः गणेश नगर, थाना उत्तर, जनपद

फिरोजाबाद में निवास करता है, "गुण्डा" है। वह अभ्यरततः भारतीय दण्ड संहिता के अध्याय 16, 17 व 22 के अधीन दण्डनीय अपराध करता है। उसकी सामान्य ख्याति दुःसाहसिक और समुदाय के लिए खतरनाक व्यक्ति होने की है और

(ख) जिला फिरोजाबाद में उसकी गतिविधियाँ या कार्य व्यक्तियों की जान या सम्पत्ति के लिए संत्रास, संकट या अपहानि करते हैं, ऐसा विश्वास करने का उचित कारण है कि वह जिले या उसके किसी भाग में भारतीय दण्ड संहिता के अध्याय 16, 17 व 22 के अधीन दण्डनीय किसी अपराध के दुष्प्रेरण में लगा है और

(ग) साक्षीगण अपनी जान या सम्पत्ति के सम्बन्ध में अपनी आशंका के कारण उसके विरूद्ध साक्ष्य देने को तैयार नहीं है, और उपर्युक्त खण्ड (क) (ख) (ग) के सम्बन्ध में उसके विरूद्ध सारवान आरोप निम्नलिखित सामान्य प्रकृति के हैंः-

1.मु0अ0सं0-648/2016 धारा364ए/302/404/201/120बी आई0पी0सी0

2. मु0अ0सं0-841/2016 धारा-2/3 गैंगस्टर एक्ट

3. एनसीआर सं0-504/506 धारा-506आई0पी0सी0

4. बीट सूचना सं0-59 बीट सूचना दिनांक 15.11.2017

25. Learned counsel for the petitioner has particularly emphasized that this notice, which is the progenitor of proceedings drawn against the petitioner under the Act of 1970, is vitiated, for the reason that it fails to disclose the "general nature of material allegations", a sine qua non of a valid notice under Section 3(1) of the Act. The question as to what constitutes "general nature of material allegations", the legal subtleties apart, has been settled consistently by this Court, to mean that in the notice under Section 3(1) of the Act of 1970, the general nature of material allegations, with reference to Clauses (a), (b) and (c) of Section 3(1) of the Act of 1970, would not imply furnishing a list of the first information reports and case crimes registered against the person proposed to be proceeded with against. Even if the District Magistrates and Divisional Commissioners cannot understand the precise import that the words "general nature of material allegations", they are reasonably expected to understand that they must not rest content with a mere mention of the list of cases registered against the person put under notice, but must indicate something of the allegations against him, may not be the full particulars, with the precision of a charge. This issue was dealt with as long back as the decision of this Court in Harsh Narain **alias Harshu v. District Magistrate Allahabad & Another9**. In **Harsh Narain** *(supra)* it was observed :

15. .....In the opening part of each notice it is stated that it appeared to the District Magistral that the petitioners were goondas satisfying the requirements of Sec. 2(b)(i) and (iv), that their movements and acts were causing or were calculator to cause alarm, danger or harm to persons or property and that witnesses were not willing to come forward to give evidence against them by reason of apprehension on their part as regards the safety of their

person or property. After the opening part, the prescribed form states:

"And whereas the material allegations against him in respect of the aforesaid clauses (a)/(b)/(c) are of the following general nature:

(1) -- -- -- -- -- -- -- -- -- -- --
(2) -- -- -- -- -- -- -- -- -- -- --

(3) -- -- -- -- -- -- -- -- -- -- --"

16. In each of the notices given to the petitioners, in this blank space, instead of setting out the general nature of the material allegations against each one of the petitioners is given a list of First Information Reports filed against each petitioner in the last several years and references of cases in which they were convicted. The learned Advocate-General has frankly and fairly accepted that the notices in the present cases do not set out the general nature of the material allegations against the petitioners. He faintly argued that this defect in the notices did not handicap the petitioners in making their representations. In our opinion, the defect of not setting out the genera nature of the material allegations in the notices is a fatal defect as it results in non-compliance with the provisions of Sec. 3(1). The notice cannot be deemed to be notices under Sec. 3(1). Sec. 3(1) enjoins upon the District Magistrate to inform the goonda of the general nature of the material allegations against him in respect of clauses (a), (b) and (c) and further enjoins upon to give the goonda a reasonable opportunity of furnishing his explanation regarding them. If the goonda is not informed of the general nature of the material allegations regarding clauses (a), (b) and (c), he can flurnish no explanation in respect of them and would be deprived of the reasonable-opportunity to which he is entitled under Sec. 3(1). Not only this, in the absence of a proper explanation, he would also be deprived of the reasonable opportunity under Sub-sec. (2) of producing his evidence in support of his explanation. When he is deprived of the reasonable opportunity at both these stages, the action taken must be held to be illegal.

26. The decision in **Harsh Narain** *(supra)* was very early in time, after the Act of 1970 came into force. There was considerable debate regarding what was the precise import of the expression "general nature of material allegations" occurring under Section 3(1) of the Act of 1970. The decision in **Harsh Narain** about the import of the expression in question, was referred for reconsideration by a larger Bench, in view of the decision of the Supreme Court in **State of Gujarat & Another v. Mehbub Khan Usman Khan & Another10.** The reference came to be considered by a Full Bench of this Court in **Ramji Pandey v. State of U.P. & Others11.** The decision in **Mehbub Khan** *(supra)* by the Supreme Court had disapproved a decision of the Bombay High Court, which apparently required particulars of the allegations to be indicated in a notice under Section 59 of the Bombay Police Act, 1951, the provisions of which were pari materia to Section 3(1) of the Act. Reference to the larger Bench came to be made as **Mehbub Khan's** case was not cited before the Division Bench in **Harsh Narain**. While approving of the principle in **Harsh Narain**, their Lordships of the full Bench in **Ramji Pandey** *(supra)* held :

18. *Mehbub Khan's* case was not placed before the Bench dealing with Harsh Narain's case and it had no occasion to consider the same, although the principles

laid down by the Supreme Court in interpreting Section 59(1) of the Bombay Police Act with regard to the necessity of "giving general nature of material allegation" are fully applicable to a notice issued under Section 3(1) of the Act. As discussed above, the Supreme Court has emphasised that the material allegations do not require giving of particulars of allegations, such as setting out of the date, time and place is not necessary, nor it is necessary to give the names of persons, who may have given information or who may refuse to appear as witnesses. In Harsh Narain's case, the Division Bench held that the notice issued in that case did not set out the general nature of material allegations. The Bench, unlike Gujarat High Court in Mahbub Khan's case, did not hold that the notice was invalid as it failed to set out particulars of the allegations instead it held that the notice did not contain even the minimum possible material allegations, as the column in the notice which was meant for setting out "the general nature of material allegations" contained in list of convictions and first information reports lodged against the petitioner of that case. By any standard, the notice in Harsh Narain's case filed to set out the general nature of material allegations, while notice in Mehbub Khan's case contained the essential statement of facts giving the general nature of the activities of Mehbub Khan. The view taken by the Bench of Harsh Narain's case is not in conflict with that of the Supreme Court. The question whether Harsh Narain's case is contrary to the law declared by the Supreme Court in Mehbub Khan's case was considered in Pannu v. Commissioner, [1974 A.W.R. 21.] and it was held that even though the case of Mehbub Khan was not cited before the Bench dealing with Harsh Narain's case, but that did not affect the position of law. We are also of the view that the decision of the Division Bench in Harsh Narain's case is not inconsistent with the law laid down by the Supreme Court in Mehbub Khan's case or Pandharinath's case.

27. It would be relevant to refer to the notice that was subject matter of action in **Ramji Pandey**. The notice is set out in extenso in the report in **Ramji Pandey** *(supra)*. It reads :

19. We would now advert to the notice issued to the petitioner in the instant case. The notice is as under.

"Notice under Section 3 of the U.P. Control of Goondas Act, 1970.

It appears to me on the basis of the information placed before me by the Superintendent of Police Ballia, that;--

(a) Shri Ranji Pandey, son of Shiv Poojan Pandey is a resident of Village Damanpura, P.S. Sikanderpur, District Bellia, and is a goonda, i.e. he himself habitually commits crime or attempts to commit or abets the commission of offence punishable under Chapters XVI, XVII XXII of the Penal Code, 1860. He is generally reputed to be a person, who is desperate and dangerous to the community.

(b) That his movements and acts are causing alarm, danger and harm to the lives and property of the persons within the circle of P.S. Sikanderpur, District Ballia. There is reasonable ground for believing that he is engaged in the commission and abetment of offences punishable under Chapters XVI, XVII and XXII in the aforesaid region of the district.

(c) The witnesses are not willing to come forward to give evidence against

him by reason of apprehension on their part as regards the safety of their personal property.

(d) In regard to the sub-paragraphs (a), (b) and (c) the material allegations of general nature against him are as follows;

1. He was convicted for two years by the Court of J.M. Ballia on 17-9-1979 in connection with offence No. 21/74 under Section 39 I.P.C.

2. The case as Crime No. 15/71 under Section 379 I.P.C. is pending.

3. The case as Crime No. 83/79 under Section 52/504 I.P.C. is pending.

4. The case Crime No. 162/79 under Section 110 Cr. P.C. is pending.

5. He was acquitted in the case Crime No. 102/72 under Section 394 I.P.C.

6. He was acquitted in the case Crime No. 250/71 under Section 177/452 I.P.C.

7. M.C.R. No. Section 109/79 Section 504/506 I.P.C

8. M.C.R. No. Section 192/79 Section 323/504 I.P.C.

9. M.C.R. No. Section 262 Section 352/504 I.P.C.

10. M.C.R. No. Section 263 Section 504/506 I.P.C.

11. M.C.R. No. Section 107/177 Cr. P.C.

The aforesaid Shri Ramji Pandey is hereby directed to present himself before me in any Court on 12-12-1979 at 10 A.M. In regard to the aforesaid material allegations he may if he so desires, give his explanation in writing giving reasons as to why an order be not passed against him under sub-section (3) of Section 3 of the U.P. Control of Goondas Act 1970 and he should also inform, if in support of his explanation he wished himself to be examined or other witnesses if any to be examined and if so their names and addresses should also be furnished.

The aforesaid Ramji Pandey is hereby further informed that if he does not present himself in the aforesaid manner or if within the specified time no explanation or information is received, it shall be presumed that Shri Ramji Pandey does not wish to give any explanation in respect of the aforesaid allegations or does not want to examine any evidence and I shall take proceedings for the compliance of the proposed order."

28. In dealing with the notice above extracted, their Lordships of the Full Bench held it to be one not conforming to the requirements of the law, as it did not carry the "general nature of material allegations". In reaching this conclusion, their Lordships of the Full Bench held :

21. The above notice is in the form prescribed under Rule 4 of the U.P. Control of Goondas Rules, 1970. In column (d) of the notice meant for setting out material allegations of general nature against the petitioner, no statement of fact relating to the petitioner's conduct has been stated, instead it mentions details of a criminal case where the petitioner was

convicted for an offence of robbery and the list of criminal cases pending against him and also a list of first information reports lodged with the police. Column (d) does not contain any allegation or material allegation against the petitioner. It was argued that if column (d) is read with clauses (a), (b) and (c) of the notice, it is possible to discern the material allegations against the petitioner. A notice under Section 3(1) cannot be issued unless the District Magistrate is satisfied about the matters set out in clauses (a), (b) and (c) of Section 3(1). The prescribed from also requires the District Magistrate to state in the notice that on the basis of the information laid before him he is satisfied that the person concerned is Goonda and that his movements and acts and conduct fulfil the conditions as set out in clauses (a), (b) and (c) of Section 3(1) of the Act. In the impugned notice the District Magistrate has set out matters as required by clauses (a), (b) and (c) in the prescribed form. The prescribed form as well as the impugned notice both seek to maintain a distinction between material allegations and the matters set out in clauses (a), (b) and (c) of the notice. The facts stated in columns (a), (b) and (c) of the notice refer to the satisfaction of the District Magistrate with regard to the matters set out in clauses (a), (b) and (c) of Section 3(1) of the Act. Clause (d) of the notice is intended to set out general nature of material allegations against the petitioner with a view to give him opportunity to submit his explanation and to defend himself. In this view of the matter, it is not possible to accept the contention that columns (a), (b) and (c) of the notice set out the general nature of material allegations against the petitioner.

22. In the instant case, the general nature of material allegations appears to be that the petitioner was waylaying persons and robbing them within the circle of Police Station Sikanderpur District Ballia and also committing theft. The allegation further appears to be that the petitioner has been assaulting people and causing injuries to them within the circle of Police Station Sikanderpur District Ballia and that witnesses are not willing to come forward to give evidence against him on account of apprehension to their lives and property. These matters could have been stated in a narrative form as was done in the case of Mehbub Khan and Pandharinath, but the impugned notice does not contain these allegations, instead it contains a list of first information reports and pending cases. **In our opinion, it is difficult to uphold the respondents' contention that the list of first information reports or list of cases in which the petitioner was convicted or the list of cases in which the petitioner was acquitted or the list of pending criminal cases against the petitioner is sufficient to meet the requirement of setting out "the general nature of material allegations."** The impugned notice is, therefore, not in accordance with Section 3(1) of the Act as it fails to set out general nature of material allegations against the petitioner.**(emphasis by Court)**

29. There were amendments made to the Act of 1970 by Act No. 1 of 1985 w.e.f. 18.01.1971. These did no change to the phraseology of Section 3(1), or the requirements of the Statute about a notice issued under Section 3(1). However, a Division Bench of this Court in **Bhim Sain Tyagi v. State of U.P. through D.M. Mahamaya Nagar12** found that there was conflict between the Division Bench decisions in **Ballabh Chaubey v. ADM (Finance), Mathura & Another13** and a decision of another Division Bench in

Subas Singh alias Subhash Singh v. District Magistrate, Ghazipur14 about the issue whether a notice under Section 3(1) of the Act of 1970, not in conformity with the Statute, could be challenged, without requiring the person put under notice to show cause against it, or, in other words, requiring him to resort to his legal remedy under the Statute. Both the Division Benches, that is to say, **Ballabh Chaubey** *(supra)* and **Subas Singh** *(supra)* had relied upon the Full Bench decision in **Ramji Pandey** to reach contrary conclusion about the maintainability of a writ petition to challenge a notice under Section 3(1) of the Act of 1970, that did not conform to the statutory requirements. Accordingly, the Division Bench hearing Bhim Sain Tyagi referred the following questions to a larger Bench (extracted from report of the decision of the full Bench in **Bhim Sain Tyagi)** :

(1) If the opportunity of show cause before the authority, who issues a show cause notice, not in conformity with the provisions of Section 3(1) of the U.P. Control of Goondas Act, could be considered an alternative remedy and,

(2) if a writ petition may be refused to be entertained only on the ground of existence of an alternative remedy even though the Court finds a particular notice illegal which makes consequential acts also illegal.

30. The aforesaid reference came up before a larger Bench of five Hon'ble Judges of this Court. The Full Bench in **Bhim Sain Tyagi v. State of U.P. through D.M. Mahamaya Nagar15** upheld the principles regarding requirements of the Statute about the import of the words "general nature of material allegations" and what these precisely mean, to render a notice under Section 3(1) of the Act valid. It must be remarked that the decision in **Bhim Sain Tyagi** was primarily on a reference about the maintainability of a writ petition under Article 226 of the Constitution, against a notice under Section 3(1) and not directly about the meaning of the expression "general nature of material allegations" occurring in that section. Nevertheless, it was pivotal to the decision about the maintainability of a writ petition against a notice under Section 3(1) of the Act, as to what the expression "general nature of material allegations" meant. It was in that context that their Lordships of the Full Bench in **Bhim Sain Tyagi** reviewed the precise connotation of the expression, and approved what was held in **Ramji Pandey** about the particulars in a notice under Section 3(1), that would satisfy what was postulated by the expression under reference. In **Bhim Sain Tyagi** it was held by their Lordships of the Full Bench :

26. The aforesaid anxiety of the Division Bench should be taken due note by the Executive and whenever a show cause notice is issued it should strictly comply with the provisions of the Act and rules. Once the decision of Ramjit Pandey has held the field in this State for more than 18 years there does not seem to be any necessity of taking a contrary view for the simple reason that all that the District Magistrate was expected by that decision to do is that the proposed Goonda should be made aware of "general nature of material allegation" against him, which is the requirement of the law. By asking the respondents to furnish to the proposed Goonda the general nature of material

allegations against him, the Full Bench in Ramji Pandey only required the law to be followed. None should doubt that once in the show cause notice the general nature of the material allegations exists, no Court interference with such a show cause notice is called for. Challenge to a valid show cause notice complying with the requirement of law has always failed and no scope of exercising provisions under Art. 226 of the Constitution of India exists in such matters. On the contrary, whenever general nature of material allegations are absent and the proposed goonda raises a grievance through a petition under Art. 226 of the Constitution of India, this Court's interference to the extent of the illegality of the notice being examined has been rightly upheld in Ramji Pandey but simultaneously it must be added that, always ensuring that, fresh notice may be issued by the District Magistrate in accordance with law. It has already been noticed above that in Subas Singh (1997 All Cri C 262) (supra) the respondents right to issue fresh notice in accordance with law was upheld and even in Harsh Narain (1972 All LJ 762) (supra) subsequent proceedings alone were quashed due to the defective notice.

27. In the administration of criminal law in our country one comes across two very important terms (1) charge and (ii) statement of accused. In fact these two are fundamental requirements of the principles of natural justice which have to be followed before an accused is condemned. One would shudder at the idea that an accused shall have stood condemned when the charge would only narrate that there is an FIR against him registered under S. 302, IPC at a police station or that in the statement of the accused only one question is put to him that an FIR has been lodged against him under S. 302 at a police station and that alone is held sufficient compliance of law. For action against a proposed goonda, the provisions contained in S. 3 of the Act, bereft of the technicalities and broader legal necessities in atrial of an accused under the Criminal Procedure Code, combine not only the "charge" and the "Statement of the accused", but also requires his "defence evidence". Thus the proposed goonda must get the fullest opportunity to defend himself. Therefore, the general nature of the material allegations must be disclosed to him by the District Magistrate.

31. The inevitable conclusion from the consistent position of the law regarding the requirements of a valid notice under Section 3(1) of the Act of 1970 is, thus, well settled, at least since **Harsh Narain** was decided and has not undergone any change. The law, as laid down in **Ramji Pandey** and otherwise consistent, is that in order to satisfy this statutory requirement about the notice carrying "general nature of material allegations" postulated under Section 3(1), there has to be some mention of what the person proposed to be proceeded with against has done, relevant to form an opinion under Clauses (a), (b) and (c) and sub-Section (1) of Section 3. It is also beyond doubt that post mention of the fact that the person put under notice has indulged in acts or done something which attracts Clauses (a), (b) and (c) of sub-Section (1) of Section 3, it is not sufficient compliance with the requirement of informing that person about the "general nature of material allegations" against him, that a list of case crimes or the first information reports registered against him be mentioned. No doubt, particulars of the allegations are not required to be detailed in a notice under Section 3(1) of the Act of

1970, such as the date, time and place of a specific act, as in the case of a charge, but some substance of it must be mentioned. If a person is sought to be proceeded with against on ground that he is a goonda under Clause (a) of Section 3(1), the general nature of material allegations may, for instance, indicate the number of acts that he has habitually committed, abetted or attempted, that constitute commission, attempt or abetment of an offence punishable under Section 153-B of the Penal Code, over a specified period of time, in a particular locality or part of the town. The date, time and place of occurrence of each of those repeated acts, that constitute the habitual commission of that offence, may not be mentioned in the fashion of a charge; but it would be no compliance with the quintessence of Section 3(1) of the Act of 1970, if a list of the case crimes alone were to be indicated in the notice as the raison de etre for the invocation of Clauses (a), (b) and (c) of sub-Section (1) of Section 3. The notice would be vitiated. For the further removal of any doubt, that the District Magistrates may harbour, this Court is minded to say that a notice under Section 3(1) of the Act must say something about the act, which the person put under notice has done, rather than listing the cases registered against him. If the mandated course is followed, the notice would certainly be valid.

32. Now, in the present case, a perusal of the notice shows that after a reference to Clauses (a), (b) and (c), all that is said by the District Magistrate in the notice under Section 3(1) is that four crimes are registered against the petitioner. Details of these have already been extracted hereinabove. It has been pointed out by the learned Counsel for the petitioners, during the hearing, that the beat report and the N.C.R. are one and the same matter, and not two different cases. Learned A.G.A. has not disputed the position for a fact.

33. Be that as it may, what is relevant is that nothing more than mention of the crime numbers is all that one finds, instead of the general nature of material allegations. A list of case crimes/first information reports/N.C.Rs. registered against the petitioner does not satisfy the test of a valid notice under Section 3(1) carrying the "general nature of material allegations". Truly, the notice, on the foundation of which the orders impugned have been made, is strictly in the teeth of the law laid down consistently by this Court; particularly, the Full Bench decision in **Ramji Pandey** and reiterated in **Bhim Sain Tyagi.** A notice under Section 3(1) of the kind that is the foundation of proceedings here has been held in **Bhim Sain Tyagi** and in earlier decisions also, to violate the minimum guarantee of the opportunity that the Statute envisages for a person proceeded with against under the Act of 1970. Thus, in this case, the impugned orders, founded as they are, on a notice under Section 3(1) of the Act, stand vitiated by defects that go to the root of the matter.

34. In the result, this petition **succeeds** and stands **allowed**. The impugned order dated 13.03.2019 passed by the District Magistrate, Firozabad, in Case No. 00049 of 2018, State of U.P. v. Pavan, under Section 3(1) of the Act of 1970 and the order dated 23.05.2019 passed in appeal by the Commissioner, Agra Division, Agra, in Case No. 00719 of 2019, Pavan Singhal v. State, under Section 6 of the Act of 1970, are hereby **quashed**.

35. Let this order be communicated to the Commissioner, Agra Division, Agra, the District Magistrate, Firozabad and the Superintendent of Police, Firozabad by the Joint Registrar (Compliance).

(2021)04ILR A50
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2021

BEFORE

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

Crl. Misc. W.P. No. 3320 of 2015

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

Counsel for the Petitioners:
Sri Ghan Shyam Mishra, Sri Ramesh Kumar Shukla

Counsel for the Respondents:
A.G.A., Sri Nabi Ullah

(A) Practice & Procedure - Discharge Application – Code of Criminal Procedure,1973 - Section 245 - At the time of consideration of the application, only probative value of the material has to be gone into and the Court is not expected to go deep into the matter. (Para 18)

For the applicability of Section 245(1) what is required is that all evidence that may be produced is taken and not that all evidence that the complainant intends to produce in the case has to be taken. The discretion of the Magistrate under Section 245(1) is to discharge the accused without affording further opportunity to the complainant to summon witnesses he is yet to produce. (Para 15)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Onkar Nath Mishra & ors. Vs State (NCT of Delhi) & anr. (2008) 2 SCC 561

2. St.of Mah. Vs Som Nath Thapa (1996) 4 SCC 659

3. St. of M.P. Vs Mohanlal Soni (2000) 6 SCC 338

4. Sheoraj Singh Ahlawat & ors. Vs St. of U.P. & anr. (2013) 11 SCC 476

5. St. of T.N. Vs Suresh Rajan & ors. (2014) 11 SCC 709

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

1. Heard learned counsel for the petitioners and Sri Arvind Kumar, learned A.G.A. appearing for the State respondent.

2 . The present petition under Article 226 of the Constitution of India was filed seeking a writ of certiorari for quashing of the orders dated 15.2.2014 and 11.12.2014 passed by the 1st Additional Chief Judicial Magistrate Varanasi and the Additional Sessions Judge, Court No. 8, Varanasi respectively, in terms of which the application of the petitioner seeking discharge was rejected and the revision filed thereagainst was also dismissed.

3. Upon the matter being taken up, on 06.02.2015, the parties were referred to mediation. The order sheet indicates that as per the report received from the mediation centre dated 09.08.2019, the mediation was completed but no agreement could be arrived at between the parties.

4. With the consent of counsel for the parties, the petition is taken up for final disposal.

5. Upon an order passed on an application under Section 156 (3) Cr.P.C.,

filed by the respondent no. 2, a first information report was registered on 16.09.2006 as Case Crime No. C-33/06 under Sections 498-A, 323, 504 I.P.C. and 3/4 Dowry Prohibition Act against the petitioners. The investigation was concluded and a final report dated 05.11.2006 was submitted. The respondent no. 2 submitted a protest petition on 12.09.2008 whereupon the learned Magistrate rejected the final report and registered Case No. 112 of 2012. The complainant and the witnesses were examined under Sections 200 and 202 and the petitioners were summoned to face the trial.

6. An application for discharge under Section 245 Cr.P.C. was moved which was rejected by the Additional Chief Judicial Magistrate Varanasi vide order dated 15.02.2014. The revision filed thereagainst was also dismissed by the Additional Sessions Judge in terms of judgment and order dated 11.12.2014. Aggrieved with the aforesaid orders the present petition has been filed.

7. The principal ground raised in the petition is that the evidence on record does not disclose that any offence is made out against the petitioners and the courts below have failed to consider the facts of the case and the material evidence while rejecting the discharge application moved by the petitioners. It is further submitted that the petitioners have been falsely implicated and that the entire proceedings are aimed at causing harassment to them.

8. The aforementioned contentions have been controverted by the learned A.G.A. appearing for the State respondent and the counsel for the respondent no. 2 by submitting that at the stage of proceedings under Section 245 the Magistrate is only required to consider the evidence prima facie and is not required to go into the evidence in full details. It is submitted that the order passed by the courts below do not suffer from any error or illegality and that the present petition is liable to be dismissed.

9. In order to appreciate the rival contentions the relevant statutory provision may be adverted to. For ease of reference Section 245 is being reproduced below:-

"245. When accused shall be discharged.- (1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

10. In a warrant case instituted otherwise than on a police report, the Magistrate may under Section 244 take all such evidence as may be produced in support of the prosecution. It is at this stage, upon taking all the evidence referred to in Section 244, if the Magistrate considers, for reasons to be recorded that no case against the accused has been made which, if unrebutted, would warrant his convocation, the Magistrate shall discharge him.

11 . The Magistrate, at this stage, is only required to consider the evidence

prima facie with a view as to whether the evidence, if unrebutted, would result in conviction.

12. The nature of evaluation to be made by the court at the stage of framing of charge came up for consideration **in Onkar Nath Mishra and others Vs. State (NCT of Delhi) and another1,** and referring to the earlier decisions in **State of Maharashtra Vs. Som Nath Thapa2, and State of M.P. Vs. Mohanlal Soni3**, it was held that at that stage the Court has to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged and it is not expected to go deep into the probative value of the material on record. The relevant observations made in the judgment are as follows :-

"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

xxx

13. Then again in State of Maharashtra Vs. Som Nath Thapa, a three-Judge Bench of this Court, after noting three pairs of sections viz. (i) Sections 227 and 228 insofar as sessions trial is concerned; (ii) Sections 239 and 240 relatable to trial of warrant cases; and (iii) Sections 245(1) and (2) qua trial of summons cases, which dealt with the question of framing of charge or discharge, stated thus: (SCC p. 671, para 32)

"32...if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be

gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

14. In a later decision in State of M.P. Vs. Mohanlal Soni, this Court, referring to several previous decisions held that: (SCC p. 342, para 7)

"7. The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. "

13. Reiterating a similar view **in Sheoraj Singh Ahlawat and others Vs. State of Uttar Pradesh and another4,** it was held that the Court trying the case can direct discharge only for reasons to be recorded by it and only if it considers the charge against the accused to be groundless.

14. The scope of the exercise of power and jurisdiction with regard to discharge again came up for consideration in **State of Tamil Nadu Vs. N. Suresh Rajan and others5,** and it was held that no mini trial is contemplated at the stage of considering the discharge application and only probative value of the materials has to be gone into to see if there is a prima facie case for proceeding against the accused. The observations made in the judgment in this regard are as follows :-

"29...It is trite that at the stage of consideration of an application for discharge, the Court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the Court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. "

15. The scope of powers under Section 245 Cr.P.C. is therefore limited and the prayer for discharge can be allowed only if the entire evidence, even if it remains unrebutted, no offence whatsoever is made out. For the applicability of Section 245 (1) what is required is that all evidence that may be produced is taken and not that all evidence that the complainant intends to produce in the case has been taken. The discretion of the Magistrate under Section 245 (1) is to discharge the accused without affording further opportunity to the complainant to summon witnesses he is yet to produce.

16. Sections 245 and 246 are supplemental to each other and before drawing the presumption under Section 246 and framing of charge, the test of prima facie case is required to be applied which would mean a case established by prima facie evidence.

17. Section 245 (2) empowers the Magistrate to discharge the accused at any previous stage of the case, if for reasons to be recorded, he considers the charge to be groundless. In order to exercise jurisdiction under sub-section (2), there must be sufficient ground or material on record for coming to the conclusion that the charge is groundless and where a *prima facie* case is made out discharge of the accused under sub-section (2) would not be proper.

18. At this stage of consideration of an application for discharge, only probative value of the material has to be gone into and the Court is not expected to go deep into the matter. The scope of consideration by the Court would be as to whether there is ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out.

19. In the case at hand, the Additional Chief Judicial Magistrate while considering the application filed under Section 245 (2) Cr.P.C. has duly taken note of the evidence recorded in support of the prosecution under Section 244 to record a conclusion with regard to the sufficiency of material for framing of charge taking into note that at this stage only a *prima facie* case is required to be seen. The Magistrate has held that on the basis of the material on record it cannot be said that no case is made out against the accused and accordingly, has proceeded to reject the application seeking discharge.

20. The revisional court has duly taken note of the fact that the Magistrate upon duly looking into the material on record has come to the conclusion that there is sufficient material to proceed for framing of charge and has rejected the discharge application for the reason that only a *prima facie* case was required to be seen at that stage. Taking into consideration the aforesaid, the Additional Sessions Judge exercising revisional powers has held that there is no material irregularity or jurisdictional error in the order passed by the Magistrate and accordingly has rejected the revision.

21 . Counsel for the petitioner has not been able to point out any material error, irregularity or perversity in the orders passed by the courts below so as to warrant interference.

22. The contention sought to be put forward that the petitioners have been falsely implicated or that on the basis of the evidence on record no offence is made out against them, cannot be considered at this stage of the proceedings where only the test of a prima facie has to be applied to consider the evidence with a view as to whether the evidence, if unrebutted, would result in conviction.

23. For the reasons aforestated, this Court is not inclined to exercise its extraordinary jurisdiction in the matter.

24. The petition stands accordingly dismissed.

(2021)04ILR A54
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2021

BEFORE

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

FAFO No.- 2905 of 2014

Smt. Rashmi Jain & Anr. ...Appellants
Versus
Smt. Seema Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri Vidya Kant Shukla

Counsel for the Respondents:
Sri Mansoor Ahmad, Sri Pranjal Mehrotra, Sri Ram Shiromani Yadav

A. Civil Law - Motor Vehicles Act,1988 - Section 41(2)-disbursements needs fresh guidelines- the guidelines in Susamma

Thomas are being blindly followed, cause more trouble these days to the claimants as the tribunals are overburdened with the matter for each time if they require some money, they have to move tribunal-the parties for their money have to come court particularly to High Court-claimaints can take care of their money-rigid stand now be given way- people have bank accounts even in village, therefore, what is the purpose of keeping money in fixed deposits in banks where a person who has suffered injuries or has lost his kith and kin, is not able to see the color of compensation-respondents shall jointly and severally liable to pay additional amount.(Para 1 to 24)

The appeal is partly allowed. (E-5)

List of Cases Cited:-

1. Khenyei Vs New India Assurance Company Ltd & ors., (2015) LawSuit SC 469

2. Oriental Insurance Company Ltd. Vs Sudhakaran K.V. & ors. ,(2008) AIR SC 2729

3. Amrit Bhanushali Vs N.I.C., (2012) 3 ACCD 1133 SC

4. New India Assurn. Co.Ltd. Vs Smt Shanti Pathak & ors.(2007) 4 TAC 17 SC

5. Shakti Devi Vs New India Assurn. Co.Ltd. & anr. (2011) 1 TAC 4

6. National Insurance Co. Ltd. Vs Paranay Sethi & ors.,(2017) 0 SC 1050

7. Munna Lal Jain & anr. Vs Vipin Kumar Sharma & ors. (2015) 6 SCALE

8. National Insurance Co. Ltd. Vs Mannat Johat & ors., (2019) 2 T.A.C. 705 S.C.

9. A.V. Padma & ors. Vs R. Venugopal, (2012) 3 SCC 378

10. G.M., Kerala St. Rd. Trans. Corpn., Trivandrum Vs Susamma Thomas & ors., (1994) AIR SC 1631

11. Zeemal Bano & ors. Vs Insurance Co. (2020) TAC(2) 118

12. Smt. Sudesna & ors Vs. Hari Singh & anr, F.A.F.O. No 23 of 2001

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

1. Heard learned counsel for the parties and perused the record.

2. This appeal has been preferred against the Judgment and award dated 30.7.2014 passed by the Motor Accident Claims Tribunal, Kanpur Nagar (hereinafter referred to as "the MACT') in Motor Accident Claim Petition No. 252 of 2011 filed by Smt. Rashmi Jain and another for enhancement of the quantum of compensation.

3. Brief facts as culled out from the record are that deceased with others was travelling in Spark Car bearing registration No. HR 01 AA 3660. Kumari Malini Jain (deceased) along with Rohit, his wife Shivani and son Shubham was going to Nazibabad from Delhi on 2.10.2010 when on the way, at about 10 a.m., driver of car bearing registration No. U.P. 20 W 7481 driving his vehicle rashly and negligently dashed with their car from the front as a result of which all the persons received severe injuries. All were rushed to Puja Hospital Nazibabad where they were told to get them treated in a better equipped hospital. The patients were taken to Meerut Hospital. Malini Jain succumbed to injuries on the way to Meerut. In the accident, Rohit sustained fracture in right leg, Shivani sustained fracture in left leg and all the three received injuries on other parts of

the body too. Deceased was an intelligent and hale and hearty girl, who was posted as Assistant Manager and used to earn Rs.30,000/- per mensem. She had obtained degree of M.B.A. from M.S.W. and X.L.R. I., Jamshedpur. The claimants filed claim petition claiming a sum of Rs.92,30,000/- as compensation from all the respondents.

4. The Tribunal heard the parties and, vide Judgment and award dated 30.7.2014, awarded a sum of Rs.9,78,500/- along with 7 per cent simple rate of interest from the date of presentation of claim petition till the date of last payment of awarded amount.

5. The appellants are parents of the deceased Malini Jain, who was 35 years of age when she was travelling in the car driven by her brother and met with an accident with the car owned by respondent No. 1. The fateful accident occurred on 2nd of October, 2010. Issues, which are not in dispute, are that the accident took place between two vehicles and negligence of both the drivers was decided by the Tribunal to be 50% each. It is an admitted position of fact that neither the deceased contributed to the accident which took place nor she was a tort feasor. It is not in dispute that the vehicle owners have not challenged the award and decree till date. The Insurance companies have also not challenged the decree and award but respondent No. 4, namely, The New India Assurance Company Ltd., which has been exonerated by the Tribunal, has contended that as appeal under Section 173 of the Motor VehiclesAct 1988 is continuation of original proceedings, they have right to defend and contend that there was also breach of condition of insurance contract by owner and driver

6. The factual datas as further culled out and important for our purposes are that the deceased was a divorcee. She was in the age bracket of 31-35 years when the accident occurred as narrated above i.e., on 2nd of October, 2010. The driver of other vehicle died in the accident. The driver of the vehicle in which the deceased was travelling suffered severe injuries, who was real brother of deceased. Other inmates of the vehicle were also injured. The parents at the time of accident in the year 2010 were aged 52 and 54 years respectively. The claimants claimed a sum of Rs. 92,30,000/- as the deceased was Assistant Manager and earning Rs. 30,000/- per month. She obtained her M.B.A. degree from M.S.W. and X.L.R. I., Jamshedpur.

7. The accident having occurred is not in dispute. On notice being served, the respondents appeared and filed their reply before the Tribunal. The claimants also filed documentary evidence. Respondent No. 2- M/s Chola Mandalam M.S. General Insurance Company, as usual, filed reply denying that the vehicle was insured with them. They contended that the income of the deceased was not proved. They contended that the F.I.R. was a delayed F.I.R. and they were not liable to pay any amount though the copy of policy being filed. They contended that the vehicle bearing Registration No. U.P. 20 W 7481 was not insured with them and that U.P. 20 W 7481 was wrongly made a party. In the alternative, they contended that the petition was not filed as per the pro forma and there is breach of policy conditions. Unfortunately, though the accident occurred in 2010 much after 1988 when the Motor Vehicles Act came into force, they have relied on section 60 of the Insurance Act, 1938 and contended that the Insurance Company have right to defend themselves and that the driver of the other vehicle did not have proper driving licence and

whether any medical policy or personal accident policy was taken or not should also be declared. Respondent No. 3-Shivani Bahel has accepted averments made in paragraphs 1and 5 of the claim petition but has denied the correctness of averments made in paragraphs 6 and 7 of the claim petition. It is submitted that the vehcile was insured with the respondent No. 4 but the sole negligence was that of the driver of the U.P.20 W 7481 as he drove the vehicle rashly and negligently and his death shows that he was totally negligent. Her husband , i.e., driver Rohit Jain also were injured and if there is any liability it would be that of the Insurance Company.

8. Respondent No. 4 Insurance Company has denied their liability and submitted that the vehicle was not driven as per the policy conditions and that there was breach of section 41(2) of the Motor Vehicles Act, 1988.

9. The Tribunal framed five issues. Issue nos. 1 and 4 are inter-connected issues regarding negligence of drivers of U.P. 20 W 7481 and HR 1 AA 3660 in which the deceased was travelling with her family members. We are not concerned with the correctness of the said issues as the appellants have not challenged the issue of negligence decided by the Tribunal and, therefore, we also do not delve into as to the factum of either negligence. The drivers were held to be equally neglegent namely 50% each.

10. Learned counsel for the appellants-claimants has heavily relied on the Judgment of the Apex Court in the case of **Khenyei vs. New India Assurance Company Ltd and others, 2015 LawSuit (SC) 469** so as to contend that no amount could be deducted from compensation to which the claimants are entitled as qua the deceased it was a case of composite negligence and not of contributory negligence. Learned counsel for the opposite party No. 4 has heavily relied on Judgment of the Apex Court rendered in the case of **Oriental Insurance Company Ltd. vs. Sudhakaran K. V. and others, A.I.R. 2008 Supreme Court 2729** to contend that the deceased was not covered in the policy.

11. The appellants-claimants have challenged the award and decree on several counts. One that though the driver of the vehicle in which the deceased was travelling had contributed to the accident having taken place, the Tribunal could not have deducted 50% from the amount payable to the parents of the deceased as neither the deceased had contributed to the accident nor she was the driver. She was an occupant of the vehicle which was insured with the respondent No. 4. Secondly, the claimants have also challenged non-grant of any amount under the head of future loss of income as, according to the Tribunal, the deceased was in permanent employment and, as such, the income, at the time of her death, had to be added by 50% which had to be considered as her future loss of income also. As far as the question of furture loss of income is concerned, the deceased may not be in Government employment, the decision of the Apex Court and that also in Sarla Varma does not specify whether it should be a government job or not. Thirdly multiplier has wrongly been applied based on the age of the parents which is against the Judgment of the Apex Court rendered in the case of **Amrit Bhanushali Vs. N.I.C., 2012 (3)**

ACCD 1133 (SC). The Tribunal has wrongly relied on the Judgments of Apex Court rendered in the case of **New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and others (Three Judges Bench), 2007 (4) TAC 17 (SC) and Shakti Devi Vs. New India Assurance Company Ltd and another, 2011 (1) TAC 4** where multiplier is granted on basis of claimants and not deceased.

12. The claimants have further contended that the income of the deceased was rightly assessed to be Rs.30,016/- per mensem, which is not in dispute. Deduction of 1/3rd should have been been towards personal expenses of deceased as per the second Schedule of the Motor Vehicles Act 1988. It is further contended that the Tribunal has awarded only Rs.10,000/- towards compensation for loss of love and affection and funeral expenses. Nothing has been awarded towards filial consortium of the parents who have lost their daughter.

13. Per contra, learned counsel for the respondent submitted that the compensation and rate of interest awarded by the Tribunal is just and proper and does not call for any interference by this Court.

14. Having considered these facts and the fact that the income of Rs.30,016/- as decided by the Tribunal is not in dispute as, according to the Form 16 produced, income of the deceased per year was Rs.3,54,000/-, hence, we can consider her income to be Rs.30,000/-.per month . Unfortunately though she was in employment and below the age of 40 years, the Tribunal did not think proper to grant any amount under the head of future loss of income which is bad in law. The amount of future loss of income in the year of judgment was 50% of the income earned. The Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and others, 2017 0 Supreme (SC) 1050** has reiterated the concept of future loss. The amount of income has to be last pay. The deceased was a salaried person below 40 years, therefore, we would add 50% towards the said head looking to the job qualification and nature of work performed by the deceased. As far as the deduction is concerned, we are unable to accept the submission of the learned counsel for the appellant that it should be 1/3rd. As deceased was a divorced lady, therefore, 1/2 would be proper deduction. This takes us to the question of multiplier, namely, whether it should be as per the age of parents or the age of the deceased. The said issue is no longer res integra in view of the decision in Pranay Sethi **(supra)** and the judgment in **Munna Lal Jain and another Vs. Vipin Kumar Sharma and others, 2015 (6) SCALE 552** and it is the age of the deceased which should be considered for the purpose of consideration of multiplier. In our case, it should be 16 looking to the age of the deceased who was in the age bracket of 31 to 35 years, which is not in dispute. Lastly, we are of the view that the amount under the head of filial consortium would be Rs.50,000/- towards the parents especially mother. Compensation towards funeral expenses is awarded a Rs.15,000/-.

15. The appellants had the trauma of emergency treatment of all the four persons out of whom Malini Jain breathed her last. Medical bills which have been produced are amounting to Rs.3,000/- which has not been considered by the Tribunal. We award said amount rounded upto Rs.5,000/-.

16. Hence, the compensation payable to the appellants in view of the decision of

the Apex Court in Pranay Sethi **(Supra)** is computed herein below:-

i. Income: Rs.30,000/- per month

ii. Percentage towards future prospects : 50% namely Rs.15,000/-

iii. Total income : Rs. 30,000 + 15,000 = Rs. 45,000/-

iv. Income after deduction of personal expenses will be 1/2 : Rs. 22,500/-

v. Annual income : Rs.22,500 x 12 = Rs.2,70,000/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.2,70,000/- x 16 = Rs.43,20,000/-

viii. Amount under filial consortium heads: Rs.50,000/-

ix. Amount under funeral expenses head : Rs.15,000

x. Amount under medical expenses: Rs.5,000/-

xi.Total compensation : Rs. 43,90,000/-

Liability:-

17. As far as the appellants are concerned, the deceased was not a tort feasor. The Tribunal has exonerated respondent nos. 3 and 4 only on the ground that the driver driving the vehicle owned by respondent no. 3 insured by respondent no.4 was also negligent and, therefore, 50 per cent has been deducted. The decision of the Apex Court in Khenyei (supra) will enure for the benefit of the appellants as it is open to the claimants to recover entire compensation from one of the joint tort feasor as this is not a case of contributory negligence but is a case of negligence which can be said to be composite qua the deceased. The New India Assurance Company Ltd. is admittedly insurer of the car in which the deceased was travelling. Hence, we hold that the respondents would be jointly liable for their portion of amount. As far as the respondent no.2 M/s Chola Mandalam M.S. General Insurance Company Ltd. is concerned, it is conveyed that 50% of the amount, which was awarded, has already been deposited by them.

18. As this is an appeal under Section 173 of the Motor Vehicle Act, 1988, which is continuation of the proceedings, the New India Insurance Company Ltd. has raised a technical stand that liability of the Insurance Company cannot be extended to death of rider in car. This ground is taken but without any strong basis the reason being that it has not been proved that vehicle was not comprehensively insured. The documentary evidence, which we have perused from the record comprises of document at Ext. 31 Ga-1/1, registration of the vehicle; document at Ext. 31 Ga-1/3; the insurance policy of The New India Assurance Company Ltd.; and document at Ext. 31 Ga-1/4, copy of driving licence of Rohit Jain, which go to show that the vehicle was comprehensively insured for which the Insurance Company has insured the owner. Copy of the policy shows that it was insured for 4 +1 passangers and as is clear from the form, it was a comprehensive policy for which Rs.8,832 were taken as premium. The vehicle was bought in the year of accident, i.e., six months before the fateful accident occurred. It was insured from 6.4.2010 to 5.4.2011. Hence, in view of the submission of the learned counsel for apellants and reliance placed on the decision of Khenyei Vs. New India Assurance Company Ltd. and others **(supra)** cannot be of any aid to the Insurnce Company once it is held that the driver had proper driving licence. In

deducting 50% of compensation, we have considered the same as oral submissions were made and it was contended that they did not challenge as respondent no.4 was exonerated. This feeble argument is not supported by any documentary evidence which shows that the said Judgment would not come to the help of the respondent Insurance Company. In that view of the matter, we are unable to accept the submission of the counsel for the respondent no.4 that the deduction is just and proper. Reliance placed on the decision titled Oriental Insurance Company Ltd. vs. Sudhakaran K. V. and others **(Supra)** cannot aid the insurance company the reason being the same was concerning non insurable right of a pillion rider where the policy was a Act policy. In the case on hand the non grant of 50% of compensation payable to claimants is because the driver of the vehicle involved was held negligent. This reasoning is against the settled principle of awarding compensation in case of composite negligence where both tort fessors would be liable and in turn the Insurance Company, which insured the vehicle and where it is proved that there is no breach of policy.

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

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

20. At this stage, it has been submitted by Sri Shukla, learned counsel for the appellants that eleven years have elapsed, the parents are at the fag end of their lives, therefore, on deposit of additional amount being made, this Court may not direct deposit of said amounts in fixed deposits and though this Court has time and again directed the Insurance Companies not to deduct TDS, the same is being deducted.

21. We deem it fit to rely on the Judgment of the Apex Court in the case **of A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378** wherein the Apex Court has considered the Judgment rendered in **General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631**. Paras 5 and 6 of A.V. Padma's Judgment read as under:-

"5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate

claimants and widows and in the case of semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits.

However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

6. In this case, the victim of the accident died on 21.7.1993. The award was passed by the Tribunal on 15.2.2002. The amount of compensation was enhanced by the High Court on 6.7.2006. Neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the Tribunal on 7.1.2008. In the application filed by the appellants on 19.6.2008 seeking withdrawal of the amount without insisting on investment of any portion of the amount in long term deposit, it was specifically stated that the first appellant is an educated lady who retired as a Superintendent of the Karnataka Road Transport Corporation, Bangalore. It was also stated that the second appellant Poornachandrika is a M.Sc. degree holder and the third appellant Shalini was holding Master Degree both in Commerce and in Philosophy. It was stated that they were well versed in managing their lives and finances. The first appellant was already aged 71 years and her health was not very good. She required money for maintenance and also to put up construction on the existing house to provide dwelling house for her second

daughter who was a co-owner along with her. The second daughter was stated to be residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. It was further stated in the application that the first appellant was obliged to provide a shelter to the first daughter Poornachandrika. It was pointed out that if the money was locked up in a nationalised bank, only the bank would be benefited by the deposit as they give a paltry interest which could not be equated to the costs of materials which were ever increasing. It was further stated that the delay in payment of compensation amount exposed the appellants to serious prejudice and economic ruin. Along with the application, the second and third appellants had filed separate affidavits supporting the prayer in the application and stating that they had no objection to the amount being paid to the first appellant.

7. While rejecting the application of the appellants, the Tribunal did not consider any of the above-mentioned aspects mentioned in the application. Unfortunately, the High Court lost sight of the said aspects and failed to properly consider whether, in the facts and circumstances of the case, there was any need for keeping the compensation amount in long term fixed deposit. "

22. Thus, it goes without saying that, in our case, the oral prayer of Sri Shukla requires to be considered as the guidelines in A.V. Padma and others **(supra)** was in the larger interest of the claimants. Rigid stand should now be given way. People even rustic villagers' have bank account which has to be compusorily linked with Aadhar, therefore, what is the purpose of keeping money in fixed deposits in banks where a person, who has suffered injuries or has lost his kith and kin, is not able to see the colour of compensation. We feel that time is now ripe for setting fresh guidelines as far as the disbursements are concerned. The guidelines in Susamma Thomas **(supra),** which are being blindly followed, cause more trouble these days to the claimants as the Tribunals are overburdened with the matters for each time if they require some money, they have to move the Tribunal where matters would remain pending and the Tribunal on its free will, as if money belonged to them, would reject the applications for disbursements, which is happening in most of the cases. The parties for their money have to come to court more particularly up to High Court, which is a reason for our pain. Reliance can be placed on Susamma Thomas (supra) in matters where claimants prove and show that they can take care of their money. In our view, the Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents. Recently, the Jammu and Kashmir High Court was faced with similar situation in the case of **Zeemal Bano and others Vs. Insurance Company, 2020 TAC (2) 118.**

23. One of usof Division Bench, namely, Dr. Justice Kaushal Jayendra Thaker in Single Bench of this Court has held that the Insurance Company should not deduct any amount under T.D.S in the case of **Smt. Sudesna and others Vs. Hari Singh and another, F.A.F.O. No.23 of 2001,** decided on 26.11.2020, which should be strictly adhered to. Relevant part of the said Judgment is as under:-

" It is further orally conveyed that even if the amounts will be deposited, the Insurance company normally deducts TDS. The judgement is reviewed and at the end.

"I. On depositing the amount in the Registry of the Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any.

II. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment is not passed because applicants/claimants are neither not illiterate and in New India Assurance Co. Ltd. Vs. Hussain Babulal Shaikh and others, 2017 (1) TAC 400 (Bom.).

III. View of the ratio laid down by Hon'ble Gujarat High Court, in the case of Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount (as directed in para No. II) without producing the certificate from the concerned Income-Tax Authority.""

24. In view of the above, the appeal is **partly allowed**. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondents shall jointly and severally liable to pay additional amountwithin a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. It is further directed that on deposit of the amount, the Tribunal shall disburse the entire amount by way of account payee cheque or by way of RTGS to the account of the appellants within 12 weeks from the date the amounts are deposited by the respondents. Record be sent back to the Tribunal.

25. A copy of this Judgment be circulated by the learned Registrar General to the Tribunals in the State for guidance after seeking approval of the Hon'ble the Chief Justice.

(2021)04ILR A63
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

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

FAFO No.- 3160 of 2018

(Deceased)Satish Chand Sharma & Ors. ...Appellants

Versus

Manoj & Anr. ...Respondents

Counsel for the Appellants:
Sri Abhishek, Sri Umesh Kumar Singh

Counsel for the Respondents:
Sri Nishant Mehrotra

A. Civil Law - Motor Vehicles Act, 1988 - Section 170 & Code of Civil Procedure,1908-Order 9 Rule 13-original claimant passed away-family members awarded further sum of money for mental trauma and incidental expenses-execution

could have been decided considering the objection of owner-decree should have been set aside only qua that portion as the remedy was for not making payment though owner was the primary debtor but there was a contract of indemnity with the Insurance Company, the relevant consideration was this factor and not the challenge to compensation-where the decree is joint and divisible, the whole decree need not be set aside-award and decree passed by the Tribunal shall stand modified.(Para 1 to 62)

B. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damages. the damages so awarded should be adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of wrong. Compensation is , therefore, required to be paid for prospective pecuniary loss i.e. future loss of income/dependency suffered on account of the wrongful act. however, no amount of compensation can restore the lost limb or the experience of pain and suffering due to loss of life. loss of a child, life or a limb can never be eliminated or ameliorated completely. therefore, in addition to pecuniary losses, the law recognizes that payment should also be made for non-pecuniary losses on account of , loss of happiness, pain, suffering and expectancy of life etc.(Para 39)

The appeal is disposed off.(E-5)

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2. UPSRTC Vs Km. Mamta & ors, (2016) AIR SCC 948

3. Sanjiv Mishra Vs Ramashcharya Verma & ors., (2010) 4 T.A.C. 113(All.)

4. Madhuben Maheshbhai Patel & ors. Vs Joseph Francis Mewan & 1 anr, (2014) Law Suit (Guj) 2214

5. Samarjeet Singh Vs Khursheed Khan & ors., (2020) 12 ADJ 168

6. Vijay Singh Vs. Shanti Devi & ors., (2017) AIR SC 5672

7. Jenabai Wd/O Abdul Karim Musa Vs Guj. St. Rd. Transport Corpn. , Ahmedabad, (1991) 1 GLR 352

8. Shanti Bai & ors. Vs Charansingh Singh & ors. (1998) ACJ 848

9. Saruyaben Harisinghbhai Bilwal V/s Ataullakhan Mehtabkhan Lalkhan pathan (2001) 3 G.L.R.2029.

10. Surpal Singh Lahubha Gohil Vs Raliyatbahen Mohanbhai Savlia,FAFO No..301 of 1990

11. Smt. Hansaguti P. Ladhani Vs The Oriental Insurance Company Ltd., (2007) 2 GLH 291,

12. Smt. Sudesna & ors. Vs Hari Singh & anr.,FAFO No. 23 of 2001

13. Mithusinh Pannasinh Chauhan Vs Guj. St. Rd. Trans. Corpn. (2015) 17 SCC 529

14. ICICI Lombard G.I.C. Vs M.D. Davasia & anr.

15. Lalan D. & ors. Vs. Oriental Insurance Company Ltd. (2014) 14 SCC 396

16. Kirti Vs Oriental Insurance Company (2021) 1 TAC 1

17. U.O.I. Vs A.S. Sharma, (1993) 1 GLH1044

18. Anita Sharma Vs New India Assurn. Comp. Ltd. (2021) 1 SCC 171

19. Sunita & ors. Vs Raj. St. Rd. Trans. Corpn. & anr., (2019) LawSuit (SC) 190

20. Mangla Ram Vs Oriental Insurance Company Limited & ors. (2018) 5 SCC 656

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

22. National Insurance Co.Ltd. Vs Smt. Vidyawati Devi & 2 ors., FAFO No. 2389 of 2016

23. Erudhyapriya Vs St Exp. Trns. Corp. Ltd. (2020) 2 TAC1

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

25. A.V. Padma & ors. Vs R. Venugopala & ors. (2012) 3 SCC 378

26. G.M., Kerala St. Rd. Trans. Corpn., Trivandrum Vs Susamma Thomas & ors., (1994) AIR SC 1631

27. Zeemal Bano & ors. Vs Insurance Co. (2020) TAC(2) 118

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

1. Heard Shri Abhishek, learned counsel for appellants and Shri Nishant Mehrotra appearing on behalf of the Insurance Company. None appears for the owner of the vehicle. We had partly allowed the appeal but had kept reasons to be penned later on as the Courts were closing for the Holi Vacations. We now Penn our reasons for allowing the appeal, filed at the behest of claimants who have been put to great injustice by the orders of the ld officers manning the Tribunals, from 2010, while losing sight of the beneficial provisions of Motor Vehicles Act, 1988 (hereinafter referred to as 'Act').

2. After the judgment was dictated we directed the office to upload the same on 14.4.2021. But immediately after directing the judgment to upload, we thought of again going through the judgment for our satisfaction when we read the judgment, unfortunately, while going through the manuscript, we found that there were certain repetitions, the paraphrasing was not proper and therefore, we directed the office not to issue the certified copy and delete the same on 14.4.2021 itself and we have corrected the manuscript again without changing the final result. This was necessary so as to maintain a better chronology and make it a more comprehensive and readable judgment. We can say that these changes were necessary to make it a more readable judgment interpreting the provisions of Order 9 Rule 13 of Code of Civil Procedure 1908 herein after referred as C.P.C. and for directing the Tribunals, on the course which they should adopt in such cases.

THE CHANGES CAN BE SAID TO BE MORE OF STYLE IN WRITING SO THIS MENTION AS SOME MIGHT HAVE DOWNLOADED AND READ THE JUDGMENT UPLOADED

3. This appeal, at the behest of the claimant (now deceased) through his legal representatives, challenges the judgment and decree dated 4.5.2018 passed by the Motor Accident Claim Tribunal/Additional District Judge, Court No. 15, Ghaziabad (hereinafter referred to as "Tribunal') in M.A.C.P. No. 516 of 2005 (Deceased Satish Chand Sharma and others Vs. Manoj and another. The appeal is preferred for enhancement of the compensation awarded under the impugned award and that with a prayer that this Court be pleased to allow the claim petition in toto by exercising powers under section 173 of the Act..

4. Recently the Apex Court in **Sudarsan Puhan Vs.Jayanta Ku. Mohanty and another etc.,reported in AIR 2018 SC4662**, reiterated the observations made in the case of **UPSRTC**

Vs. Km. Mamta and others, reported in AIR 2016 SCC 948, directing that as appeal is continuation of the earlier proceedings, High Court is under legal obligation to decide all the issues raised and decide the lis and decide appeal by giving reasons.

5. Essential facts and chronology of events giving rise to the instant dispute are noted at the outset. We feel it necessary to narrate the chronology of events which would show that the Tribunal has committed illegality in passing the impugned award which requires to be readdressed by this Court in favour of the claimants who represent the estate of the injured who died subsequent to the passing of award and decree in in his favour in the year 2010. The accident occurred on 22.2.2005. The claimant was admitted in hospital from the date of accident and, thereafter was discharged. The claimant filed claim petition on 14.9.2005 after being discharged from hospital. On petition being filed, summons were issued to respondents. Though disputed by owner, the respondent No.1-owner was served with the summons on 13.1.2007 as mentioned by the Tribunal in its judgment dated 27.9.2010. The matter proceeded ex parte against the owner namely Manoj Kumar. The owner and driver of the offending vehicle did not appear before the Tribunal. The Insurance Company sought adjournment till 2008 and did not file their reply. The reply one of denial was filed in the year 2009. The evidences were recorded from 2009 to 2010. On 08.07.2010 the Insurance Company was permitted to contest the petition under Section 170 of the Motor Vehicles Act, 1988. The Tribunal passed award on 27.09.2010 in favour of claimant .The Tribunal came to the conclusion that as the owner did not appear it could not be held that the vehicle was insured on the date of accident i.e. 22.2.2005.It is admitted position of fact that though the policy was produced, the Tribunal passed award only against the owner on 27.09.2010 as no other documents were produced. thereby did not hold respondent No.2 Insurance Company liable to satisfy the award and pay the claimant.

6. The Tribunal vide award dated 27 9 2010 awarded medical expenses for the treatment. In the judgment and award dated 27.09.2010 where all the documents were proved, the Tribunal granted a sum of Rs. 20,16,500/-(rounded up) as medical expenses on the basis of the documents which were produced and awarded a sum of Rs. 63,250/- for not being able to attend the services for 163 days due to injuries, under other head under pecuniary as also non pecuniary damage,did not grant any amount for the future loss or under other admissible heads, and granted only a further sum of Rs. 5.000/- for pain shock and suffering.

7. The next important aspect to be noted for our purpose is that the claimant preferred execution petition being 34 of 2011 against the owner. Notice /summons came to be issued to the owner but the owner did not respond The owner did not appear before the executing court. The owner appeared after two years namely on 16.4.2013 after issuance of attachment warrant against him,the owner filed application under Order 9 Rule 13 of C.P.C. contending that he was never served with any summons/notice and came to know of the proceedings only when the clerk from the office of Tehsildar came with the warrant and hence filed application before the tribunal to set aside

the ex parte decree-as his vehicle was insured with respondent no 2 who would be liable to satisfy the decree. The Tribunal in application 14 of 2013 filed not in execution petition but in macp no 516 of 2005 (disposed) granted ex parte stay of execution of warrant and decree on 25 4 2013. The matter thereafter was adjourned from time to time and as the record shows till 2015 except adjourning the matter no further steps were taken and then came to be listed again on 29.4.2016 namely after six years of passing of the decree. The tribunal allowed the application under Order IX Rule 13 of C.P.C. From the said date, the matter again went on being listed and thereafter the legal heirs were added as original claimants. The record shows that when the application was filed in the year 2013, the documents showing that the vehicle was insured were also on record and were produced. The respondent was permitted to file his reply which he filed on 29.11.2016. On 5.1.2017, an application was moved on coming to know that the proceeding was going on. On 30.5.2017 an application was made that the deceased died out of the injuries sustained due to the accident and medical evidence was also filed by the claimants and doctors were examined on oath. The last bill of OPD of 1.8.2013 was also filed. It is an admitted position of fact that to the documents which were filed the Insurance company did not raise any objection. The objection was to the order dated 29.4.2016 which was unfortunately rejected. The claimants filed reply contending that though the vehicle was insured, the Insurance company had taken the stand that the vehicle was not insured. Against the order rejecting the application, the Insurance company requested to stay the orders dated 29.4.2016 and 9.3.2018 as they wanted to challenge the same but from the record we find that there is no challenge either to the said order or the subsequent award dated 4.5.2018 namely the impugned award. The original claimant meanwhile after appearing in response to the application for setting aside the decree, passed away in the year 2013 more particularly on 2.8.2013. The tribunal allowed the application under order 9 Rule 13 of C.P.C. (against a dead person) on 29.7.2016. This order was passed on hearing the advocate of claimant and directed execution petition to be kept on file. The award was set aside. The matter was adjourned from time to time without any orders. After a period of one year, i.e in the year 2017 heirs of the claimant were brought on record. The Tribunal permitted owner to produce documents so as to prove that the vehicle was insured . The tribunal decided the matter afresh by permitting owner to file written statement.

8. It is an admitted position that in the execution petition though served the owner did not appear. The tribunal issued recovery warrants against the owner When warrants were issued and bailiff tried to execute the decree, owner filed an application on 16.04.2013 under Order 9 Rule 13 of C.P.C. and prayed for stay of execution of award. There was no delay condonation application filed with the application requesting to set aside the decree. On 24.05.2013, the Tribunal granted ex-parte stay against execution of decree. The Tribunal directed issuance of notice, after issuance of notice, to the original claimant who was alive is not known whether appeared and filed objections to the said application for review/application for setting aside the award. The matter after granting stay came

up for hearing only in the year 2016. The Tribunal passed the order in application filled under Order 9 Rule 13 C.P.C. on 24.05.2013 stayed the recovery proceeding ex parte. The order was passed in Misc. Case No. 14 of 2013 on 29.04.2016, namely after the death of original decree holder. On 2.8.2013 Satish Chandra, the original claimant, had passed away, which shows that the order passed on 29.4.2016 was against a dead person. Despite that, instead of removing this irregularity the application (paper No. 445 Ga) filed by the Insurance Company was dismissed by the tribunal.

9. The moot question is could the decree not have been set aside in part which was the prayer by the owner as the decree was severable , the prayer of the owner could be answered by treating it as objection to decree. The policy and non breach of policy condition could be proved and the insurance company could have been directed to indemnify the injured. The execution application and application to set aside the decree passed against the owner was kept pending and was adjourned and listed in the year 2016 which was again adjourned.

10. An application was filed in the year 2018 by the Insurance Company that the original claimant had died and the order passed on the application under Order 9 Rule 13 C.P.C. in absence of the original claimant was bad in the eyes of law as the order passed in the year 2016 allowing the application under Order 9 Rule 13 of C.P.C. was against a dead person. This application was also rejected by Tribunal. The Tribunal and on oral testimony of doctors who had treated the original claimant and on the testimony of original claimant which was recorded earlier, re decided the entire lis and even came to its own finding and even did not grant the full amount of medical expenses which was earlier granted by tribunal of competent jurisdiction. The reason for reducing the claim was that the documents were not proved and that deceased died due to kidney failure and after prolonged treatment passed away.

11. It is submitted by the counsel for the appellants that the Tribunal was suppose to decide only the liability and not the compensation awarded. Had the tribunal awarded compensation also been decided as per law and or at least granted what the earlier tribunal had granted, the appellants would not have been forced to prefer this appeal for pressing for what is known as just compensation under Section 166 of the Act. The chronology of events would show that the main claimant in his life time had a award and decree passed in his favour and the same had to be executed. The Tribunal on re-appreciation of evidence disallowed majority of the claim amount under the head of medical expenses on the ground that the documents were not proved and granted paltry sum of Rs. 1,19,000/- as medical expenses as against more than twenty lacs spent by the claimant by the time award dated 27.9.2010 was pronounced.

12. We would be obliged to decide as to whether the approach of the Tribunal in awarding compensation by award dated 29.7.2010 and 4.5.2018 can be sustained.

13. The accident occurred on 22.02.2005 is not in dispute and the injured was rushed to hospital where he was treated for injuries received due to accident. The original claimant who was going on his vehicle at 7.45 a.m and was hit by bus bearing No.DL IP 6567 which was being

driven by driver rashly and negligently. The said finding of fact does not require any further elaboration as it has attained finality.

14. From the record available which we have minutely perused it is evident that the claim petition was allowed in favour of the original injured claimant when he was alive way back in the year 2010 and the decree was passed against the owner as though policy was produced, as it was not proved to exist on date of accident and that the terms were fulfilled or not was not proved the Insurance Company was not made liable is also bad as the policy papers were valid at the time of accident and hence recovery rights could have been granted or not but we do not go in ti that issue in this appeal as the said finding is not challenged,

15 . The Tribunal while deciding the claim petition on 29.7.2010 held that as the injured was in service and his pay package had increased no amount under pecuniary loss was awarded, the documentary evidence was produced as far as medical expenses which came to Rs. 20,84,750/- was the amount, which was rounded up to Rs. 20,16,500/- awarded and loss of five months' salary for(163 days), which came to Rs. 63,250/- and Rs. 5,000/- was added for pain shocks and sufferings was granted

16. As narrated above this decree was sought to be executed against the owner of the vehicle. The difficulty of the original claimant now started because the owner of the vehicle did not bring any documents before the Executing Court in his defence but instead of depositing the amount after a period of three years filed an application being Application No. 14 of 2013 in MACP No. 516 of 2005 for stay and to set aside the decree qua him. even without condoning the delay the learned Tribunal on 24.05.2013 stayed the recovery. It appears that the objections raised by the claimants and the insurance company were not considered by the Tribunal while allowing the application to set aside the decree..

17. With this prelude we decide the lis between the parties and the question of law namely whether the tribunal could due to the prolong litigation re decide compensation already awarded or it was to confine itself to the objection raised by the owner namely that insurance company was to satisfy the decree.

18. The Tribunal which decided the matter in the year 2010 had framed the following five issues and answered the same. The subsequent tribunal decided these issues but gave different reasons

"(१) क्या दिनांक 22-02-2005 को समय ७:४५ बजे प्रातः याची सतीश चंद शर्मा जब अपनी मोटरसाइकिल संख्या UP14P5863 हीरो हौंडा से अपने कार्यालय उत्तर प्रदेश राज्य औद्योगिक विकास निगम ग़ाज़िआबाद जा रहा था तो पटेलनगर तिराहे पर पटेल नगर की ओर से आ रही बस सं० DL1P6567 जिसका चालक वाहन को तेजी व लापरवाही से चला रहा था, ने उसकी मोटरसाइकिल में सामने से बायीं तरफ टक्कर मार दी जिसके कारन याची गंभीर रूप से घायल हो गया?

(२) क्या दुर्घटना के समय प्रश्नगत वाहन DL1P6567 विपक्षी संख्या - २ के यहां बीमित नहीं था ? यदि हाँ तो प्रभाव ?

(३) क्या दुर्घटना के समय दुर्घटना से ग्रस्त वाहन संख्या DL1P6567 के चालक के पास वैध एवं प्रभावी लाइसेंस नहीं था? यदि हाँ तो प्रभाव ?

(४) क्या दुर्घटना के समय दुर्घटना से ग्रस्त वाहन संख्या DL1P6567 बस चलाने की वैध परमिट नहीं था ? यदि हाँ तो प्रभाव ?

(५) क्या याची प्रतिकर पाने का अधिकार है यदि हाँ तो कितना व किस पक्ष से?"

19. The Issue No.1 as as can be seen related to the negligence and who was negligent? Whether the driver of the motorcycle No. U.P. 14 P 5863 who was driving Hero Honda was negligent or the driver of the Bus No. DL IP 6567 was negligent? The Tribunal while deciding this lis vide award dated 27.9.2010 held in favour of the claimant but while deciding this issue afresh in the year 2018, it went on to hold that the death was due to dialysis. This finding cannot withstand the judicial scrutiny as it was not within the purview of the tribunal to decide how the claimant died while deciding issue relating to negligence and was beyond the purview of the said issue as the wordings suggest the said observations were unwarranted. However, the final finding is that accident occurred because of rash and negligent driving of the driver of the offending vehicle and no negligence was attributed to claimant)deceased).

20. As far as the Issues No. 2, 3 and 4 are concerned, the Tribunal returned the finding in favour of the claimants and owner and held that the Insurance Company would be liable as the documents subsequently filed by owner proved that there was no breach of policy conditions. The Tribunal while re deciding the case ventured and also to decide Issue No.5 also afresh and decided all other issues afresh and granted compensation to the tune of Rs. 2,02,967/-only with 7%, rate of interest from the date of filing of the claim petition till realisation against owner and insurance company jointly and severely.

21 This takes us to the crux of the matter, namely whether the tribunal had power to re decide compensation awardable to the claimant who passed away before the decree was recalled or set aside.

22. The learned counsel for the appellant heavily relied on decisions cited herein below so as to contend that the lis even after allowing the application under Order 19 Rule 13 of C.P.C. was between the owner and the Insurance Company . The claimant and thereafter his heirs could not have been put to disadvantage due to efflux of time .It is further submitted that the owner was agitated only qua the party who should satisfy the decree as policy conditions of insurance was not breached and the owner had satisfied the tribunal as early as 2013 when stay was granted against implementation of recovery warrants that insurance company should be saddled with liability. It is further submitted that the reasonings given by the tribunal to reduce the compensation payable is also based on wrong interpretation of the judgments relied as it was proved that deceased died after the award and the subsequent tribunal could not come to the finding that documents were not proved. The decisions relied by the appellants are as follows:-

(1). Sanjiv Mishra Vs. Ramashcharya Verma and others, 2010 (4) T.A.C. 113 (All.);

(2). Madhuben Maheshbhai Patel and Ors Vs. Joseph Francis Mewan & 1 Anr, 2014 LawSuit (Guj) 2214; and

(3). Samarjeet Singh Vs. Khursheed Khan and others, 2020 (12) ADJ 168.

23. It is submitted by the learned counsel for the appellants that decision rendered in the case of Sanjiv Mishra (supra), Division Bench of this Court has decided two appeals namely one filed by the claimants and other filed by the Insurance Company The appeal of the

Insurance Company was dismissed. The order of the Tribunal regarding the compensation was upheld and modified. The factual aspect about injuries and the-compensation payable was considered IT is further submitted that in the decision titled **Madhuben Maheshbhai Patel and Ors (supra)** is pressed into service as the Division Bench of the Gujarat High Court decided the fact whether subsequent death of injured-claimant would abate the cause of action or right of legal representative would survive and to what compensation they would be entitled. Lastly it is submitted that the entire exercise is bad and against the object of the Act for which learned counsel relies on the decision **in Samarjeet Singh(supra**). It is further submitted on behalf of the claimants that the deceased passed away because of the after effect of the accident and the cause of death was also attributable to the injuries caused and therefore the finding of fact by the tribunal that the claimant died solely due to kidney failure is bad in eye of law and is based on misreading of the evidence of treating doctors witness no 3 and 4 who have orally deposed and proved medical bills and certificates produced prior to 2010 and later on . Learned counsel for the appellants has submitted that on the basis of the ratio of the judgements relied the claimants who are heirs and legal representatives of the original claimant are entitled to the loss to the estate which would include personal expenses incurred on the treatment and other claims related to the loss to the estate.

24 Per contra, the learned counsel for the insurance company while supporting the judgment of the Tribunal whose judgment is impugned herein relied on decision of Supreme Court in **Vijay Singh Vs. Shanti Devi and others, AIR 2017 SC 5672** and has contended that once an ex-parte decree has been set aside, the matter had to be decided afresh.

25. It would be profitable to reproduce paragraphs 9 to 12 of the decision in Sanjiv Mishra (supra):-

"According to us, argument which has been made by the learned Counsel appears to be fallacious. Whether the law is codified or not, is not the subject matter nor the situation is contemplated in the Indian law. Therefore, requirement of the evidence is necessary to come to a conclusion by the Court whether the subsequent injury is independent or consequential to the accident. If it is independent, claim has to be refused. But if it is consequential due to loss of any of his usual skill, which was lost due to accident, Insurance Company cannot shirk the liability.

So far as the total claim is concerned, though this seems to be more than Rs.10 lacs (ten lacs), but the medical expenses is Rs.7,69,296/- (Seven lacs sixty nine thousand two hundred ninety six). Therefore, the claimant only got the compensation of Rs.3,06,000/- (Three lacs six thousand). The accident is of the year 2002. The original order of the Tribunal is of the year 2006. Now it is the year 2010. By the passage of time, much more expenditure might have been incurred which cannot be part and parcel of the claim. Therefore, taking into the totality of the facts, we cannot refuse any compensation on the basis of the order, passed by the Tribunal. Hence, we uphold the order of the Tribunal.

Learned counsel for the appellant-Insurance Company has made his submission with regard to the rate of

interest which according to them ought to be at the rate of 6%. We are of the view that the Tribunal has passed the order carrying on the interest @ 6% but when this Court has passed the order in the earlier occasion directed to deposit the entire sum within 60 days, but the Insurance Company instead of depositing the same, only by making an application for recalling the order dated 18.11.2009, they themselves become silent, which does not favour to get reduced rate of interest. Making a recall application itself cannot operate as an order of stay of the order dated 18.11.2009.

Therefore, at this stage, if we grant any relaxation for payment of accruing interest @ 9%, that will be indulgence to the Insurance Company. In further, ***the interest at the rate of 9%, according to us, now is usual rate of banking interest, therefore, it cannot be said to be excessive****. Hence the appeal of the Insurance Company is dismissed on merits." (emphasis supplied).*

The High Court of Gujarat in case titled **Madhuben (supra)** held:-

"Whether the view taken by the learned Single Judges of this Court in the decisions referred to above as well as decision of the Division Bench in the case of Surpal Singh L. Gohil v. R. M. Savalia (supra), lay down the correct proposition of law regarding applicability of Section 306 of the Succession Act to a claim -application under Section 166 of the MV Act where the claim for compensation is filed for the personal injuries caused to the claimant and during the pendency of the petition, he died a natural death."

26. After a detailed discussion, the Division Bench in case referred to it in Madhuben (supra) has answered the reference holding that claim would be payable to legal heirs where claimant dies as follows:-

"....we are of the opinion that maxim "actio personalis moritur cum persona" on which section 306 of the Succession Act is based cannot have an applicability in all actions even in an case of personal injuries where damages flows from the head or under the head of loss to the estate. Therefore, even after the death of the injured claimant, ***claim petition does not abate and right to sue survive to his heirs and legal representatives*** *in so far as* ***loss to the estate is concerned****, which would include* ***personal expenses incurred on the treatment and other claim related to loss to the estate.*** *Under the circumstances, the issue referred to the Division Bench is answered accordingly....." (emphasis supplied)*

27. It is an admitted position of fact that the petitioner survived for a period of eight years after the accident. The petition was taken up for hearing during that period and award was passed. The position as held by High Court of Gujarat in light of the decisions reported in 1991[1] GLR 352 in the case of **Jenabai Wd/O Abdul Karim Musa Vs. Gujarat State Road Transport Corporation, Ahmedabad**, the heirs would be entitled to compensation. It would be necessary to note the fact that the deceased at the time of filing of the petition and on date of decision namely 27.9.2010 was alive. The decisions on which reliance can be placed so as to come to the finding as to entitlement and amount admissible would have been decided in case of Shanti Bai and others v. Charansingh Singh and others 1998 ACJ 848 and judgement in **case of Saruyaben Harisinghbhai Bilwal**

v/s. Ataullakhan Mehtabkhan Lalkhan Pathan reported in 2001 [3] G.L.R. 2029. The fact that whether his heirs would be entitled to dependency benefit or the claimant would be entitled to the amount of compensation on the basis of injury sustained in the accident will have to decided by this court. The facts go to show that the claimant was under the constant treatment of doctors till the claimant survived therefore, it can safely be held that the accident caused lot of trauma both to the claimant as well his heirs. There is nexus between the death of the deceased and accidental injury. There is sufficient evidence to the effect that death of the deceased was due to development which took place due to resultant multiple injuries caused by the accident which would show that injuries were the root cause of the death. Therefore, heirs are entitled to compensation. As per oral testimony of the original claimant who was alive and there after the substituted heirs of the deceased namely the original claimant, who passed away after three years of the award but he suffered till end of his life because of this accident and incidental diseases. Reliance on the decision **titled Surpal Singh Ladhubha Gohil Versus Raliyatbahen Mohanbhai Savlia** in Letters Patent Appeal No. 83 of 2007 ; in First Appeal No. 301 of 1990 decided on December 24, 2008 where the court considered provisions of Section 166, of the Act, read with Order 22 Rule 1 of C.P.C. while considering the maxim "actio personalis moritur cum persona" and its applicability, and, injuries sustained by original claimant. The death of original claimant during pendency of claim petition his legal heirs being brought on record and where the Tribunal held that claimants would not be entitled to compensation since they have no right to continue the proceedings on the death of original claimant, since action for personal injury abates with the death of original claimant. The question whether maxim "actio personalis moritur cum persona" namely that personal right of action abates with the death of the person, can be imported to a social welfare legislation so as to deny the benefits to legal heirs of a deceased claimant, to the advantage of a wrong doer the High Court held that strict application of maxim "actio personlis mortiur cum persona" cannot be imported to defeat the purpose and object of a social welfare legislation like Motor Vehicles Act. Once the status of claimants as legal heirs or legal representatives is conceded and acknowledged, to deny benefit of compensation to them on the ground that injury was personal to the claimant, it will be giving a premium to the wrong doer and it would defeat the very purpose and object of beneficial piece legislation. The question whether injury was personal or otherwise is of no significance so far as wrong doer is concerned and he is obliged to make good the loss sustained by injured, even after death of injured, claim petition does not abate and right to sue survives to his heirs and legal representatives.

28. The decision cited by learned counsel for insurance company in **Vijay Singh(supra)** will not apply at the out set as it was in execution petition and both the appeals against the ex-parte decree was filed . The execution petition was filed meanwhile and the appellant took the possession. The application of the defendant for setting aside ex-parte decree was allowed throughout which is not the case in our case . We are to consider beneficial peace of legislation where the Tribunal was not even asked to reconsider the question of quantum and interest

29. It can be safely culled out from the record that the main purpose for filing the application under Order 9 Rule 13 C.P.C. by the owner was to see that the liability is mulcted on the Insurance Company and not on them. The decree could have been set aside in part namely qua issue of liability as it was a award which could be set aside in part there was definitely severable decree. The provision of Order 9 Rule 13 of Code of Civil Procedure, 1908 (referred as 'C.P.C.') reads as follows:-

*"**Setting aside decree ex parte against defendant**.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

[Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]."

30. In our case Order 9 Rule 13 C.P.C. could not have been made applicable by setting aside the entire decree instead partial modification of decree even in execution could have been resorted to which would have served the purpose of all the litigating parties. Even if during the execution, proceedings it was brought to the notice of the executing court that the vehicle was insured, the liability could have been fastened on the contesting insurance company with whom the vehicle was insured. We may hold that the documentary evidence,which was placed and that part could have be ordered as expeditiously as possible, may on the first hearing before the Tribunal by directing owner to produce all the documents which were subsequently produced,these facts showed that there were no breach of policy conditions and that part of the finding namely Issue Nos. 2 and 3 could have been severed, reviewed and or Order 9 Rule 13 C.P.C. could not have been made fully applicable. Thus, the judgment under challenge is erroneous. Fresh finding of quantum could not have been given on the same set of evidence recorded in the matter .

31. The order of attachment could have been passed, unfortunately, the Tribunal showed over leniency to the judgment debtor namely the owner and granted indulgence. The Tribunal could have decided the issue regarding the liability only afresh and should have decided what is known as just compensation. The judgment, therefore,

suffers from vice of non-application of mind. The basic principles of adjudication of claim petition were absent in both the decisions.

32. In this view of the matter, let us see had the decree passed on 27.09.2010 been executed what would have been the position. In the event the decree would have been executed, of course, the claimants would have got the benefit of the decretal amount during the life-time of the original claimant who breathed his last in 2013. Had an illegal stay would not have been granted, what would have been the position. The Tribunal instead of granting stay could have directed the Insurance Company to verify the documents and deposited the amount as per the provisions of the Motor Vehicles Act, 1988 more particularly Section 169 read with Section 170 and further Section 174 of the Act.

33. It is settled position of law that the award of the Claims Tribunal shall be paid by owner or driver of the vehicle in the accident and they would be indemnified by insurer or by all or any of them, as the case may be. Thus, we venture to decide the quantum as the claimant was alive when the first decree was passed. However, he has subsequently passed away and therefore, as far as the enhancement is concerned, we would be guided by the provisions of law and the Section 173 of the Motor Vehicles Act which grants statutory right of appeal, will have to be looked into. The powers of the Appellate Court will have to be exercised so as to do justice. It is clear that on the death of the injured pending appeal, the claim will not be liable to be dismissed. The claim can survive to the legal representatives under the possible heads such as medical expenses, loss of income, loss to the estate of the deceased. The facts in our case are slightly different the reason being that in our case after the decree was passed and after the execution proceeding started, the claimant died after three years namely during the period when the application under Order 9 Rule 13 C.P.C. was pending. As per the practice and procedure the reliability of the witnesses was already accepted in the earlier award which could not have been re-decided

34. The decision in the case of **Samarjeet Singh (supra)** is though of single judge deciding appeal where similar situation had arisen except the fact of death of claimant. The claimant had preferred appeal against the judgment and award dated 28.5.2019 passed by Motor Accident Claims Tribunal, Kanpur Nagar re-deciding the matter and reducing the compensation from Rs. 3,79,220/- to Rs. 1,19606/- with interest at the rate of 7 per cent from the date of judgment.

35. The facts are similar in the case on hand. The Tribunal re-decided the entire matter on an application moved by the owner of the offending vehicle. Vide judgment and order dated 23rd of November, 2020, this Court has held thus:-

"31. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansaguti P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291,*** *total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate*

amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

32. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of A.V. Padma (supra). The same is to be applied looking to the facts of each case."

36. The issue which arises before us is whether a subsequent Tribunal could partially non-suit the claimant on the same set of evidence except the fact that the heirs were joined as claimants without leading fresh evidence and could have completely ignored the findings recorded by the Tribunal of competent jurisdiction? No doubt, the Tribunal will have all the powers of a civil court which is meant for doing complete justice. The question which arises is had the amount been deposited by the judgment debtor, what would have been the situation? The Tribunal committed a mistake rather irregularity by setting aside the award and decree in totality under Order 9 Rule 13 C.P.C. after the death of the original claimant without impleading the legal heirs. The Tribunal further committed an error which is apparent on the face of record by re-deciding the compensation. The only new circumstances were death of the injured claimant and production of documents so as to prove that the vehicle was insured and there was no breach of policy condition.

37. The awards passed by of the Claims Tribunal must be in conformity with the provisions of Section 166 read with Section 169 and 170 of the Act, which reads as follows:-

"166. Application for compensation.-- (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made—

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

(b) by the owner of the property; or

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

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under Section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

*(3) * * * **

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."

"168. Award of the Claims Tribunal.—

(1)
.....

(2)
.....

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

"Section - 169. Procedures And Powers Of Claim Tribunals.-

(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry.

***170. Impleading insurer in certain cases**.-- Where in the course of any inquiry, the Claims Tribunal is satisfied that ---*

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceedings

and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

38. Reference to and reliance on the decision of the **Samarjeet Singh's** case (supra) will also go to show that the Tribunal has erred in exercising power under Order 9 Rule 13 of C.P.C. The decisions impugned are not in conformity with the object of the Act. The findings are perverse and do not satisfy the legislative intent of the Act. The claimants were under the impression that the lis was between the owner and the Insurance Company and had the owner deposited the entire amount which he was supposed to, he could have recovered the same from the Insurance Company; if he had proved that there was no breach of policy condition. The primary duty to satisfy the decree is on the driver and owner of the offending vehicle. The only basis of challenge was that the owner had all the documents and therefore, it was the liability of the Insurance Company to indemnify as per the Act. The Tribunal was only under an obligation to direct the payment to be made by the Insurance Company which could have done even in the execution proceedings as the provisions of the Code of Civil Procedure, 1908 were applicable to the Act. The provisions of part - II namely Sections 36 to 74 as well as Order 21 of C.P.C. relates to the payment of money under decree. The process for execution was also stayed without any order directing part compliance of the decree as required under the the provisions of Order 21 Rule 26 C.P.C and that the order staying the execution to the detrimental of the claimant could not have been passed ex parte frustrating the very provision of the Code and Act. The Tribunal acted in a very casual manner by not deciding the matter for a period of five years namely 2013 till 2018.

39. We now consider the question of compensation. The claimant had sustained injuries and the right to claim damages accrued in the year 2005 more particularly on 22.2.2005 the year of accident. The decision in the case of ***Raj Kumar Vs. Ajay Kumar and another, (2011) 1 SCC 343*** will have to be considered on the facts of the present case also as in this case the injured was alive on date the first decision was rendered. Undoubtedly, the compensation in law is paid to restore the person, who has suffered damage or loss in the same position, if the tortuous act or the breach of contract had been committed. The law requires that the party suffering should be put in the same position, if the contract had been performed or the wrong had not been committed. The law in all such matters requires payment of adequate, reasonable and just monetary compensation. In case of motor accidents the Endeavour is to put the dependents/ claimants in the pre-accidental position. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damages. The damages so awarded should be adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of the wrong. Compensation is, therefore, required to be paid for prospective pecuniary loss i.e. future loss of income/dependency suffered on account of the wrongful act. However, no amount of compensation can restore the lost limb or the experience of pain and suffering due to loss of life. Loss of a child, life or a limb can never be eliminated or ameliorated

completely. To put it simply-pecuniary damages cannot replace a human life or limb lost. Therefore, in addition to the pecuniary losses, the law recognizes that payment should also be made for non-pecuniary losses on account of, loss of happiness, pain, suffering and expectancy of life etc.

40. We would also take upon ourselves to refer to law laid down **in Mithusinh Pannasinh Chauhan Versus Gujarat State Road Transport Corporation, 2015 (17) SCC 529; ICICI Lombard General Insurance Company Vs. M.D. Davasia & Anr.;** and **Lalan D. and Ors. Vs. The Oriental Insurance Company Ltd. (2014) 14 SCC 396; Kirti vs Oriental Insurance Company: 2021 (1) TAC 1** and two decades old decision of Gujarat High Court in **Union of India Vs. A.S. Sharma,1993(1)GLH1044** In the case of **Kirti (supra)** the principle of assessment of compensation even for home maker has been narrated. We may even take guidance from the decision of the Apex Court in **Anita Sharma Vs. New India Assurance Company Ltd. reported in (2021) 1 SCC 171** on the point of just compensation and also for the appreciation of pleadings and proof and the standard required for placing reliance on the evidence led both oral and documentary and lastly role of Tribunals in interpreting beneficial legislation. The principles and approach has been highlighted by the apex Court which this Court is bound to apply and mitigate the hardship of person wronged. We feel that the decree was severable and therefore the Tribunal should have set aside only that part of the decree which was challenged. The object and reasons of the said provision is to ensure that parties are not put to such hardship because of the ex part decree. As narrated herein above, the execution could have been decided considering the objection of the owner and that the decree should have been set aside only qua that portion as the remedy was for not making payment though he was the primary debtor but there was a contract of indemnity with the Insurance Company. The relevant consideration was this factor and not the challenge to compensation. The provisions of Order 9 Rule 13 no doubt states that the entire decree be set aside but where the decree is joint and divisible, the whole decree need not be set aside is the view of the Division Bench of the Andhra Pradesh High Court. We feel that the illustration given in the Code of Civil Procedure, 11th Edn on page 1120 in (1960) 2 Andh WR 160 (162 (DB) and the logical and practical approach suggested for such matters would be to set aside that portion of the decree and award for which prayers are made as review is not maintainable and/or review of limited portion of the judgment is permissible. We hold that in future the mode to be adopted would be to set aside the decree qua the findings which are challenged and/or permit objection even in the execution filed by the claimant and/or the Insurance Company where they are given right to recovery from the owner and the owner can prove that there was no breach of policy condition but he was unfortunately not represented before the Tribunal properly and, therefore, we feel that instead of remanding the matter, we decide the lis so that the claimant who are without the fruits of litigation started by their father who later on succumbed to the vagaries of the injuries which though the Tribunal has felt that was not because of this injuries but because of his failure of his kidney. The Doctor has said that the trauma

of this accident may have accelerated the problem of kidney. However, we do not delve further into that and propose to decide the lis under Section 173 of the Motor Vehicles Act.

41. In case on hand the injured had to be given a reasonable amount of compensation as there is permanent disablement resulting from the accident this is a finding of fact but both the adjudicating authorities declined to grant compensation as the original claimant was in government service and there was no loss of monetary benefit due to the accident as held by the tribunal This denial is bad as held by High court of Gujarat in the case titled Union of India Vs. A. S. Sharma (supra), the High Court of Gujarat has held that a person has to be compensated for the torturous act and it is this act for which the tortfeasor cannot be benefitted. In our case also the deceased died on 2.8.2013 i.e. three years after the first decree and award were passed in his favour. The finding of the Tribunal in both the awards that as he was a salaried person and as his salary had increased, he was not entitled for loss to estate is bad.

42. The question whether the Tribunal could have revisited and re-decided the issue of compensation will also have to be looked into as this is an appeal under Section 173 of the Act and this Court is obliged to do what is known as complete justice. Whether the order allowing application under Order 9 Rule 13 of C.P.C. passed in the year 2016 was a nullity in the eyes of law as it was passed against a dead person.

43. The subsequent Tribunal even did not consider granting the amount which was already granted to him by the earlier Tribunal on the erroneous finding that the documentary evidence was not proved and that he had died out of natural death. Unfortunately, the Tribunal has mislead itself that it had to decide the issue of quantum also. The pleadings of the owner was not qua the compensation awarded but was qua indemnification and liability and hence, as narrated herein above, had the Tribunal taken a practical approach, it would not have disregarded the earlier medical bills. The injured was admitted in hospital on 25.2.2005 and was being treated, admittedly, up to year 2010, in such situation we have to take into account the period up to 29.7. 2010 when the decree was passed. Whether he was in the fourth stage of kidney problem could not have been evaluated by the learned Tribunal once the earlier Tribunal had held that he was being treated up to 2010. The bills which have already been considered could not have been re-evaluated by the Tribunal though there was no fresh evidence led. The tribunal had already decided on 27.09.2010 holding that the medical bills were admissible to the original claimant.

44. The Tribunal while considering objection in the execution petition, could have considered that the objections raised could be permitted to be raised as per the provisions of C.P.C. and also as per provisions of Section 170 of Act and mulcted the liability on the Insurance Company as per the provisions of the Act. A question arises as to whether the decision of the Tribunal act detrimental to the beneficiary of the beneficial legislation , namely, the claimant? These are the questions which will have to be answered as we could not find from the Commentary as to whether a decree already granted while claimant was alive, be reviewed on the application of the owner and the entire decree could be set aside and a fresh

decision could be rendered. So as to do the complete justice,we will have to rely on the principle of granting just compensation and the law enunciated in **Madhuben** (supra) by the High Court of Gujarat by the Division Bench of High Court of Gujarat headed by His Lordship Justice M.R. Shah, J. (as He then was), the admitted position is that the injured-claimant had fractured both his legs. On 21.06.2005, he was readmitted and was operated. The accident occurred on 22.02.2005. The Tribunal exhibited all the documents being 81G to 289 G which were medical certificates which were proved after recording oral evidence of the claimant and his wife. The Tribunal in its judgment dated 27.09.2010 granted the medical expenses on the basis of these documents.

45. The question which arises is should we set aside the award as the order passed in 2016 was a nullity or decide the lis here so as to do complete justice as the record is before us and now except the legality of compensation has to be decided

46. The order in 2016 allowing application under Order 9 Rule 13 of C.P.C. against a dead person is nullity and is irregularity. We do not propose to remand the matter to the Tribunal as we would decide the lis here itself as 15 years have already elapsed and 9 years have elapsed after the death of the claimant as the Insurance Company has accepted their liability by not challenging the award of the Tribunal. The legal heirs would have spent the amount for medical expenses of their father during his life time. The facts would demonstrate that for no fault of the appellants herein, the Tribunal who could not have refused to grant compensation and practically non suited, the appellants qua injuries and disability incurred due to the vehicular accident The subsequent award shows that the Tribunal took a very hyper technical stand in not granting any compensation as it was of the view that the claimants had failed to prove medical certificates and that no amount for future loss could be granted though the treating doctor was examined on oath and disbelieved the medical certificate produced and though not objected to be read in evidence by any of the parties. The same have been discarded.

47. The injuries which were caused were in the realm of tortuous act. The injured had suffered 40 per cent disability. His pay package was Rs. 11,500/- at the time of the accident. The Tribunal at the first instance while deciding the quantum did not grant what can be said to be the compensation for the tortuous act just on the ground that the injured was a government servant and his pay package had increased.

48. It has been time and again held that trappings of civil and criminal proceedings cannot be applied in a very strict manner. I am fortified in my view by the decisions in **Sunita and others Vs. Rajasthan State Road Transport Corporation and Another, 2019 LawSuit (SC)190, Mangla Ram Vs. Oriental Insurance Company Limited and Others, 2018 (5) SCC 656 and Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186**. The compensation is ordered to be reassessed in view of the submission made by learned counsel for the appellant and in view of and in view of the decision in F.A.F.O. No.2389 of 2016 **(National Insurance Co. Ltd. Vs. Smt. Vidyawati**

Devi And 2 Others) decided on 27.7.2016. On the basis of the recent judgments laying principles for ascertaining compensation. The right to compensation would accrue on the date the accident took place, namely, 22.02.2005. The law enunciated in **Kirti Vs. the Oriental Insurance Company Limited** (supra) that the compensation awarded by a court ought to be just, reasonable and must undoubtedly guided by principles of fairness, equity and good conscious. In our case both the Tribunals had not granted what can be said to be just compensation.

49. We take aid of the observations and ratio laid in **Erudhayapriya Vs State Express Transport Corp. Ltd reported in 2020 (2) TAC1.**We have perused all the medical reports of the claimant up to 2010 showing the pain of several times being hospitalised for corrective surgery apart from his kidney problem which he developed at the of age of 38 years . The trauma and his chances of promotion were hampered we do not grant the compensation on multiplier method as functional loss is not that much as his job was on but there was permanent disablement as per doctors certificate which has been considered by tribunal but compensation denied . Hence, the findings of the Tribunal in its subsequent judgment being perverse are set aside as far it relates to compensation awarded which is computed in a manner not approved by Apex Court in Anita Sharma (supra).

50. The compensation now to be paid would be determined on the basis of the age of the injured which was 38 years at the time of the accident, he suffered 40 per cent permanent disability and was in permanent government service earning a sum of Rs. 11500/- per month. His medical expenses as granted by the Tribunal in its order dated 29.07.2010 is maintained entirely as all the documents are proved, therefore, the finding to the contrary in the subsequent judgment impugned in this appeal dated 4.5.2018 is bad in the eyes of law and against settled legal principles.

51. The additional amount of five months' salary as actual loss to the estate granted by the Tribunal is also maintained. This takes us to further amount which would be payable to the claimants. We award a lump-sum amount of two lacs of rupees in addition to the compensation as loss to estate and mental harassment to the legal heirs for protracted litigation as they were not supposed to be brought even on record as the lis now was only between owner and the Insurance Company. But non appearing of the owner and a wrong stand taken by the Insurance Company that the vehicle was not insured on 22.02.2005 became detrimental.

52. In view of the above discussion, the amount payable would be Rs.20,16,500 + 63,250 +5,000 being Rs20,84750/ as awarded by the tribunal in its award dated 27.9.2010.The original claimant has passed away hence the family members can be awarded a further sum of two lacs and fifty thousand for loss to estate. Rs. 50000/- for mental trauma and incidental expenses for looking after the deceased after he suffered the injuries. We award a lump sum amount aggregating to total compensation for a sum of Rs.24,00,000/- .(twenty four lacs)

53. The respondents shall jointly and severely pay a sum of Rs. 24,00,000/- (Twenty Four lacs) which is much on the lower side than what would be admissible but as the original claimant has passed away we deem it fit to grant this amount

comprising of medical expenses plus actual loss of salary as computed by tribunal in award dated 29.7.2010 and additional amount under other heads.

54. The insurance company having accepted its liability by not challenging the finding of the tribunal deciding that the insurance company is liable under contract of insurance shall deposit the awarded amount after deducting the amount if any deposited pursuant to the impugned award and decree within a period of two months from the date of this order. The insurance company has not challenged its liability nor before this court it is proved or demonstrated that the owner has violated any policy condition. The insurance company has been rightly saddled with liability by the tribunal which finding we affirm.

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

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

56. The amount shall carry interest also at the rate of 7.5 per annum from the date of the filing of the claim petition till the date of actual deposit..

57. Since the injured-claimant was in government service, T.D.S.if has to be deducted on pecuniary damages will be deducted as per statutory rules.

58. The amount once deposited be not kept in fixed deposit as the appellants must have borne the medical expenses which we are reimbursing to them after 11 years. Reference to decision in A**.V. Padma and others Vs. R. Venugopala and others(2012) 3 SCC 378** can be made where principles for disbursement are given. On monies being deposited apportionment be made as directed by the tribunal.

59. We deem it fit to rely on the Judgment of the Apex Court in the case **of A.V. Padma and others Vs. R. Venugopal, 2012 (3) SCC 378** wherein the Apex Court has considered the Judgment rendered in **General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631**. Paras 5 and 6 of A.V. Padma's Judgment read as under:-

"5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical

approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi- literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits.

However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

6. In this case, the victim of the accident died on 21.7.1993. The award was passed by the Tribunal on 15.2.2002. The amount of compensation was enhanced by the High Court on 6.7.2006. Neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the Tribunal on 7.1.2008. In the application filed by the appellants on 19.6.2008 seeking withdrawal of the amount without insisting on investment of any portion of the amount in long term deposit, it was specifically stated that the first appellant is an educated lady who retired as a Superintendent of the Karnataka Road Transport Corporation, Bangalore. It was also stated that the second appellant Poornachandrika is a M.Sc. degree holder and the third appellant Shalini was holding Master Degree both in Commerce and in Philosophy. It was stated that they were well versed in managing their lives and finances. The first appellant was already aged 71 years and her health was not very good. She required money for maintenance and also to put up construction on the existing house to

provide dwelling house for her second daughter who was a co-owner along with her. The second daughter was stated to be residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. It was further stated in the application that the first appellant was obliged to provide a shelter to the first daughter Poornachandrika. It was pointed out that if the money was locked up in a nationalised bank, only the bank would be benefited by the deposit as they give a paltry interest which could not be equated to the costs of materials which were ever increasing. It was further stated that the delay in payment of compensation amount exposed the appellants to serious prejudice and economic ruin. Along with the application, the second and third appellants had filed separate affidavits supporting the prayer in the application and stating that they had no objection to the amount being paid to the first appellant.

7. While rejecting the application of the appellants, the Tribunal did not consider any of the above-mentioned aspects mentioned in the application. Unfortunately, the High Court lost sight of the said aspects and failed to properly consider whether, in the facts and circumstances of the case, there was any need for keeping the compensation amount in long term fixed deposit. "

60. Thus, it goes without saying that, in our case, the oral prayer of learned counsel for the claimants to be considered as the guidelines in **A.V. Padma and others (supra)** was in the larger interest of the claimants. Rigid stand should now be given way. People even rustic villagers' have bank account which has to be compulsorily linked with Aadhar, therefore, what is the purpose of keeping money in fixed deposits in banks where a person, who has suffered injuries or has lost his kith and kin, is not able to see the colour of compensation. We feel that time is now ripe for setting fresh guidelines as far as the disbursements are concerned. The guidelines in Susamma Thomas **(supra),** which are being blindly followed, cause more trouble these days to the claimants as the Tribunals are overburdened with the matters for each time if they require some money, they have to move the Tribunal where matters would remain pending and the Tribunal on its free will, as if money belonged to them, would reject the applications for disbursements, which is happening in most of the cases. The parties for their money have to come to court more particularly up to High Court, which is a reason for our pain. Reliance can be placed on **Susamma Thomas (supra)** in matters where claimants prove and show that they can take care of their money. In our view, the Tribunal may release the money with certain stipulations and that guidelines have to be followed but not rigidly followed as precedents. Recently, the Jammu and Kashmir High Court was faced with similar situation in the case of **Zeemal Bano and others Vs. Insurance Company, 2020 TAC (2) 118.**

61. In view of the above, the appeal is **partly allowed**. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondents shall jointly and severally liable to pay compensation and deposit additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. It is further

directed that on deposit of the amount, the Tribunal shall disburse the entire amount by way of account payee cheque or by way of RTGS to the account of the appellants within 12 weeks from the date the amounts are deposited by the respondents.

62. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein afore mentioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and not blindly apply the judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case. A copy of this Judgment be circulated by the learned Registrar General to the Motor Accident Claims Tribunals in the State of Uttar Pradesh for guidance after seeking approval of the Hon'ble the Chief Justice.

63. The record and proceeding be sent back to the Tribunal.

64. We are thankful to both the learned advocates for assisting us.

(2021)04ILR A86
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2021

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Habeas Corpus No. 13183 of 2020

Km. Advika Tandon ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Tilhari, Kapil Misra, Pushpila Bisht

Counsel for the Respondents:
G.A., Nishant Shukla

A. Constitution of India, 1950-Article 226-Seek direction or order in nature of Habeas Corpus-petitioner and his wife admittedly are living separately and their minor daughter is in the custody of her mother and grandparents-the rule nisi is made absolute -the child is more than 9 years old-the mother becomes entitled to the custody of child as of right because mother who is not incapacitated in any manner and gainfully employed, being well qualified, she establishes a prima facie case – father has not been consistent with his stand and he changed his stand after broadly agreeing before court-however father would be entitled for visitation right.(Para 21 to 45)

B. 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 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 gurardianship, and then specifies that the custody should be given to the mother so long as the child below fiver years in age. we must immediately clarify that this section or for that matter any other provision including those contained in the Guardians and Wards,Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years.(Para 40)

The petition is disposed off. (E-5)

List of Cases cited:-

1. Elizabeth Dinshaw Vs Arvand M. Dinshaw, (1987) 1 SCC 42

2. Lahari Sakhamuri Vs Subhan Kodali (2019) 7 SCC 311

3. Nithya Anand Raghavan Vs St. (NCT of Delhi),(2017) 8 SCC 454

4. Kanika Goel Vs St. (NCT of Delhi), (2018) 9 SCC 578,

5. Yashita Sahu Vs St. of Raj. (2013) SCC 67

6. Nilanjan Bhattacharya Vs St. of Karn., Civil Appeal No. 3284 of 2020

7. Roxann Sharma Vs Arun Sharma, (2015) 8 SCC 318

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

(i). Significance of Marriage as Social Institution:-

1. Marriage is an institution that admits man and woman to family life. It is a stable relationship in which a man and a woman are socially permitted to live together without losing their status in the community. Marriage is not merely concerned with the couple; rather it affects the whole society and future generations. The responsibilities it entrusts a couple with are thus both heavy and delicate. In Hindu view, marriage is not a concession to human weakness, but a means for spiritual growth. Man and woman are soul mates who, through the institution of marriage, can direct the energy associated with their individual instincts and passion into the progress of their souls. The institution of marriage is the central draft of all the forms of human society which are a part of civilization. Marriage is the deepest as well as the most complex of all human relations because it is a difficult task for two people to lead their life together when they have their independent thinking and way of living. In Indian life, role expectations are highly specific and institutional in marriage, thus a woman's role in family has remained multifarious. Marriage and family, as a set of institutions, also encompass formal and informal, objective and subjective aspects. Family is a fundamental building block of all human civilization. Marriage is the glue that holds it together. The health of culture, its citizens and their children is ultimately linked to the success of marriage.

2. Strong stable marriages are the best way to ensure that children become responsible members of society. Marriage improves the health and longevity of men and women; gives them access to more active and satisfactory married life, increases wealth and assets, boosts children's chances of success and enhances men's performance at work and their earning. When one gets rid of the institution altogether there are many harmful consequences. It is not just the marrying of two people together, but its success or failure equally affects society. When a family falls apart, it leaves a negative impact on the community because the children of such a family are more likely to be delinquents. On the contrary when a family is strong, the community is positively affected. Every child that goes out into the world from a stable happy home is a blessing to the community, and is able to make a contribution, rather than being a drain on the community.

3. Creation of male and female is not an accidental fact or afterthought but the very apex of God's creative activity. Even more it is the sexual pairing of male and female activity that is the pinnacle of the creative process. To deny the distinction of two sexes is to deny what is integral to God's ultimate creative act.

4. The inherent characteristics of marriage are intimacy, companionship, procreation and parenting. Marriage is not simply a celebration or expression of love. It is the world's most basic and universal institution - the foundation on which families are created and society reproduces itself. Society suffers when procreation and parenting is separated from the definition of marriage. Marriage is the most diverse relationship known to humanity because it unites the two halves of humanity - male and female. It is not a civil right; it is an institution given specific cultural and legal recognition because of the unique benefits it confers on adults, children and society at large.

5. Islam considers marriage as both a physical and spiritual bond that endures into the afterlife, also recommends marriage high among other things, it helps in the pursuit of spiritual perfection. The Bahai Faith sees marriage as, a foundation of the structure of society.

6. Buddhism does not encourage or discourage marriage, although it does teach how one might live a happily married life.

7. Hinduism sees marriage as a sacred duty that entails both religious and social obligations. Old Hindu literature in Sanskrit gives many different types of marriages and their categorization ranging from *Gandharva Vivaha* to normal marriages, to *Rakshasa Vivaha*.

Marriage was well established in the Vedic age. The history of ancient India may be said to commence with the period during which the Rig Veda was composed. Vedic literature is the prime source of all cultural manifestations in India. Marriage was considered as a social and religious institution and a necessity for two individuals of opposite sex who had attained full physical development. Woman as a wife is denoted by the words Jaya, Jani, Patni. Jaya: shares the husband's affection, *Jani*: the mother of the children, *Patni*: the partner in the observance and performance of religious sacrifices. It is said that man is only one half and he is not complete till he is united with a wife. Hindu mythology has the concept of *Ardhnarishwara* (half female and half male combination to make the perfect whole).

8. A woman's existence merged with that of a man through the performance of a ceremony and hence it was imperative for the couple to carry out their promises made before supreme witness: Agni. In the *Brahadaranyaka Upanishad*, the ideal picture of a wife and the other half of the husband have been beautifully delineated by a very telling simile of the half of a shell.

9. In Hindu society marriage is supposed to be a social obligation, for it is believed t hat marriage is not only a means of continuing the family but also a way of repaying one's debt to the ancestors. It is a life-long commitment of wife and husband and is the strongest social bond that takes place between a man and a woman. The norms set up for regulating the marital behavior in Hindu society is closely connected with religious duties and hence the impact of religious duties has more effect than any other element. *Grahastha Ashram*, the second of the four stages of life, begins when a man and a woman marry and start a house hold.

10. The family disintegrates when the marital relations break, as in the case of divorce. Historically it has been transformed from a more or less self-

contained unit into a definite and limited organization of minimum size, consisting primarily of the original contracting parties. It is a unit of society, society to state and state to nation.

11. A person is socialized in the family. The child's first school is his home and family, which conditions his attitude and behavior towards the elders in society, and which imparts practical education to the child concerning the customs in society, conduct, and other important elements of culture, preservation of health, love, sympathy, and cooperation. It is in the family that the child acquires important qualities as sincerity, sympathy, self-submission, responsibility and character which help the child in becoming an important and responsible member of society. In the family the child gets full freedom of expressing his ideas and views. Psychologists have incontestably proved that the proper development of child is impossible without a good environment in the family.

12. Marriage is a legally, socially, and religiously recognized interpersonal relationship, usually intimate and sexual, and often created as a contract. Controversies apart, marriages are still made in heaven for the average Hindu couple. It is a lifelong commitment and is the strongest social bond between a man and a woman. The human society developed and redefined the institution of marriage over a long period of time. The human instinct such as love, affection, joy, jealousy, hate, fear, and pride has not changed over millenniums. People still need stable family environment and friends to share life experiences. No doubt with the changing circumstances, the significance of marriage is decreasing. It is considered as something secondary, not necessary. To make a family now the new generation is adopting children from orphanages but, the fact is that for giving the child love, affection, attachment, warmth of relations a family is required.

13. Previously, a family crisis of the nature of a maladjustment between husband and wife was overcome by the constraining influence of the elders, kinsmen and social mores and traditions and the family was saved from disintegration but, with the existing loss of respect for the power of these modes of social control husband and wife are deprived of guide or mediator and in a fit of temper or even vengeance they destroy delicately loving nurtured sapling which is the family.

14. In the modern time, the institution of family is undergoing rapid changes due to which the structure of the family is changing. The tie of marriage is the basis of the family. Weakening of marriage ties results in weakening of family ties. Now-a-days marriage is not a religious ritual but merely a social contract which can easily be broken on the grounds of boredom, or some kind of misunderstanding. Consequently, there are an increasing number of divorces. A major cause of the weakening of marriage ties is the failure of men to adapt to new circumstances created by the education of women.

(ii). Impact of Family Breakdown on Children's Well-Being

15. Sociological researches have shown that a child grows up in an intact, two-parent family with both biological parents present do better on a wide range of

outcomes than children who grow up in a single-parent family. Single parenthood is not the only, nor even the most important, cause of the higher rates of school dropout, teenage pregnancy, juvenile delinquency, or other negative outcomes we see; but it does contribute independently to these problems. Neither does single parenthood guarantee that children will not succeed; many, if not most, children who grow up in a single-parent household do succeed.

16. Empirical studies show that divorce has been shown to diminish a child's future competence in all areas of life, including family relationships, education, emotional well-being, and future earning power. Children are at increased risk of adverse outcomes following family breakdown and that negative outcomes can persist into adulthood.

17. Evidence also show that relatively few children and adolescents experience enduring problems, and some children can actually benefit when it brings to an end a "harmful' family situation, for example where there are high levels of parental conflict, including violence. Long-term effects in adults, who as children have experienced family breakdown, include problems with mental health and well-being, alcohol use, lower educational attainment and problems with relationships.

(iii). Psychological and Emotional Aspects of Divorce

18. A child's continued involvement with both of his or her parents allows for realistic and better balanced future relationships. Children learn how to be in relationship by their relationship with their parents. If they are secure in their relationship with their parents, chances are they will adapt well to various time-sharing schedules and experience security and fulfillment in their intimate relationships in adulthood. One important factor which contributes to the quality and quantity of the involvement of a father in a child's life is mother's attitude toward the child's relationship with father. When fathers leave the marriage and withdraw from their parenting role as well, they report conflicts with the mother as the major reason.

19. The impact of father or mother loss is not likely to be diminished by the introduction of step-parents. No one can replace Mom or Dad who bring the child in this world. And, no one can take away the pain that a child feels when a parent decides to withdraw from his/her life.

(iv) Facts of this case :-

20. This petition under Article 226/227 of the Constitution of India has been filed with following reliefs:-

"(i) Issue a writ, direction, or order in the nature of Habeas Corpus to produce the detenue before the Hon'ble Court by the Respondents along with full disclosure of reports of all Corona-Tests conducted on the detenue and all Respondents in her close proximity after the Corona-death on 6-Jul-2020 fol lowing multiple positive cases in Respondent No.4's family.

(ii) Issue a writ, direction or order in the nature of Habeas Corpus to the Respondents (Opposite Parties) to set the detenue at liberty forthwith and to not interfere with the personal liberty of the detenue/petitioner.

(iii) It is further prayed, Hon'ble Court may kindly be pleased to seek

testimony of the petitioner in a free and fair environment to corroborate her true wishes, and issue direction to the Respondents to immediately hand over interim custody of minor daughter Advika to her father so that she may continue her quality education at Pune while availing the safety, comforts and intellectually stimulating growth environment of her Pune home,

(iv) It is further prayed, the Hon'ble Court may kindly be pleased to issue direction to the Respondent no. 4 to co operate wholeheartedly with petitioner's father to permit and fa cilitate petitioner's education at her renowned Pune school with immediate effect.

(v) It is further prayed, the Hon'ble Court may kindly be please to issue direction to the Respondent nos. 4, 5, 6, 7 & 8 to not change or attempt to change the physical location and/ or school of the petitioner without the prior knowledge and writ ten consent of her father at any time till she turns 18 years old.

(vi) It is further prayed, Hon'ble Court may kindly be pleased to issue direction to the respondents no. 4, 5, 6, 7 and 8 to immediately cooperate and allow un-constrained, exclusive physical and telephonic access at-will between the petitioner and petitioner's father with prior written intimation to Respondent No. 4 as per below:

a) For physical access: A minimum 2-day prior written intimation on email and whatsapp of Respondent No. 4

b) For telephonic access: A minimum 6-hour prior writ ten intimation via email / whatsapp to Respondent No. 4

(vii) It is further prayed, the Hon'ble Court may kindly be pleased to issue direction to the Respondent no. 4 to allow and let the minor daughter spend 100% of her school's winter vacation, at least 60% of her school's summer vacation and at least 50% of all long-weekends in a calendar year exclusively with petitioner's father. If the petitioner and Respondent No. 4 are mutually willing to spend the balance remaining vacation time exclusively together, then Respondent No. 4 must:-

a) Bear the entire boarding, lodging and travel expenses of the petitioner in the event of availing such balance vacation time exclusively and

b) Arrange and comply with the pick-up / drop-off of the petitioner from the society gate of the petitioner's father's residence on such occasions and

c) Permit at least 15 minutes telephonic conversation daily between the petitioner and petitioner's father to enquire and validate the petitioner's well-being while the petitioner is with Respondent No.4.

(viii) It is further prayed, the Hon'ble Court may kindly be please to issue direction to the Respondent no. 4 that all times while the petitioner is in the exclusive company of Respondent no. 4 (i.e. at times when the petitioner's father is not physically present simultaneously with the petitioner), in the event of either any out-station travel by Respondent No. 4 or any other similar unavailability that compromises Respondent No. 4's personal care and supervision of petitioner, Respondent No. 4 should arrange and ensure in advance, completely at her own

expense, effort and planning, for the petitioner (minor daughter) to be in the custody and care of petitioner's father (Amit Tandon) for the duration of Respondent No. 4's such outage or unavailability i.e. to mean that Respondent No. 4 should not entrust the petitioner's care with any other person besides the petitioner's father in the event of her own absence while enjoying her exclusive company.

(ix) It is further prayed, the Hon'ble Court may kindly be please to issue direction to the Respondent no. 4 to immediately handover all the originals of petitioner's personal/KYC records (Passport, Aadhaar, Birth Certificate etc), school records/results and other personal belongings of the petitioner to the petitioner's father."

21. The facts of the present case are that from the wedlock of Amit Tandon, father of the petitioner, and Ms. Parul Tandon (the date of marriage 27.11.2004), the detenue was born on 13.08.2011. At present she is more than nine years of age. The present habeas corpus petition has been filed through father Amit Tandon with prayer to produce the corpus/detenue Km. Advika Tandon, who is allegedly in illegal custody of her mother, maternal grand-father, maternal grand-mother, maternal uncle/mama and maternal aunt/masi. The father, Amit Tandon is an entrepreneur, but before that he was pursuing career in Information Technology from 1998 to 2009. It is alleged that on 26.08.2019 the mother of the detenue picked her directly from the school, St. Mary School, Pune and brought her to Lucknow by flight. She dropped message to Amit Tandon "*boarded for Lucknow with Advika"*.

22. It is alleged that the respondent no.4 is not fit to have the custody of the detenue as she suffers from *Poly Cystic Ovary Syndrome* (PCOS). This ailment leads to low energy levels, frequent fatigue and mood swings which are not conducive to child attention and growth whereas the father, Amit Tandon is quite fit and has no ongoing health ailments/medication. It is also stated that the detenue shares an extremely close bond with her father and grand mother who have been playing pivotal, predominant and significant role in her grooming, nurturing since childhood, whereas the respondent no.4, the mother, has been focusing primarily on promoting her career. It has been further stated in the writ petition that the detenue has better place in Pune living with her father and grand-mother. She has an independent room in her home in Pune, which situates at prime location along with all paraphernalia. St. Mary's School, Pune where the detenue was studying in Class-III is an eminent school, 155 years old, and top ranked Institution in the country. It has further been stated that the respondent no.4 made frequent extended professional trips while leaving the detenue behind in a fragile state without proper schooling. Schools in Lucknow are not match to St. Mary School, Pune and now detenue is studying in Seth M.R. Jaipuria School. It has further been stated that the detenue's well being and safety are likely to be severely compromised in Lucknow whereas in Pune 24x7 strongly guarded CCTV cameras, gated society of 72 flats, protected park and game playing area at his residence which is in prime location of Kalyani Nagar, Pune whereas the respondent no.4 is living with the detenue at an relatively under developed and unsafe area at the outskirts of Lucknow. It is further stated that maternal grand father/Nana and maternal uncle/Mama have severe drinking problem which has led to the separate living of wife

of respondent no.7 along with their 3 years old son since March 2019. It has been further stated that a mysterious death of another sister of respondent no.4 took place at the tender age of 18 years in the same household. Another sister of respondent no.4, i.e. respondent no.8 is employed in Mumbai and she is unmarried and aged about 38 years.

23. Respondent no.4 suddenly departed from matrimonial home on 26.08.2019 primarily on account of differences that the father of detenue, Amit Tandon, over letting his 71 years old mother move to stay with him permanently. The permanent home of the family of Amit Tandon is in Varanasi and it was acquired in December 2018 due to acquisition of Kashi Vishwanath Mandir Corridor and, then the mother of Amit Tandon moved with him to Pune. Respondent no.4 was unhappy by the mother of Amit Tandon moving and living permanently with them and she threatened to go back to Lucknow and live with her parents along with daughter, if the mother would continue to live in the house. It is further stated that after respondent no.4 departed with detenue from Pune to Lucknow, the father Amit Tandon, made frequent trips to Lucknow to reason her to be back in the matrimonial home, but despite his sincere efforts to reconcile the matter during these visits, the respondent no.4 was rigid on her instance that only if the petitioner either arrange for a separate residence of his mother in Pune or send her away only then the respondent no.4 and detenue would return to Pune. It is, therefore, submitted that considering the infrastructure, the house hold comfort, environment and schooling as well as petitioner's being fit physically and mentally, Lucknow would not be conducive place for the detenue to live in; Pune as better fitted for her, therefore, the detenue should be released from the custody of respondent no.4 to go with her father.

24. On the other hand, respondent no.4, the mother of detnue, has submitted that there is a matrimonial dispute between the parties and, the detenue is living with her mother who has been forced to live with her parents. Due to the conduct of the father of detenue, the detenue is residing with her mother and maternal parents' house and the same cannot be termed as illegal by any stretch of imagination. It has further been stated that the writ petition is not maintainable and is liable to be dismissed on the ground on non-maintainability. It is further submitted that father of detenue has an efficacious remedy to file a petition before the appropriate court for redressal of his grievance, if any. It has further been stated that the mother had compromised with her career and left job as a dutiful wife and mother of the detenue. It has been stated that the ruses in ovaries developed during the course of married life of respondent no.4. The father of detenue has treated her with grave cruelty and never bother to take care of her. He has always been sarcastic, inconsiderate towards her. It has further been stated that the father of detenue has forced the respondent no.4 to part with her savings from salary income on the pretest of running household. The respondent no.4 used to transfer the money in the account of father of detenue pro-actively and she had spent around Rs.1 crore from her salary.

25. It has further been stated that she has decent medical condition, enjoying good health, whereas the father of the detenue has extreme anger issues, severe allergies and chronic OCD problem. He has

unhealthy relation with almost every family member and is incapable of contributing to a young girl's growth and development. The mother of the father can barely fetch for herself. It has further been submitted that it would not be in the paramount interest of the detenue to live with such a family. It has also been submitted that behaviour of the petitioner has been in fact causing a lot of mental trauma and unnecessarily mental and emotional pressure on the detenue at her tender age. He has created such conditions that it became impossible for respondent no.4 or the detenue to live with him any longer.

26. It has been stated that the detenue was initially admitted in Seth MR Jaipuria School, Lucknow in Class-III, however, due to threats advanced by the father, the said Institution has shown its inability to continue the detenue to study in the Institution. Therefore, she was admitted in Modern Vidyawati School which is also a very reputed Institution in Lucknow. It has been further submitted that efforts are being made for the detenue to get her admission in La Martiniere College or Loreto Girls School and in all likelihood she would get admission in some reputed school. It has further been submitted that the detenue being female child and, no female family member is available in the family of father of detenue, it is not in the interest of the child to be left in the custody of the father.

(v) Analysis :-

27. While deciding the dispute of such a nature, the Court has to see the paramount interest of the child.

28. I have heard learned counsel for the parties and perused the pleadings and record of the petition.

29. This Court vide order dated 29.01.2020 directed the father of the detenue, respondent no.4 and detenue to be present in Court on 24.02.2021.

30. On 24.02.2021, the Court interacted with the father and mother of detenue separately and in their absence with the detenue. After understanding the respective stands and keeping in view the welfare of the child, the Court was of the view that the custody of the detenue cannot be given to the father at this stage. The Court while referring the matter to the Mediation Centre had passed the following order :-

"1. In pursuance of the order dated 29.01.2021, father of the detenue, Mr. Amit Tandon, detenue, Km. Advika Tandon and Ms. Parul Tandon, wife of Mr. Amit Tandon are present in the Court.

2. The court has spoken to Mr. Amit Tandon and Ms. Parul Tandon and Km. Advika Tandon, in absence of her parents.

3. The Court is of the view that at this stage, custody of Ms. Advika Tandon cannot be given to the father. It also appears that she is happily living with her mother in Lucknow but she would also like to have love and affection of her father. Km. Advika Tandon has informed the Court that she speaks with her father over phone and twice a week on Skype.

4. Ms.Parul Tandon further states that the father of the child can visit her at any time with prior notice and he can make telephone call to her for short duration anyday. She will never object regarding visiting the father to meet the child or having conversation over telephone or

Skype as the case may be. It is also broadly agreed that the child would like to visit her father during long vacations and stay with her grand mother. But, permanently at this stage, she would like to live with her mother.

5. Keeping broad consensus between the parties, in order to formalize the terms of settlement between the parties with respect to custody and visitation in respect of Km. Advika Tandon, it would be appropriate to refer this matter before Mediation and Conciliation Centre of this Court.

6. Both the parties have agreed to be present before the Mediation and Conciliation Centre of this Court on 25.02.2021 at 2:30 P.M. Ms. Parul Tandon is directed to bring Km. Advika Tandon before the Mediation Centre.

7. Learned mediator is requested to make his/her all out efforts to get the matter settled between the parties and reduce the terms of settlement in writing and place it before the Court for passing appropriate order.

8. List this case on 04.03.2021 along with report of Mediation Centre.

9. Today and tomorrow, the father can take the child to treat her anywhere of her choice."

31. However, the mediation proceedings failed and the case came to be listed before this Court again. The Court again tried to settle the matter between the parties amicably keeping in view the paramount interest of the child. However, the Court could not succeed in settling the matter amicably between the parties and, therefore, it proceeded to hear the parties so that the petition can be disposed off. It appears from the respective stands of the parties that the marriage between them has been irretrievably broken down. More than anybody else it is the detenue who is suffering at this stage. She is suffering from mental and emotional trauma and is in a state of confusion because of quarreling of her parents over her custody. In matter like this the Court has to keep in mind the paramount interest of the child while deciding the question of custody of the child.

32. It is no longer res integra that a petition for habeas corpus is maintainable if the child is in the custody of another parent. It is the settled law that the Court can move in its extraordinary jurisdiction to secure the best interest of the child.

33. The Hon'ble Supreme Court in the cases of **Elizabeth Dinshaw Vs. Arvand M. Dinshaw, (1987) 1 SCC 42 and Lahari Sakhamuri Vs. Sobhan Kodali (2019) 7 SCC 311** among others has held that writ petitions in cases like this are maintainable.

34. In the case of **Nithya Anand Raghavan Vs. State (NCT of Delhi), (2017) 8 SCC 454**, Hon'ble Supreme Court in para nos.46 to 47 has held as under :-

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.

35. Further in the case **of Kanika Goel Vs. State (NCT of Delhi), (2018) 9 SCC 578,** Apex Court in paragraph 34 has held as under :-

34. As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful.

36. Hon'ble Supreme Court in the case of **Nithya Anand Vs. State (NCT of Delhi) (supra)** has held that *in a habeas corpus petition, the Court has to examine at the threshold whether the minor is in lawful or unlawful custody of another person. The custody of the minor with the natural guardian being her mother cannot be said to be unlawful. 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. It has further been held that instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child.*

37. In **Yashita Sahu Vs State of Rajasthan 2013 SCC 67** it has been reiterated that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

In paragraph 20 to 25 in respect of the paramount consideration being welfare of the child, Hon'ble Supreme Court in the said judgement has held as under :-

Welfare of the child - the paramount consideration

20. It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

21. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.

22. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

23. The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As

observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

24. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like the present one where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.

25. In addition to "visitation rights","contact rights" are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, email or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

(vi) Conclusion :-

38. The court exercises "parens patriae" jurisdiction while deciding the custody of a minor child. The Court can on its own fix the terms and conditions of custody and visitation rights of another parent.

39. The Supreme Court in the case of **Nilanjan Bhattacharya Vs. State of Karnataka, Civil Appeal No.3284 of 2020** has held that the Court has to fix the terms and conditions of custody and visitation rights considering the welfare of the child.

40. This Court in Habeas Corpus Petition No.450 of 2020 (Master Advik Sharma Vs. State of U.P.) has held that there is a strong presumption about a child's welfare to be better secured in the mother's hand, which can be dispelled only by cogent and glaring evidence about the mother's lack of fitness to discharge her maternal obligations.

Para 49 of the said judgment which is relevant is extracted hereinunder :-

"49. In the opinion of this Court, there is a strong presumption about a child's welfare to be better secured in the mother's hand, which can be dispelled only by cogent and glaring evidence about the mother's lack of fitness to discharge her maternal obligations, as already remarked.

There is no such circumstance or evidence brought to this Court's notice that may render Preeti unfit to take care of her minor son. This Court is fortified in the view that we take by 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."

41. In the present case, the mother of detenue is fully qualified having MBA and gainfully employed. Except from minor health issues, she does not suffer from any major health problem. The court cannot lose sight of the fact that the detenue is minor girl child. Lucknow is not a small place. It is a capital of the biggest State in the country and has good educational Institutions as well as medical facilities. It is well connected with all over the country as well as foreign countries. The schooling in Lucknow is not bad as projected by the father of the detenue. At this young age, the detenue requires love and affection of the mother as well as father. Since, the parents have decided to live separately, the Court has to consider where the paramount interest of the child lies and how it can be best secured while deciding the question the custody.

42. The father of the petitioner is contributing only Rs.10,000/- per month only. When the Court asked him whether he is ready to contribute something more, he specifically denied and said that he did not have means to contribute more. The mother, however, has shown generously to accommodate the father of detenue to provide the visitation rights. She had agreed to give custody of the detenue for two days in a month and custody for 50% of the summer as well as winter vacations so that child can live exclusively with the father of the petitioner with excess to mother. The father has not been consistent with his stand and he changed his stand after broadly agreeing before the Court.

43. This Court does not find anything from the pleadings or the submissions which would disentitle the mother to have the custody of the child.

44. Considering the age, sex of the child and she being in the custody of mother who is not incapacitated in any manner and gainfully employed, being well qualified, it would not be appropriate to give the custody of the child to the father, Amit Tandon. In interaction with the Court, the detenue expressed that she would like to be with father during vacations but

primarily she would like to be with her mother.

(vii) Relief :-

45. Considering all these aspects, this Court does not find any merit and substance in this petition, which is hereby disposed off with visitation rights to the father of the detenue in following manner :-

(i) Mr. Amit Tandon can visit the detenue on any day with prior notice to her mother. He can make telephonic call for short duration every day to converse with the detenue.

(ii) Mother of the detenue would not object on visiting the child or having conversation over telephone or Skype as the case may be.

(iii) Twice in a week the father can speak to the child over Skype for ½ hour duration each day and during winter and summer vacation the father can take the child to be with him and her mother for 50 % of the vacations, but primarily the detenue would live with her mother.

(iv) The father has stated that he is an entrepreneur and, therefore, he should contribute Rs.10,000/- per month more for the maintenance and study of the detenue for the time being in addition to what he is already contributing.

(2021)04ILR A100
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.03.2021

BEFORE

THE HON'BLE ALOK SINGH, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Single No. 7362 of 2021

Namrata Mark. Pvt. Ltd. New Delhi & Ors. ...Petitioners

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Karunanidhi Yadav, Krishna Kant

Counsel for the Respondents:
A.S.G.

(A) Practice & Procedure - Maintainability of Writ Petition- Prevention of Money Laundering Act, 2002 - Section 5(1) - The High Court has wide jurisdiction under Article 226 of the Constitution does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the Statute. (Para 34)

In the instant case, where the provisional attachment order No. 02 of 2021 dated 09.03.2021 is under challenge, no ground has been taken to suffice the invocation of remedy available under Article 226 of the Constitution of India. (Para 24)

The order of provisional attachment is akin to "show-cause notice". (Para 26)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Special Director Vs Mohd. Ghulam Ghouse (2004) 3 SCC 440: 2004 SCC (Cri) 826

2. U.O.I. Vs Kunisetty Satyanarayana (2006) 12 SCC 28: (2007) 2 SCC (L&S) 304

3. St.of Orissa & ors. Vs MESCO Steels Ltd. & anr. (2013) 4 SCC 340

4. U.O.I. & ors. Vs Coastal Container Transporters Association & ors. (2019) 20 SCC 446

5. Commission of Central Excise Vs Krishna Wax Pvt.Ltd. (2020) 12 SCC 572

6. U.O.I. Vs Guwahati Carbon Ltd. (2012) 11 SCC 651.

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

1. By means of the present writ petition, a challenge has been made to the provisional attachment order no. 2 of 2021 dated 09.03.2021 (annexed as annexure no. 1 to the writ petition) passed by respondent no. 4 in exercise of power under sub-Section 1 of Section 5 of the Prevention of Money Laundering Act, 2002 (in short 'Act'). The petitioner has also sought consequential relief which is to the effect that respondents may be directed not to give effect to the provisional attachment order no. 2 of 2021 dated 09.03.2021. The reliefs as sought in the writ petition on reproduction, reads as under:-

"a) issue a writ, order or direction in the nature of CERTIORARI quashing the impugned provisional attachment order no. 02/2021 dated 09.03.2021 (Annexure No. 1) passed by respondent no. 4 with respect to the four sugar mills of the petitioner, and all other consequential proceeding arising thereof in respect of the petitioner;

b) issue a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the provisional attachment order no. 02/2021 dated 09.03.2021 passed by respondent no. 4 and not to unnecessary harass the petitioner."

2. For the purpose of admission and interim relief sought in the writ petition, Sri Satya Prakash Singh, Learned Senior Advocate assisted by Sri Karunanidhi Yadav, Advocate submitted that the impugned provisional attachment order has been passed in violation of the provisions of Section 5 of the Act. The procedure, as required has not been followed prior to passing of the impugned order. Even no opportunity was provided by the concerned authority before passing the impugned order.

3. It is further submitted that the entire controversy is related with the dis-investment policy of sugar mills in the State of U.P., which were sold to different companies through auction. Elaborating his arguments, he submitted that, a Public Interest Litigation (PIL) No. 5283 (MB) 2021 (Sacchidanand Gupta vs. State of U.P. and Ors.) was filed before this Court challenging the auction of sugar mills, which was dismissed by this Court vide judgment and order dated 20.08.2016, and the same was challenged before Hon'ble Apex Court in SLP No. 26351 of 2016. In SLP, an order dated 16.09.2016 was passed. As per interim order dated 16.09.2016, the respondents therein (including the petitioner) are free to use the sugar mills purchased by them as sugar mills and make them functional and if the sugar mills have gone out of production, the same cannot be transferred or otherwise alienated or encumbered without the permission of Hon'ble Apex Court. In this way, there is no question of alienation of the property and creation of third party right, as such, the impugned provisional attachment order is liable to be interfered by this Court in the writ jurisdiction.

4. He further stated that before passing the provisional attachment order under Section 5 of the Act, the concerned authority is required to record the reasons to believe on the basis of material in his

possession that if such proceeds of crime are concealed, transferred or dealt with in any manner then it would frustrate the proceedings relating to confiscation of such proceeds of crime and in the instant case, there is already an interim order of Hon'ble Apex Court and as such, no third party right can be created in terms of the same as such also the impugned order is not sustainable.

5. He further submitted that the proceedings have been initiated on account of political vendetta and to settle the political scores. On this aspect, he submitted that Mohd. Iqbal, father of Mohd. Wazid and Mohd. Javed, who is the director of the Company, had been frontline leader of Bahujan Samaj Party and taking into account the same, an FIR dated 07.11.2017 was lodged at Police Station-Gomti Nagar, Lucknow registered as case crime no. 1409 of 2017, under Sections 420, 468, 471, 477A IPC & 629A of the Companies Act, 1956. Aggrieved by the FIR dated 07.11.2017, Mohd. Wazid and Mohd. Javed approached this Court by means of Writ Petition No. 36872 (MB) of 2018 (Suman Sharma and three ors. vs. State of U.P.), which was disposed of vide judgment and order dated 18.12.2018, wherein it was provided that the petitioners shall not be arrested till submission of police report. In another criminal case, Mohd. Wazid and Mohd. Javed were implicated and being aggrieved, they filed a Writ Petition No. 29757 (MB) of 2017 (Mohd. Wajid and Ors vs. State of U.P. and Ors.) and this Court interfered in the matter and passed an interim order dated 03.12.2019, staying the operation of order dated 04.04.2019, whereby a direction was issued to transfer the investigation of case crime no. 1409 of 2017, under Sections 420, 468, 471, 477A IPC and 629A of the Companies Act, 1956 lodged at P.S.-Gomti Nagar, District Lucknow to CBI. The case crime no. 1409 of 2017 also relates to seven of the closed sugar mills out of 21 auctioned sugar mills.

6. He further stated that even Competition Commission of India in the year 2013 took cognizance and a case no. 01 of 2013 was registered against the petitioner and other companies. This case was based upon findings in the performance Audit Report of the Comptroller and Auditor General (CAG) of India. The said matter was duly contested by the petitioners and other and after recording the findings in favour of the petitioner and others, the Competition Commission of India closed the proceedings vide order dated 04.05.2017.

7. Sri Satya Prakash Singh, learned Senior Advocate, based on the aforesaid submission submitted that the proceedings carried out under the Act including the impugned order dated 09.03.2021 has been passed just to settle the political rivalry and score and the same is abuse of process of law. The prayer is to entertain the writ petition and to pass an interim order staying the operation and implementation of impugned provisional attachment order no. 02 of 2021 dated 09.03.2021

8. Opposing the prayer of learned Senior Advocate appearing on behalf of the petitioner, Sri S.B. Pandey, Assistant Solicitor General of India assisted by Sri Shiv P. Shukla submitted that in view of the opportunity to the petitioner to plead its case before the statutory forum provided under Section 8 of the Act, the present writ petition challenging the provisional attachment order no. 02 of 2021 dated 09.03.2021 passed in exercise of power as envisaged under Section

5 of the Act, is not maintainable. This remedy is statutory remedy. He further stated that against the order of Adjudicating Authority under Section 8 of the Act, there is a provision of appeal under Section 26 before Appellate Tribunal and thereafter any person aggrieved by any decision or order of Appellate Tribunal can file an appeal under Section 42 of the Act before the concerned High Court. He submitted that in view of the statutory remedies available to the petitioner, this Court may not exercise its jurisdiction under Article 226 of the Constitution of India. The relevant provisions of the Act [Section(s) 8, 26 & 42], on reproduction reads as under:-

"8 Adjudication. –

(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an 13 [offence under section 3 or is in possession of proceeds of crime], he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government: Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person: Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub- section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf, and

(c) taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering: Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized under section 17 or section 18 and record a finding to that effect, such attachment or retention of the seized property or record shall—

(a) continue during the pendency of the proceedings relating to any scheduled offence before a court; and

(b) become final after the guilt of the person is proved in the trial court and order of such trial court becomes final.

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the attached property.

(5) Where on conclusion of a trial for any scheduled offence, the person concerned is acquitted, the attachment of the property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect.

(6) Where the attachment of any property or retention of the seized property or record becomes final under clause (b) of sub-section (3), the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property.

26. Appeals to Appellate Tribunal.—

(1) Save as otherwise provided in sub-section (3), the Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal.

(2) Any banking company, financial institution or intermediary aggrieved by any order of the Director made under sub-section (2) of section 13, may prefer an appeal to the Appellate Tribunal.

(3) Every appeal preferred under sub-section (1) or sub-section (2) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or Director is received and it shall be in such form and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may after giving an opportunity of being heard entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), or sub-section (2), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Director, as the case may be.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of filing of the appeal.

***42. Appeal to High Court**.--Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order: Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.*

Explanation.--For the purposes of this section, "High Court" means—

(i) The High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(ii) Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain."

9. Sri Pandey further submitted that in the instant case, it has not been urged by learned counsel for the petitioner that the impugned order is without jurisdiction or has been passed without any foundation as such also, the petitioner is under obligation to avail the remedies available under the statute.

10. He further stated that prior to passing of the order of provisional attachment, the Act does not provide for giving an opportunity of hearing. In this way, the argument of learned counsel for the petitioner, on this aspect, is fallacious.

11. It is further submitted that before the High Court of Delhi, a writ petition bearing W.P. (C) No. 5511 of 2019 : (Wave Hospitality Private Limited vs. Union of India) was filed challenging the provisional attachment order, as also challenging Section(s) 5(1), 5(5), 8(3), 8(5) and 8(6) of the Prevention of Money Laundering Act was filed. In the said writ petition, a preliminary objection with regard to maintainability of the writ petition was raised and after considering the factual as also the legal aspect of the case, the High Court of Delhi dismissed the petition vide order dated 30.05.2019 with liberty to the petitioner to show cause the impugned order, which was order of provisional attachment under the Act.

12. Sri Pandey further submitted that proceedings under Prevention of Money Laundering Act are different from the proceedings carried out by the Competition Commission of India and the decision of Competition Commission of India including the findings therein would not affect the proceedings under the Act. The Act was enacted by the Parliament to prevent Money Laundering and to provide confiscation of property derived or involved in Money Laundering and for matters connected therewith or incidental thereto. Thus, the submission of learned counsel for the petitioner based on the findings of the Competition Commission of India has no force.

13. He also stated that the impugned order of attachment is not in violation of interim order of the Hon'ble Apex Court, as the same imposes certain restrictions on the purchasers of sugar mills.

14. Lastly, he submitted that all the pleas which have been raised by the petitioner before this Court can be raised by the petitioner before Adjudicating Authority under Section 8 of the Act and the Adjudicating Authority, as appears from Section 8(2), is under obligation to consider the same.

15. We have considered the submissions made by learned counsel for the parties.

16. Before we proceed to take up the issue of maintainability of writ petition, we feel it appropriate to advert, in brief the

reason behind enacting the Prevention of Money Laundering Act, which was enacted in the year 2002. This Act was brought in force w.e.f 01.07.2005. The reason for enacting this Act is to implement the political declaration adopted by the United Nations General Assembly held in the month of June, 1998 in which India was a Member. The statement of objects and reasons recognizes that money laundering, is a serious threat not only to financial system of country but also to its integrity and sovereignty. In this view, to prevent money laundering and to provide for confiscation of property derived from or involved in money laundering and for the matter connected therewith, the provision has been made in the Act. The Money Laundering is not only the threat, as aforesaid, to our country, but it is also affecting the entire world.

17. Taking note of aforesaid, we are considering the issue of maintainability of instant writ petition challenging the provisional attachment order no. 2 of 2021 dated 09.03.2021

18. The intention behind the Act is to check the money laundering, as defined under Section 3 of the Act, the same reads as under:-

3. Offence of money-laundering *--Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.*

19. Punishment for money laundering is provided under Section 4 of the Act. Section 5 deals with the provisional attachment, which is limited to 180 days only. Sections 6 to 11 deal with the constitution of Adjudicating Authority and adjudication process.

20. It reflects from the aforesaid sections that while adjudicating the action of officials related to provisional attachment, a duty is cast upon the Adjudicating Authority to consider entire material and Adjudicating Authority is under statutory obligation to conduct full-fledged enquiry and trial and only thereafter, the provisional attachment can be confirmed or rescinded.

21. Sections 5 to 11 are under Chapter III of the Act, which provides for attachment, adjudication and confiscation.

22. In order to protect the right of the concerned person over the property in issue, the process of adjudication after provisional attachment order is provided under the Act.

23. No doubt, that in certain contingencies, inspite of existence of alternative statutory remedy available to the aggrieved person, the remedy available under Article 226 of Constitution of India can be availed by filing writ petition and Constitutional Courts can entertain the same. These contingencies, broadly, are (i) where it is a case of Inherent Lack of Jurisdiction, (ii) where there is a breach/violation of Principles of Natural Justice, (iii) Where the writ petition has been filed for enforcement of Fundamental Rights and, (iv) where the vires of the Act is challenged.

24. In the instant case, assailing the provisional attachment order No. 02 of 2021 dated 09.03.2021, no ground has been

taken that the order has been passed by an incompetent authority or by an authority having no jurisdiction. In this view, it is not a case of lack of jurisdiction. Further, in this writ petition, the vires of the Act has not been challenged.

25. In this case, Right to Property is involved. Right to property is a constitutional right, which is always subject to restriction imposed by law. Further, the Right to Property has not been included under Part-III of the Constitution of India, which deals with the Fundamental Rights. Article 300-A is under Chapter IV of Part-XII of Constitution of India and it provides Right to Property. Thus, this is also not a case of enforcement of Fundamental Right. On the other hand, this is a case of right over the property, which can efficaciously be adjudicated by Forums provided under the Act.

26. So far as the plea of breach of natural justice, as raised by the counsel for the petitioner for entertaining the writ petition is concerned, we are of the view that the same is unsustainable. The reason for it, in our view, is that an order of provisional attachment is akin to "show-cause notice". This observation is based on the following main reasons; inferred by us from the provisions envisaged under Sections 5 & 8 of the Act:-

(i) The life of provisional attachment order is 180 days only and there exists a statutory remedy to the concerned person against the same under Section 8 of the Act, which provides full-fledged hearing/trial and as also complete opportunity of hearing to the aggrieved person to present his case,

(ii) Opportunity of hearing under Section 8 is not a "post-decisional hearing"

(iii) After the adjudication, as per Section 8 of the Act, the order of provisional attachment can be confirmed or rescinded.

(iv) In order to protect the right over the property, to avoid the prejudice to the concerned party on account of the action of the officials, the proper opportunity of hearing is provided to the concerned party under the Act itself.

27. It is trite law that the writ petition at the stage of show cause notice is not maintainable. **(Vide: Special Director vs. Mohd. Ghulam Ghouse, (2004) 3 SCC 440 : 2004 SCC (Cri) 826; Union of India v. Kunisetty Satyanarayana, (2006) 12 SCC 28:(2007) 2 SCC (L&S) 304; State of Orrisa & Ors Vs. MESCO Steels Ltd. & Another (2013) 4 SCC 340; Union of India & Ors Vs. Coastal Container Transporters Association & Others (2019) 20 SCC 446; Commissioner of Central Excise Vs. Krishna Wax Private Ltd.(2020) 12 SCC 572; Union of India v. Guwahati Carbon Ltd., (2012) 11 SCC 651).**

28. We also find from the above quoted provisions of the Act that in addition to remedy available under Section 8 of the Act, the party/person aggrieved by an order made by Adjudicating Authority can prefer an appeal under Section 26 of the Act before the Appellate Tribunal and thereafter any person aggrieved by any decision or order of Appellate Tribunal can file an appeal before the concerned High

Court, as provided under Section 42 of the Act.

29. In addition to what we have already observed hereinabove, on the plea based on principle of natural justice, we would like to further observe that albeit alternative remedy is not absolute bar for entertaining the writ petition but taking note of multi layered remedies available in the statute under consideration itself, it would not be appropriate for this Court to exercise the discretionary jurisdiction provided under Article 226 of the Constitution of India on the plea of violation of Principles of Natural Justice. Further, the Act itself does not provide any opportunity of hearing to the concerned party prior to passing of order of provisions attached under Section 5 of the Act. Rightly so as after the order under Section 5 of the Act, the aggrieved party has multi layered remedies under the Act.

30. So far as the plea(s) related to recording of 'reasons to believe' while passing the provisional attachment order and other procedural irregularities/illegalities are concerned, the same are statutory infraction and being so the same can be pleaded before the Adjudicating Authority as also in the appeal(s) provided under Sections 26 & 42 of the Act.

31. Regarding the arguments of the learned Senior Advocate, based on the facts related to the interim order of Hon'ble the Apex Court, political rivalry and finding of Competition Commission, we are of the view that it would not be appropriate for this Court to advert into the same and record finding(s), as it could prejudice the case of either of the parties before the Adjudicating Authority and other forums available under the Act.

32. We may usefully refer to the exposition of the Apex Court in **Titaghur Paper Mills Co. Ltd. & Another vs. State of Orrisa and Ors. 11(1983) 2 SCC 433**, wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of.

In paragraph 11 of the above report, the Court observed thus:-

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton6 in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. (1919 AC 368) and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. (1935 AC 532) and Secretary of State v. Mask & Co. (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine." (emphasis supplied)"

(iii) Impugned order of provisional attachment has been passed by competent authority and on this aspect, no ground has been taken in writ petition.

34. In the subsequent decision in **Mafatlal Industries Ltd. & Ors. vs. Union of India & ors. (1997) 5 SCC 536,** *the Apex Court went on to observe that an Act cannot bar and* curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pas orders which can be settled only through a mechanism prescribed by the Statute.

35. For the foregoing reasons, including that the multi-layered remedies are available to the petitioner under the statute in which the impugned order of provisional attachment has been passed as also the judgments referred hereinabove, we are not inclined to entertain this writ petition challenging the provisional attachment order no. 2 of 2021 dated 09.03.2021 under Section 5 of the Prevention of Money Laundering Act, 2002. Accordingly, the writ petition is **dismissed** with no order as to costs.

36. However, the petitioner is at liberty to avail the remedies available under the Act.

(2021)04ILR A109
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2021

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Rera Appeal Defective No. 6 of 2021

Air Force Naval Housing Board Air Force Station, Race Course, New Delhi
...Appellant
Versus
U.P. Real Estate Regulatory Authority Regional Office, G.B. Nagar & Ors.
...Respondents

Counsel for the Appellant:
Sri Ashish Kumar Singh, Sri Ajay Kumar Singh

Counsel for the Respondents:
Sri Wasim Masood

(A) Civil Law - The Real Estate (Regulation & Development) Act, 2016 - Section 44(2) - Application for settlement of disputes and appeals to Appellate Tribunal - Section 43(5) - Tribunal must form its opinion on the facts and material before it - why a higher percentage of the disputed penalty be deposited by a 'promoter'- appellant as a condition to entertain its appeal - no discretion has been vested with the Tribunal to waive the requirement to deposit of 30% of the penalty amount as a pre-condition to maintain an appeal against a penalty order. (Para -19,20)

Appeal filed by appellant against the order of the RERA - Tribunal dismissed appeal filed by the appellant at the preliminary stage - not entertained due to lack of payment of higher amount of pre-deposit directed by the Tribunal under Section 44(2) of the Real Estate Act, 2016 - penalty imposed on the appellant - Tribunal required the appellant to deposit the balance amount i.e. the entire amount of penalty awarded by the RERA as a pre-condition to maintain the appeal.

HELD:- The Tribunal has not recorded any special reasons as were necessary and has thus not 'determined' the amount to be deposited as a pre-condition to maintain the appeal. Then, the decisions of this Court relied upon by the Tribunal are wholly distinguishable. The minimum deposit to maintain an appeal against the penalty, would be 30% of the penalty amount. For deposit of any higher amount, a determination would have to be made by the Tribunal. Therefore, those amounts may have to be deposited in entirety . Order passed by the Tribunal dated 28.02.2020 is set aside. (Para - 26,30,32)

Appeal allowed. (E-6)

List of Cases cited:-

1. Radicon Infrastructure & Housing Pvt. Ltd. Vs Karan Dhyani , Second Appeal No.364 of 2018

2. Radicon Infrastructure & Housing Pvt. Ltd. Vs Dhaneshwari Devi Dhyani , Second Appeal No. 367 of 2018

3. Garikapatti Veeraya Vs N. Subbiah Choudhury , AIR 1957 SC 540

4. Nahar Industrial Enterprises Ltd. Vs Hong Kong &Shanghai Banking Corp., (2009) 8 SCC 646

5. Raj Kumar Shivhare Vs Directorate of Enforcement, (2010) 4 SCC 772

6. Ashok Leland Ltd. Vs St. of T.N. & ors. (2004) 3 SCC 1

(Delivered by Hon'ble Saumitra Dayal Singh, J)

1. Heard Sri Ashish Kumar Singh, learned counsel for the appellant and Sri Wasim Masood, learned counsel for the Uttar Pradesh Real Estate Regulatory Authority (RERA in short).

2. The present appeal has been filed against the order passed by the Real Estate Appellate Tribunal (Tribunal in short) in Appeal/Misc. Case No.360 of 2019 dated 28.02.2020 whereby the Tribunal has dismissed that appeal filed by the appellant, under Section 44(2) of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as the 'Act'). Since the appellant's appeal before the Tribunal had been dismissed at the preliminary stage, it was not entertained due to lack of payment of higher amount of pre-deposit directed by the Tribunal. Principally, that issue appears to be an issue between the appellant and the Tribunal, affecting the right of appeal of the appellant without

examination on merits. Hence, the present appeal has been heard and decided at the fresh stage itself, without notice to the claimant respondent.

3. Undisputedly, the above-described appeal came to be filed by the appellant against the order of the RERA, dated 10.04.2019 whereby penalty @ MCLR + 1% w.e.f. 01.07.2012 was imposed on the appellant. It may also not be disputed that, at the time of filing the aforesaid appeal, the appellant furnished a demand draft for an amount of Rs.6,33,000/- towards 30% of the penalty amount awarded by the RERA. Further, it appears that there is no dispute to the computation of 30% of the disputed demand of penalty. By an order dated 28.01.2020, the Tribunal required the appellant to deposit the balance amount i.e. the entire amount of penalty awarded by the RERA as a pre-condition to maintain the appeal. For convenience, the relevant part of the order dated 28.01.2020 is quoted below:

"From perusal of the order sheet, it is clear that the Applicant has not complied with the provisions of Section 43(5) of the Act in legal sense.

Applicant is directed to deposit the balance amount, if any, towards Section 43(5) of the Act, in the light of observation laid down by Hon'ble High court Lucknow Bench, "in Second Appeal No. 364 & 367 of 2018 (Radicon Infrastructure & Housing Private Limited vs. Karan Dhyani), decided on 26.7.2019." by the date fixed.

Put up on 28.02.2020 for compliance of Section 43(5) of the Act."

4. Thereafter the matter was listed before the Tribunal on 28.02.2020 whereupon the Tribunal passed the below quoted order:

"From the perusal of order sheet, it is quite clear that on the last date applicant was directed to deposit the balance amount towards Section 43(5) of the Act, in the light of observation laid down by the Hon'ble Allahabad High Court, Lucknow bench, "in Second Appeal No. 364 & 367 of 2018 (Radicon Infrastructure & Housing Private Limited vs. Karan Dhyani), decided on 26.7.2019, but today counsel for the applicant stated that applicant is not in a position to deposit the balance amount in the light of order dated 28.01.2020, hence the instant case is dismissed due to non compliance of Tribunal's order dated 28.01.2020.

From the perusal of order sheet, it also transpires that cost amount Rs. 1,000/- has been imposed on 03.01.2020 and the same has not been deposited so far in the Tribunal's fund.

Applicant's counsel assured that he will deposit the cost amount during the course of day. After deposit the cost amount the file shall be put up before me today at 4:00 p.m."

5. The Tribunal has relied on the observations made by the Lucknow Bench of this Court in ***Second Appeal No.364 of 2018 (Radicon Infrastructure And Housing Private Limited Vs. Karan Dhyani) and Second Appeal No. 367 of 2018 (Radicon Infrastructure And Housing Private Limited Vs. Dhaneshwari Devi Dhyani), decided on 26.07.2019,*** to

require the appellant to deposit the entire amount of disputed penalty as a condition to maintain the appeal.

6. The present appeal has been pressed on the following question of law:

"Whether deposit of entire disputed demand of penalty is a condition precedent to maintain the appeal against penalty, under Section 44(2) of the Real Estate (Regulation & Development) Act, 2016?"

7. Learned counsel for the appellant would submit, undisputedly, the appellant is a zero-profit organization, registered as a society of retired personnel of the Indian Air Force and the Indian Navy. It exists and operates only for the purpose of providing affordable housing to the members of the Indian Air Force and the Indian Navy and the widows of such personnel.

8. In the context of the order impugned in the present appeal, it has been submitted, Section 43(5) of the Act does not mandate pre-deposit of the entire disputed demand of penalty as a pre-condition to maintain an appeal under Section 44(2) of the Act. Also, the decision of this Court in Second Appeal Nos.364 of 2018 and 367 of 2018 does not lay down as a proposition of law that the entire disputed demand of penalty must be deposited before an appeal is entertained or maintained under Section 44 of the Act.

9. Thus, learned counsel for the appellant would submit that the Tribunal has completely misread the law and/or mis-applied itself to reach a very harsh conclusion that the appeal filed by the appellant was not maintainable because the appellant did not deposit the entire disputed demand of penalty.

10. Learned counsel for the RERA would submit that the right of appeal granted under Section 34 of the Act is circumscribed and conditioned by Section 43(5) of the Act. According to him, there is no right vested in the appellant to maintain its appeal by depositing 30% of the disputed penalty. The Tribunal could determine a higher amount and, as has been done in the present case. The right of appeal would arise only upon deposit of that higher amount. Since the appellant did not make the necessary deposit, the Tribunal has rightly dismissed its appeal.

11. Having heard learned counsel for the parties and having perused the record, it appears that the controversy revolves around the interpretation to be given to Section 43 (5) of the Act. That provision of law reads as below:

"43(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 at least 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."

12. In **Garikapatti Veeraya v. N. Subbiah Choudhury AIR 1957 SC 540** the Supreme Court considered the nature and extent of the right of appeal and held:

"23. From the decisions cited above the following principle clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

13. Then, in **Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corp., (2009) 8 SCC 646**, while dealing with the issue pertaining to the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, it has been reiterated and elaborated as below:

"Vested right of appeal

125.Another aspect of the matter also cannot be lost sight of. A plaintiff of a suit will have a vested right of appeal. The said right would be determined keeping in view the date of filing of the suit. Such a right of appeal must expressly be taken away. An appeal is the "right of entering a superior court, and invoking its aid and interposition to redress the error of the court below" and "though procedure does surround an appeal the central idea is a right".

126.The right of appeal has been recognised by judicial decisions as a right which vests in a suitor at the time of institution of original proceedings. The Privy Council in Colonial Sugar Refining Co.v.Irving[1905 AC 369 : (1904-07) All ER Rep Ext 1620 (PC)] noted that: (AC p. 372)

"... To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

127.When a person files a civil suit his right to prosecute the same in terms

of the provisions of the Code as also his right of appeal by way of first appeal, second appeal, etc. are preserved. Such rights cannot be curtailed, far less taken away except by reason of an express provision contained in the statute. Such a provision in the statute must be express or must be found out by necessary implication". (emphasis supplied)

14. Relevant to the issue of deposit of the disputed demand as a pre-condition to maintain an appeal under the FEMA, in ***Raj Kumar Shivhare v. Directorate of Enforcement, (2010) 4 SCC 772,*** the Supreme Court considered the effect of statutory restrictions placed on the right to appeal and observed as under:

"19.The word "any" in this context would mean "all". We are of this opinion in view of the fact that this section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by statute, as it is barred here under Section 34 of FEMA, is an inherent right (see Section 9 of the Civil Procedure Code) but a right of appeal is always conferred by a statute. While conferring such right a statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by this Court on the basis of an interpretative exercise".

.....

.....

29.By referring to the aforesaid schemes under different statutes, this Court wants to underline that the right of appeal, being always a creature of a statute, its nature, ambit and width has to be determined from the statute itself. When the language of the statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same."

15. Reading Section 43 (5) of the Act strictly, the first conclusion that may be safely drawn is, no appeal may be filed by a 'promoter' against the order of the RERA imposing penalty unless a minimum of 30% of the demand of penalty is pre-deposited by such 'promoter'. There is absolutely no discretion vested in the Tribunal to reduce that amount below the statutorily defined minimum of 30% of the penalty imposed by the RERA. That condition is absolute. It has also been met, in the facts of this case.

16. Second, a discretion is vested in the Tribunal to determine an amount more than 30% of the penalty - to be deposited as a condition to maintain such appeal by a 'promoter'. The legislature has referred to the same as such higher percentage "as may be determined by the Appellate Tribunal."

17. Thus, in the first place, in the event of an appeal being filed by a 'promoter' against an order of the RERA, imposing penalty, such appellant must necessarily deposit 30% of the penalty imposed as a pre-condition to maintain that appeal. There can be no exception to the

same. Neither that percentage or amount can be reduced by the Tribunal nor an appeal filed without deposit of that amount be entertained by the Tribunal.

18. If the Tribunal were to require a particular 'promoter'-appellant to deposit an amount that be more than 30% of the penalty amount imposed by the RERA in the order impugned before the Tribunal, as a pre-condition to maintain its appeal, it would have to first determine the same. The word 'determine' is not defined under the Act. In Ashok Leland Ltd. v. State of Tamil Nadu And Another, (2004) 3 SCC 1, while considering the meaning to be given to the word 'determination' appearing in paragraph nos.94, 95 & 96, the Supreme Court observed as under:

"94.The word "determination" must also be given its full effect, which presupposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion of (sicor) finding.

95.In Aiyar, P. Ramanatha:Law Lexicon, 2nd Edn., it is stated:

"Determination or order.--The expression 'determination' signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression 'order' must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial.Jaswant Sugar Mills Ltd.v.Lakshmi Chand[AIR 1963 SC 677, 680] (Constitution of India, Article 136)."

96.In Black's Law Dictionary, 6th Edn., it is stated:

"A 'determination' is a 'final judgment' for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action.Thomas Van Dyken Joint Venture v. Van Dyken[90 Wis 236, 279 NW 2d 459, 463] ."

19. In the context of Section 43(5) of the Act, the Tribunal must form its opinion on the facts and material before it - why a higher percentage of the disputed penalty be deposited by a 'promoter'-appellant as a condition to entertain its appeal. Undoubtedly, this would involve exercise of judicial discretion. In comparable situations arising under fiscal statutes, the concept of pre-deposit, pre-exists. There, (as enabled by the statute), discretion is often bestowed on the appeal authority/Tribunal to waive, either in part or in whole, the condition of pre-deposit. In those situations, the Courts have consistently opined in favour of such discretion being exercised on brief reasons being disclosed while exercising such a discretionary power - as to existence or otherwise of prima-facie case, financial hardship, and irreparable *injury.*

20. However, as noted above, under section 43(5) of the Act, no discretion has been vested with the Tribunal to waive the requirement to deposit of 30% of the penalty amount as a pre-condition to maintain an appeal against a penalty order. In fact, a discretion has been vested in the Tribunal to be exercised against the appellant before it, that too at the first/preliminary stage of entertainment of

the appeal. When exercised, it would place an extra restriction on the right of appeal being exercised by an aggrieved *'promoter'*/appellant before the Tribunal.

21. If exercised routinely and not in exceedingly rare and demanding circumstances, that discretion exercised may lead to denial to an aggrieved *'promoter'*/appellant, its statutory right of appeal or it may render it completely illusory. Plainly, in the context of the Act, the appeal before the Tribunal is the first and the only appeal on facts. The further appeal to this Court is an appeal on substantial question/s of law. Thus, the Tribunal may never place a condition so onerous or burdensome, on the appellant before it, as may shut out the only remedy of appeal on fact, available under the Act.

22. The judicial discretion thus vested on the Tribunal must be exercised with extreme care and it must not appear to have been exercised on whims or fancies. It may be exercised only in extreme cases. Only by way of illustration, that discretion may be exercised where it appears to the Tribunal, even on a *prima facie* basis, that the penalty imposed by RERA is too less/insignificant to the infraction found or that the appellant before it is a repeat or habitual or wilful offender or the facts appear to involve large scale infractions of the law, by way of an organised activity. In such and other cases, for which judicially sound reasons may be recorded as may compel or commend to the Tribunal to require a particular appellant to deposit an amount higher than the statutory pre-defined limit of 30% of the penalty.

23. Unless careful application of mind is first made by the Tribunal to the facts of the individual case and unless the Tribunal records specific reasons to determine the higher amount required to be deposited by the 'promoter'-appellant, to maintain its appeal against the order imposing penalty passed by the RERA, the entire exercise made by the Tribunal may be questioned as arbitrary or unreasoned. That would be wholly undesirable and an avoidable course in the context of the quasi-judicial power exercised by the Tribunal.

24. In exercising its power, the Tribunal may always remain cognizant of the real purpose for which it exists being to deliver justice by adjudicating the appeals brought before it, on merits. Normally, the legislature provides a right of appeal without a condition of pre-deposit. However, in financial matters, the modern legislative trend has been to provide for a minimum deposit as a pre-condition to maintain the appeal. Unless the orders of the Tribunal requiring pre-deposit at higher rates (30% of penalty) are informed with reasons, such practice, if allowed, would amount to taking away the right of appeal before the Tribunal, by an order passed by the Tribunal that has been vested with the jurisdiction to decide such appeals on merits. It would be a uniquely odd process and result, factually and jurisprudentially. The appellant in that situation may end up being pre-judged by the Tribunal.

25. Therefore, in addition to the above, in each case where it proposes to enhance the pre-deposit amount, the Tribunal would also be obliged to consider the prima facie merits, the financial hardship (of the 'promoter'-appellant) and the question of irreparable loss or hardship that may be claimed by such 'promoter'-appellant, if it were to be compelled to deposit any amount higher than 30% of the penalty awarded by the RERA, as a

condition to maintain its appeal against the penalty order.

26. Consequently, the power of the Tribunal to direct pre-deposit in excess of 30% of the penalty, under section 43(5) of the Act is found to be purely discretionary, to be exercised with extreme caution, in rare cases, by way of an exception and not routinely.

27. Coming to the facts of this case, the Tribunal has not recorded any special reasons as were necessary and has thus not 'determined' the amount to be deposited as a pre-condition to maintain the appeal. Then, the decisions of this Court relied upon by the Tribunal are wholly distinguishable. In Second Appeal No. 367 of 2018, Radicon Infrastructure (supra), the following questions of law had been framed:

"(1) Whether in the light of Section 43(1) read with proviso to said Section, the Designated Appellate Tribunal can continue to function even after the period of one year from the date of coming into force the Real Estate (Regulation and Development) Act, 2016 ?

(2) Whether the appointment of the Chairperson and three whole time members of the Appellate Tribunal under Section 45 of the Real Estate (Regulation and Development) Act 2016 have the effect of establishment of an Appellate Tribunal under Section 43(1) of the Real Estate (Regulation and Development) Act, 2016 ?

(3) Whether order passed by the Designated Appellate Tribunal as provided under proviso to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 could have been passed even after it became coram non judis ?

28. Those questions had been answered by the learned Single Judge, vide judgment dated 26.7.2019 and the appeal dismissed. Inasmuch as, it is plainly apparent that the question of law framed in that appeal were different, the decision of the same has no bearing on the question involved in the present case. Insofar as Second Appeal No. 364 of 2018, Radicon Infrastructure (supra) is concerned, an additional question of law was framed by the Court, to the following effect :

"Whether the appellate tribunal while passing an order in terms of the proviso to sub-section 5 of Section 43 has any discretion to allow the deposit of a lesser portion of the total amount to be paid to the allottee including interest and compensation imposed on him or the entire amount, as such has to be deposited without any discretion in this regard with the appellate tribunal to reduce the same and whether in view of the use of the word determined by the appellate tribunal in the first part of the proviso is indicative of requirement of application of mind by the appellate tribunal ?"

29. That additional question was answered in the negative. Specific to the issue of penalty to pre-deposit viz-a-viz penalty imposed, it was observed as under :

"With regard to the penalty the appellate tribunal has to "determine' whether 30% of the penalty imposed or such a higher percentage as it may determine is to be deposited, but when it

comes to the deposit of the total amount to be paid to the allottee including interest and compensation under the orders of the regulatory authority or adjudicating officer, no such discretion based on a 'determination' appears to have been vested in the Appellate Tribunal by the legislature."

30. Thus, the view taken by this Court in the aforesaid decision is only to the effect that the minimum deposit to maintain an appeal against the penalty, would be 30% of the penalty amount. For deposit of any higher amount, a determination would have to be made by the Tribunal. The Court made a distinction in the statutory conditions requiring pre deposit to be made with respect to the disputed demand of penalty (where a minimum 30% was required to be deposited and a higher deposit required if the Tribunal so determined) and other amounts that may be awarded by the RERA where no such discretion exists. Therefore, those amounts may have to be deposited in entirety.

31. Therefore, even in that earlier decision of this Court, it was not laid down by way of a rule that the appellant deposits the entire amount of penalty as a pre-condition to maintain its appeal. The Tribunal has clearly misconstrued, both the statutory provision as well as the decisions of this Court passed in Second Appeal Nos. 364 of 2018 and 367 of 2018. Accordingly, the question of law is answered in the negative i.e. in favour of the appellant.

32. Consequently, the order dated passed by the Tribunal dated 28.02.2020 is set aside. Normally, the matter would have been remanded to decide the application under section 43(5) of the Act, afresh, however, since it has already been observed, that no special circumstance had been recorded or noted by the Tribunal and the appellant had already deposited 30% of the disputed demand of penalty, in the facts of the present case, since the status of the appellant is also claimed to be that of a zero-profit society existing solely for the object of providing affordable housing to the personnel of the Indian Air Force and Indian Navy and the widows of such personnel, it appears just that the appeal be heard and decided by the Tribunal on its own merits, against the deposit of 30% of the disputed demand of penalty.

33. According the appeal is **allowed**.

(2021)04ILR A118
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

S.C.C. Revision Defective No.- 02 of 2021

Uday Bhan Tiwari ...Revisionist
Versus
Pashupati Colonizers Pvt. Ltd. & Ors. ...Respondents

Counsel for the Revisionist:
Sri Kamlesh Kumar Mishra

Counsel for the Respondents:

(A) Practice & Procedure - Necessary & Proper Party – Code of Civil Procedure,1908 - Order 1 Rule 10(2)

It is a settled proposition of law that on death of a tenant, his heirs inherits the tenancy jointly and decree passed against one or some of the tenant is binding on non impleaded tenant also. The revision-applicant who is claiming to be the

joint tenant of the property is neither necessary or proper party. The present impleadment application is filed mischievously with an intent to delay the disposal of the suit. (Para 16-19)

Revision Rejected. (E-8)

List of Cases cited:-

1. Suresh Kumar Kohli Vs Rakesh Jain & anr. 2018 (2) ARC 40 SC

2. Krishna Kityal (Smt.) Vs Kamlesh Gupta (Smt.) & anr. 2008 (2) ARC 603 *(followed)*

3. Lalit Kumar Vs Neel Kantheshwar & ors. Civil Misc. Writ Petition No. 20787 of 2006 *(distinguished)*

4. Gauri Shankar Gupta Vs Anita Mishra & anr. 2004 (1) ARC 200 *(followed)*

5. Ashok Chintaman Juker & ors. Vs Kishore Pandurang Mantri & anr. AIR 2001 SC 2251

6. H.C. Pandey Vs G.C. Paul AIR 1989 SC 1470

7. Harish Tandon Vs Aditional District Magistrate & ors. 1995 (1) ARC 220 (SC) *(followed)*

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

1. Heard learned counsel for the revision-applicant.

2. The present revision under Section 25 of Provincial Small Causes Courts Act is directed against the order dated 5.12.2020 passed by Additional District Judge/Special Judge (Prevention of Corruption Act), Court No. 5, Gorakhpur in S.C.C. Suit No. 9 of 2010 (Pashupati Colonizers Vs. Chandra Bhan Tripathi) whereby the court below has dismissed the application of the revision-applicant under Order 1 Rule 10 (2) of C.P.C. for impleading him as respondent in the S.C.C. Suit No. 9 of 2010.

3. A suit for eviction has been instituted by the respondent No. 1-Pashupati Colonizers Private Limited contending inter-alia that Chandra Bhan Tiwari (since deceased) was tenant of the premise No. C-123/89 Purdilpur, District Gorakhpur. The rent of the premise has not been paid since January 2006. After the death of Sri Chandra Bhan Tiwari, the respondent Nos. 2 and 3 have been substituted as his heirs.

4. In the suit, the revision-applicant filed an application paper No. 127-Ga under order 1 rule 10 (2) C.P.C. on the ground that his father late Ram Lakhan Tiwari was original tenant of the premises in question, and after his death, he alongwith his brother late Chandra Bhan Tiwari became the joint tenant of the premises in question. Therefore, the revision-applicant is necessary and proper party in the aforesaid suit and the suit cannot be decided effectively without impleadment of revision-applicant.

5. The application paper No. 127-ga was contested by the respondent No. 1 by filing objection paper No. 131-ga wherein it is contended that the revision-applicant was never in possession of any portion of the property in dispute nor he was a joint tenant of the property in dispute. The application has been filed after 10 years from the date of institution of suit only with an intention to delay the disposal of the suit. It was further pleaded that the revision-applicant alongwith his brother had submitted affidavit 16-ga on 9.2.2011 for recall of the ex-parte order, and in the affidavit paper No. 17-ga, he had not claimed that he was ever in possession of the property in dispute. It was also stated

that the revision-applicant had knowledge about the case since 7.2.2011.

6. The trial court while dismissing the application noted that the suit have been instituted in the year 2010 and the revision-applicant alongwith his brother late Chandra Bhan Tiwari had filed application 16-ga under order 9 rule 7 of C.P.C. for recalling the ex-parte order and in the objection filed against the said application, the respondent No. 1-plaintiff has stated that the revision-applicant was not recessary party as the person who is doing business in the premises in dispute was impleaded as a party, yet he did not file any impleadment application immediately thereafter.

7. The trial court also noticed the judgement of the Apex Court in the case of **Suresh Kumar Kohli Vs. Rakesh Jain and another, 2018 (2) ARC 40 SC** and judgement of this Court in the case of **Krishna Kityal (Smt.) Vs. Kamlesh Gupta (Smt.) and another, 2008 (2) ARC 603** in concluding that the revision-applicant is neither necessary party nor a proper party as after the death of original tenant, his heirs inherited the property jointly and a decree passed against one or some of them is binding upon other tenants.

8. Challenging the impugned order, counsel for the revision-applicant has submitted that the revision-applicant is necessary and proper party and impleadment of necessary and proper party can be done at any stage of the proceedings in the interest of justice. He submits that in the facts of the present case, the court below has committed manifest error of law in not allowing the application of revision-applicant under order 1 rule 10 (2) of C.P.C. despite the fact that the revision-applicant is necessary and proper party.

9. In support of his submission, he has placed the judgement of this Court rendered in Civil Misc. Writ Petition No. 20787 of **2006 (Lalit Kumar vs. Neel Kantheshwar and others)** wherein this Court relying the judgement of this Court in **Gauri Shankar Gupta Vs. Anita Mishra and another, 2004 (1) ARC 200** has held that ordinarily after the death of tenants particularly in case of tenancy of non-residential building all the heirs must be impleaded as tenants in ejectment suit.

10. I have heard learned counsel for the revision-applicant and perused the record.

11. The facts as emanate from the record are that the case of plaintiff-respondent No. 1 is that he has purchased the property in dispute from the erstwhile owner Sri Amitabh Rai by sale deed dated 15.6.2004. Chandra Bhan Tiwari (since deceased) was the tenant of the property in dispute. The tenant had not paid the rent of the property in dispute since January 2006, and therefore, the cause of action arose for the plaintiff-respondent No. 1 seeking a decree of eviction against tenant Chand Bhan Tiwari (since deceased) on the ground of arrears of rent. It is also clear from the record that the revision-applicant has filed application alongwith affidavit paper No. 16-ga and 17-ga with late Chandra Bhan Tiwari for recalling the ex-parte order in which specific objection was filed by the plaintiff/respondent No. 1 that the revision-applicant has no concern with the premise in question nor he is in possession over any part of the premises in dispute. The revision-applicant, thereafter, did not file any application for impleadment in the suit and went into slumber, and after about 10 years from the date of filing of the suit, he woke up for his

right and filed impleadment application under order 1 rule 10 (2) of C.P.C. claiming himself to be proper and necessary party for effective adjudication of the case.

12. The trial court noticed paragraphs-25 and 26 of the written statement of the defendant No. 1 wherein it is averred that original suit No. 776 of 2003 (Chandra Bhan Tiwari vs. Amitabh Rai and others) was instituted in the court of Civil Judge (Jr. Division) with respect to the property in dispute, and if the revision-applicant was necessary party then in what capacity Chandra Bhan Tiwari alone instituted original suit No. 776 of 2003. The trial court after noticing the aforesaid fact held that the revision-applicant is not a necessary party as Chandra Bhan Tiwari alone had instituted a suit against erstwhile owner Amitabh Rai on the ground of possession in the property in dispute. The aforesaid finding is based upon proper apprecation of facts on record and is not perverse.

12.A. At this juncture, it would be apt to consider judgement of Apex Court as well as of this Court as to what is the right of the heirs of original tenant after his death in the rented property. The Apex Court in the case of **Suresh Kumar Kohli (supra)** held that where original tenant dies, the legal heirs inherit the tenancy as joint tenants and occupation of one of the tenant is occupation of all the joint tenants, therefore, it is not necessary for landlord to implead all legal heirs of deceased tenant, whether they are occupying the property or not. It is sufficient for the landlord to implead either of those persons who are occupying the property as party. Paragraphs-20 & 21 of the said judgement is reproduced herein below:-

"20. We are of the view that in the light of H.C. Pandey (supra), the situation is very clear that when original tenant dies, the legal heirs inherit the tenancy as joint tenants and occupation of one of the tenant is occupation of all the joint tenants. It is not necessary for landlord to implead all legal heirs of the deceased tenant, whether they are occupying the property or not. It is sufficient for the landlord to implead either of those persons who are occupying the property, as party. There may be a case where landlord is not aware of all the legal heirs of deceased tenant and impleading only those heirs who are in occupation of the property is sufficient for the purpose of filing of eviction petition. An eviction petition against one of the joint tenant is sufficient against all the joint tenants and all joint tenants are bound by the order of the Rent Controller as joint tenancy is one tenancy and is not a tenancy split into different legal heirs. Thus, the plea of the tenants on this count must fail.

21. Even otherwise, the intervention at this belated stage of execution proceedings, in the fact and circumstances of the case, seems to be a deliberate attempt to nullify the decree passed in favour of the appellant herein as when Respondent No.1 filed objections under Section 47 Order XXI of the Code, he claimed to be in possession of the suit premises, however, he failed to produce any evidence except two rent receipts for the months of December, 1993 and January 1994 that too when the Respondent No. 1 in his objection petition filed in the execution proceedings of the eviction decree has himself admitted that the there exists a dispute between him and Respondent No. 2 and they had parted their ways."

13. Paragraphs-11, 14 and 16 of **Ashok Chintaman Juker & Ors vs. Kishore Pandurang Mantri & Anr, AIR 2001 SC 2251** relevant in the context of present case is reproduced herein below:-

"11. The question that arises for consideration in such cases is whether the tenancy is joint or separate. In the former case notice on any one of the tenants is valid and a suit impleading one of them as a defendant is maintainable. A decree passed in such a suit is binding on all the tenants. Determination of the question depends on the facts and circumstances of the case. No inflexible rule or straight-jacket formula can be laid down for the purpose. Therefore, the case in hand is to be decided in the facts and circumstances thereof.

14. This Court in the case of H.C. Pandey vs. G.C. Paul, AIR 1989 SC 1470 taking note of the settled position that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant, held that it is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereafter and that is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. This Court further held that the respondent acted on behalf of the tenants; he paid rent on behalf of his father and he accepted notice on behalf of all; in the circumstances the notice served under Section 106 of the Transfer of Property Act on the respondent was sufficient and it was a valid notice.

16. In the case on hand, as noted earlier, on the death of the original tenant Chintaman the rent bills in respect of the premises in question were issued in the name of his elder son Kesrinath and on his death the rent bills were issued in the name of his widow Smt.Kishori Kesrinath Juker. It is not the case of the appellant no.1 that there was any division of the premises in question or that rent was being paid to the landlord separately by him. Indeed the appellant no.1 took the plea that he was paying the rent through Smt. Kishori Kesrinath Juker. Thus the tenancy being one, all the members of the family of the original tenant residing with him at the time of his death, succeeded to the tenancy together. In the circumstances the conclusion is inescapable that Smt. Kishori Kesrinath Juker who was impleaded as a tenant in the suit filed by the landlord represented all the tenants and the decree passed in the suit is binding on all the members of the family covered by the tenancy. In the circumstances the decree passed in terms of the compromise entered between the landlord and Smt. Kishori Kesrinath Juker can neither be said to be invalid nor inexecutable against any person who claims to be a member of the family residing with the original tenant, and therefore, a tenant as defined in Section 5 (11) (c). The position that follows is that the appellants have no right to resist on the ground that the decree is not binding on them. Further, the trial court and the appellate court concurrently held that the appellant no.1 has not been residing in the premises since 1962 i.e. when his elder brother Kesrinath was alive. Therefore, when the suit was filed in the year 1992 there was no necessity for the landlord to implead appellant no.1 or members of his family in the suit since he (landlord) had no cause of action for seeking a decree of recovery of possession from them. In that view of the matter the decree under

execution does not suffer from any illegality or infirmity. Viewed from any angle the appellants have no justification on the facts as well as in law to resist execution of the decree for possession of the premises by the landlord. The Executing Court rightly rejected the objection filed by the appellants against execution of the decree and the appellate court and the High Court rightly confirmed the said order. This appeal being devoid of merit is dismissed with costs which is assessed at Rs.10,000/-."

14. The Apex Court in the case of **H.C. Pandey Vs. G.C. Paul, AIR 1989 SC 1470** held that heirs of original tenant succeed to tenancy as joint tenants and not as tenant in common. Paragraph-4 of the judgement is reproduced herein below:-

"4. It is now well settled that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. In the present case it appears that the respondent acted on behalf of the ten- ants, that he paid rent on behalf of all and he accepted notice also on behalf of all. In the circumstances, the notice served on the respondent was sufficient. It seems to us that the view taken in Ramesh Chand Bose (supra) is erroneous where the High Court lays down that the heirs of the deceased tenant succeed as tenants in common. In our opinion, the notice under S. 106 of the Transfer of Property Act served by the appellant on the respondent is a valid notice and therefore the suit must succeed. "

15. This Court also in the case of **Krishna Kityal (Smt.) (supra)** has held that on the death of tenant, his heirs succeeds the tenancy right as joint tenancy. Paragraph-7 of the judgement is reproduced herein below:-

"7. Coming to the facts of the present case, it is not in dispute that Sanjay Kumar one of the sons of Late Manohar Lal is carrying on the business from the shop in question he admittedly has obtained registration from the Trade Tax Department for carrying on the business in the said shop. It is also not in dispute that the present application for impleadment was filed on a day earlier when date of delivery of judgment was fixed. The Supreme Court in the case of Harish Tandon (Supra) has held that on the death of tenant, the heirs succeed the tenancy rights as joint tenants, he represents the estate of the deceased as heirs. It is a single tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefor and the heirs succeed to the tenancy as joint tenants."

16. In the case of **Lalit Kumar** (supra) relied upon by counsel for the revision-applicant, this Court has also noted the proposition that after the death of tenant, his heirs inherited the tenancy jointly and decree passed against one or some of the tenant is binding on non impleaded tenant also. However, this Court in the said case concurred with the argument of counsel for

the petitioner that when a joint tenant applies for impleadment, he cannot be non suited on the aforesaid proposition of law by placing reliance upon judgement of this Court in the case of **Gauri Shankar Gupta** (supra). In my opinion, the judgement of this Court in the case of Lalit Kumar (supra) is not applicable in the facts of the present case for two reasons; firstly in the case in hand, the impleadment application has been filed maliciously to delay the disposal of the suit inasmuch as the suit has been filed in the year 2010 and the impleadment application has been filed in the year 2020 despite the fact that the applicant has knowledge about the pendency of the suit since 2011 as he had filed application to recall the ex-parte order on 9.2.2011. Secondly, the judgement of this Court in **Gauri Shankar Gupta** (supra) was considered by this Court in the case of **Krishna Kityal (Smt.)** (supra) and this Court placing reliance upon judgement of **Harish Tandon Vs. Additional District Magistrate and others, 1995 (1) ARC 220 (SC)** held that on the death of a tenant the heirs succeeded the tenancy rights as joint tenant, and it rejected impleadment application. Accordingly, this Court is bound by the law propounded by this Court in latter judgement **Krishna Kityal (Smt.)** (supra).

17. Now applying the aforesaid principle in the case in hand, the revision-applicant who is claiming to be the joint tenant of the property being son of late Ram Lakhan Tiwari, who according to the revision-applicant was original tenant of the premises in dispute, is neither necessary party nor proper party.

18. It is also pertinent to mention that the present application has been filed by the revision-applicant only with a purpose to delay the disposal of the suit inasmuch as he had filed an application in the year 2011 for recall of the ex-parte order in which specific case of the landlord-respondent No. 1-plaintiff was that the revision-applicant is neither in possession of the premises in dispute nor has any concern with the premises in dispute, yet he had slept over the matter and did not file any impleadment application immediately, and after about 10 years, he filed application for impleadment in the suit.

19. For the aforesaid reasons, the present application under order 1 rule 10 of C.P.C., has been filed mischieviously only to delay the suit.

20. For the reasons given above, in the opinion of the Court, the trial court has not committed any jurisdictional error or any material irregularity in rejecting the application under order 1 rule 10 of C.P.C. Accordingly, this Court is of the opinion that the present revision lacks merit and is **dismissed** with no order as to costs.

(2021)04ILR A124
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matter Under Article 227 No. 673 of 2021 (Civil)

Om Prakash Agarwal ...Petitioner
Versus
Lacchi Ram & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anupam Laloriya, Sri Pankaj Saksena

Counsel for the Respondents:

(A) Civil Law - Code of Civil Procedure ,1908 - Order VII Rule 11 read with section 151 - Rejection of plaint - Section 115 - Revision - power under Article 227 is of the judicial superintendence - which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. (Para -13)

Application under Order VII Rule 11 read with section 151 of Code of Civil Procedure - to reject the plaint - ground - plaintiff is not specified/identify the exact location of his ½ share - map and the decree passed by Commissioner not annexed - objection filed by the petitioner - application rejected by Civil Judge (Senior Division)

HELD:- The present petition is not at all maintainable specially due to the fact that a statutory alternative remedy is available to the petitioner to file a Civil Revision before the revisional court as provided under Section 115 of the Code of Civil Procedure. (Para - 20)

Petition disposed off. (E-6)

List of Cases cited:-

1. R.K. Roja Vs U.S. Rayudu & anr. , AIR 2016 SC 3282

2. Virudhunagar Hindu Nadargal Dharma Paribalam Sabai & ors. Versus Tuticorin Educational Society & Ors , (2019) 9 SCC page 538

3. Dahiben Vs Arvindbhai Kalyanji Bhanusali (Gajra) (D) THR LRS & ors. , 2020 4 Supreme 160

4. Indian Oil Corporation Ltd. Vs M/S J. Lal Filling Station & anr., Matter Under Article 227 No. 339 of 2021

5. Indian Oil Corporation Ltd. Vs Amritsar Gas Service & ors. reported in (1991) 1 SCC page 533

6. Surya Dev Rai Vs Ram Chander Rai & ors. (2003) 6 SCC 675

7. Jasbir Singh Vs St. of Punj. (2006) 8 SCC 294

8. CIT Vs Bombay Trust Corporation reported in AIR 1930 PC 54

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Pankaj Saxena, counsel for the petitioner.

2. The petitioner has preferred the present petition inter-alia with the prayer to set aside the order dated 05.03.2020 passed by Civil Judge (Senior Division), Jhansi in Original Suit No. 259 of 2016 (Lachchi Ram vs. Rajesh and others).

3. Facts in brief as contained in the present petition are that Original Suit No. 259 of 2016 was filed by one Lachchi Ram along-with Mukesh against Rajesh and 4 others including the present petitioner Om Prakash Agarwal in the Court of Civil Judge (Senior Division), Jhansi for permanent injunction and for declaration that the decree dated 26.05.1993 passed by Commissioner, Jhansi in Appeal No. 56 of 1993 (Ranpat Singh Parihar vs. State) be declared void inter-alia on the ground that he is the owner of ½ of the plot being plot nos. 2308, 2309, 2310, 2311 and 2314 total 5 plots of area 1.71 decimal, situated in Mohal Nandu Khata, Khewat No. 11, Mauja-Jhansi, Pargana and District-Jhansi. Ranpat Singh has got a decree in his favour from the Commissioner, Jhansi on 26.05.1993 on the basis of which he has sold the land in question to petitioner and respondent nos. 3 to 6 who are trying to dispossess the plaintiff.

4 . An application was filed by the present petitioner as provided under Order VII Rule 11 read with section 151 of Code of Civil Procedure with the prayer to reject the plaint itself mainly on the ground that the plaintiff is not specified/identify the exact location of his ½ share and has not annexed map and the decree passed by Commissioner, Jhansi Division Jhansi dated 26.05.1993, copy of the objection filed by the petitioner as stated above is appended as Annexure-4 to the present petition. The aforesaid application was filed by the petitioner in the aforesaid suit on 01.04.2019. The aforesaid application was heard by the Civil Judge (Senior Division), Jhansi and rejected vide its judgment and order dated 05.03.2020. It is argued that application filed by the petitioner under Order VII Rule 11 read with section 151 of the Code of Civil Procedure is illegally and arbitrary rejected by the trial court. It is further argued that the order impugned is in complete violation of the settled principles of law.

5. Counsel for the petitioner relied upon the following judgments:-

1. ***AIR 2016 SC 3282 R.K. Roja vs. U.S. Rayudu and Another*** *decided on 04.07.2016.*

2. ***Virudhunagar Hindu Nadargal Dharma Paribalam Sabai & Ors. Versus Tuticorin Educational Society & Ors*** *reported in* ***(2019) 9 SCC page 538*** *decided on 03.10.2019.*

3. ***Dahiben vs. Arvindbhai Kalyanji Bhanusali (Gajra) (D) THR LRS & ORS*** *reported in* ***2020 4 Supreme 160*** *decided on 09.07.2020.*

4. ***Matter Under Article 227 No. 339 of 2021 (Indian Oil Corporation Ltd. vs. M/S J. Lal Filling Station And Another)*** *decided on 29.01.2021.*

6. Heard counsel for the petitioner and perused the record.

7. It appears from perusal of the record that in Original Suit No. 259 of 2016 filed by the plaintiff-respondent, an application was filed by the petitioner under Order VII Rule 11 read with Section 151 of C.P.C., to dismiss the aforesaid suit. From perusal of the order passed by the trial court it has been held by the court below that the plaint could only be rejected in case it is found that no cause of action is disclosed or suit is barred by limitation under Rule 11 (d). It is stated in the order impugned that the issue has already been framed and issue nos. 2 and 3 in respect of valuation and jurisdiction of the court has already been decided. It is further stated in the order impugned that the application filed by the present petitioner could only be decided after perusal of the evidence and as such the application filed by the present petitioner for dismissal of the plaint was rejected.

8. In the case of **R.K. Roja (Supra),** it was held by the Hon'ble Supreme Court that the application filed under Order VII Rule 11 of the Code of Civil Procedure can be filed at any stage. The only restriction is that consideration of application for rejection should not be made on the basis of allegations made by the defendant in his written statement or on the basis of the allegations in application for rejection of plaint, the Court has to consider only plaint as a whole and in case entire plaint comes under situations covered under Order VII Rule 11 (a) to (f) of Code of Civil Procedure, the same has to be rejected. It is further held that without disposing of an

application filed under Order VII Rule 11 of the Code of Civil Procedure the court could not proceed with the trial. Relevant paragraphs of the aforesaid judgment namely paragraph nos. 5 and 6 are reproduced below:-

5. We are afraid that the stand taken by the High Court in the impugned order cannot be appreciated. An application under Order VII Rule 11 of the CPC can be filed at any stage, as held by this Court in Sopan Sukhdeo Sable and others v. Assistant Charity Commissioner and others, (2004) 3 SCC 137... "The trial court can exercise the power at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. ...". The only restriction is that the consideration of the application for rejection should not be on the basis of the allegations made by the defendant in his written statement or on the basis of the allegations in the application for rejection of the plaint. The court has to consider only the plaint as a whole, and in case, the entire plaint comes under the situations covered by Order VII Rule 11 (a) to (f) of the CPC, the same has to be rejected.

6. Once an application is filed under Order VII Rule 11 of the CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (Election Petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter (See Saleem Bhai and 3 others v. State of Maharashtra and others, (2003) 1 SCC 557. But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court. To quote relevant portion from paragraph-20 of Sopan Sukhdeo Sable case (supra):

"20. ... Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. ..."

9. In the case **of Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & Ors (Supra)** it was held by the Hon'ble Supreme Court that whenever the proceedings are under the code of Civil Procedure and the forum is the Civil Court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. The relevant paragraphs of the aforesaid judgment namely paragraphs no. 11 to 14 is reproduced below:-

"11. Primarily the High Court, in our view, went wrong in overlooking the

fact that there was already an appeal in C.M.A. No. 1 of 2018 filed before the Sub-Court at Tuticorin under Order XLI, Rule 1 (r) of the Code, at the instance of the fifth defendant in the suit (third respondent herein), as against the very same order of injunction and, therefore, there was no justification for invoking the supervisory jurisdiction under Article 227.

12. Secondly, the High Court ought to have seen that when a remedy of appeal under section 104 (1) (i) read with Order XLIII, Rule 1 (r) of the Code of Civil Procedure, 1908, was directly available, the respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu Vs. S. Chellappan & Ors., (2000) 7 scc 695, this Court held that "though no hurdle can be put against the exercise of the Constitutional powers of the High Court, it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a Constitutional remedy".

13. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before Civil Courts in terms of the provisions of Code of Civil procedure and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which the respondents 1 and 2 invoked the jurisdiction of the High court. This is why, a 3 member Bench of this court, while overruling the decision in Surya Dev Rai vs. Ram Chander Rai, (2003) 6 scc 675, pointed out in Radhey Shyam Vs. Chhabi Nath, (2015) 5 scc 423 that "orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts.

14. Therefore wherever the proceedings are under the code of Civil Procedure and the forum is the Civil Court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."

10. In so far as the case of **Dahiben (Supra)** is concerned in the aforesaid case suit filed by the plaintiff in the trial court was barred by limitation, the orders were passed and Hon'ble Apex Court stating therein that application filed under Order VII Rule 11 (d) of Code of Civil Procedure holding that the suit filed was barred by limitation. Since the suit was clearly barred by the limitation as per Article 59 of Limitation Act, 1963 it was liable to be dismissed. The relevant paragraph of the aforesaid judgment namely paragraph no. 15.8 is reproduced below:-

15.8 The delay of over 5 and ½ years after the alleged cause of action arose in 2009, shows that the suit was clearly barred by limitation as per Article 59 of the Limitation Act, 1963. The suit was instituted on 15.12.2014, even though the alleged cause of action arose in 2009, when the last cheque was delivered to the plaintiffs.

The Plaintiffs have failed to discharge the onus of proof that the suit was filed within the period of limitation. The plaint is therefore, liable to be rejected under Order VII Rule 11 (d) of CPC.

11. In so far as the case of the **Indian Oil Corporation Ltd. (Supra)** is concerned, it appears from perusal of the aforesaid judgment that the suit filed by the plaintiff was barred by the provisions of sub-section (1) of Section 14 of the Specific Relief Act. The aforesaid section was duly taken into consideration by the Hon'ble Apex Court in the case of **Indian Oil Corporation Ltd. vs. Amritsar Gas Service & others** reported in (1991) 1 SCC page 533. In view of the same it was held by this Court that since the suit itself was barred as per the provisions of sub-section 1 of Section 14 of the Specific Relief Act, the necessary orders were passed by this Court. However in the aforesaid cases after the arguments were advance at great length by the counsel for the parties a prayer itself was made by the counsel for the plaintiff-respondent that the plaintiff-respondent be allowed for withdrawal of suit itself hence the ratio of the aforesaid judgment will not apply.

12. It is clear from perusal of the facts as narrated above that the none of the judgments will help the petitioner in so far as the present petition is concerned.

13. The supervisory jurisdiction of this Court over subordinate Courts is well settled, the scope of judicial reviews is very limited and narrow. It is not to correct the errors in the orders of the court below but to remove manifest and patent errors of law and jurisdiction without acting as an appellate authority. The power provided under Article 227 of the Constitution of India does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It is well settled that power under Article 227 is of the judicial superintendence which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them.

14. In the case of Surya **Dev Rai vs. Ram Chander Rai and Others (2003) 6 SCC 675**, it was held by the Hon'ble Supreme Court in exercise of supervisory power under Article 227, High Court can correct errors of jurisdiction committed by subordinate Courts. It also held that when subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or jurisdiction though available is being exercised in a manner not permitted by law and failure of justice or grave injustice has occasioned, the Court may step in to exercise its supervisory jurisdiction. However, it also said that be it a writ of certiorari or exercise of supervisory jurisdiction, none is available to correct mere errors of fact or law unless error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the

provisions of law; or, a grave injustice or gross failure of justice has occasioned thereby.

15. In the Case of **Jasbir Singh Vs. State of Punjab (2006) 8 SCC 294**, the Hon'ble Apex Court held as under:

"...while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions."

16. Against the order impugned by which an application filed by the petitioner under Order VII Rule 11 of the Code of Civil Procedure was dismissed a remedy is available to the petitioner to approach the appellate/revisional forum. As per Section 96 of the CPC, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. Therefore, unless the order rejecting an application filed under Order 7 Rule 11 CPC is held to be a decree, an appeal will not lie under Section 96 of the CPC. Order XLIII Rule 1 of the CPC provides for appeals from orders. As per Order XLIII of the CPC, an appeal is not provided for as against an order allowing or dismissing an application filed under Order 7 Rule 11 of the Code of Civil Procedure. Section 2(2) of the CPC reads as follows:-

"2. Definitions. -.....

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question withinSection 144, but shall not include –

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation. - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

17. A reading of the aforesaid provision makes it clear that an order rejecting a plaint shall be deemed to be a decree, but it has not been provided in the said section that an order dismissing an application to reject a plaint is deemed to be a decree. The word "deemed" is commonly used for creating a statutory fiction for extending the meaning to a subject-matter which it does not specifically designate.

18. In the case of **CIT vs. Bombay Trust Corporation reported in AIR 1930**

PC 54, it is stated that when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament or the Legislature requires him to be treated as if he were.". An adjudication not fulfilling the requisites of Clause 2 of Section 2 of the Code cannot be said to be a "decree". By a legal fiction, however, certain orders and determinations are deemed to be "decree" within the meaning of Section 2(2). When a statutory fiction is created by a Legislature, it cannot be ignored. The effect of such legal fiction is that a position which otherwise is not present, it is deemed to be present under the specified circumstances. As stated above, Section 2(2) of the Code specifically provides that rejection of a pliant shall be deemed to be a decree, but the Legislature has consciously not included the order dismissing an application for rejection of plaint filed under Order 7 Rule 11 of the CPC within the deeming provision and therefore, it is clear that an order seeking rejection of the plaint cannot be deemed to be a decree within the meaning of Section 2 (2) of the CPC. When an order cannot be deemed to be a decree under Section 2(2) of the Code, though the order decides an important aspect of the trial affecting the very valuable right of the defendant, it cannot be held that an appeal will lie against such an order, especially when no appeal is provided against such an order under Order 43 CPC.

19. In so far as the present case is concerned the petitioner has directly approached this Court under Article 227 of Constitution of India against the order by which an application filed by the defendant-petitioner under Order 7 Rule 11 was rejected by the court below.

20. In this view of the matter the Court is of the opinion that the present petition is not at all maintainable specially due to the fact that a statutory alternative remedy is available to the petitioner to file a Civil Revision before the revisional court as provided under Section 115 of the Code of Civil Procedure.

21. In view of the same as stated above, without interfering with the order passed by the court below and without expressing any opinion on the merits of the case, the present petition is disposed of finally, permitting the petitioner to file a revision as provided under Section 115 of the Code of Civil Procedure, if so advised.

(2021)04ILR A131
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matter Under Article 227 No. 2029 of 2020
(Civil)

Manoj Kumar Parashar & Anr.
...Petitioners
Versus
District Judge, Agra & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amit Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Tripathi, Sri Anil Kumar Sharma

(A) Civil Law - Code of Civil Procedure ,1908 - Order 1 Rule 10 read with Order 22 Rule 10 and Section 151 CPC - Transfer of Property Act,1882 - Section 52 - Transfer of property pending suit

relating thereto - *Doctrine of lis pendens* - jurisdiction, power, or control which a court acquires over property involved in suit, pending the continuance of the action, and until final judgment therein - U.P. Urban Land (Ceiling and Regulation) Act, 1976 - Section 8(4), Section 33 - surplus/excess land - The pendente lite purchaser would be entitled to, or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court - mere pendency of the suit does not prevent one of the parties to the suit from dealing with the subject matter of the suit - a transferee pendente lite is not void ab initio - It only makes such transfer subject to the rights of the parties finally determined .(Para - 9,11)

Dispute regarding the property - Petitioners owner of the land in question - competent authority declared surplus/excess land - father of the petitioners filed Misc. Appeal - dismissed in default - restoration application - execution power of attorney - petitioners have never executed any power of attorney - application under Order 1 Rule 10 read with Order 22 Rule 10 and Section 151 CPC - impleading - applicant/appellant no.3 - never authorized anyone to sell or otherwise deal with their share in the land in question - denied the execution of power of attorney as well as execution of sale deeds - impleadment application not legally maintainable - District Judge allowed the impleadment application .

HELD:- The petition is devoid of merit is liable to be dismissed. Since the misc. appeal is pending a further direction is given to the court below to decide the aforesaid appeal in accordance with law most expeditiously and positively within a period of six months.(Para – 13)

Petition dismissed. (E-6)

List of Cases cited:-

1. Jayaram Mudaliar Vs Ayyaswami & ors., (1972) 2 SCC 200

2. Raj Kumar Vs Sardari Lal & ors., 2004 AIR SCW 470

3. A Nawab John & ors. Vs V.N. Subramaniyam, 2012 AIR SCW 4248

4. Thomson Press (India) Ltd. Vs Nanak Builders &Investors Pvt. Ltd. & ors., 2013 (5) SCC 397

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Amit Kumar Mishra, counsel for the petitioner and Sri Anil Kumar Sharma, counsel for the respondent no.3.

2. The petitioners have preferred present petition inter-alia with the following prayer :-

"(a) Set aside the impugned order dated 18.01.2020 passed in Misc. Case No.235 of 2006 in Misc. Appeal No.487 of 1985 (Shri Krishna Kumar Parashar & others Vs. State of U.P. & others) passed by District Judge Agra by which allowed the impleadment application no.158ka of respondent no.3 (Annexure No.13 of the Misc. Petition);"

3. The facts in brief as contained in the petition is that the dispute is regarding the property bearing Khasra plots No. 134-A measuring 2 bighas 11 biswas 9 biswansis and 7 kachwansis and plot no.134-B measuring 4 bighas 11 biswas and 10 biswansis equivalent to 16495.8015 sq. meter situated in Village Tora, Tehsil and District Agra and the petitioners are owner of the land in question, which is clear from fasli year 1422-27, i.e., for the year 2015-20. The competent authority has declared the above mentioned land in question as surplus/excess land under Section 8(4) of the Urban Land (Ceiling and Regulation) Act, 1976 in Case No.4955/3605 of 1976-77 on 5.6.1980. Aggrieved against the order dated 5.6.1980, the father of the petitioners filed Misc.

Appeal No.487 of 1985 (Babulal Vs. State of U.P. and others) under Section 33 of the U.P. Urban Land (Ceiling and Regulation) Act, 1976. The said misc. appeal was dismissed in default. Against the order of dismissal petitioners filed the restoration application no.4ga, which was registered as Misc. Case No.235 of 2006 (Krishna Kumar Parashar & others Vs. State of U.P. and others). The aforesaid restoration application was admitted and notice was issued to the opposite parties and 18.07.2006 was date fixed for objection and disposal by the District Judge, Agra. Mr. Anup Kumar executed power of attorney on 29.01.2016 in the name of Gaurav Parashar for 1/4 part of the land in question. On the basis of power of attorney the Gaurav Parashar on 30.01.2016 executed registered sale deed in the name of Vikas Jain for the land in question. Manoj Kumar executed alleged power of attorney on 24.06.2016 in the name of Ashish Upadhay which was registered on 02.07.2016 for 1/3rd part of khata no.84 khasra no.134 area 0.1040 hectare and khata no.92 khasra no.134 area 1.6480 hectare. On the basis of alleged power of attorney Ashish Upadhaya on 4.7.2016 executed registered sale deed in the name of Vikas Jain for the land in question. On 23.04.2019 respondent no.3 filed an application no.158-ka supported with an affidavit no.159ka under Order 1 Rule 10 read with Order 22 Rule 10 and Section 151 CPC in Misc. in Case No.235 of 2006 for impleading them as party as applicant/appellant no.3. On 26.4.2019 petitioners filed reply 174C to the impleadment application dated 23.4.2019 and submitted that petitioners have never executed any power of attorney and never authorized anyone to sell or otherwise deal with their share in the land in question and denied the execution of power of attorney dated 29.01.2016 and 24.06.2016 and also denied the execution of sale deeds dated 30.01.2016 and 04.07.2016 and therefore the impleadment application is not legally maintainable and is liable to be quashed. The private respondent has given the reply. The District Judge, Agra allowed the impleadment application no.158-ka of respondent no.3 on 18.01.2020.

4. Mr. Moti Singh, learned Standing Counsel has vehemently opposed the aforesaid prayer.

5. Normally as a public policy, once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, principals of lis pendens has been evolved so that litigation may finally terminate without the intervention of a third party. This is because of public policy, otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end.

6. The doctrin of lis pendens has been dealt with in great detail by the Hon'ble Supreme Court in the case *of* ***Jayaram Mudaliar Vs. Ayyaswami and Ors***. reported in ***(1972) 2 SCC 200***. The relevant paragraph namely paragraph nos.42 to 46 is reproduced hereinbelow :-

"42. As some argument has been advanced on the supposed inapplicability of the general doctrine of lis pendens to the impugned sales, the nature, the "basis, and the scope of this doctrine may be considered here.

43. It has been pointed out, in Bennet "On lis pendens", that, even before

Sir Francis Bacon framed his ordinances in 1816 "for the better and more regular administration of justice in the chancery, to be daily observed" stating the doctrine of lis pendens in the 12th ordinance, the doctrine was already recognized and enforced by Common law Courts. Bacon's ordinance on the subject said :

"No decree bindeth any that commeth in bona fide, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill, nor the order; but, where he comes in pendente lite, and, while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth; but, if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice."

The doctrine, however, as would be evident from Bennet's work mentioned above, is derived from the rules of jus gentium which became embodied in the Roman Law where we find the maxim : "Rem (sic) de qua controversia prohibemur (sic) in acrum dedicare" (a thing concerning which there is a controversy is prohibited, during the suit from being alienated). Bell, in his commentaries on the laws of Scotland said that it was grounded on the maxim : "Pendente lite nibil innovandum". . He observed :

"It is a general rule which seems to have been recognized in all regular systems of jurisprudence, that during the pendence of an action, of which the object is to vest the property or obtain the possession of. real estate, a purchaser shall be held to take that estate as. it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced."

44. In the Corpus Juris Secundum (Vol. LIV-p. 570), we find the following definition :

"Lis pendens literally means a pending suit; and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in suit, pending the continuance of the action, and until final judgment therein."

45. Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject of litigation so that parties litigating before it may not remove any part of the subject matter outside the power of the court to deal with it and thus make the proceedings infructuous.

46. It is useful to remember this background of Section 52 of our Transfer of Property Act which lays down :

"During the pendency in any Court...of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

7. In the case of ***Raj Kumar versus Sardari Lal and others, 2004 AIR SCW 470,*** the doctrine of lis pendens as

expressed in Section 52 of the Transfer of Property Act was considered by the Supreme Court. The transfer took place during the pendency of the suit, but the Decree passed ex-parte in the suit was sought to be set aside, not by the defendant on record, but by a person, who did not come or was not brought on record promptly, and hence, apparently appeared to be a third party. The Supreme Court observed that such a person in accordance with the principles incorporated in Section 52 of the Transfer of Property Act would be a representative-in-interest of the defendant-judgement debtor. Under Section 52 of the Transfer of Property Act, a decree passed against the defendant transferor would also be executed against the lis pendens transferee of the defendant, even though he was not a party to the suit. Such a person can prefer an appeal being a person aggrieved. The person who is liable to be proceeded against in execution of the decree can file an appeal against the decree. Such a person can also file an application for recall under Rule 13 of Order IX of the CPC, as such, a person stepped into the shoes of the defendant and the decree was sought to be executed against him. It was held by the Supreme Court that a lis pendens transferee, though not brought on record under Order XXII Rule 10 of CPC, is entitled to move an application under Order IX Rule 13 of CPC to set aside a decree passed against his transferor, the defendant in the suit.

8. In the case of ***A Nawab John and others versus V.N. Subramaniyam, 2012 AIR SCW 4248,*** the Supreme Court was considering a case where a specific performance of a registered agreement and delivery of possession was sought by the plaintiff in a suit before the trial court. During the pendency of the suit, the sole respondent V.N. Subramaniam filed an application, praying that he may be impleaded as a party-defendant to the said suit on the ground that he had purchased the suit property. His application for impleadment was allowed and the plaint came to be amended mentioning the details of subsequent events. The Supreme Court examined the background of insertion of the doctrine of lis pendens in Section 52 of the Transfer of Property Act.

9. The Supreme Court referred to the language of Section 52 of the Transfer of Property Act and observed in Paragraph-17 that it is settled legal position that the effect of Section 52 is not to render transfers effected during pendency of a suit by a party to the suit void, but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to, or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court. The mere pendency of the suit does not prevent one of the parties to the suit from dealing with the subject matter of the suit. The Section only postulates a condition that the lis pendens alienation will in no manner affect the rights of the other party under any decree, which may be passed in the suit unless the property alienated with the permission of the Court. In Paras 18 and 19 of the said judgment, the Supreme Court observed thus:-

"18. Such being the scope of Section 52, two questions arise: whether a pendente lite purchaser: (1) is entitled to be

impleaded as a party to the suit?; (2) once impleaded what are the grounds on which he is entitled to contest the suit.

19. This Court on more than one occasion held that when a pendente lite purchaser seeks to implead himself as a party-defendant to the suit, such application should be liberally considered. This Court also held in Saila Bala Dassi v. Nirmala Sundari Dassi [AIR 1958 SC 394] that, "justice requires", a pendente lite purchaser "should be given an opportunity to protect his rights". It was a case, where the property in dispute had been mortgaged by one of the respondents to another respondent. The mortgagee filed a suit, obtained a decree and "commenced proceedings for sale of the mortgaged property". The appellant Saila Bala, who purchased the property from the judgment-debtor subsequent to the decree sought to implead herself in the execution proceedings and resist the execution. That application was opposed on various counts. This Court opined that Saila Bala was entitled (under Section 146 CPC) to be brought on record to defend her interest because, as a purchaser pendente lite, she would be bound by the decree against her vendor. There is some divergence of opinion regarding the question, whether a pendente lite purchaser is entitled, as a matter of right, to get impleaded in the suit, this Court in Amit Kumar Shaw v. Farida Khatoon [(2005) 11 SCC 403]: (AIR 2005 SC 2209: 2005 AIR SCW 2078), held that:

"Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case."

The preponderance of opinion of this Court is that a pendente lite purchaser's application for impleadment should normally be allowed or "considered liberally." (emphasis supplied)

10. In the case of **Thomson Press (India) Limited versus Nanak Builders and Investors Private Limited and others 2013 (5) SCC 397,** the Supreme Court was considering an appeal arising out of a suit for specific performance of prior agreement to sell filed by the buyer against the original owner/transferor/seller pendente lite. In Paragraph 26 to 29 of the said judgment, the Supreme Court after referring to Section 52 of the Transfer of Property Act, observed that transfer during pendency of suit does not automatically

render such transfer void. The provisions of the Section only render such transfers subservient to the rights of the parties to a litigation. The transferees acquiring any immovable property during litigation over it, are held to be bound, by application of the doctrine of lis pendens and by the decree passed in the suit even though they may not have been impleaded in it. "The whole object of the doctrine of lis pendens is to subject parties to the litigation, as well as others who seek to acquire rights in immovable property, which are the subject matter of litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated." The Supreme Court further observed in Paragraphs 55 and 56 that a transferee pendente lite can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post such transfer. Sometimes a transferor pendente lite may not even defend the title properly as he has no interest in the same or may collude with the plaintiff in which case the interest of the purchaser pendente lite will be ignored. To avoid such situations, transferee pendente lite can be added as a party defendant to the suit provided his interest is substantial and not just peripheral. This is particularly so where the transferee pendente lite acquires the interest in the entire estate that forms the subject matter of the dispute.

11. It is evident from a careful consideration of latest judgments of the Supreme Court dealing with Section 52 of Transfer of Property Act that the Supreme Court has emphasized that a transferee pendente lite is not void ab initio. It only makes such transfer subject to the rights of the parties finally determined.

12. In the facts and circumstances of the case, the Court is of the opinion that the order impugned, which is under challenge, does not want for any interference by this Court.

13. The petition is devoid of merit is liable to be dismissed. Since the misc. appeal is pending a further direction is given to the court below to decide the aforesaid appeal in accordance with law most expeditiously and positively within a period of six months from the date of production of certified copy of this order but after after giving opportunity to the parties concerned and without granting unnecessary adjournments to either of the parties.

14. Accordingly, present petition is dismissed.

(2021)04ILR A137
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2017

BEFORE

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

Matter Under Article 227 No. 6423 of 2019 (Crl)

Munna Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjive Kumar Gupta, Sri Jai Prakash Singh-I

Counsel for the Respondents:
A.G.A.

(A) Civil Law - The Essential Commodities Act, 1955 - Sections 3/7, 6A -

Confiscation of essential commodity, Section 6-B - Issue of show cause notice before confiscation of foodgrains, etc., Section 6-C - Appeal , Section 6BB - Review, Code of Criminal Procedure, 1973 - Section 451, Section 452 or Section 457 - Article 300-A of the Constitution - Every citizen has a right to his property.

Collector ordering confiscation of the petitioner's tractor along with its trolley, under Section 6-A of the Act of 1955, with an option to pay in lieu of confiscation and take back the tractor - Appeal under section 6C - dismissed by Additional Sessions Judge and affirming an order of collector - hence petition.

HELD:- The impugned order passed by the Collector and the Judge in appeal are conspicuously silent about the identity of the person too, who seized the vehicle carrying the stock of controlled rice. In the clear opinion of this Court, upon findings of the kind recorded by the Authorities below, confiscation of the petitioner's tractor cannot be ordered. The learned Sessions Judge, while affirming the Collector's order, has not at all bestowed consideration to the infirmities, procedural and substantive, vitiating the order of confiscation. The order passed by the Additional Sessions Judge is also bad on the same score, as the Collector's. It goes without saying that if in the criminal case instituted on the basis of the same facts arising from the FIR relating to Case Crime No. 413 of 2016, under Section 3/7 of the Act of 1955, the petitioner is convicted at the trial, it would be open to the learned Judge to pass appropriate orders regarding confiscation of the tractor-trolley in question, subject, of course, to his discretion, in the exercise of powers under Section 7(1)(c) of the Act of 1955.(Para - 14,17)

Petition allowed. (E-6)

List of Cases cited:-

1. M/s. Shri Laxmi Trading Co.& anr. Vs The Additional District Magistrate (Civil Supplies Section), Rourkela & anr., 1989 SCC Online Ori 316

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

This petition under Article 227 of the Constitution seeks to question an order of Mr. Ehsanullah Khan, the then Additional Sessions Judge, Court No. 3, Shahjahanpur dated 05.09.2017, passed in Criminal Appeal No. 38 of 2017, under Section 6-C of The Essential Commodities Act, 19551, dismissing the said appeal and affirming an order of Mr. Narendra Kumar Singh, the then Collector, Shahjahanpur, ordering confiscation of the petitioner's tractor along with its trolley, under Section 6-A of the Act of 1955, with an option to pay in lieu of confiscation.

2. The facts that give rise to the present petition are these :

According to the State, on 11.09.2016 at 11 O' Clock in the night, a tractor of Sonalika make, blue in colour, bearing Registration No. UP 27 Y 1676, along with a trolley, was carrying 41 bags full of rice. The tractor belonged to the petitioner, Munna Singh. The tractor was being followed by a Maruti Van, bearing Registration No. UP 27 AB 6557, which had, for its occupants, Jagdish Singh and Surendra Singh. It is said that these two men were owners of the bulk of rice being carried on the tractor trolley. This tractor was apprehended by one Vishram Singh, and information was sent to Police Station - Paraur, District - Shahjahanpur. A police party arrived and took away the tractor, its trolley and the consignment of rice to the police station. Information was also given over telephone to the Sub-Divisional Magistrate, Jalalabad. Thereafter, the Supply Inspector, together with the Naib Tehsildar, came over to Village Khajuri and recorded the statement of the tractor owner, Munna Singh. Munna Singh apparently acknowledged the ownership of the tractor. It was revealed that one

Rajnish, a native of the village, who runs a grocer's shop, had hired the tractor and the trolley, that was apprehended with the consignment of rice. Jagdish Singh, on the other hand, was ascertained to be a Fair Price Shop dealer. The Supply Inspector and the Naib Tehsildar undertook a joint inspection of Jagdish Singh's Fair Price Shop located in Village Dari. Jagdish Singh was not found there. His wife laid the shop open, where the two officials found seven bags of wheat, three bags of rice and 20 kilograms of loose sugar. These commodities were not shown in the stock register.

3. On discovery of the aforesaid facts, a case was registered against Jagdish Singh and Surendra Singh on the basis of a First Information Report2 lodged by Rameshwar Dayal, Supply Inspector, Jalalabad, as Case Crime No. 413 of 2016, under Section 3/7 of the Essential Commodities Act, 1955, Police Station - Paraur, District - Shahjahanpur. Post registration of the crime, the Station House Officer, Police Station - Paraur, moved the Collector under Section 6-A of the Act of 1955, asking that the petitioner's Tractor and the Maruti Van, bearing Registration No. UP 27 AB 6557, be confiscated in favour of the State, on ground that these were involved in carrying an essential commodity i.e. controlled rice, in contravention of control orders issued under the Act of 1955. The aforesaid report to the Collector was made by the Station House Officer, Police Station - Paraur vide Memo No. 9/16 dated 16.12.2016. The Collector, Shahjahanpur issued a notice dated 26.04.2017 to the petitioner, amongst others, requiring him to show cause against the proposed confiscation.

4. The petitioner submitted his objections to the show cause, being objections dated 03.05.2017. He said in those objections that his vehicle has been shown involved in the crime falsely. It was urged that the petitioner had no criminal history, involving the vehicle or otherwise, and that he was not a previous convict. The tractor, together with the trolley, was financed by a certain Magma Finance Limited, and that the petitioner had to pay Equated Monthly Installments that he had been regularly paying up to the month of July, 2016. He said that the schedule of repayment would also go awry, once his tractor had been seized. The tractor was also insured by Magma HDI General Insurance Company, but due to seizure of the tractor, the petitioner would not be able to pay the due premia. The tractor was particularly important to the petitioner in his agricultural operations for tilling and harvesting. It was specifically said in Paragraph No. 5 of the objection that his tractor had no connection, whatsoever, to the consignment of rice, that was apprehended on 11.09.2016 at 11 O' Clock in the night. He referred to a certain G.D. Entry No. 23 dated 20.09.2016, that bore no reference to the recovery or the recovery memo about the petitioner's tractor and trolley. It was also said that the Supply Inspector and the Investigating Officer had taken his signatures on blank papers, which were utilized to record statements falsely attributed to him. It was emphasized that there was no evidence about recovery of the incriminating essential commodity from the petitioner's tractor and trolley. It was, amongst others, particularly said in the objections that the failure to draw a recovery memo was a red pointer to the ante-timed action that was taken, and was a fact that could not be ignored. The petitioner's tractor was taken away much later by the Police from his house, where it

was parked. It is said in Paragraph No. 11 of the objections that 41 bags of controlled rice were seized from some other trader that have been connected to Jagdish and the other co-accused, including the petitioner. It was also said that in order to prevent the tractor from rotting at the police station, it was but appropriate that it may be given into the petitioner's custody, as he was the registered owner thereof. It was undertaken that the petitioner would not transfer or alter or damage the tractor in question and produce it, as and when required physically.

5. The District Magistrate, after considering the petitioner's objections vide order dated 05.06.2017, ordered confiscation of his tractor in favour of the State. The Collector further ordered that the petitioner had an option to pay a sum of Rs. 4,61,700/- in lieu of confiscation and take back the tractor. The petitioner challenged the Collector's order, by an appeal under Section 6C of the Act of 1955 carried to the learned District Judge. The appeal was numbered on the file of the learned District Judge as Criminal Appeal No. 38 of 2017. It was assigned to the learned Additional Sessions Judge, Court No. 3, Shahjahanpur. The appeal was heard and dismissed by the learned Additional Sessions Judge by means of the impugned judgment and order dated 05.09.2017.

6. Aggrieved, this revision has been preferred.

7. Heard Mr. Jai Prakash Singh, learned counsel for the petitioner and the learned A.G.A. appearing on behalf of the State.

8. The Authorities below have relied upon the report submitted by the Police to accept for a fact that the petitioner's tractor and trolley was carrying 41 bags of rice, that were taken away from the Public Distribution System surreptitiously by Jagdish Singh, a Fair Price Shop Dealer. The vehicle was apprehended, while it was ferrying the controlled commodity to a grocer's shop. The Collector has also accepted for a fact that the Maruti Van that was trailing the tractor carrying the consignment of rice, had, for its occupants, Jagdish Singh, the Fair Price Shop dealer and another Surendra Singh. The Collector concluded that the Maruti Van was being used to keep vigil over movement of the tractor trolley. The presence of the Fair Price Shop dealer has been regarded by the Collector as an added circumstance to show the incriminatory character of the consignment carried in the tractor trolley. It has also been held that the petitioner failed to show that his vehicle was used in the offending operation, despite due care and caution observed by him. Ex hypothesi, the tractor and the trolley in question owned by the petitioner was held carrying the consignment of a controlled commodity unauthorisedly, and in contravention of the control order. The Collector has ordered confiscation of the petitioner's tractor and the trolley, in exercise of powers under Section 6A(1)(c) of the Act of 1955. The learned Judge has broadly written findings of affirmation with not much of a notable addition to the content of the reasoning, except the finesse of better diction coming to him from his forensic training, which the Collector did not have.

9. Before this Court, the learned Counsel for the petitioner has placed much reliance on a release application dated 04.01.2017, that was moved before the Collector, asking for release of the tractor in question, urging a case more or less on

the lines set out in the objections filed in response to the show-cause notice under Section 6A(1) of the Act of 1955. Interestingly, it is averred in Paragraph No. 7 of the writ petition that vide order dated 05.06.2017, the Collector had released the tractor in favour of the petitioner, with a direction to deposit cash in the sum of Rs. 4,61,700/-. Learned counsel for the petitioner has virtually urged before this Court that the condition circumscribing the release with the requirement of a cash deposit of Rs. 4,61,700/- was too onerous to be imposed upon the registered owner of a vehicle. Learned counsel has relied on the provision of Section 452(2) of the Code of Criminal Procedure, 19733 to say that the delivery of property, subject matter of a crime, to any person entitled to its possession, can be ordered by the Magistrate to be given to that person, upon executing a bond, with or without sureties to the satisfaction of the Court. On the equities of the case, it is urged by learned counsel for the petitioner that the petitioner is a poor farmer, aged about 60 years. He is ready to execute a bond, along with sureties to the satisfaction of the Collector. In fact, there is a recital to the last mentioned effect made in Paragraph No. 11 of the writ petition.

10. Much emphasis is placed by the learned counsel on the fact that he is the registered owner of the tractor, and is, therefore, entitled to its possession, pending outcome of the criminal case. Though no counter affidavit has been filed in opposition to the writ petition, the impugned orders, for all their worth, set against the petitioner's case in the writ petition, impugning them, are to be judged valid or vitiated. To the understanding of this Court, the petitioner's case for release of his tractor, pending decision of the criminal case based on the FIR, by resort to proceedings under Section 452 of the Code or for that matter, Section 451 or Section 457, is based on a gross misconception. The petitioner's tractor is not being held as case property, pending decision of the Trial Court, in the criminal case that has originated from Crime No. 413 of 2006, under Section 3/7 of the Act of 1955, Police Station - Paraur, District - Shahjahanpur. The petitioner's tractor has, in fact, been confiscated in favour of the State by the Collector, in proceedings under Section 6-A(1) and is now State property. What the petitioner thinks as an onerous condition for the release of his tractor imposed by the Collector, asking him to deposit a sum of Rs. 4,61,700/- is no condition for release. That is, in fact, an option given by the Collector to the petitioner, being the owner of the confiscated tractor and trolley, to pay its market price in lieu of confiscation. The nature of the order passed by the Collector and its consequences have been completely misunderstood by the petitioner, which is vivid from his pleadings in Paragraph No. 7 of the writ petition, that read :

> That on 05.06.2017 the learned respondent No. 2 has released the Tractor in favour of the petitioner with the direction to deposit Cash amount of Rs. 4,61,700/-.

11. This Court is seized of the matter in a jurisdiction that is essentially equitable. Therefore, even if the petitioner has assailed the orders impugned on the basis of a flawed understanding about the nature of the proceedings relating to those orders, this Court considers it imperative to examine the validity of those orders on the parameters of the Statute under which these

have been made. This course this Court all the more chooses, because the orders impugned are purely confiscatory, and therefore, have to be strictly examined to ensure that these have been made in accordance with the Statute. Section 6A(1) of the Act of 1955 is extracted below :

6A Confiscation of essential commodity:-[(1)] Where any 10 [essential commodity is seized] in pursuance of an order made under section 3 in relation thereto, 11 [a report of such seizure shall, without unreasonable delay, be made to] the Collector of the district or the Presidency town in which such 10 [essential commodity is seized] and whether or not a prosecution is instituted for the contravention of such order, the Collector 12 [may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied] that there has been a contravention of the order 13 [may order confiscation of—

(a) the essential commodity so seized;

(b) any package, covering or receptacle in which such essential commodity is found; and

(c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity:]

Provided that without prejudice to any action which may be taken under any other provision of this Act, no foodgrains or edible oilseeds in pursuance of an order made under section 3 in relation thereto from a producer shall, if the seized foodgrains or edible oilseeds have been produced by him, be confiscated under this section:

Provided further that in the case of any animal, vehicle, vessel or other conveyance used for the carriage of goods or passengers for hire, the owner of such animal, vehicle, vessel or other conveyance shall be given an option to pay, in lieu of its confiscation, a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such animal, vehicle, vessel or other conveyance.

12. Section 6-B of the Act of 1955 reads :

6B. Issue of show cause notice before confiscation of foodgrains, etc.- (1) No order confiscating any essential commodity, package, covering or receptacle, animal, vehicle, vessel or other conveyance shall be made under section 6A unless the owner of such essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance or the person from whom it is seized—

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the essential commodity package, covering or receptacle, animal, vehicle, vessel or other conveyance;

(b) is given an opportunity of making a presentation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) is given a reasonable opportunity of being heard in the matter.

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any animal, vehicle, vessel or other conveyance shall be made under section 6A if the owner of the animal, vehicle, vessel or other conveyance proves to the satisfaction of the Collector that it was used in carrying the essential commodity without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal, vehicle, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(3) No order confiscating any essential commodity package, covering, receptacle, animal, vehicle, vessel or other conveyance shall be invalid merely by reason of any defect or irregularity in the notice, given under clause (a) of sub-section (l), if, in giving such notice, the provisions of that clause have been substantially complied with.

STATE AMENDMENT

Uttar Pradesh.--After section 6B, insert the following section, namely:--

"6BB. Review.--(1) Where the Collector is satisfied that an order of confiscation or an order refusing confiscation made under section 6A suffers from a mistake apparent on the face of the record (including any mistake of law) he may within one month of such order issue notice to the owner of the essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance, or, as the case may be, the person from whom it was seized, to show cause why that order should not be reviewed, and after giving him a reasonable opportunity of being heard, pass such order on review as he thinks fit.

(2) The provisions of sections 6C and 6D shall apply in relation to an order passed originally under Section 6A."

13. It is evident that proceedings for confiscation of a vehicle used in the transportation of an essential commodity in breach of a Control Order, taken under Section 6-A of the Act of 1955 are quite independent and different from a prosecution before the Court trying the offence founded on the same contravention under Section 7 of the Act under reference. Here, this Court, for the present, is not concerned with the jurisdiction of the Court trying the offence to order confiscation of the vehicle carrying a commodity in contravention of an order issued under the Act of 1955. The Collector has chosen to initiate proceedings under Section 6-A, which have been taken to their logical conclusion, ending in an order of confiscation. The power vested in the Collector to confiscate a vehicle, alleged to be involved in carrying an essential commodity in violation of a control order, makes it imperative for the Collector to serve a notice in writing upon the owner of the vehicle or the person from whom it has been seized, informing him of the grounds on which the Authority proposes to confiscate the vehicle. Clause (b) of sub-Section (1) requires the provision of an opportunity to the owner of the vehicle or the person from whom it is seized, to make a representation in writing, within a reasonable time, to be indicated in the notice against the proposed confiscation. The last procedural requirement under Section 6-B is carried in Clause (c) of sub-

Section (1), which mandates that a reasonable opportunity of being heard in the matter be afforded. Broadly, these conditions have been fulfilled by the Collector before passing the order impugned. But, what sub-Section (2) of Section 6-B of the Act of 1955 requires is virtually the existence of mens rea of the specific kind postulated by the Statute before an order of confiscation can be validly made. Sub-Section (2) of Section 6-B requires that no order of confiscation of a vehicle can be made under Section 6-A, if the owner of the vehicle proves to the satisfaction of the Collector that the vehicle used in transportation of the offending commodity was so employed without his knowledge or connivance, or that of his agent or any person in-charge of the vehicle and further that all reasonable and necessary precautions against such offending use had been taken. This clause seems to put the entire burden on the owner of the vehicle about showing the absence of mens rea. But the way it has come to be interpreted, mens rea is an essential prerequisite for the passing of an order of confiscation under Section 6-A. The Collector is required to enter a specific finding about it. In this connection, reference may be made to the decision of a Division Bench of Orissa High Court in M/s. **Shri Laxmi Trading Co. and Another v. The Additional District Magistrate (Civil Supplies Section), Rourkela and Another4**. In **Shri Laxmi Trading Co**. *(supra)* it was held :

16. Coming now to the second question as to whether "mens rea" is an essential precondition for passing an order of confiscation under S. 6-A of the Essential Commodities Act, Mr. Patnaik, the, learned counsel for the petitioners, contends that confiscation is undoubtedly penal in nature and, therefore, to attract the said provision, it must be established that the violation was intentional and was made with criminal intention. In the case of Madhav Keshav v. State of Maharashtra, 1977 Cri LJ 1800, a Bench of the Bombay High Court considered the question of requirement of mens rea under S. 6-A of the Essential Commodities Act. It was held by their Lordships:--

"If this is the law, which is already laid down, so far as S. 7 is concerned, and if the provisions of S. 6-A are in pari materia with the provisions of S. 7, we see no reason why the element of mens rea should not form part of the breach of the rules alleged under S. 6-A. The act which constitutes the basis of prosecution as well as the basis of an Order, an adjudication and confiscation being the same, it cannot have a different content under S. 6-A and S. 7 of the same Act...."

17. In the case of Mewalal Kapildeo Prasad v. State of Bihar, 1978 Cri LJ 873, a Bench of the Patna High Court also considered the same question and held:--

"....Therefore, for confiscation as well as for conviction it must be established that the person concerned has contravened any order made under S. 3. It is a well-settled rule of interpretation that a word occurring in the same Act is usually to be given the same meaning unless a different intention is expressed by the provisions of the Act. As such, the word "contravention' has to be interpreted in S. 6-A and in S. 7 to mean that the provision of any order framed under S. 3 of the Act has been contravened intentionally. On the other hand, if it is found that the contravention was unintentional and the person concerned

had taken all reasonable care and was carrying on the business in a bona fide manner, then, in my view, even for S. 6-A of the Act, it has to be interpreted that in the eye of law there has been no contravention so as to visit the dealer with the consequences of confiscating the articles which had been seized...."

18. A learned single Judge of the Allahabad High Court in the case of Ashok Kumar v. State of U.P., 1984 All LJ 876, also considered the question of mens rea vis-a-vis S. 6-A of the Essential Commodities Act and held:--

"In order to attract the operation of S. 6-A, Essential Commodities Act, aforesaid, it had to be established that there was commission of offence under S. 3, read with S. 4 of the said Act and Order. Unless it is found that the accused had mens rea at the time of commission of the said offence, S. 6-A of the aforesaid Act could not come into play as was held in Nathulal v.State of Madhya Pradesh reported in AIR 1966 SC 43 : (1966 Cri LJ 71...."

19. A learned single Judge of the Delhi High Court in the case of Delhi Administration v. Munshi Ram Ram Niwas, 1985 Cri LJ 1230, also held:--

"The provisions of S. 6-A are in pari materia with the provisions of S. 7. An intentional contravention of an order made under S. 3 of E.C. Act has to be established. Mens rea or bona fide of a dealer is a necessary element of the proceedings under S. 6-A of E.C. Act. The preponderance of judicial opinion is that mens rea is a necessary ingredient in the proceedings for enforcing the penal provision incorporated in S. 6-A of E.C. Act which empowers the Collector to order confiscation....."

20. The Madhya Pradesh High Court also took the same view in the case of Khemraj Jugraj v. State of Madhya Pradesh, 1981 Cri LJ 1479.

21. In view of the plethora of decisions, referred to supra, it must be held that mens rea is an essential ingredient to attract the provisions of S. 6-A of the Essential Commodities Act. The submission of Mr. Patra, the learned Additional Government Advocate, appearing for the State, that S. 10-C of the Essential Commodities Act presumes mens rea is not of much significance. No doubt, S. 10-C raises a presumption that culpable mental state exists, but it is a rebuttable presumption and it will be open for the accused to prove that he had no such mental state with respect to the act charged. In our opinion, S. 10-C itself indicates that mens rea is a necessary element to attract the provisions of the Act, but by virtue of legal fiction, a presumption arises which can be rebutted by an accused. Admittedly, neither the Collector while passing the original order, nor the State Government while disposing of the appeal has considered the question of presence or absence of mens rea of the petitioner and whether in the facts and circumstances of the case, petitioner has been able to rebut the presumption arising out of S. 10-C of the Act. On the other hand, the facts of the case reveal that the petitioner has been submitting returns as an "importer" on a bona fide belief that the provision relating to "importer" in the State Order still continues. .....

14. In the present case, what appears from a perusal of the impugned order passed by the Collector and the available

records, is that it has not even been mentioned anywhere as to who was the person driving the tractor and the trolley carrying the alleged essential commodity, when it was seized. The impugned order passed by the Collector and the Judge in appeal are conspicuously silent about the identity of the person too, who seized the vehicle carrying the stock of controlled rice. A perusal of the FIR, however, shows that it was apprehended by a certain Vishram Singh, who informed the police about the apprehension. In the FIR also, which carries the statement of Vishram Singh, all that is said is that the tractor belonged to the petitioner. It is not said who was driving the tractor or had control over it. The petitioner, in his objections submitted to the Collector, said that the tractor, along with the trolley, was picked up from his home by the Police and was never apprehended in the manner alleged by the Authorities or in the notice giving rise to the confiscation proceedings. It has particularly been mentioned in Paragraph No. 5 of the objections that the G.D. entry relating to seizure of the stock of rice made at the police station vide G.D. No. 23 at 15:40 hours does not bear any reference to the tractor trolley or a memo of recovery relating to seizure of the tractor trolley. With all these objections taken, and the gaping flaw in the State's report about the conspicuous absence of the tractor driver's name anywhere, ought to have moved the Collector into asking the State to furnish these details and establish on the basis of records that the petitioner's tractor was at all involved. Quite apart, the Collector had to record a finding, if he reached conclusion on the basis of material before him, that the petitioner's tractor was indeed involved, that the petitioner knew that it was carrying an essential commodity in violation of a Control Order. Much about this angle of mens rea would depend upon who was driving the tractor. If it was a person other than the petitioner, a finding would have to be recorded that the person who was driving the tractor had the necessary mens rea, which he shared with the petitioner. The impugned order passed by the Collector does not carry any of these decisive findings; it does not even mention the essential fact as to who was driving the tractor at the relevant time, and the nature of his connection to the petitioner. It is logically on the edifice of these facts that a finding about mens rea would be built.

15. The Collector was also required, amongst others, by all standards of fairness, to return a finding on the petitioner's specific objection, that there was no entry about the seizure of his tractor in G.D. No. 23 or to a recovery memo relating to his tractor, the said G.D. entry being one relating to the seizure of an essential commodity allegedly carried on the petitioner's tractor-trolley.

16. The absence of all these findings render the order impugned, passed by the Collector, one in violation of Section 6-A(1) read with Section 6-B of the Act of 1955. An order of confiscation has very serious civil consequences for the person whose property is confiscated. Every citizen has a right to his property, guaranteed by Article 300-A of the Constitution and the deprivation of that right can come about strictly in accordance with law; not otherwise. Both the Authorities below, in the clear opinion of this Court, have proceeded on what are sketchy and vague findings, so far as involvement of the petitioner's tractor in carting an offending essential commodity is concerned. In the clear opinion of this Court, upon findings of the kind recorded

by the Authorities below, confiscation of the petitioner's tractor cannot be ordered. The learned Sessions Judge, while affirming the Collector's order, has not at all bestowed consideration to the infirmities, procedural and substantive, vitiating the order of confiscation. The order passed by the Additional Sessions Judge is also bad on the same score, as the Collector's. It goes without saying that if in the criminal case instituted on the basis of the same facts arising from the FIR relating to Case Crime No. 413 of 2016, under Section 3/7 of the Act of 1955, Police Station - Paraur, District - Shahjahanpur, the petitioner is convicted at the trial, it would be open to the learned Judge to pass appropriate orders regarding confiscation of the tractor-trolley in question, subject, of course, to his discretion, in the exercise of powers under Section 7(1)(c) of the Act of 1955.

17. In the result, this writ petition **succeeds** and stands **allowed**. The impugned order dated 05.06.2017, passed by the District Magistrate, Shahjahanpur, and the order dated 05.09.2017 passed by the Additional Sessions Judge, Court No. 3, Shahajahanpur, in Criminal Appeal No. 38 of 2017, are hereby **set aside**.

18. Let the petitioner's tractor, bearing Registration No. UP 27 Y 1676, of Sonalika make, blue in colour, be returned to him forthwith, upon the petitioner executing a personal bond in the sum of Rs. 1 lac and undertaking to produce the tractor-trolley before the Trial Court, if and when required, and not to change its coat, colour or appearance, or damage or destroy it, or transfer it to a third party. However, if the trial is not pending, no such bond is required to be furnished before release. In the event the confiscated tractor has been auctioned, its price equivalent to the sum determined by the Collector vide order dated 05.06.2017 payable by the petitioner in lieu of confiscation, that is to say, Rs. 4,61,700/- shall be paid to the petitioner by the State, forthwith.

(2021)04ILR A147
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Matter Under Article 227 No. 6794 of 2019

Madhuri Shrivastav & Anr. ...Petitioners
Versus
Sri Praveen Kumar Shrivastav & Ors. ...Respondents

Counsel for the Petitioners:
Sri V.R. Tiwari

Counsel for the Respondents:
Sri Praveen Kumar Srivastava (In Person), Dhruv Narayan Mishra

(A) Civil Law - Code of Civil Procedure ,1908 - Order XXIX Rule 2A - Hindu Marriage Act, 1995 - Section 9 , Section13 and Section 26, Section 28-A - Hindu Minority and Guardianship Act, 1956 - Section 6 (a) - Natural guardians of a Hindu minor - where a boy and a girl are major and they are living with their free will, then, nobody including their parents, has authority to interfere with their living - any interim order passed during the pendency of the case will merged with the final judgment. (Para - 17,25)

Petitioner no.1 along-with her daughter filed the present petition - prayer to quash the entire proceeding of Case under Section 28-A of the

Hindu Marriage Act read with Order 39 Rule 2-A of the C.P.C. - pending in the court of Additional Judge, Family Court - petitioner no.1 got marriage with respondent no.1 - seeking direction commanding the respondent No.1 to pay to petitioners with simple interest - in compliance of the judgment/decree passed by the Court below in Marriage Case .

HELD:- Since the petitioner no.2 has now become major nobody can compel her including her father to stay with him or to meet with his father from time to time , as such no benefit could be given to the respondent no.1 in so far as Section 6(a) of the Act, 1956 is concerned. The main case has already been decided by the court below. The interim order passed to the effect that the respondent no.1 will be permitted to meet with his daughter namely petitioner no.2/Ms.Vaishnavi has not been complied with during the pendency of the aforesaid case. Respondent no.1 has attained the age of majority and as such the aforesaid orders has now become without any substance. (Para - 18,19)

Petition disposed off. (E-6)

List of Cases cited:-

1. Gian Devi Vs The Superintendent, Nari Niketan, Delhi & ors., (1976) 3 SCC 234

2. Lata Singh Vs St. of U.P. & anr., (2006) 5 SCC 475

3. Bhagwan Dass Vs State (NCT of Delhi), (2011) 6 SCC 396

4. Deepika & anr. Vs St. of U.P. & ors., 2013 (9) ADJ 534

5. National Bal Bhawan & anr. Vs U.O.I. & ors. , (2003) 9 SCC 671

6. St. of W.B. & ors. Vs. Banibrata Ghosh & ors., (2009) 3 SCC 250

7. Prem Chandra Agarwal & anr. Vs U.P. Financial Corporation & ors., (2009) 11 SCC 479

(Delivered by Hon'ble Prakash Padia, J.)

1. Pursuant to the order passed by this Court on 2.3.2021 both the petitioners namely Smt. Madhuri Shrivastav and Ms. Vaishnavi appeared in person before this Court. The respondent no.1/Praveen Kumar Shrivastav also appeared in person.

2. Mr. Dhruv Narayan Mishra, who was appointed Amicus Curiae by order of this Court dated 26.2.2020, is also present to assist the Court.

3. The petitioners have preferred present petition with the following prayers :-

"1. Issue an order of certiorari quashing entire proceedings of Case No.13/2013 (Praveen Kumar Srivastav Vs. Smt Madhuri Srivastav), U/s 28A of Hindu Marriage Act, read with Order XXIX Rule 2A of CPC, pending before the Additional Judge, Family Court, Allahabad, imposing heavy cost to the respondent No.1.

2. Issue another order or direction commanding the respondent No.1 to pay sum of Rs.2,83,600/- to petitioners with simple interest since January, 2015, within a stipulated period of time, in compliance of the judgment/decree dated 17.01.2015, passed by the Court below in Marriage Case No.291/2003.

3. Issue any other writ, order or direction which this Hon'ble Court may found deem fit and proper with the facts and circumstances of the case. So that justice be done.

4. To award cost to the petition from respondent No.1."

4. It is stated by petitioner no.1/Smt. Madhuri Shrivastav that she is a teacher in

Jagat Taran Golden Jubilee School, Allahabad since 2006 and the petitioner no.2/Ms. Vaishnavi was pursing her B.A. II Examination from Allahabad University, Allahabad at the time when the present petition was filed. At present she is studying at B.A. III.

5. The date of birth of petitioner no.2 is 13.3.2000 and now she became major. It appears from perusal of the record that petitioner no.1 namely Smt. Madhuri Shrivastav, daughter of late Trilokinath Shrivastav along-with her daughter namely Ms. Vaishnavi filed the present petition inter-alia with the prayer to quash the entire proceeding of Case No.13 of 2013 under Section 28-A of the Hindu Marriage Act read with Order 39 Rule 2-A of the C.P.C. pending in the court of Additional Judge, Family Court, Allahabad. It appears from perusal of the record that the petitioner no.1/Madhuri Shrivastav got marriage with Praveen Kumar Shrivastav in the year 1998. After two years of marriage from their wedlock a daughter, petitioner no.2/Km. Vaishnavi, was born. Thereafter, family members of the respondent no.1 Praveen Kumar Shrivastav started harassing the petitioner no.1-Smt. Madhuri Shrivastav.

6. It further reveals from perusal of the record that the respondent no.1/Praveen Kumar Shrivastav preferred Case No.291 of 2003 (Praveen Kumar Shrivastav Vs. Smt. Madhuri Shrivastav), under Section 9 and 13 of the Hindu Marriage Act. Apart from the same, another case was filed by him being Marriage Case No.507 of 2004, under Section 26 of the Hindu Marriage Act before the court below. The Case No.291 of 2003, which was filed under Section 9 and 13 of the Hindu Marriage Act, was decreed partly while Case No.507 of 2004, which was filed under Section 26 of the Hindu Marriage Act was rejected vide judgment and decree dated 17.1.2015. Though Case No.507 of 2004 was finally decided on 17.1.2015 but during the pendency of the aforesaid case various interlocutory orders were passed from time to time. By the aforesaid orders directions were given to the respondent no.1 to meet with his minor daughter. Since the aforesaid orders were not complied with, an application was filed by the respondent no.1 in the court below under Order 39 Rule 2-A of the CPC which was numbered as Misc. Case No.13 of 2013. In the aforesaid case an application being Paper No.33-C dated 03.05.2019 was also filed by the respondent no.1 with the allegation that the petitioners are still flouting order dated 03.05.2005 and 03.06.2010.

7. It further appears from perusal of the record that the Family Court, Allahabad also directed the Station House Officer, Mutthiganj, District Prayagraj to permit the respondent no.1/Praveen Kumar Shrivastav to meet with his daughter namely Ms. Vaishnavi/petitioner no.2 on second Sunday of every month between 4.00 to 6.00 P.M.

8. In view of the aforesaid, petitioners have preferred present petition.

9. It is stated by the petitioner no.1 that in the proceedings initiated by the respondent no.1 by filing a suit being Suit No.291 of 2003, under Section 9 and 13 of the Hindu Marriage Act, 1995 an order was passed by the Additional Judge, Family Court, Allahabad on 17.1.2015. By the aforesaid order petition filed by the

plaintiff/respondent no.1 for divorce was allowed. Further directions were given to the plaintiff/respondent no.1 in the petition to make payment of Rs.2,83,600/- to the petitioner no.1. Since the aforesaid order was not complied with a prayer has been made by the petitioner no.1 in the present petition for compliance of the aforesaid order.

10. Apart from a petition under Section 9 and 13 of the Hindu Marriage Act for divorce another petition was filed by the respondent no.1 being petition No.507 of 2004 in the Family Court, Allahabad under Section 26 of the Hindu Marriage Act. The said petition was also finally disposed of by the Additional Principal Judge, Family Court, Allahabad, vide order dated 17.1.2015. The aforesaid petition filed by the plaintiff/respondent no.1 was dismissed by the court below giving cogent reasons.

11. A specific query has been made by the Court from the respondent no.1 that whether the order dated 17.1.2015 passed in Case No.507 of 2004 filed under Section 26 of the Hindu Marriage Act was challenged by him before any other forum or not. It is stated by him that a fresh petition was filed under the same section i.e. under Section 26 of the Hindu Marriage Act.

12. It is argued by him that the aforesaid case was also dismissed by the Principal Judge, Family Court, Allahabad. The specific date has not been disclosed by him. In so far as the order dated 17.1.2015 passed in Matrimonial Case No.291 of 2003, which was filed under Section 9 and 13 of the Hindu Marriage Act, in which the decree of divorce was passed and directions were given to make the payment of Rs.2,83,600/- is concerned, it is stated that against the aforesaid order a review petition has been filed by the plaintiff/respondent no.1 in the court of Additional Principal Judge, Family Court, Allahabad being Review Petition No.8 of 2015, copy of the same is appended as annexure 8 to the present petition.

13. It is admitted by both the parties that aforesaid review petition is still pending and no final decision has been taken on the same.

14. The date of birth of the petitioner no.2 namely Ms. Vaishnavi is 13.3.2000 and now she has became major. It is stated by her that she is not willing to meet with her father. It is further stated by her that since she is major hence she is free to live according to her own wishes and nobody can compel her to meet with her father.

15. On the other hand it is argued by respondent no.1 that various orders were passed by the Family Court, Allahabad, from time to time by which the petitioner no.2 was permitted to meet with her father namely respondent no.1/Praveen Kumar Shrivastav but those orders were not complied with and as such contempt petition was also filed by him in the Family Court, Allahabad, which is still pending even today.

16. From perusal of the entire records it appears that two petitions are pending consideration before the court below namely Contempt Petition No.13 of 2013 as well as Review Petition No.8 of 2015.

17. The Supreme Court in a long line of decisions has settled the law that where a boy and a girl are major and they are living with their free will, then, nobody including

their parents, has authority to interfere with their living. Reference may be made to the judgements of the Supreme Court in the cases of ***Gian Devi v. The Superintendent, Nari Niketan, Delhi and others, (1976) 3 SCC 234; Lata Singh v. State of U.P. and another, (2006) 5 SCC 475; and, Bhagwan Dass v. State (NCT of Delhi), (2011) 6 SCC 396***, which have consistently been followed by the Supreme Court and this Court, as well as of this Court in ***Deepika and another v. State of U.P. and others, 2013 (9) ADJ 534.*** The Supreme Court ***in Gian Devi (supra)*** has held as under: -

"7. ... Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age.

As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter."

18. In view of the aforesaid, the Court is of the opinion that since the petitioner no.2 has now become major nobody can compel her including her father to stay with him or to meet with his father from time to time.

19. In so far as the relief as prayed by the petitioners in the present petition that the court below namely Principal Judge, Family Court, Allahabad be directed to decide the proceedings of Case No.13 of 2013 filed by the plaintiff/respondent no.1 is concerned, it is clear from perusal of the record that the main case has already been decided by the court below on 17.1.2015. The interim order passed to the effect that the respondent no.1 will be permitted to meet with his daughter namely petitioner no.2/Ms.Vaishnavi has not been complied with during the pendency of the aforesaid case. As stated above now the respondent no.1 has attained the age of majority and as such the aforesaid orders has now become without any substance.

20. Respondent no.1 placed reliance Section 6 (a) of the Hindu Minority and Guardianship Act, 1956. It is argued that in case a boy or an unmarried girl-the father, and after him, the mother: provided the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

21. The statement of objects and reasons attained in the Act, 1956 reads as follows :-

"Statement of Objects and Reasons- This is another instalment of the Hindu Code and it deals with the law relating to minority and guardianship.

2. Under the Indian Majority Act, 1875, a person attains majority on his completing the age of 18 years but if before the completion of that age he has a guardian appointed by the Court, he attains majority on completing the age of 21 years. That Act applies to all persons including Hindus but an exception is made with respect to the capacity of any person to act in the matter of marriage, dower, divorce and adoption. Marriage and divorce have already been dealth with so far as Hindus are concerned and the definition of minor

in the Bill will ensure that the age of majority is 18 for all practical purposes."

22. Section 6 of the aforesaid Act is reproduced hereinbelow :-

***"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 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."

23. From perusal of the same, it appears that the aforesaid act will apply only in respect of a minor. The age of majority has been given in the Act is 18 years.

24. It is clear from perusal of the same that petitioner no.2 has already attained the age of majority as such no benefit could be given to the respondent no.1 in so far as Section 6(a) of the Act, 1956 is concerned.

25. Apart from the same, it is clear from the record that the case filed, under Section 26 of the Hindu Marriage Act, by the respondent no.2 has already been decided finally on 17.1.2015. During the pendency of the aforesaid case certain interim orders were passed by which directions were given by the court below to permit the petitioner no.2 to meet with her father from time to time. Since the aforesaid orders were not complied with a misc. case was filed by the respondent no.2 being Case No.13 of 2013 in order to initiate the contempt proceedings. It is settled law that any interim order passed during the pendency of the case will merged with the final judgment.

26. In the case of ***National Bal Bhawan and another Vs. Union of India and others reported in (2003) 9 SCC 671***, the Supreme Court held that :-

"4. It is no longer res integra that once a writ petition is finally disposed of by the High Court, any interim order passed in pending writ petition merges with the final order. If the respondents were aggrieved by the interim order in terms of which the writ petition was disposed of, it was incumbent upon the respondents either to have amended the memo of appeal by challenging the final order passed by the Single Judge of the High Court or ought to

have preferred fresh letters patent appeal against the final order passed by the Single Judge."

27. In the case of ***State of West Bengal and others Vs. Banibrata Ghosh and others reported in (2009) 3 SCC 250*** it was held by the Apex Court that :-

"The Interim Order doest not decide the fate of the parties to the litigation finally, it is always subject to and merges with the final order passed in the proceedings."

28. In the case of ***Prem Chandra Agarwal and another Vs. Uttar Pradesh Financial Corporation and others*** reported in ***(2009) 11 SCC 479*** it was held by the Apex Court that :-

"Once a final order is passed, all the earlier interim orders merge into the final order, the interim orders cease to exist."

29. In view of the settled proposition of law though Misc. Case No.13 of 2013, which was filed by the respondent no.1, is still pending consideration before the court below but the Court is of the opinion that in view of the law laid down by the Supreme Court as stated above no useful purpose would be served to keep the aforesaid misc. case pending. In view of the same, Case No.13 of 2013 filed by the respondent no.1 is hereby dismissed. The court below is directed to pass appropriate orders in the aforesaid case most expeditiously and preferably within a period of two weeks from the date of presentation of certified copy of this order.

30. In so far as Review Petition No.8 of 2015 is concerned Principal Judge, Family Court, Allahabad is directed to decide the same most expeditiously and positively within a period of four months from the date of production of a certified copy of this order.

31. During course of arguments, it is stated by petitioner no.2/Ms. Vaishnavi that wholly illegally even after the petitioner no.2 attained the age of majority her father is trying to harass her from time to time by adopting all the modes including with the help of Police. Since petitioner no.2 has already attained the age of majority, all the district authorities are restrained to interfere with the peaceful living of the petitioner no.2 in any manner whatsoever. In the special facts and circumstances of the case, District Magistrate, Prayagraj and S.S.P., Prayagraj is directed to see that respondent no.1 or any other person will not harass her in any manner whatsoever. In case of any difficulty petitioners are free to approach the S.S.P., Prayagraj and in case any such complaint is made he is directed to look into the matter immediately.

32. Accordingly, present petition is disposed of.

MATTERS UNDER ARTICLE 227
No. - 6794 of 2019

Petitioner :- Madhuri Shrivastav And Another

Respondent :- Sri Praveen Kumar Shrivastav And 3 Others

Counsel for Petitioner :- V.R. Tiwari

Counsel for Respondent :- Praveen Kumar Srivastava (In Person),Dhruv Narayan Mishra

Hon'ble Prakash Padia,J.

Vide order dated 26.02.2020 Mr. D. N. Mishra, learned counsel, was appointed Amicus Curiae in the case to assist the Court.

Vide order dated 12.10.2020 further direction was given by this Court to make payment of Rs.15,000/- to Mr. D. N. Mishra, Amicus Curiae, for assisting the Court within a period of two weeks.

When the matter was finally decided by me on 03.03.2021 the assistance was also given by Mr. D. N. Mishra, Amicus Curiae, to resolve the dispute.

In this view of the matter, office is directed to pay Rs.15,000/- in favour of Mr. D. N. Mishra, Amicus Curiae, within a period of three weeks from today.

(2021)04ILR A154
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal No. 22 of 2021

Bhanu Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anand Prakash Paul, Sri Brij Bhushan Paul

Counsel for the Respondents:
C.S.C.

A. Civil Law - Dying in Harness Rules, 1974 – Hindu Adoption and Maintenance Act, 1956 – Section 7, Proviso of Section s 7 & 8 – Compassionate appointment – Claim on the basis of Adoption – Adoption deed declare the deceased-employee as unmarried, though he was married – Lack of wife's consent – Effect – Party propounding an adoption by a Hindu male, who has a living wife, has to adduce evidence to prove that the same was done with the consent of his wife – This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption – Held, the learned Single Judge was justified in negativing the claim of the writ petitioner (the appellant) for compassionate appointment on the basis of his alleged adoption by the deceased employee. (Para 12 and 18)

B. Evidence law – Adoption deed – Validity – Presumption – Rebuttable or not – Legal principle laid down – Once a registered deed of adoption is produced though there arises a presumption that the adoption has been made in compliance with the provisions of the 1956 Act but that presumption is rebuttable – Whether that presumption has been rebutted depends on the facts of each case borne out from the evidence on record. (Para 15)

Special Appeal dismissed of. (E-1)

Cases relied on :-

1. Laxmibai Vs Bhagwantbuva, (2013) 4 SCC 97
2. Brajendra Singh Vs St.of M.P., (2008) 13 SCC 161
3. Ghisalal Vs Dhapubai, (2011) 2 SCC 298
4. Jai Singh Vs Shakuntala, (2002) 3 SCC 634

(Delivered by Hon'ble Manoj Misra, J.& Hon'ble Rohit Ranjan Agarwal, J.)

In re: Delay Condonation Application No. NIL of 2021:

1. As the limitation expired during the period of COVID-19 pandemic, the office has not reported the appeal to be beyond the period of limitation but, as a delay condonation application has been filed, to avoid any technicalities, we deem it appropriate to allow the application and condone the delay, if any.

In re: Appeal

2. Heard Sri B.B. Paul for the appellant; the learned Standing Counsel for the respondents 1, 2 and 3; and perused the record.

3. This intra-court appeal has been filed by the writ-petitioner (for short the appellant) against the judgment and order dated 25.11.2020 passed by the learned Single Judge in Writ A No. 10300 of 2107 by which appellant's writ petition has been dismissed.

4. Facts, in brief, giving rise to this appeal are that on death of one Rajendra Singh on 03.06.2016, in harness, by claiming himself as his adopted son, the appellant applied for compassionate appointment. As the claim of the appellant was not being addressed, the appellant filed Writ A No.53860 of 2016 and obtained a direction on 17.11.2016 for consideration of his claim. Pursuant to that direction, the Divisional Director, Social Forestry Division, Mau (for short Director), by order dated 17.12.2016, rejected the claim of the appellant upon finding as below : (a) Rajendra Singh had a living wife in Phoolmati against whom he had instituted suit no.145 of 1994 which was decided in terms of a compromise on 31.08.1997, as per which their relationship as a married couple were to continue; (b) Phoolmati claimed herself to be the sole heir of Rajendra Singh and had denied adoption of the appellant; (c) under Dying in Harness Rules, 1974, preference is to be accorded to the deceased's wife; (d) the adoption deed relied by the appellant appeared fraudulent as it recited that Rajendra Singh, the adoptive father, was unmarried even though he had a living wife in Phoolmati; (e) the educational certificates of the appellant, even those that were obtained post the date of alleged adoption, reflected the name of his natural parents, namely, Raj Narain and Kamla; (f) the extract of Parivar register also reflects the name of appellant's father and mother as Raj Narain and Kamla, respectively and, therefore, the plea of adoption set up by the appellant is nothing but fraudulent made with a view to make unlawful gain. Assailing the order dated 17.12.2016 the appellant filed Writ A No. 10300 of 2017 by claiming that as the adoption was by a deed of adoption, dated 07.02.2001, registered on 14.12.2009, there was no justification to deny the benefit of compassionate appointment to the appellant. In the counter affidavit to the writ petition, inter alia, the validity of the alleged adoption was questioned. In the rejoinder affidavit, to meet the objection that a married Hindu male could not lawfully take in adoption without the consent of his wife, a stand was taken that Phoolmati, wife of Rajendra Singh, had left her husband and that in Suit No.145 of 1994, on the basis of compromise, dated 31.08.1997, a decree of divorce came to be passed on 01.09.1997, hence, her consent was not required.

5. The learned Single Judge dismissed the petition of the appellant upon finding that: (a) there was no decree of divorce

obtained by Rajendra Singh (the deceased employee) against his wife Phoolmati who was alive at the time of the alleged adoption; (b) the adoption deed discloses Rajendra Singh's status as single, which implies that there was no consent of his wife for taking the appellant in adoption as is the mandatory requirement of the proviso to section 7 of the Hindu Adoption and Maintenance Act, 1956 (for short the 1956 Act); (c) mere separate living by the wife, or wife's estrangement from her husband, would not obviate the requirement of her consent to make a valid adoption. The learned single Judge concluded that the alleged adoption is invalid and also fraudulent because, despite alleged adoption, the name of natural parents of the appellant continued in educational certificates that were obtained post the date of alleged adoption.

6. Sri B.B. Paul, learned counsel for the appellant, has questioned the correctness of the order passed by the learned Single Judge by claiming that the learned Single Judge has failed to notice that by a decree dated 31.08.1997 the marriage of Rajendra Singh with his wife Smt. Phoolmati stood dissolved. Moreover, even if it is assumed that there was no legal divorce, she, by living separate from her husband, had renounced the world therefore her consent was not necessary. The next submission is that the learned single judge had failed to consider the import of section 16 of the1956 Act which, upon existence of a registered deed of adoption, raises a presumption as to the validity of adoption and since there was no serious contest to the adoption of the appellant by any of the successors of the deceased employee, the appellant ought to have been provided the benefit of adoption by raising that presumption. In support of this submission reliance was placed on a decision of the Apex Court in ***Laxmibai v. Bhagwantbuva, (2013) 4 SCC 97*** where it was held that if there is a registered document pertaining to the adoption there is a presumption, under Section 16 of the 1956 Act, to the effect that the adoption has been made in compliance with the provisions of the 1956 Act, until and unless such presumption is disproved.

7. Having noticed the submissions made, on a careful perusal of the record, we find that the submission of Sri Paul that there exists a decree of divorce, dated 31.08.1997, severing the marital bond between Rajendra Singh and his wife Phoolmati, is contrary to the record. The alleged decree, which has been brought on the record as Annexure RA III to the rejoinder affidavit filed in the writ proceeding, is not a decree of divorce. It only disposes off divorce proceeding in terms of the compromise. The compromise records payment of Rs.5000/- to Phoolmati towards litigation expenses and its terms (at page 209 of the paper-book) are: (a) that Rajendra Singh and Phoolmati shall continue to remain husband and wife; (b) that Phoolmati's name, as Rajendra Singh's wife, would be entered in his service-book; and (c) that she would get maintenance @ Rs.500 pm. In view of the above, the submission of the learned counsel for the appellant that on account of divorce between Phoolmati and Rajendra Singh her consent was not required for adoption has no basis on facts and is rejected outright.

8. Before we weigh the merit of other submissions made by the learned counsel for the appellant, it would be apposite to notice the provisions of sections 6, 7, 8 and 16 of the 1956 Act, the applicability of which on the parties is not in issue. These are as below:

"6. Requisites of a valid adoption.*--No adoption shall be valid unless—*

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

***7. Capacity of a male Hindu to take in adoption**.--Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:*

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation.--If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

8. Capacity of a female Hindu to take in adoption.--Any female Hindu—

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.

***16. Presumption as to registered documents relating to adoptions.**--Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*

9. From a perusal of the provisions extracted above, it is clear that for an adoption to be valid one of the conditions is that the person taking in adoption must have the capacity to adopt. As per section 7, a male Hindu, who is of sound mind and is not a minor, could take a son or daughter in adoption provided, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. In the instant case, the argument on behalf of the appellant is that as the wife had not been in the company of her husband therefore it could be taken that she had renounced the world and, as such, her consent would not be required. This contention was specifically repelled by the learned single judge by placing reliance on a decision of the Apex Court in the case of ***Brajendra Singh v. State of M.P., (2008) 13 SCC***

161 where the Apex Court while dealing with the capacity of a female Hindu to take in adoption interpreted the provisions of section 8 of 1956 Act, in paragraphs 15 to 17 and 19 of its judgment, as under:

"15. We are concerned in the present case with clause (c) of Section 8. The section brings about a very important and far-reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from clause (c) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the section expressly provides for cases in which she can adopt a son or daughter to herself during the lifetime of the husband. She can only make an adoption in the cases indicated in clause (c).

16. It is important to note that Section 6(i) of the Act requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption. Section 8 speaks of what is described as "capacity". Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or son's son or grandson by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with clauses (I) and (ii) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance with the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void.

17. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorced woman. There is conceptual and contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration sought for. Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of the law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of the law. Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

19. A married woman cannot adopt at all during the subsistence of the marriage except when the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically departs from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossess the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and adoption without wife's consent would be void. Both proviso to Section 7 and 8(c) refer to certain circumstances which have effect on the capacity to make an adoption."

(Emphasis supplied)

10. Learned single judge upon noticing that the provisions of the proviso to section 7 of the 1956 Act are, in part, pari materia to clause (c) of section 8 of the 1956 Act, by applying the interpretation accorded to clause (c) of section 8 of the 1956 Act by the Apex Court in **Brajendra Singh's case (supra),** held that the requirement of consent of the wife, under the proviso to section 7 of the 1956 Act, cannot be dispensed with where there is no dissolution of marriage even though the wife might be estranged from her husband and staying separate. In our considered view, the learned single judge was right in holding that the consent of even an estranged wife for taking in adoption would be required, if the marriage has not been dissolved. No doubt, consent of wife would not be required where the marriage has been dissolved or the wife has completely renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. But, here, it has not been proved that the marriage was dissolved. Rather, the document produced is to the contrary. Further, there is nothing on record to suggest that Phoolmati has completely renounced the world or has ceased to be a Hindu or has been declared of unsound mind by any court. Mere staying separate from one's husband may amount to renouncing the husband but not the world. Under the circumstances, Phoolmati's consent was required before her husband could take in adoption.

11. Noticeably, there is no evidence brought on record to demonstrate that consent of Phoolmati was obtained or was there, before her husband allegedly took the appellant in adoption. In ***Ghisalal v. Dhapubai, (2011) 2 SCC 298***, the Apex Court after laying emphasis on the mandatory requirement of obtaining consent of wife before the husband could

validly take a son or a daughter in adoption, interpreted the term consent, in paragraph 26 of the judgment, as follows:

"26. The term "consent" used in the proviso to Section 7 and the Explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject-matter of challenge before the court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption."

(Emphasis supplied)

12. From the decision noticed above, the legal principle deducible is that the party propounding an adoption by a Hindu male, who has a living wife, has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. In other words, the court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

13. Now, we shall examine the nature of presumption that arises under section 16 of the 1956 Act. In **Jai Singh v. Shakuntala, (2002) 3 SCC 634,** the Apex Court had held that the presumption that arises out of section 16 of the 1956 Act is rebuttable and the inclusion of the words "unless and until it is disproved" appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence on record in support of adoption. The relevant portion of that judgment, as found in paragraph No.2 thereof, is extracted below:

"2. The section thus envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the statute is rather definite since the legislature has used "shall" instead of any other word of lesser significance. Incidentally, however, the inclusion of the words "unless and until it is disproved" appearing at the end of the statutory

provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession -- thus onus of proof is rather heavy. Statute has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words "unless and until it is disproved" shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption. Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed above."

14. Even in the decision in ***Laxmibai's case (supra),*** relied by the learned counsel for the appellant, the Apex Court held that a very heavy burden is placed upon the propounder to prove adoption but once a registered document recording the adoption is brought before the court the onus shifts. The court however clarified that this aspect must be considered taking note of various attending circumstances. The relevant portion of that judgment i.e.paragraph 33, is extracted below:

"33. The appellate court could therefore, not have drawn any adverse inference against the appellant-plaintiffs on the basis of a mere technicality, to the effect that the natural parents of the adoptive child had acted as witnesses, and not as executors of the document. Undoubtedly, adoption disturbs the natural line of succession, owing to which, a very heavy burden is placed upon the propounder to prove the adoption. However, this onus shifts to the person who challenges the adoption, once a registered document recording the adoption is brought before the court. This aspect must be considered taking note of various other attending circumstances i.e. evidence regarding the religious ceremony (giving and taking of the child), as the same is a sine qua non for valid adoption."

(Emphasis supplied)

15. The legal principle deducible from the decisions noticed above is that once a registered deed of adoption is produced though there arises a presumption that the adoption has been made in compliance with the provisions of the 1956 Act but that presumption is rebuttable. Whether that presumption has been rebutted depends on the facts of each case borne out from the evidence on record.

16. In the instant case, the adoption deed on which reliance has been placed by the appellant declares Rajendra Singh as unmarried whereas, it is established on the record, he was married and had a wife living on the date of adoption. Therefore once it was proved that Rajendra Singh had a living wife, the presumption, if any, arising from that deed with regard to the adoption being in accordance with the provisions of the 1956 Act stood demolished because how could it be presumed that the wife had given her consent for her husband to take a son in adoption when even the existence of that wife is not acknowledged. In fact in the adoption deed Rajendra Singh has been described as unmarried. Thus, when clinching evidence had come on board that

the person who allegedly took the appellant in adoption had a living wife, whose existence was denied in the deed, the presumption, whatever available, stood rebutted.

17. At this stage, we may notice another statement of the learned counsel for the appellant though not vehemently pressed as an argument. It was stated that there were property documents on record to show that the estate of the deceased employee (Rajendra Singh) had come to the appellant and, therefore, for all practical purposes he was the son of the deceased employee. We find not much value in those facts because here, to qualify as a dependent of an employee who died in harness, the appellant had set up a plea that he was the adopted son of the deceased employee. Once that plea stood discarded upon finding that a valid adoption could not be established, as to how the property of the deceased employee devolved was not important and binding on the authorities who were to deal with the claim for compassionate appointment on the strength of adoption. That apart, there were other circumstances also, such as continuance of name of natural parents of the appellant in educational certificates, obtained after the alleged date of adoption, to suggest that adoption was sham may be to divest the estranged wife of her claim in the deceased employee's property.

18. For all the reasons recorded above, we are of the considered view that the learned single judge was justified in negativing the claim of the writ petitioner (the appellant) for compassionate appointment on the basis of his alleged adoption by the deceased employee.

19. The appeal is, accordingly, **dismissed.**

(2021)04ILR A162
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal No. 66 of 2021

Brij Bhushan Maurya ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Uma Nath Pandey,Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

A. Civil Law – U.P. Government Servants Conduct Rules, 1956 – Rule 3(1) – UP Government Servants (Discipline & Appeals) Rules, 1999 – Rule 7 – Disciplinary Enquiry – Punishment – Reversion – Major Penalty – Lack of Oral Enquiry – Effect – Principle of Natural Justice – Applicability – Held, where, in a major penalty enquiry, after service of the charge-sheet, the charge-sheeted employee in his reply to the charge-sheet does not admit the charge or refutes the charge, it is mandatory to fix a date for an oral enquiry – Failure to fix a date for the oral enquiry in such circumstances would vitiate the enquiry and the consequential order of punishment – It is not necessary for the charge-sheeted officer to pray for an oral enquiry inasmuch as the moment the charge-sheeted officer does not admit the charge or refutes the charge, an oral enquiry is required not only to comply with the provisions of the 1999 Rules but also the principles of natural justice. (Para 18)

Special Appeal allowed. (E-1)

Cases relied on :-

1. Sur Enamel & Stamping Works Ltd. Vs The Workmen; 1963 AIR SC 1914

2. St. Of U.P. & anr. Vs Sri C.S. Sharma; AIR 1968 SC 158

3. Radhey Kant Khare Vs U.P. Co-Operative Sugar Factories Federation Ltd.; 2003 (21) LCD 610

4. St. Of Uttaran. & ors. Vs Kharak Singh; (2008) 8 SCC 236

5. St. of U.P. and others Vs Saroj Kumar Sinha; (2010) 2 SCC 772

6. Chamoli District Co-operative Bank Ltd. Vs Raghunath Singh Rana & ors.; (2016) 12 SCC 204

(Delivered by Hon'ble Manoj Misra, J.& Hon'ble Rohit Ranjan Agarwal, J.))

1. This intra-court appeal arises from a judgment and order, dated 02.03.2021, of a Single Judge in Writ A No. 8811 of 2020 whereby the writ petition of the appellant assailing a punishment order of reversion, dated 01.10.2020, has been dismissed.

2. The factual matrix of the case is as follows:-

(i) The appellant (writ petitioner) gained entry in service through U.P. Public Service Commission (for short the Commission) and, at the relevant time, was posted as District Inspector of Schools (for short DIOS), Basti. With reference to his functioning as DIOS Basti, he was served a charge-sheet, dated 17.05.2006, levelling upon him a charge that he granted permission/ approval for payment of salary to one Class C and three Class D employees appointed in educational institutions (i.e. M.P.B.P. Balika Inter College, Harraiya, Basti and Kishan Inter College, Bhanpur, Basti) without prior concurrence/ recommendation of the Regional Level Committee headed by Joint Director of Education, as was required by the Government Order dated 19.12.2000, and by doing so he violated the Government Order. With reference to this charge-sheet, a report exonerating the appellant was submitted on 02.06.2009 with which the State Government did not agree. Rather, it proposed a punishment of reversion to be imposed upon the appellant and sent the same for approval of the Commission. The Commission, however, disagreed with the proposed punishment and, rather, proposed a lesser punishment of withholding two increments. The State Government vide order dated 14.03.2012 passed the order as proposed by the Commission. This order of punishment, dated 14.03.2012, has been separately challenged by the appellant through Writ A No. 21916 of 2012 which is pending.

(ii) In the meantime, another charge-sheet dated 15.04.2009, was served upon the appellant. The second charge-sheet levelled two charges. The first being that before granting approval to the appointment of Class C employee, namely, Shiv Kumar, at M.P.B.P. Balika Inter College, Harraiya, Basti, vide order dated 11.08.2004, the appellant failed to accord consideration for adjustment of compassionate appointees working against supernumerary posts, as was required by a Government Order dated 30.07.1992, thereby causing financial loss to the State Exchequer. In addition to above, it was alleged, the mandate of Government Order dated 19.12.2000 requiring approval from the Regional Level Committee was not met. The second charge levelled in the charge sheet dated 15.04.2009 was in respect of according approval to the appointment and payment of salary to as

many as 10 direct appointees on the post of Peon in various institutions of the district without taking into consideration the mandate of the Government Order dated 30.07.1992 mentioned above. In addition to above, it was alleged, the appellant had failed to follow the guidelines contained in the Government Order dated 19.12.2000 requiring approval of the Regional Level Committee before appointment and payment of salary. It was alleged that the action of the appellant caused loss to the State Exchequer and amounted to violation of Rule 3(1) of U.P. Government Servants Conduct Rules, 1956 (for short 1956 Rules).

(iii) The appellant submitted his reply to the charge-sheet dated 15.04.2009 stating, inter-alia, that requirement to first adjust compassionate appointees working against supernumerary posts did not place any restriction on appointment of persons belonging to reserved categories as clarified by Government Order dated 06.09.2000. In addition to that, it was stated that in respect of appointment on Class 'C' post, one Kamlesh Pratap Singh, appointed on a supernumerary post, was adjusted in Kishan Inter College, Basti. Apart from above, it was claimed that there were 160 sanctioned posts of clerk in the district against which there were only 145 appointees therefore, on the date of sanction of appointment, there were 15 posts lying vacant. In respect of not following the mandate of Government Order dated 19.12.2000 it was stated that the said Government Order would not come in the way of payment of salary made to appointees against already sanctioned posts inasmuch as its operation was limited to newly sanctioned posts. Support was drawn from a Government Order dated 29.12.2006, issued pursuant to High Court's order dated 09.05.2006 in Writ No.3363 of 2002, providing that for approval of appointment and sanction of salary to Group C and Group D posts in educational institutions covered by U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder it is the DIOS who is the authority competent. Likewise, in respect of charge no.2 similar defence was set up and, in addition to that, it was stated that there were as many as 624 sanctioned Group D posts in the district against which only 517 posts were filled and as many as 107 posts were vacant therefore the allegation that loss was caused to the State Exchequer is incorrect. Thus, in short, both the charges were denied by the appellant.

(iv) After submission of reply by the appellant, on 17.02.2011 an enquiry report was forwarded to the State Government. Acting on it, the State Government issued show cause notice to the appellant on 20.09.2011 to which a reply was submitted by the appellant on 02.12.2011. After consultation with the Commission, the State Government, by order dated 01.10.2020, imposed major punishment of reversion upon the appellant, thereby, reverting him from the post of District Inspector of Schools to the post of Basic Shiksha Adhikari, as originally held by the appellant, coupled with a censure entry.

3. Through Writ A No.8811 of 2020, the appellant questioned the order of punishment, inter-alia, on two grounds:-

(a) that the second charge-sheet in effect is an extension of the first therefore, as under the first charge-sheet the petitioner has already been punished, the second charge-sheet proceeding and punishment violates the doctrine of double jeopardy;

(b) that after receipt of reply from the appellant to the second charge-sheet, the enquiry officer did not fix any date, time and place of the enquiry and no enquiry including oral enquiry was held by the enquiry officer as is the mandate of Rule 7of the U.P. Government Servants (Discipline & Appeals) Rules, 1999 (for short 1999 Rules) and as such the entire enquiry and consequent punishment stands vitiated not only for violation of the provisions of the 1999 Rules but also the principles of natural justice.

4. The State contested the writ petition by filing counter-affidavit stating therein that the two charge-sheets were quantitatively and qualitatively different. The first was in respect of approval of payment of salary to one Class 'C' and three Class 'D' employees in violation of Government Order dated 19.12.2000 whereas the second was in respect of according approval to the appointment and consequential payment of salary to one clerk and ten Class IV employees without taking into consideration the Government Order dated 30.07.1992 which required prior adjustment of compassionate appointees, working on supernumerary posts, against sanctioned posts. Therefore, the doctrine of double jeopardy was not applicable. In respect of the second ground taken by the appellant, the State claimed that the enquiry report was based on documents which were not refuted and therefore no prejudice was caused to the appellant by not holding an oral enquiry. Hence, the writ petition was liable to be dismissed.

5. The learned Single Judge dismissed the writ petition by holding that the scope of enquiry under the two charge-sheets was different and therefore the doctrine of double jeopardy would not apply on the facts of the case. In respect of the second ground taken by the appellant, that is of not holding oral inquiry, the learned single judge observed that the appellant could not demonstrate that any prejudice was caused to him by not holding an oral enquiry inasmuch as the enquiry report was based on documents. The learned single judge accordingly dismissed the writ petition.

6. We have heard Sri Ashok Khare, learned senior counsel, assisted by Sri Uma Nath Pandey, for the petitioner-appellant; and the learned Standing Counsel for the respondents. As the affidavits exchanged between the parties, before the learned Single Judge, are available in the paper book of this appeal, with the consent of learned counsel for the parties, this appeal has been finally heard at the admission stage itself and is being decided by this judgment.

7. Sri Khare though, initially, tried to demonstrate that the two charge-sheets were more or less similar in pith and substance, but when confronted with the contents of each of the two charge-sheets, which have been extensively quoted in the judgment of the learned Single Judge to demonstrate that the scope of the two charge-sheets was different, rightly did not take his submissions further on that score. We have also noticed the contents of the two charge-sheets and having noticed the contents thereof, we are in agreement with the view of the learned single judge that the scope of inquiry in the two charge-sheets was different and, therefore, the second enquiry, which had much wider scope than the first, would not be hit by the doctrine of double jeopardy. The view of the learned

single judge on that issue is, accordingly, affirmed.

8. In respect of the second ground taken in the writ petition, that is there was no oral inquiry held, Sri Khare pointed out to the averments made in paragraphs 15 and 28 of the writ petition. Therein specific averment was made that after submission of the reply to the charge-sheet, no date, time and place of the enquiry was fixed nor intimated to the petitioner-appellant by the enquiry officer and that no enquiry including oral enquiry was held by the enquiry officer. It was pointed out that there was no specific denial of the aforesaid averments in the counter-affidavit. Sri Khare submits that the view taken by the learned Single Judge that by not holding an oral enquiry, no prejudice was caused to the appellant because the inquiry report is based on documents is erroneous inasmuch as the stand of the appellant was : (a) that under the Government Order dated 06.09.2000, there was a specific provision that there would be no stoppage of appointment of candidates belonging to the reserved categories, such as Scheduled Caste, Scheduled Tribes and Other backward classes, while ensuring adjustment of compassionate appointees working on supernumerary posts against regular vacancies therefore, even if such appointments were made, they would not be considered in the teeth of the earlier Government Order dated 30.07.1992; (b) that there was no question of financial loss to the State Exchequer as appointments were admittedly against vacant sanctioned posts, inasmuch as, the sanctioned posts lying vacant in the district were much larger in number than the posts against which appointments were made and approved; and (c) that under the Government Order dated 29.12.2006 as well as the Regulations framed under the UP Intermediate Education Act, 1921, the power to accord approval to the appointment of Class III and Class IV employees vested in the DIOS, which was not circumscribed by the Government Order dated 19.12.2000. Sri Khare submitted that the aforesaid defence of the petitioner-appellant has been discarded by the disciplinary authority by relying upon the enquiry report dated 20.09.2011 in which the enquiry officer had observed that in support of the defence, no proof was submitted by the charge-sheeted officer. He submits that oral enquiry was necessary because in the oral enquiry, the charge-sheeted officer would have had an opportunity not only to produce evidence in his defence but also question the documents relied upon against him. Hence, the view taken by the learned Single Judge that by not holding an oral enquiry, no prejudice was caused to the appellant is not correct.

9. Per contra, the learned Standing Counsel supported the judgment of the learned Single Judge by claiming that since the charge has been substantiated on the basis of documents, of which there was no denial, the learned Single Judge was justified in holding that no prejudice was caused to the appellant by not holding oral enquiry.

10. Having considered the rival submissions and upon perusal of the records, it is established as a fact that after submission of reply by the appellant to the charge-sheet, no date, time and place of the enquiry was fixed by the enquiry officer and that no oral enquiry was held by the enquiry officer. We have therefore to examine whether by not holding an oral enquiry and by not fixing a date to enable the charge-sheeted officer to

appear and submit his defence in the inquiry, the enquiry gets vitiated. If so, whether it vitiates the report and the order of punishment.

11. It is not in dispute that 1999 Rules are applicable for the purposes of imposing penalty on the appellant. Rule 3 of the 1999 Rules provides for the penalties that can be imposed upon a Government Servant for good and sufficient reasons:

Minor penalties :

(i) Censure;

(ii) Withholding of increments for a specified period;

(iii) Stoppage at an efficiency bar;

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders; and

(v) Fine in case of persons holding Group 'D' posts.

Major penalties :

(i) Withholding of increments with cumulative effect;

(ii) Reduction to a lower post or grade or time scale or to a lower stage in a time scale;

(iii) Removal from the service which does not disqualify from future employment; and

(iv) Dismissal from the service which disqualifies from future employment.

12. From above, it is clear that the punishment of reversion from the post of District Inspector of Schools to the original post of Basic Shiksha Adhikari is a major penalty, as has been imposed upon the appellant. For imposition of major penalty, under 1999 Rules, the procedure is laid down in Rule 7 of the 1999 Rules. Rule 7 provides that the disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges. With regard to the form of the charge-sheet it is provided that the facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges. The charge-sheet is to be approved by the disciplinary authority provided where the appointing authority is Governor, as is in the present case, the charge-sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department. The charges framed are to be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same along with oral evidence, if any, has to be mentioned in the charge-sheet. The charged Government servant is required to put in a written statement of his defence in person on a specified date, which is not to be less than 15 days from the date of issue of charge-sheet, and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He is also to be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer

shall proceed to complete the inquiry ex parte. Sub-clause (vi) of Rule 7 provides that where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission. Sub-clause (vii) of Rule 7 provides that where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence, provided that the Enquiry Officer may for reasons to be recorded in writing refuse to call such witness. Sub-clause (viii) of Rule 7 confers power upon the Inquiry Officer to summon any witness to give evidence or require any person to produce documents etc. Sub-clause (x) of Rule 7 of 1999 Rules provides as follows:

"Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant."

13. As to the manner in which a disciplinary enquiry is to be held and whether an oral enquiry is a must, there are a number of decisions. In ***Sur Enamel and Stamping Works Ltd. vs The Workmen, 1963 AIR SC 1914,*** it was held "*An enquiry cannot be said to have been properly held unless (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined - ordinarily in the presence of the employee - in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the enquiry officer records his findings with reasons for the same in his report."* The Supreme Court in that case had found that the enquiry report had placed reliance on certain reports which were not made available to the workman and the person, who prepared those reports, did not attend the enquiry at all. Such an enquiry was held to be invalid.

14. In ***State Of Uttar Pradesh & Anr vs Sri C.S. Sharma, AIR 1968 SC 158***, the apex court took the view that an opportunity has to be given to the charge-sheeted employee to produce his witnesses or to lead evidence in defence in absence whereof, the entire disciplinary proceeding gets vitiated. A Division Bench of this Court in ***Radhey Kant Khare vs U.P. Co-Operative Sugar Factories Federation Ltd., 2003 (21) LCD 610*** by placing reliance on various decisions of the Apex Court as well as of this Court emphasising upon the necessity of an oral enquiry, expounded the law as follows:-

"After a charge-sheet is given to the employee, an oral enquiry is a must, whether the employee requests for it or not. Hence, a notice should be issued to him indicating him the date, time and place of the enquiry. On that date the oral and documentary evidence against the employee

should first be led in his presence..... Ordinarily, if the employee is examined first, it is illegal..... No doubt in certain exceptional cases, the employee may be asked to lead evidence first....., but ordinarily the rule is that first the employer must adduce his evidence. The reason for this principle is that the charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. Where no witnesses were examined and no exhibit or record is made but straightaway the employee was asked to produce his evidence and documents in support of his case it is Illegal....."

15. In ***State Of Uttaranchal & Ors vs Kharak Singh : (2008) 8 SCC 236,*** after considering a catena of decisions, the Apex Court summarized the legal principles, in paragraph 15 of the judgment, as follows:-

"From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

16. In ***State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772,*** in the context of 1999 Rules, the Apex Court upon finding that inquiry officer had failed to fix a date for appearance of the charge-sheeted employee to answer the charge, after noticing sub rule (x) of Rule 7 of the 1999 Rules, in paragraph 26 of its judgment, observed :-

" The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges."

In paragraph 27 of the said judgment, the Apex Court, after quoting sub-rule (x) of Rule 7 of the 1999 Rules, observed :-

"A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his

appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge."

17. In the case of ***Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others : (2016) 12 SCC 204***, in the context of the procedure laid down in Regulation 85 of the U.P. Co-operative Societies Employees Service Regulations, 1975, the Apex Court after noticing various earlier decisions rendered by it, in paragraph 22 of its judgment, held that the disciplinary enquiry stood vitiated because the inquiry officer fixed no date for the oral enquiry after service of reply to the charge-sheet.

18. A conspectus of the decisions noticed above would show that where, in a major penalty enquiry, after service of the charge-sheet, the charge-sheeted employee in his reply to the charge-sheet does not admit the charge or refutes the charge, it is mandatory to fix a date for an oral enquiry. Failure to fix a date for the oral enquiry in such circumstances would vitiate the enquiry and the consequential order of punishment. It is not necessary for the charge-sheeted officer to pray for an oral enquiry inasmuch as the moment the charge-sheeted officer does not admit the charge or refutes the charge, an oral enquiry is required not only to comply with the provisions of the 1999 Rules but also the principles of natural justice. In a disciplinary enquiry, even if evidence is in the form of documents, the documents would have to be produced and their authenticity certified either by production of a witness or on the basis of an admission of the charge-sheeted employee made by him after receipt of those documents or production of those documents before him in the inquiry. After the department has led its evidence, the charge-sheeted employee is to be given opportunity to lead evidence in defence. Defence evidence may be oral or documentary depending upon the nature of the evidence which the defence wishes to rely on.

19. In the instant case, the appellant had not admitted the charges. He had pleaded not guilty. In these circumstances, he had a right to lead evidence in defence in the inquiry. Not holding an inquiry in these circumstances most certainly was prejudicial to his defence more so when the reversion order dated 01.10.2020 recites that the appellant had not led any evidence to substantiate his defence. The view taken by the learned Single Judge that the writ petitioner (the appellant herein) had failed to demonstrate as to what prejudice was caused to him by not holding an oral enquiry, in our considered view, is not correct. Because, once the writ petitioner (the appellant herein) had refuted the charges by claiming that the order of approval of the appointments and payment of salary, at his level, was not a misconduct to his understanding, as, according to him, there existed Government Orders to support such action, he was entitled to an oral hearing. Not holding an oral hearing has

most certainly been prejudicial to his interest.

20. At this stage, we may observe that the charge levelled upon the petitioner was with regard to breach of Rule 3 of 1956 Rules. Rule 3 provides: *(1) Every Government servant shall at all times maintain absolute integrity and devotion to duty. (2) Every Government servant shall at all times conduct himself in accordance with the specific or implied orders of Government regarding behaviour and conduct which may be in force.* Misconduct is not defined. But a conduct which is in violation of the code of conduct prescribed for the office concerned may be treated as a misconduct. Ordinarily, a breach of the prescribed code of conduct may occur in two situations. One due to improper motives, which is to be viewed seriously, and the other due to negligence which may be visited with minor punishment, dependent on facts of a case. As to whether a conduct referable to breach of circular/ government orders amounts to a misconduct, if so and punishable to what extent, under the Rules, is dependent upon multiple factors such as : (a) whether such departmental guidelines / circulars / government orders are well circulated and admit of no two views; and (b) whether, on account of multiple instructions in the form of circulars/ government orders, there exist a scope to have different views. In addition to above, there may be a situation where the conduct in question of an officer facing enquiry is influenced by a misleading note put by his subordinate staff in ordinary course of business. If it is so, the violation of the Government order or instruction or circular may not be attributable to that officer but to his subordinate. Thus, to reach to a well considered finding on the issue, it is desirable to have a date fixed in the inquiry so as to provide the charge-sheeted officer an opportunity to submit his defence. But, for all of this, an oral enquiry is necessary. Depriving a charge-sheeted officer of the opportunity of an oral enquiry, under the circumstances, would therefore, in our considered view, cause serious prejudice to his defence. Hence, the view to the contrary taken by the learned single judge is not correct.

20. As, admittedly, the enquiry officer fixed no date for oral enquiry on the charge-sheet served on the appellant, in spite of the fact that the appellant had submitted a reply refuting the charges, the enquiry stood vitiated and so did the enquiry report as well as the consequential action. The appeal is therefore **allowed**. The judgment and order of the learned Single Judge dated 02.03.2021 in Writ A No. 8811 of 2020 is set aside. The punishment order dated 01.10.2020 passed by the second respondent is quashed. The respondents, however, are at liberty to carry out the disciplinary proceeding on the charge-sheet dated 15.04.2009 from the stage of the enquiry, in accordance with law, and in the light of the observations made herein above. There is no order as to costs.

(2021)04ILR A171
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

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

Writ A No. 1309 of 2017

Ram Bachan Ram ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bed Kant Mishra

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Dileep Kumar Panday U.O.I.

A. Civil Law - Central Reserve Police Force Act, 1949 – Section 11(1) – Financial Handbook, Vol 2 Part II – Fundamental Rules 54 & 54A – Dismissal order – Subsequently set aside – Not on merit, but because the punishment order was found to be disproportionate – Effect – Entitlement of Back wages and Continuity of Service – Findings of the Inquiry Officer about the petitioner's guilt were not disturbed – Petitioner cannot be said to be a government servant, who, by any means, stands fully exonerated by a judicial determination or otherwise – Common thread running between provisions of Rule 54 and Rule 54-A of the Fundamental Rules is that it is a complete and clean exoneration of a government employee that entitles him to all his emoluments, and continuity of service for the period of deprivation – Held, the petitioner's case would clearly be governed by the provisions where entitlement to full back-wages and continuity of service is not there. (Para 14 and 15)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Devendra Pratap Narain Rai Sharma Vs St. of U.P. & ors.; AIR 1962 SC 1334

2. J.K. Synthetics Ltd. Vs K.P. Agrawal & anr.; (2007) 2 SCC 433

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

The petitioner has brought the present petition, challenging an order dated 07.01.2016, passed by the Deputy Inspector General of Police, Group Center, Central Reserve Police Force, Allahabad (now Prayagraj) to the extent that it declines full wages to the petitioner for the period 17.04.2008 to 19.07.2013. Further, a mandamus has been sought, ordering the respondents to release full pay and arrears for the period 17.04.2008 to 19.07.2013, together with award of seniority and grant of promotion. In substance, the petitioner asks this Court to treat the period 17.04.2008 to 19.07.2013 as period of service deemed to be rendered free from blemish, like any other employee.

2. The facts giving rise to the present writ petition are these :

The petitioner was recruited on the post of Constable/Mali with the Central Reserve Police Force1 in the year 1991. He was posted at the Group Centre, Allahabad in the month of December, 2008. Shorn of unnecessary details, it appears that the petitioner's wife was unwell and undergoing treatment at the Nazreth Hospital, Prayagraj. The petitioner was detailed to Sentry duty at the residence of the Deputy Inspector General of Police, Group Center, CRPF, Allahabad on 01.03.2008 from 18:00 hours to 02.03.2008 until 18:00 hours, along with other guards. The petitioner, however, on 02.03.2008, left post from 06:00 hours to 08:00 hours. The respondents say that this absence from post was without permission, whereas, the petitioner claimed that he had sought the requisite permission. A preliminary inquiry was held in the matter. A departmental inquiry was ordered under Section 11(1) of The Central Reserve Police Force Act, 19492 read with Rule 27 of the The Central Reserve Police Force Rules, 19553. Vide memo dated 13.03.2008 issued by the Additional Deputy Inspector General of Police, Group Center, Allahabad, two

charges were framed against the petitioner. The first was about his unauthorized absence from post on 02.03.2008 from 06:00 hours to 08:00 hours, without the permission of the competent authority, and the other was that on 02.03.2008 at 05:45 hours, the petitioner, without permission of the competent authority, carried his service weapon/ammunition to his allotted government quarter, and that he left the weapon and ammunition without security at his quarter located in the camp compound for the period of time that he moved out of the camp premises to drop his wife to the railway station.

3. A departmental inquiry followed. At the conclusion of the disciplinary proceedings, about which there is no issue here, the petitioner was punished by the Disciplinary Authority/Additional Deputy Inspector General of Police, Group Center, CRPF, Allahabad, inflicting the following penalties :

[1]. Dismissal from service w.e.f. 17.04.2008.

[2]. The period of suspension pending inquiry from 02.03.2008 to 16.04.2008 (46 days) to be treated as such.

There were certain ancillary directions, that are not relevant.

4. This order was appealed by the petitioner to the Deputy Inspector General of Police, CRPF, Allahabad through a statutory appeal. The Deputy Inspector General of Police, by his order of 7th August, 2008 dismissed the appeal and affirmed the Disciplinary Authority's order. The petitioner carried a revision under Rule 27/29 of the Rules of 1955 to the Inspector General, CRPF, Lucknow. The aforesaid revision was dismissed vide an order dated 27.01.2009. Aggrieved, the petitioner instituted a writ petition before this Court, being Writ - A No. 16965 of 2009. The aforesaid writ petition was allowed by a judgment and order dated 08.05.2013, in terms that the orders dated 17.04.2008, 07.08.2008 and 27.01.2009, dismissing the petitioner from service and its affirmation in appeal and revision, were all quashed, with a remit of the matter to the Disciplinary Authority, directing him to pass fresh orders in accordance with law, within three months of the date of presentation of a certified copy of this Court's order.

5. In compliance with the said judgment and order passed by this Court, it appears that the petitioner was issued a letter dated 26.06.2013, directing him to report at the Group Center, CRPF, Allahabad on or before 20.07.2013, to consider his case for reinstatement in service, and further to pass fresh orders in the disciplinary matter. The petitioner reported on 20.07.2013 in the forenoon. He was permitted to join w.e.f. 20.07.2013, again in the forenoon. The respondents then proceeded to consider what fresh orders were to be made in the disciplinary matter. The Disciplinary Authority proceeded to pass those fresh orders on 08.08.2013, punishing the petitioner in the following terms :

[1]. Confinement to Quarter Guard for 15 days from 16.08.2013 to 30.08.2013 with one hour punishment drill daily. Dismissal from service ordered earlier vide order dated 17.04.2008 was directed to be set aside.

[2]. The period of suspension from service pending inquiry from

02.03.2008 to 16.04.2008 (46 days) was directed to be treated as such.

6. The period of dismissal from service from 17.04.2008 forenoon to 19.07.2013 i.e. until the petitioner's reinstatement on 20.07.2013 (forenoon) was directed to be treated as "dies non" on the principle of "no work no pay". The aforesaid break in service was, however, condoned, acting in terms of an order of the Government of India dated 23.09.1982, pursuant to Rule 28 of the Central Civil Services (Pension) Rules, 19724. This condonation was indicated to be for the limited purpose of reckoning the petitioner's pensionary benefits etc.

7. The petitioner appealed the order dated 08.08.2013 to the Deputy Inspector General of Police, Group Center, CRPF, Allahabad to the extent that the Disciplinary Authority had treated the period of his dismissal from service as one not spent on duty and deprived him of all consequential benefits of salary, allowances and seniority. The aforesaid appeal, preferred under Rule 27 of the Rules of 1955, was rejected by the Appellate Authority vide order dated 04.02.2014. The petitioner carried a revision to the Inspector General of Police, under Rule 27 of the Rules of 1955, assailing both orders and asking that the period intervening 17.04.2008 and 19.08.2013, that is to say, the period when the petitioner was out of service, be treated as one spent on duty, with grant of consequential benefits of arrears of salary, bonus and promotion. The Inspector General of Police, vide order dated 11.06.2014, dismissed the revision, but passed better worded directions, reiterating what the Authorities below had done. All the three orders were put in issue by the petitioner through a petition preferred to the Special Director General, Central Zone, Kolkata. The Special Director General, Central Zone, Kolkata, vide his order dated 5th of December, 2014 apparently rejected the petitioner's representation in terms of the following directions :

(i) "The petitioner has been given relief on the direction of the Hon'ble Court (Judgment dated 08/05/2013 in WP No.16765 of 2009). The Hon'ble Court has not given specific service and financial benefits to the petitioner. As such there is no parity with CT/GD Murugesan and ASI/M M.D. Salam as claimed with that of the petitioner. The benefits which are to be allowed should be based on rule positions i.e. FR-54.

(ii) The petitioner has already been given leniency by way of awarding a lesser punishment. The petitioner has not submitted any new material or valid ground to interfere in the orders of disciplinary, appellate and Revisioning authorities. Since in the instant case the petitioner has not been exonerated from the charges, the competent authority has treated the intervening period as period spent not on duty, which is correct as per FR-54 (1,5).

(iii) In view of the above, I reject the request of the petitioner to the extent of service benefits of intervening period. The pay and allowance of intervening period of the petitioner from the date of dismissal to the date of re-instatement as per FR (4,7) may be finalized by the IG, CS immediately."

8. While giving effect to the order of 5th December, 2014 passed by the Director General of Police, the Deputy Inspector General, CRPF, Allahabad regularized the

period between 17.04.2008 to 19.07.2013 and directed that for the intervening period from 17.04.2008 to 19.07.2013, the petitioner would be entitled to salary and allowances at the rate of 50 percent. It has further been provided that the petitioner would be entitled to the first Assured Career Promotion5 pay scale w.e.f. 05.10.2003, upon completion of 12 years' service and to the second ACP pay scale w.e.f. 05.10.2011, upon completion of 20 years' service. The order dated 07.01.2016 passed by the Deputy Inspector General of Police, CRPF, Allahabad, which is the order impugned read as a whole, shows that the period between 17.04.2008 to 19.07.2013 has been held for the petitioner as one spent on duty. It has not been regarded as period not spent on duty. If this were not so, the petitioner would not have been awarded the second ACP pay scale w.e.f. 05.10.2011, inasmuch as the said ACP is awarded upon completion of 20 years' service. The impugned order also shows to its face that the second ACP was granted on completion of 20 years' service. The petitioner had joined service in the year 1991, and, therefore, he was awarded the second ACP in the year 2011. This award of the second ACP shows that the break in service from 17.04.2008 to 19.07.2013 was effectively regularized and reckoned as period spent on duty. The only deprivation to which the petitioner was subjected was the award of salary and allowances, reduced by 50 percent, for the period 17.04.2008 to 19.07.2013. Learned counsel for the petitioner urges as the first grievance, the denial of 50 percent wages for the period 17.04.2008 to 19.07.2013 and asks to be paid in full for that period, together with arrears.

9. The last order that governs the rights of the petitioner, which, admittedly, became final inter se the parties, is the order of December the 5th, 2014 passed by the Special Director General, CRPF, Kolkata. This order, while substantially upholding the orders passed by the Authorities below, makes a specific direction, subject to which the petitioner stands reinstated in service. The Director General's order clearly says that since the petitioner has not been exonerated of the charges, the Competent Authority has treated the intervening period (from 17.04.2008 to 19.07.2013) as one spent not on duty. The Director General has also remarked that this part of the order is correct, as it accords with the Fundamental Rule 54 (1) and (5). The Director General has gone on to further say in his order that he rejects the petitioner's request to the extent of grant of service benefits for the intervening period (that is to say, 17.04.2008 to 19.07.2013).

10. So far, there is no ambiguity in the Director General's order. But, towards the tail end of it, there is a rather confounding direction, which has been referred to verbatim, in the part of this judgment where the order of the Director General dated 05.12.2014 has been quoted. This direction says that the pay and allowance for the intervening period from the date of dismissal to the date of reinstatement may be finalized as per "FR (4,7)" by the Inspector General, CS immediately. It is this last direction carried in the Director General's order of 5th December that has led the Deputy Inspector General, CRPF to award 50 percent back wages to the petitioner for the period 17.04.2008 to 19.07.2013 and also grant continuity of service without break. To the understanding of this Court, there is variance between the order of the Director General, in terms of which, the petitioner

finally stands reinstated in service and those carried in the order impugned. The terms carried in the order impugned are at variance to the petitioner's advantage, contrary to the Director General's order of 5th December, 2014. The Director General's order of 05.12.2014 has not been formally impugned in the writ petition, but this Court would think that the validity of the order could still be examined, considering that the petitioner has asked for a mandamus to direct the respondents to release his full pay and arrears for the intervening period 17.04.2008 to 19.07.2013, with consequential benefits (seniority and promotion).

11. The right to receive back wages and grant of continuity of service upon dismissal etc. from service being set aside, is governed by Fundamental Rule 54 and 54-A of the Financial Handbook, Vol. 2, Part II to IV. The relevant clauses of these rules may be quoted in extenso :

54. (1) When a Government servant who has been dismissed, removed or compulsorily retired is re- instated as a result of appeal or review or would have been so re-instated but for his retirement on superannuation, while under suspension or not, the authority competent to order re-instatement shall consider and make a specific order:-

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension proceeding his dismissal, removal or compulsory retirement, as the case may be, and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) When the authority competent to order re- instatement is of the opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6),be paid full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representations within 60 days from the date on which the communication in this regard is served on him and after considering the representation, if any submitted by him, direct for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7),be paid for the period of such delay, only such amount not being the whole of such pay and allowances as it may determine.

(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension proceeding dismissal, removal or compulsory retirement, as the case may be shall be treated as a period spend on duty for all purposes.

(4). In cases other than those covered by sub-rule (2) [including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing

authority solely on the ground of non-compliance with the requirements of Clause (1) of Clause (2) of Article 311 of the Constitution and no further inquired is proposed to be held], the Government servant, shall, subject to the provision of sub-rules (6) and (7) be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not dismissed, removed or compulsory retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be as the competent authority may determine after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection, within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as my be specified in the notice.

(5). In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose :

Provided that if the Government servant so desires such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

Note. - The order of the competent authority under the preceding proviso shall be absolute and higher sanction shall be necessary for the grant of-

(a) extraordinary leave in excess of three months in case of temporary Government servant; and

(b) leave of any kind in excess of five years in the case of permanent Government servant.

(6). xxxxx

(7). xxxxx
(8). xxxxx

54-A. (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a Court of Law and such Government servant is re-instated without holding any further enquiry, the period of absence from duty shall be regularized and the Government servant shall be paid pay and allowance in accordance with the provisions of sub- rule (2) or (3) subject to the directions, if any, of the court.

(2) (i) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court solely on the ground of non-compliance with the requirements of the clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, the Government servant shall subject to the provision of sub-rule (7) of rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal, or compulsory retirement, as the case may

be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him, in that connection within such period (which is no case shall exceed 60 days from the date on which the notice has been served) as may be specified in the notice:

(ii) The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be and the date of judgment of the court shall be regularized in accordance with the provisions contained in sub-rule (5) of Rule 54.

(3) If the dismissal, removal, or compulsory retirement of a Government servant is set aside by the Court on the merits of the case, the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of re- instatement shall be treated as duty for all purposes and he shall be paid the full pay and allowances for the period to which he would have been entitled, had he not been dismissed, removed or compulsorily retired, as the case may be."

(4) xxxxx

(5) xxxxx

12. A reading of Rules 54 and 54-A of Fundamental Rules makes it evident that these govern the entitlement of a government servant to his back wages during the period of time that he has remained out of service, in consequence of an order of dismissal, removal or compulsory retirement etc. and the date of his reinstatement. These rules also govern the entitlement of a government servant to the treatment or otherwise of the period of absence from service as one spent on duty. Rule 54 specifically speaks about these entitlements and some others upon a government servant being reinstated in service, in consequence of an order of dismissal, removal etc. being set aside in appeal or review. More specifically, it deals with those consequences and the relevant entitlement of a government servant, where the order is set aside by higher departmental authority or forum in appeal or review. Reference to the words "appeal" or "review" in Rule 54 is to a departmental remedy alone, and not a judicial remedy. The provisions of Rule 54 were held not to apply by their Lordships of the Supreme Court in **Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh and Others6** where the dismissal of a public servant was declared invalid by a decree of the Civil Court. This is all the more evident from the fact that Rule 54-A was introduced later on in the Fundamental Rules, which specifically deals with the consequence of an order of dismissal, removal or compulsory retirement of a government servant being set aside by a Court of Law and the government servant being reinstated in consequence. There might be slight difference of form between between Rule 54 and Rule 54-A of the Fundamental Rules, but what is of importance is that both under Rule 54 and 54-A, there is a broad and discernible difference between the consequences of an order of dismissal etc. being set aside on merits ft, and on the other, on the ground of non-compliance with Clauses (1) or (2) of Article 311 of the Constitution, followed by

a decision not to hold any further inquiry. Where the order of dismissal etc. is set aside on merits, sub-Rule (3) of Rule 54-A is clear that the period intervening date of dismissal etc. and the date of reinstatement shall be treated one spent on duty for all purposes, including payment of full pay and allowances. In case, however, the dismissal order is set aside on grounds of violation of Clause (1) or (2) of Article 311, with no further inquiry being proposed to be held, the government servant, on reinstatement, would be entitled to such amount of pay and allowances for the period of his ouster from employment, as the competent authority may determine after provision of opportunity to represent Clause (2) of sub-Rule (2). Rule 54-A also provides, in a situation of the latter kind, that the period of time between the dismissal etc. and the date of judgment of the Court shall be governed by the provisions of sub-Rule (5) of Rule 54. Now, sub-Rule (5) of Rule 54 provides that in a case where the order of dismissal etc. is set aside in the contingencies envisaged by sub-Rule (4) of Rule 54 (that are the same as those enumerated in sub-Rule (2) of Rule 54-A), that is to say, the order being set aside for violation of Article 311 (1) and (2), the period of time between dismissal and reinstatement shall not be treated as one spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose, to borrow the precise phraseology of the Rule.

13. A careful comparison of the provisions of Rule 54 and 54-A shows that there is no difference in the principles applicable to the rights of an employee upon reinstatement, in case of relief by departmental forum or a court of law, except those that emanate from the nature of the Court's jurisdiction on the one hand and that of the departmental, appellate or reviewing authority on the other. For instance, while sub-Rule (3) of Rule 54-A speaks about the order of dismissal etc. being set aside by a court on merits, entitling the government servant to a reinstatement with all monetary and other consequential benefits, the pari materia provision of sub-Rule (2) of Rule 54 speaks about the opinion of the competent authority to order reinstatement of a government servant upon his dismissal etc. being set aside in appeal or review, specifically on the point whether the government servant has been fully exonerated in order to entitle him to full salary and emoluments. Likewise, it is under sub-Rule (3) of Rule 54 the opinion of the authority reinstating about a full exoneration in appeal or review for the government servant that would entitle him to the period of his absence from duty to be treated as time spent on duty for all purposes. The principles in sub-Rule (3) of Rule 54-A and sub-Rule (3) of Rule 54 are identical. The differences in phraseology to express the same substance, as said earlier, emanate from the difference in the nature of the powers exercised by the Court that are of judicial review in one case, and, in the other, of the employer.

14. The common thread running between provisions of Rule 54 and Rule 54-A of the Fundamental Rules is that it is a complete and clean exoneration of a government employee that entitles him to all his emoluments, and continuity of service for the period of deprivation. In case the government servant is reinstated on anything short of a full exoneration, that would compare to an honourable acquittal

in a criminal trial, the entitlement to the entire salary and allowances as also continuity of service is not envisaged. Sub-Clause (1) of sub-Rule (2) of Rule 54-A clearly refers to a dismissal etc. being set aside not only for breach of Clauses (1) or (2) of Article 311 but also where the exoneration is not on merits. There is, thus, no substantial difference between Rule 54 and Rule 54-A of the Fundamental Rules, except that in one case, reinstatement is in consequence of an order made in departmental appeal or other remedy and the other, as a result of judicial determination.

15. In the present case, it is not in issue that this Court, while setting aside the order of dismissal, did not do so on merits. In other words, the order was not set aside, fully exonerating the petitioner. Rather, it was set aside because the punishment was found to be disproportionate. It is for the said reason that the matter was remitted to the Disciplinary Authority to pass fresh orders, in accordance with law. The findings of the Inquiry Officer about the petitioner's guilt were not disturbed, or the acceptance of these by the Inquiry Officer. What troubled the Court's conscience was the disproportionate punishment meted out. There is also no cavil that out of the two charges laid against the petitioner, he admitted one and contested the other. Thus, the petitioner cannot be said to be a government servant, who, by any means, stands fully exonerated by a judicial determination or otherwise. The petitioner's case, therefore, would clearly be governed by the provisions where entitlement to full back-wages and continuity of service is not there. In this connection, there is a very illuminating guidance by the Supreme Court to be found, albeit, in the context of an industrial dispute, in J**.K. Synthetics Ltd. v. K.P. Agrawal and Another7** which was a case of the dismissal of a workman on three charges. The Labour Court had ultimately held one charge not proved, the second proved and as regards the third, the workman held entitled to the benefit of doubt. The Labour Court had initially awarded substitution of the punishment of termination of service with stoppage of increment for two years, but, later on, on an application for the correction of award under Section 66 of the Uttar Pradesh Industrial Disputes Act, 1947 directed that apart from stoppage of two annual increments, the employer would pay full wages for the period of ouster from service. In the background of those facts, in **J.K. Synthetics Ltd.** (supra) their Lordships held :

19. ..... Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in

which event, there can be a consequential direction relating to continuity of service). **What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc.**

20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination.(emphasis by Court)

16. The decision in **J.K. Synthetics Ltd.** might have been rendered in a very different statutory context and relating to a different jurisdiction, to which a different jurisprudence applies, but the fundamental principles about ordering reinstatement of an employee and his rights to back-wages and continuity of service are the same, as those expressed in Fundamental Rule 54 and 54-A.

17. In view of facts that obtain here, this Court does not find any good ground to interfere.

18. In the result, this writ petition **fails** and stands **dismissed**.

19. Costs easy.

(2021)04ILR A181
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ A No. 7114 of 2020

Sanny Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhanu Pratap Singh, Sri Rateesh Singh

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

A. Service law – Post in UP Police – Recruitment – Non-disclosure of criminal cases, including one of moral turpitude – Effect – Act of deliberate non disclosure or willful suppression of criminal cases by a

candidate invites penalties. However, at times mere non disclosure may not be grave enough to cause a dismissal from service – Equally in other cases, the fact of disclosure in itself may not prevent the invalidation of the appointment – Held, nature of criminal cases have a more decisive say in the matter. (Para 21)

B. Service law – Recruitment – Evaluation of suitability – Nature – Administrative or Quasi judicial or Judicial – Held, determination of suitability of a candidate for appointment is an administrative decision which is part of the recruitment process. The process of evaluating suitability for appointment is not an adjudication of guilt or innocence as in a criminal case. Nor is it a quasi judicial process or a civil law proceeding. (Para 29)

C. Service law – Departmental proceedings – Acquittal in criminal case – Effect – Honourable acquittal and Acquittal simplicitor – Difference – While Honourable acquittal is an acquittal as if the prosecution did not happen, acquittal on benefit of doubt is an acquittal on account of witnesses turning hostile – An acquittal in a criminal trial simplicitor will not lead to an automatic discharge in departmental proceedings. (Para 38 and 39)

D. Service law – Suitability of candidates – Evaluation – Evidentiary standard of preponderance of probabilities – Departmental proceeding and Selection process – Difference – Rights of a government employee facing departmental proceedings are significantly different from a candidate who is participating in a selection process. The evidentiary standard of preponderance of probability is not applicable to the proceedings which consider the suitability of a candidate before making the appointment – Held, authority while determining the suitability of a candidate for public employment is not required to reach the level of evidentiary standards demanded of the prosecution in a criminal trial or asked of a party in a civil trial or required of a department in a disciplinary enquiry. (Para 45 and 51)

E. Service law – Recruitment – Selection process – Suitability of candidate – False declaration – Deliberate suppression of criminal case – Effect – Principle of law laid down in Avtar Singh's case followed – Multiplicity of cases manifested repetitive criminal conduct and thus assumed significance – Cases involving heinous nature of offences or offences involving moral turpitude may dissuade the competent authority from approving the candidate for appointment – Held, the competent authority cannot be faulted for finding that the aforesaid antecedents revealed traits which made the petitioner unsuitable for appointment. (Para 59, 60, 75 and 76)

Writ Petition dismissed (E-1)

Cases relied on :-

1. Avtar Singh Vs U.O.I. & ors.; (2016) 8 SCC 471

2. Commissioner of Police, New Delhi & ors. Vs Mehar Singh; (2013) 7 SCC 685

3. B. Ramakrishna Yadav & ors. Vs The Superintendent of Police & ors.; AIR 2016 AP 147

4. R.P. Kapur Vs U.O.I. ; AIR 1964 SC 787

5. Management of R.B.I. Vs Bhopal Singh Panchal; (1994) 1 SCC 541

6. Commissioner of Police, New Delhi Vs Mehar Singh; (2013) 7 SCC 685

7. Inspector General of Police Vs S. Samuthiram; (2013) 1 SCC 598

8. RBI Vs Bhopal Singh Panchal; (1994) 1 SCC 541

9. St. of M.P. Vs Bunty; (2019) SCC OnLine SC 430

10. Shankarshan Das Vs U.O.I.; (1991) 3 SCC 47

11. St. of Bihar Vs The Secretariat Assistant Successful Examinees Union; (1994) 1 SCC 126

12. Mohammed Imran Vs St. of Mah.; (2019) 17 SCC 696

13. Commissioner of Police & ors. Vs Sandeep Kumar; (2011) 4 SCC 644

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner has assailed the order dated 15.06.2020 passed by respondent no. 3- Superintendent of Police, Jalaun, cancelling his selection as Constable in the U.P. Police.

2. The judgment is being structured in the following conceptual framework to facilitate the discussion:

I.	Introduction		
II.	Submissions of learned counsels		
III.	Facts		
IV.	Legal perspectives		
	IV.i. Examination of suitability of Candidates for appointment		
		A	Material for formation
		B	Nature of proceedings
		C	Standard of evidence &
		D	Procedure for enquiry
	IV.ii	**Line of Enquiry by the authorities**	
		A.	Consideration of criminal cases
		B	Mitigating factors
	IV.iii		Decision of the authority
V.	Analysis of facts and conclusions		

I. Introduction:

3. The recruitment process for various posts in the U.P. Police was initiated by notification dated 14.01.2018. The petitioner applied in response to the said notification. The petitioner was selected for appointment to the post of Constable in the UP Police.

4. The declaration made by the petitioner in the affidavit of verification on 22.04.2019 during the recruitment process disclosed following criminal cases:

"(1) NCR 131/2015 धारा 323, 504, 506 IPC, थाना हाथरस गेट में दोषमुक्त है

(2) FIR No. 0030/ 2018 महिला थाना हाथरस धारा 498, 323, 504, 506 IPC तथा

दहेज़ अधिनियम 3, 4 में दोषमुक्त

(3) FIR No. 0760/2018 धारा 354(घ) 120-B, 504, 506, 11, 22 67(a) I.P.C. में विचाराधीन विवेचनाधीन"

5. The petitioner was denied appointment as Constable. Being aggrieved the petitioner approached this Court by instituting a writ petition, registered as ***Writ A No. 3547 of 2020, Sanny Kumar Vs. State of U.P. and Others.*** The operative portion of the judgment in ***Sanny Kumar (supra***) dated 04.03.2020 is extracted hereinunder:

"In view of the above, as no useful purpose would be served in keeping the matter pending, with the consent of parties the matter is being decided at this stage. It is directed that in case petitioner approaches the respondent no. 3 through a comprehensive representation along with certified copy of this order within fifteen days from today, the respondent no. 3 shall consider and decide the same, in accordance with law, keeping in mind the guidelines issued by Apex Court in case of Avtar Singh (Supra), and taking into account the result of the criminal cases lodged against the petitioner, preferably within a period of two months from the date of receipt of representation of petitioner."

6. Pursuant to the said order passed by this Court, the impugned order dated 15.06.2020 was passed.

II. Submissions of learned counsels:

7. Shri Bhanu Pratap Singh, learned counsel assisted by Shri Rateesh Singh, learned counsel for the petitioner contends that the petitioner had truthfully declared details of all the criminal cases pending against him in the affidavit of verification. The petitioner has not been chargesheeted in two cases. One of the cases is an offshoot of a matrimonial dispute of his brother. The impugned order has overlooked the acquittal of the petitioner by the court in one criminal case. The authority has not adopted any standard of evidence while considering the material against the petitioner. In absence of conviction by a court, appointment cannot be refused.

8. Per contra, Shri Vikram Bahadur Yadav, learned Standing Counsel for the State of U.P. submits that the petitioner was named in multiple criminal cases. The petitioner was not acquitted honourably by the trial court in the first case. The petitioner was named in the first information reports lodged in the other cases including one for an act of moral turpitude. The fact that the Investigation Officer did not chargesheet the petitioner does not exonerate the petitioner, particularly, when trials are on foot.

9. The competent authority gave full consideration to all material facts in the right perspective. Persons with such criminal profiles are not fit for appointment in the police force.

10. Heard learned counsel for the parties.

III. Facts of the case and the impugned order:

11. The undisputed facts necessary for adjudication of this controversy can be prised out from the impugned order. The declaration made by the petitioner disclosing the criminal prosecutions faced by him was part of the recruitment process.

Before approving the appointment the Superintendent of Police, Hathras, by communication dated 25.05.2019, sought an opinion of the District Magistrate, Hathras, in the matter.

12. According to the impugned order dated 15.06.2020, the District Magistrate, Hathras, constituted a committee to consider the suitability of the petitioner for appointment. The petitioner was given an opportunity to tender his defence before the committee.

13. The impugned order considers the defence of the petitioner before the committee. The petitioner asserted that he was acquitted in the first case. His nomination in the criminal case registered by his sister-in-law was false. The mother-in-law of his brother also set up her younger daughter to falsely implicate the petitioner in another case. The findings of the committee are then set out at length in the impugned order.

14. The criminal case registered as NCR No. 131 of 2015 under Sections 323, 504, 506 I.P.C. Police Station Hathras Gate, District Hathras was tried as Criminal Case No. 1924 of 2015, (State Vs. Raghuvir Singh and Others). The impugned order records that the committee found that the acquittal of the petitioner in the said case by the learned trial court was not honourable. The petitioner was acquitted by the learned trial court, solely on account of the prosecution witnesses turning hostile.

15. The committee referencing the Case Crime No. 760 of 2018, under Sections 354kha, 120-B, 504, 506 I.P.C. and Sections 11 and 22 of POCSO Act, 2012 read with Section 67A of IT Act, found that the petitioner had been accused of sending obscene messages, and outraging the modesty of a minor girl child. These offences are grave and come within the ambit of moral turpitude. The case has gone to trial. The defence of the petitioner was untenable.

16. The third case was registered by the wife of the petitioner's brother, as Case Crime No. 30 of 2018, under Sections 498-A, 323, 504, 506, 307 and 313 I.P.C. and 3/4 of Dowry Prohibition Act, at Police Station Mahila Thana, District Hathras.

17. The District Magistrate, based on the committee report found against the suitability of the petitioner for appointment in the U.P. Police.

18. The Superintendent of Police, Hathras, agreed with the findings of the committee and recommendation of the District Magistrate, Hathras. The competent authority also recorded his conclusions independently. The acquittal of the petitioner was not honourable. The petitioner was involved in several serious criminal cases, including one of moral turpitude. The latter cases are pending before the trial court. The petitioner was not suitable for appointment in the police force. Accordingly, the candidature of the petitioner for appointment as a Constable in the U.P. Police was cancelled by the impugned order dated 15.06.2020.

19. The process of recruitment to public office envisages affirmation of an affidavit, or filling up an attestation form, or a declaration to be made by a candidate disclosing details of past and pending criminal prosecutions against him.

20. Cases broadly fall in two categories, namely, where the candidate has disclosed criminal cases, and when the candidate has concealed information pertaining to criminal prosecution.

21. The act of deliberate non disclosure or willful suppression of criminal cases by a candidate invites penalties. However, at times mere non disclosure may not be grave enough to cause a dismissal from service. Equally in other cases, the fact of disclosure in itself may not prevent the invalidation of the appointment. Nature of criminal cases have a more decisive say in the matter.

22. As noticed earlier the petitioner had disclosed all the criminal cases against him in the declaration submitted during the recruitment.

IV. Legal perspective:

IV.i. Examination of suitability of candidates for appointment : Role of Criminal Antecedents:

23. The impact of criminal antecedents on the appointment of a selected candidate was crystallized in ***Avtar Singh v. Union of India and Others1***. However, the submissions made at the bar expand the scope of the controversy and require consideration of the contours and nature of an enquiry by the competent authority into the criminal antecedents of the candidate and its bearing on appointment.

24. The purpose and subject matter of the proceeding, the rights engaged, material for consideration, and consequences of the decision, decide the nature of the enquiry and procedure to be adopted.

25. The purpose of the enquiry is to determine suitability of a candidate to hold office. The police is a disciplined force which is charged with the duty to uphold the law and order in the State. Personnel in uniform belonging to disciplined forces, are expected to bear impeccable character and possess unimpeachable integrity. Adherence to these standards is essential to enable them to discharge their duties effectively, and retain the confidence of the public at large.

26. The narrative will be fortified by reference to judicial authorities in point. The need for appointing persons of untarnished character in the police force was underscored in ***Commissioner of Police, New Delhi and others Vs. Mehar Singh2***

"The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force. The Standing Order, therefore, has entrusted the task of taking decisions in these matters to the Screening Committee.

The decision of the Screening Committee must be taken as final unless it is mala fide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are in public domain and are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who are likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of trust reposed in it and must treat all candidates with even hand."

27. In ***B. Ramakrishna Yadav and others Vs. The Superintendent of Police and others,3*** the Full Bench of Hon'ble High Court of Andhra Pradesh held:

"Verification of character and antecedents is one of the important features in service jurisprudence so as to find out whether a selected candidate is suitable to the post. Having regard to the antecedents of a candidate, if appointing authority finds that it is not desirable to appoint such person, in particular to a discipline force, it can deny employment or even terminate such person, if appointed, within the shortest possible time from the date of verification of character and antecedents. This has to be scrupulously followed in case of recruitment in police force, it being a disciplined force. As observed by the Supreme Court in Mehar Singh (supra), people repose great faith and confidence in the police force, and therefore, the selected candidate must be of confidence, impeccable character and integrity. A person having criminal antecedents is, undoubtedly, not fit in this category, more particularly when he has suppressed the information about his involvement in criminal case(s) irrespective of the fact whether the case was pending or he was acquitted."

28. Criminal antecedents are thus accepted in law as reliable guides for an employer to assess character traits and evaluate the suitability of a candidate for appointment.

IV.i.-B. Nature of the proceeding/Scope of Enquiry into suitability for appointment:

29. Determination of suitability of a candidate for appointment is an administrative decision which is part of the recruitment process. The process of evaluating suitability for appointment is not an adjudication of guilt or innocence as in a criminal case. Nor is it a quasi judicial process or a civil law proceeding.

IV.i-A. Material for consideration by the authority.

30. In public employment diverse material for formation of opinion in regard to the suitability of a candidate is acquired from different sources.

31. The diversity of material available with the authority to form its opinion is inherent in the process of determining the suitability of the candidate. The material before the authority may be reliable and conclusive or credible but probative. Both kinds of material are liable to be considered. Material of probative value but

credible worth is not to be discarded, and there is no impediment in its consideration.

32. One such source is the record of criminal proceedings against the candidate. The full inventory of material before the authority includes the F.I.R., the evidence collected during the criminal investigation, chargesheet submitted in court, evidence emerging during the trial, the judgment rendered by a court of law. On the foot of such material, the competent authority can make its decision on the fitness of the candidate for appointment.

IV.i.-C. Method of Evaluation of Material/ applicability of Standards of evidence:

33. The competent authority is not always bound by the findings of the court, nor is it invariably constrained by the opinion of the investigation officer. The reasons are not far to seek.

34. The purposes of a criminal investigation, criminal trial, civil proceeding, departmental enquiry, are distinct from the rationale behind the exercise of verification of criminal antecedents of a candidate for appointment in a recruitment process. The nature of rights engaged in the respective proceedings are also different. The lattermost proceeding is an executive function, while former proceedings are judicial and quasi judicial in nature respectively.

35. Criminal prosecution of an individual before the court of law is to bring an offender of criminal laws to justice, and to punish the guilty. The object of the competent authority in a recruitment process is only to determine the suitability of a candidate to hold a public post.

36. Secondly, strict rules of evidence apply to criminal prosecution. The prosecution can succeed only when it attains the standard of evidence which proves the guilt of the accused beyond reasonable doubt. The competent authority on the contrary is not constrained by any such standard of evidence.

37. Acquittal by the criminal court happens when evidence is not sufficient to sustain a conviction. Failure to prove an offence before a court of law in a criminal trial may not reduce the probative value of said evidence before the competent authority in a recruitment process. Such evidence when placed before the competent authority may constitute credible material of probative value to render a candidate unsuitable for appointment. The scope of discretion of the competent authority will also depend on the nature of findings of the court on the same evidence.

38. Weight is given by judicial authorities to the nature of acquittal over the mere fact of acquittal. Cases in point accordingly classify acquittals in different categories-honourable acquittal, acquittal as if the prosecution did not happen, acquittal on benefit of doubt, acquittal on account of witnesses turning hostile.

39 . An acquittal in a criminal trial simplicitor will not lead to an automatic discharge in departmental proceedings. This proposition was enunciated in ***R.P. Kapur vs. Union of India (UOI)4*** in the following terms:

"9... Take again the case where suspension is pending criminal proceedings. The usual ground for suspension pending a criminal proceeding is that the charge is connected with his position as a government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude. In such a case a public servant may be suspended pending investigation, enquiry or trial relating to a criminal charge. Such suspension also in our opinion is clearly related to disciplinary matters. ***If the trial of the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, even in case of acquittal proceedings may follow where the acquittal is other than honourable***. The usual practice is that where a public servant is being tried on a criminal charge, the Government postpones holding departmental enquiry and awaits the result of the criminal trial and departmental proceedings follow on the result of the criminal trial. Therefore, suspension during investigation, enquiry or trial relating to a criminal charge is also in our opinion intimately related to disciplinary matters. We cannot therefore accept the argument on behalf of the respondent that suspension pending a departmental enquiry or pending investigation, enquiry or trial relating to a criminal charge is not a disciplinary matter within the meaning of those words in Article 314.....

(emphasis supplied)

40. The distinction between honourable acquittal and acquittal based on benefit of doubt was considered in relation to the right to reinstatement in service and other service benefits ***in Management of Reserve Bank of India Vs. Bhopal Singh Panchal5***, by laying down the law as under:

"13.....When the High Court acquitted the respondent-employee by its order of November 21, 1977 giving the benefit of doubt, the Bank rightly refused to reinstate him in service on the ground that it was not an honourable acquittal as required by Regulation 46(4).

15.... It is only if such employee is acquitted of all blame and is treated by the competent authority as being on duty during the period of suspension that such employee is entitled to full pay and allowances for the said period."

41. ***Commissioner of Police, New Delhi Vs. Mehar Singh6*** attempted to define the expression "honourable acquittal" after acknowledging that the term often eludes precise definition. **Mehar Singh (supra)** after placing reliance on the law laid down in ***Inspector General of Police Vs. S. Samuthiram7, and RBI vs. Bhopal Singh Panchal8*** held as under:

"25. The expression "honourable acquittal" was considered by this Court in S. Samuthiram [Inspector General of Police v. ***S. Samuthiram, (2013) 1 SCC 598 : (2013) 1 SCC (Cri) 566 : (2013) 1 SCC (L&S) 229]*** . In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 IPC and under Section 4 of the Eve-Teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses

turned hostile. Referring to the judgment of this Court in ***RBI v. Bhopal Singh Panchal [(1994) 1 SCC 541 : 1994 SCC (L&S) 594 : (1994) 26 ATC 619]*** , where in somewhat similar fact situation, this Court upheld a bank's action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings. This Court observed that the expressions "honourable acquittal", "acquitted of blame" and "fully exonerated" are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted". This Court expressed that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."

42. More recently in line with the said authorities, in ***State of M.P. Vs. Bunty9*** it was held:

"13. The law laid down in the aforesaid decisions makes it clear that in case of acquittal in a criminal case is based on the benefit of the doubt or any other technical reason. The employer can take into consideration all relevant facts to take an appropriate decision as to the fitness of an incumbent for appointment/continuance in service. The decision taken by the Screening Committee in the instant case could not have been faulted by the Division Bench."

43. The value of a chargesheet submitted by an Investigation Officer in a court, for the authority considering the suitability of candidate for appointment would now merit consideration.

44. The chargesheet submitted before the court is the result of criminal investigation by the Investigation Officer. During investigation of a criminal case the Investigation Officer has to be responsive to the standard of evidence required in a criminal trial. For the competent authority nomination or omission to name a person in a chargesheet, is at best an opinion of the Investigation Officer. Absent nomination as an accused in a chargesheet, or even a clean chit by an Investigation Officer, ipso facto does not create an entitlement for appointment. The opinion of the Investigation Officer will deserve respect, but it does not foreclose the discretion of the authority. The competent authority may for good reason based on material in the record form a different opinion in the matter of fitness for appointment.

45. In civil proceedings and departmental enquiries, the standard of evidence employed to prove a fact is preponderance of probabilities. The rights of a government employee facing departmental proceedings are significantly different from a candidate who is participating in a selection process. The evidentiary standard of preponderance of probability is not applicable to the proceedings which consider the suitability of a candidate before making the appointment.

46. The duty of an employer to evaluate the suitability of a candidate for appointment is paired with the right of the candidate for a fair consideration of his credentials.

47. Rights of selected candidates have been settled by good authority.

48. In **Shankarshan Das Vs. Union of India10**, the rights of candidates in a recruitment process were posited for determination. Selected candidates do not acquire an indefeasible right to be appointed was the principle holding in ***Shankarshan Das (supra),*** which is set out hereunder:

"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. Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] , Neelima Shangla v. State of Haryana [(1986) 4 SCC 268 : 1986 SCC (L&S) 759] , or Jatinder Kumar v. State of Punjab [(1985) 1 SCC 122 : 1985 SCC (L&S) 174 : (1985) 1 SCR 899]."*

49. ***State of Bihar Vs. The Secretariat Assistant Successful Examinees Union11*** reinforces the said proposition of law.

50. Reception of evidence is invariably required when the fact finder is required to achieve the two standards of evidence discussed above. Insistence on the said standards of evidence would demand introduction of evidence in decisions made in the recruitment process. This is fraught with serious consequences. The recruitment process would be quagmired in legal adjudications and disputes. The nature of rights of selected candidates does not permit adoption of the aforesaid standards of evidence.

51. To sum up, the authority while determining the suitability of a candidate for public employment is not required to reach the level of evidentiary standards demanded of the prosecution in a criminal trial or asked of a party in a civil trial or required of a department in a disciplinary enquiry.

IV.i.-D. Procedure for enquiry:

52. The conclusion of the competent authority is an estimation at best. The decision made by inferences drawn from the material in the records, by its very nature can never be proved by mathematical accuracy. However, to obviate possibilities of miscarriage of justice, judicial safeguards have to be built into the decision making process.

53. The law has set its face against an arbitrary denial of appointment to selected candidates. In ***Mohammed Imran Vs. State of Maharashtra12,*** it was held:

"5. Employment opportunities are a scarce commodity in our country. Every advertisement invites a large number of aspirants for limited number of vacancies. But that may not suffice to invoke sympathy for grant of relief where the credentials of the candidate may raise serious questions regarding suitability, irrespective of eligibility. Undoubtedly, judicial service is very different from other services and the yardstick of suitability that may apply to other services, may not be the same for a judicial service. But there cannot be any mechanical or rhetorical incantation of moral turpitude, to deny appointment in judicial service simplicitor. Much will depend on the facts of a case. Every individual deserves an opportunity to improve, learn from the past and move ahead in life by self-improvement. To make past conduct, irrespective of all considerations, an albatross around the neck of the candidate, may not always constitute justice. Much will, however depend on the fact situation of a case.

9....If empanelment creates no right to appointment, equally there can be no arbitrary denial of appointment after empanelment."

54. Emphasizing the need to exercise powers reasonably and objectivity in such matters, the Supreme Court in ***Avtar Singh (supra)*** held thus:

"35...Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases."

55. The procedural safeguards in an administrative decision making process which has penal consequences shall apply to these proceedings.

56. The authority has to adopt a procedure which is consistent with principles of natural justice.

57. Adverse material has to be provided to the candidate. The candidate can tender his defence to refute the aforesaid material and point out mitigating circumstances in his favour in the proceeding. When need arises fair and an impartial opportunity of hearing may be given to such candidate.

IV.ii. Line of Enquiry by the authorities

58. With the nature of material, evidentiary requirements, and procedural details in place, the line of enquiry to be followed by the authority shall now receive consideration.

59. Consequences of a false declaration made in the course of verification at the time of his recruitment and invalidating effect of criminal cases on the prospects for appointment, were broadly settled in ***Avtar Singh (supra***), in the following terms:

"We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

(1) Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

(2) While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

(3) The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

(4) In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted: -

(a) In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

(b) Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

(c) If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

(5) In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

(6) In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

(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.

(8) If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

(9) In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing

order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

(10) For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

(11) Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

IV.ii.-A. Line of Enquiry- Aggravating Factors

60. Regard has to be paid by the competent authority to the gravity and heinous nature of offences or offences involving moral turpitude. Such cases may dissuade the competent from approving the candidate for appointment.

61. Multiplicity of criminal prosecutions is also a factor while considering the suitability of a candidate. Repetitive criminal acts may reinforce the inference of criminal traits or vice and violence in a candidate.

62. Material in the record should strongly support the inference of criminal traits, or a tendency of involvement in criminal offences, or to directly engage in criminal acts or vice and violence in the conduct. These qualities are not conducive to holding public office. On this foot the authority can justify denial of appointment.

IV.ii-B. Line of Enquiry - Mitigating Factors

63. The line of enquiry shall extend to the consideration of mitigating factors in each case.

64. The authority has to make allowance for mitigating factors in a case. Indiscretions of youth, and fallibility of human nature have to be accorded full weight. Fallibility of human nature is distinct from criminal traits in character. Depraved conduct is not youthful indiscretion. Trivial offences may often occur by human error and not perpetrated by a criminal mindset. Trivial offences may not invite invalidation of candidate. The competent authority has to determine where the threshold lies and draw the line in light of facts of each case.

65. The judgment ***in Commissioner of Police and Ors. Vs. Sandeep Kumar13,*** cited with approval in ***Avtar Singh (supra***), turned on similar facts:

"8. We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter. When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often be condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives."

66. The authority also cannot neglect the realities of social life and pace of the judicial process and have to factor them in the decision.

67. The practice of falsely framing young members of a family in trivial offences especially in villages is not uncommon. Prosecution in these offences is easily initiated and cases remain pending indefinitely.

68. Tendency to falsely implicate all family members and even distant relatives in many criminal cases arising out of matrimonial disputes has also been noticed by the courts.

69. The employer has to be alert to these realities and factor them in the decision in the facts of a case.

IV (iii). Decision of the authority:-

70. The authority while taking a decision in the matter has to consider relevant facts and material in the record and also the defence tendered by the candidate. The order should be supported by reasons which reflect due application of mind to relevant considerations. A perverse finding or a decision taken on no evidence or an order based on irrelevant considerations will vitiate the decision. Such decision would be vulnerable to judicial interdict.

V. Analysis of Facts & Conclusions:

71. The facts of the case and the impugned order shall now be analyzed in the legal perspective stated in the preceding paragraphs.

72. The procedure adopted by the competent authority while passing the impugned order is compliant with principles of natural justice.

73. The finding of the competent authority in Criminal Case No. 1924 of 2015, State Vs. Raghuvir Singh and others, that the verdict of the learned trial court was not an honourable acquittal of the petitioner is correct on facts and in conformity with law. The competent authority was within its jurisdiction to give weight to the fact and circumstances of witnesses turning hostile in the trial, leading to the acquittal of the petitioner. The acquittal does not help the case of the petitioner.

74. Most importantly, the case was not an isolated one. The petitioner was an accused in the F.I.R. registered as Case Crime No. 760 of 2018, under Sections 354-Kha, 120-B, 504, 506 I.P.C. and Sections 11 and 22 of POCSO Act, and Section 67A of the I.T. (Amendment) Act, 2008, Police Station Hathras Gate, District Hathras. The competent authority had good justification to make a decision at variance with the opinion of the Investigation Officer who did not name the petitioner as an accused in the chargesheet. The fact remains that the petitioner was nominated as an accused in the FIR in a grave offence involving moral turpitude and the trial is underway. Allegations of sexual offences against children are most serious and cannot be lightly dismissed by any employer. These facts are liable to be factored in the decision and were legitimately considered in the impugned order.

75. Both the criminal cases were in no way connected with each other. Criminal cases were instituted by different parties for

separate offences. Multiplicity of cases manifested repetitive criminal conduct and thus assumed significance.

76. The competent authority cannot be faulted for finding that the aforesaid antecedents revealed traits which made the petitioner unsuitable for appointment.

77. True it is that Case Crime No. 30 of 2018, under Sections 498-A, 323, 504, 506, 307, 313 I.P.C. and 3/4 of Dowry Prohibition Act, at Police Station Mahila Thana, District Hathras, arose out of a matrimonial dispute between the petitioner's brother and his wife. However, it is of no avail to the petitioner, in the facts of this case. The multiplicity of criminal cases as seen earlier constitute aggravating circumstances which compelled the competent authority to find against the petitioner.

78. In the opinion of the competent authority the multiple criminal cases yielded material of credible nature with high probative value. The order of the competent authority based on the said material is supported by reasons. The impugned order factors relevant criteria and excludes irrelevant considerations. The inferences drawn by the authority are reasonable. The impugned order is in conformity with judicial authorities in point. There is no procedural impropriety committed by the authority while passing the impugned order.

79. The pleadings in the writ petition and the material in the record before this Court, do not establish any perversity in the findings. In these facts, disclosure of the criminal cases by the petitioner is not a defence against cancellation of his selection.

80. In wake of the preceding discussion, the impugned order dated 15.06.2020 passed by respondent no. 3-Superintendent of Police, Jalaun is not liable to be interfered with.

81. The writ petition is liable to be dismissed and is dismissed.

(2021)04ILR A196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.032021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 14808 of 2020

Khem Singh ...Petitioner
Versus
U.P. State Road Transport Corp. at Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhawesh Pratap Singh

Counsel for the Respondents:
Sri Adarsh Bhushan

A. Civil Law – Contractual Service – Abandonment of service - Termination - Scope of Judicial Review - Industrial Employment (Standing Orders), 1946; Specific Relief Act, 1963: Section 14

i) Jurisdiction - Employees of the State Road Transport Corporation are not civil servants, and they are not entitled to protection of Article 311(2) of the Constitution. (Para 15)

Where an employee intends to enforce constitutional rights or right under statutory regulations, the civil court will have jurisdiction to try a suit. Where, however, the employee claims rights and obligations under Industrial Disputes Act or sister laws (Standing Orders) the civil court would lack jurisdiction. The

employee will have to take remedy before the forum under the Industrial Disputes Act. Where the relationship between the employer and employee is contractual, the right to enforce the contract of service is prohibited in terms of Section 14 of the Specific Relief Act, 1963. (Para 16)

ii) Arbitration clause - The presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies u/Article 226 of the Constitution of India. If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. (Para 17)

It is not being disputed that Transport Corporation is a State within the meaning of Article 12. The employees of the Transport Corporation do not enjoy the status, and/or protection of a civil servant within the meaning of Article 309 and 311 of the Constitution. The service condition of the petitioner is governed by the terms stipulated in the contract of service and not by rules/regulation having statutory force. A writ u/Article 226 would be maintainable notwithstanding the arbitration clause in the contract of service.

(iii) Judicial Review - The relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach of the contract, the remedy of the employee is only to seek damages and not specific performance. (Para 20)

Employee cannot seek enforcement of reinstatement by way of a mandamus but all the same he would be entitled to all his benefits (pecuniary) flowing from the terms of appointment from the date of termination order to date of expiry of the contract. (Para 22)

Writ Court can examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. The Court, however, cannot sit in the arm chair of the employer to decide whether a more reasonable decision or course of action could have been taken in the circumstances. (Para 27)

In the present case, the question is whether termination of the petitioner is arbitrary, in violation of Article 14 to warrant interference with the impugned order. The impugned order records that petitioner has not resumed service at the place of transfer/attachment, against the terms of the contract requiring the employee to render service for 22 days in a month. The attachment was made due to shortage of staff at Agra. The medical certificate was not submitted by the petitioner though demanded, as has been noted by the authority in the impugned order. The medical certificate, brought on record, merely prescribes four weeks bed rest due to complaint of low back pain. The certificate is not supported by any medical prescription nor the course and nature of treatment undergone by the petitioner. The onus in the first instance is upon the petitioner to discharge the burden. It is a question of fact resting upon evidentiary determination, which cannot be gone into u/Article 226 of the Constitution in the first instance. The motive or foundation for passing the termination order that weighted with the employer would rest upon evidence of the respective parties. The petitioner in the circumstances would have to seek remedy before the appropriate authority/forum. (Para 29)

Writ petition disposed of with liberty. (E-3)

Precedent followed:

1. Rajasthan State Road Transport Corporation & anr. Vs Bal Mukund Bairwa, (2009) 4 SCC 299 (Para 13)

2. Rajasthan SRTC Vs Krishna Kant, (1995) 5 SCC 75 (Para 14)

3. Rajasthan State Road Transport Corporation & ors. Vs Zakir Hussain, (2005) 7 SCC 447; 2005 SCC (L&S) 945 (Para 15)

4. Unitech Ltd. & ors. Vs Telangana State Industrial Infrastructure Corporation (TSIIC) and others, Civil Appeal No. 317 of 2021, decided on 17th February, 2021 (Para 17)

5. ABL International Ltd. Vs Export Credit Guarantee Corporation of India, (2004) 3 SCC 553 (Para 18)

6. Executive Committee of Vaish Degree College Vs Lakshmi Narain, MANU/SC/0066/1973 (Para 19)

7. Smt. J. Tiwari Vs Smt. Jawala Devi Vidya Mandir, AIR 1981 SC 122 (Para 19)

8. S.B.I. Vs S.N. Goyal, Civil Appeal Nos. 4243-4244 of 2004, decided on 02.05.2008 (Para 20 (iii))

9. A.P. State Federation of Coop. Spinning Mills Ltd. & anr. Vs P.V. Swaminathan, (2001) 10 SCC 83 (Para 21)

10. State of Orissa Vs Chandra Shekhar Mishra, (2002) 10 SCC 583 (Para 23)

11. Satish Chandra Anand Vs U.O.I., 1953 AIR (SC) 250 (Para 24)

12. Delhi Transport Corporation Vs D.T.C. Mazdoor Congress & ors., 1991 Suppl. SCC 600 (Para 25)

13. Balmer Lawrie & Co. Ltd. Vs Partha Sarathi Sen Roy, (2013) 8 SCC 345 (Para 25)

14. Central Inland Water Transport Corporation Ltd. & anr.Vs Brojo Nath Ganguly and another, 1986 3 SCC 156 (Para 26)

15. Pearlite Liners (P) Ltd. Vs Manorama Sirsi, (2004) 3 SCC 172 (Para 28)

Present petition challenges termination order dated 05.12.2020.

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

1. Heard Sri Bhawesh Pratap Singh, learned counsel for the petitioner and Sri Adarsh Bhushan, learned counsel appearing for the respondents.

2. The petition is being decided on merit at the admission stage, on consent, without calling for counter affidavit as per Rules of the Court.

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

4. The facts giving rise to the instant petition, briefly stated, is that petitioner came to be appointed conductor on contract with the respondent-Uttar Pradesh State Road Transport Corporation, Mathura (for short "Transport Corporation') in January 2007. The contract of service is for a period of 11 months which has been renewed from time to time by executing subsequent contract. The copy of the contract executed on 7 July 2020 by the petitioner has been supplied by learned counsel appearing for the respondent.

5. The petitioner came to be terminated earlier by order dated 22 August 2018, passed by the third respondent, Assistant Regional Manager, U.P. State Road Transport Corporation, Taj Depot, Agra, on the ground of misconduct, alleging that petitioner while on duty on bus No. U.P. 85H9600 entered into an altercation. F.I.R. came to be lodged on 22 August 2018 against 13 named persons and

14 unknown persons. Petitioner was admitted to bail by the competent court.

6. Aggrieved, petitioner challenged the termination order in a petition being Writ-A No. 808 of 2020, which came to be allowed vide order dated 17 January 2020. The matter was remanded to the concerned authority for proceeding afresh, in accordance with law on specific charges of misconduct. A further direction was issued to reinstate the petitioner. Pursuant thereof, petitioner came to be reinstated on 18 February 2020. It is urged that before the enquiry came to be concluded petitioner came to be attached/ transferred, due to shortage of staff, to Taj Depot, Agra, from the present place of posting at Mathura, vide order dated 4 November 2020. Pursuant thereof, petitioner came to be relieved vide order dated 5 November 2011, passed by the Additional Regional Manager, Mathura. Petitioner by the impugned order came to be terminated for not joining and rendering service at the place of attachment in terms of the contract.

7. It is urged that neither the order of attachment was served upon the petitioner nor it was marked to the petitioner. It is alleged that petitioner, thereafter, fell seriously ill on 3 November 2020 and was advised bed rest by the doctor at district hospital Mathura. The parcha of the hospital shows that petitioner was complaining of low back pain. It appears that the third respondent vide communication dated 28 November 2020, demanded the medical certificate in support of his illness. Petitioner responded but did not submit the medical certificate dated 4 November 2020, which records that petitioner was suffering from low back pain and was advised bed rest for four weeks.

8. It is urged by learned counsel for the applicant that without considering the fact that the letter reached the petitioner on 4 December 2020, by the impugned order dated 5 December 2020, the services of the petitioner came to be terminated. The order of termination is under challenge.

9. Learned counsel for the petitioner submits that order terminating the services of the petitioner is vitiated for the reason that no opportunity of hearing was provided; petitioner was advised bed rest from 4 November 2020 for four weeks, therefore, he could not report at the place of attachment; the impugned order is punitive in nature; fulfledged departmental enquiry was not conducted; nor charge sheet was issued. In other words the order of punishment is punitive, arbitrary and not as per terms of the contract.

10. In rebuttal, learned counsel appearing for the respondents, on instructions, submits that the services of the petitioner came to be dispensed with as per terms and conditions of the contract; petitioner had not reported at the place of posting and had given an impression that he is no longer interested in continuing with the service. It is further submitted that there is an arbitration clause in the agreement for redressal of the dispute. The writ petition, therefore, is not maintainable. The impugned order terminating the services is simpliciter and does not cast any stigma. The motive of passing the order is abandonment of service; the order is not founded on misconduct, malice or efficiency.

11. Rival submissions fall for consideration.

12. The question that arises for consideration is whether the Court would have jurisdiction in matter of contract of service under Article 226 of the Constitution or in the alternative whether the contract of service can be enforced in writ jurisdiction.

13. It would be apposite to examine the law with regard to jurisdiction; scope of judicial review in contractual matter pertaining to service.

(A) Jurisdiction:

A three Judge Bench of Supreme Court in its decision titled **Rajasthan State Road Transport and another v. Bal Mukund Bairwa1,** revisited the issue with regard to jurisdiction of civil court/Labour Court to entertain suits/petitions questioning the orders of termination of workman and held as follows :

"36. If an employee intends to enforce his constitutional rights or a right under a statutory regulation, the civil court will have the necessary jurisdiction to try a suit. If, however, he claims his right and corresponding obligations only in terms of the provisions of the Industrial Disputes Act or the sister laws so called, the civil court will have none. In this view of the matter, in our considered opinion, it would not be correct to contend that only because the employee concerned is also a workman within the meaning of the provisions of the 1947 Act or the conditions of his service are otherwise governed by the Standing Orders certified under the 1946 Act, ipso facto the civil court will have no jurisdiction. This aspect of the matter has recently been considered by this Court in ***Rajasthan SRTC v. Mohar Singh****. The question as to whether the civil court's jurisdiction is barred or not must be determined having regard to the facts of each case.*

37. If the infringement of the Standing Orders or other provisions of the Industrial Disputes Act are alleged, the civil court's jurisdiction may be held to be barred but if the suit is based on the violation of principles of common law or constitutional provisions or on other grounds, the civil court's jurisdiction may not be held to be barred. If no right is claimed under a special statute in terms whereof the jurisdiction of the civil court is barred, the civil court will have jurisdiction.

38. Where the relationship between the parties as employer and employee is contractual, the right to enforce the contract of service depending on personal volition of an employer is prohibited in terms of Section 14(1)(b) of the Specific Relief Act, 1963. It has, however, four exceptions, namely, (1) when an employee enjoys a status i.e. his conditions of service are governed by the rules framed under the proviso appended to Article 309 of the Constitution of India or a statute and would otherwise be governed by Article 311(2) of the Constitution of India; (2) where the conditions of service are governed by statute or statutory regulation and in the event mandatory provisions thereof have been breached; (3) when the service of the employee is otherwise protected by a statute; and (4) where a right is claimed under the Industrial Disputes Act or sister laws, termination of service having been effected in breach of the provisions thereof.

39. The appellant Corporation is bound to comply with the mandatory provisions of the statute or the regulations framed under it. A subordinate legislation when validly framed becomes a part of the Act. It is also bound to follow the principles of natural justice. In the event it is found that the action on the part of the State is violative of the constitutional provisions or the mandatory requirements of a statute or statutory rules, the civil court would have the jurisdiction to direct reinstatement with full back wages."

(Refer-Premier Auto mobiles Ltd. v. **Kamlekar Shantaram Wadke of Bombay and others3)**

14. Industrial Employment (Standing Orders) Act, 1946, are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to `statutory provisions' and any violation of these Standing Orders entitles an employee to appropriate relief before the forum created by the Industrial Disputes Act. The legal position is that Standing Orders have no statutory force and are not in the nature of delegated/subordinate legislation. .(Refer:**Rajasthan SRTC v. Krishna Kant)**

15. In **Rajasthan State Road Transport Corporation and others v. Zakir Hussain,** Supreme Court held that the employees of the State Road Transport Corporation are not civil servants, and they are not entitled to protection of Article 311(2) of the Constitution.

16. It follows that where an employee intends to enforce constitutional rights or right under statutory regulations, the civil court will have jurisdiction to try a suit. Where, however, the employee claims rights and obligations under Industrial Disputes Act or sister laws (Standing Orders) the civil court would lack jurisdiction. The employee will have to take remedy before the forum under the Industrial Disputes Act. Where the relationship between the employer and employee is contractual, the right to enforce the contract of service is prohibited in terms of Section 14 of the Specific Relief Act, 1963.

(B) Arbitration clause:

17. The presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226 of the Constitution of India. If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. **(Refer- Unitech Limited and others versus Telangana State Industrial Infrastructure Corporation (TSIIC) and others)**

18. This principle was recognized in **ABL International Ltd. V Export Credit Guarantee Corporation of India :**

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the

Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) ***And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."***

(emphasis supplied)

19. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. The High Court having regard to the facts of each case, has a discretion to entertain or not to entertain a writ petition.

(C) Judicial Reviews:

There is a clear distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding the nature of relief damages or reinstatement with consequential reliefs is whether employment is governed purely by contract or by a statute or statutory rules. Even where the employer is a statutory body and the relationship is purely governed by contract with no element of statutory governance, the contract of personal service will not be specifically enforceable. Conversely, where the employer is a non-statutory body, but the employment is governed by a statute or statutory rules, a declaration that the termination is null and void and that the employee should be reinstated can be granted by courts. (Vide **:Executive Committee of Vaish Degree College v. Lakshmi Narain8 and Smt. J. Tiwari v. Smt. Jawala Devi Vidya Mandir)**

20. When an employee of a statutory body whose service is terminated, pleads that such termination is in violation of statutory rules governing his employment, an action for declaration that the termination is invalid and that he is deemed to continue in service is maintainable and will not be barred by Section 14 of the Specific Relief Act. Where, however, the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach of the contract, the remedy of the employee is only to seek damages and not specific performance. Courts will neither declare such termination to be nullity nor declare that the contract of employment subsits nor grant the consequential relief of reinstatement, subject to the recognised exceptions:

(i) a civil servant (Article 311/rules made under Article 309 of the Constitution);

ii) a workman having protection of Industrial Disputes Act, 1947;

(iii) an employee of a statutory body governed by mandatory provisions of statute or statutory rules. **(Refer- State Bank of India and others versus S.N. Goyal)**

21. In **A.P. State Federation of Coop. Spinning Mills Ltd. and another Versus P.V. Swaminathan11**, the appellant therein was State within the meaning of Article 12 of the Constitution. The order of termination of the employee appointed on contract on the face of it appears to be innocuous, that would not prohibit the Court from looking at the attending circumstances prior to the issuance of the termination order to find out whether termination was the motive or inefficiency or misconduct was the foundation for passing the order of termination.

"The legal position is fairly well settled that an order of termination of a temporary employee or a probationer or even a tenure employee, simpliciter without casting any stigma may not be interfered with by the court. But the court is not debarred from looking at the attendant circumstances, namely, the circumstances prior to the issuance of order of termination to find out whether the alleged inefficiency really was the motive for the order of termination or formed the foundation for the same order. If the court comes to a conclusion that the order was, in fact, the motive, then obviously the order would not be interfered with, but if the court comes to a conclusion that the so-called inefficiency was the real foundation for passing of order of termination, then obviously such an order would be held to be penal in nature and must be interfered with since the appropriate procedure has not been followed."

22. The Supreme Court in the given facts came to the conclusion that the order of termination founded on inefficiency is vitiated, but held that the employee cannot seek enforcement of reinstatement by way of a mandamus but all the same he would be entitled to all his benefits (pecuniary) flowing from the terms of appointment from the date of termination order to date of expiry of the contract.

23. In **State of Orissa v. Chandra Sekhar Mishra12,** the respondent had been appointed Homeopathic Medical Officer whose services were subsequently terminated by issue of a notice. While rejecting the challenge to the termination order, the Court observed "when the respondent was only a contractual employee, there could be no question of his being granted the relief of being directed to be appointed as a regular employee."

24. I may also refer to the decision of the Supreme Court in **Satish Chandra Anand v. Union of India13**, where the petitioner, an employee of the Directorate General of Resettlement and Employment, was removed from contractual employment after being served a notice of termination. The contract of service was initially for a period of five years which was later extended. A five-Judge Bench hearing the matter, dismissed the petition, challenging the termination primarily on the ground that the petitioner could not prove a breach of a fundamental right since no right accrued to him as the whole matter rested in contract and termination of the contract did not amount to dismissal, or removal from service nor was it a reduction in rank. The Court found it to be an ordinary case of a contract being terminated by notice under one of its clauses. The Court observed :

"10. There was no compulsion on the Petitioner to enter into the contract he did. He was as free under the law as any

other person to accept or reject the offer which was made to him. Having accepted, he still had open to him all the rights and remedies available to other persons similarly situated to enforce any rights under his contract, which has been denied to him, assuming there are any, and to pursue in the ordinary Courts of the land, such remedies for a breach as are open to him to exactly the same extent as other persons similarly situated. He has not been discriminated against and he has not been denied the protection of any laws which others similarly situated could claim..."

25. In **Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others14,** Supreme Court was dealing with the constitutional validity of Regulation 9 (b) that authorized termination by service of one month's notice or pay in lieu thereof. Sawant, J. in his concurring opinion held that the provision contained the much hated rules of hire and fire reminiscent of the days of laissez faire and unrestrained freedom of contract and that any such rule would have no place in service conditions being arbitrary and violative of Article 14 of the Constitution. (Refer-Balmer Lawrie & Co. Ltd. vs. Partha Sarathi Sen Roy15)

26. To the same effect was an earlier decision of this Court in **Central Inland Water Transport Corporation Ltd. And another v. Brojo Nath Ganguly and another16,** where the Supreme Court had refused to enforce an unfair and unreasonable contract or an unfair and unreasonable clause in a contract entered into between parties who did not have equal bargaining power.

27. In **Unitech** (supra), the Court cautioned that while exercising jurisdiction under Article 226 of the Constitution in a contractual dispute, which in my opinion would also include contract of service entered between the employee and the State or instrumentality of State, the Court, however, must not enter into disputed questions of fact resting upon evidence. The observation in para 35 of the report reads thus:

"In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked."

(D) Analysis and Summation:

A conspectus of the pronouncements of Supreme Court and the development of law over the past few decades thus show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State or instrumentality

of the State. Remedy for a breach of a contractual condition was by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review. A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. The Court, however, cannot sit in the arm chair of the employer to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge.

28. **In Pearlite Liners (P) Ltd. Versus Manorama Sirsi17**, the question before the Court was, "*Can a contract of service be specifically enforced?"* The case was of private employment which normally would be governed by the terms of the contract between the parties. The issue before the Court, inter alia, was with regard to the validity and non compliance of transfer order. The observation made by the Supreme Court is relevant in the facts of the instant case:

"In the absence of a term prohibiting transfer of the employee, prima facie, the transfer order cannot be called in question. The plaintiff has not complied with the transfer order as she never reported for work at the place where she was transferred. As a matter of fact, she also stopped attending the office from where she was transferred. Non-compliance with the transfer order by the plaintiff amounts to refusal to obey the orders passed by superiors for which the employer can reasonably be expected to take appropriate action against the employee concerned.

In case of such insubordination, termination of service would be a possibility. Such a decision purely rests within the discretion of the management."

29. Applying the law in the facts of the case in hand, it is not being disputed that Transport Corporation is a State within the meaning of Article 12 of the Constitution of India. The employees of the Transport Corporation do not enjoy the status, and /or protection of a civil servant within the meaning of Article 309 and 311 of the Constitution. The service condition of the petitioner is governed by the terms stipulated in the contract of service and not by rules/regulation having statutory force. A writ under Article 226 would be maintainable notwithstanding the arbitration clause in the contract of service. The question that arises is whether termination of the petitioner is arbitrary, in violation of Article 14 to warrant interference with the impugned order. The impugned order records that petitioner has not resumed service at the place of transfer/attachment, against the terms of the contract requiring the employee to render service for 22 days in a month. The attachment was made due to shortage of staff at Agra. The medical certificate was not submitted by the petitioner though

demanded, as has been noted by the authority in the impugned order. The medical certificate, brought on record, merely prescribes four weeks bed rest due to complaint of low back pain. The certificate is not supported by any medical prescription nor the course and nature of treatment undergone by the petitioner. The issue whether the petitioner was justified in not complying the order of posting due to his illness rests upon the genuineness of his medical treatment. The onus in the first instance is upon the petitioner to discharge the burden. The medical certificate prescribing bed rest and not supported by any other material to show the nature and followup treatment to support the stand of the petitioner is a question of fact resting upon evidentiary determination, which cannot be gone into under Article 226 of the Constitution in the first instance. The motive or foundation for passing the termination order that weighted with the employer would rest upon evidence of the respective parties. The petitioner in the circumstances would have to seek remedy before the appropriate authority/forum.

30. The writ petition, in the circumstances would not be maintainable, accordingly, disposed of with liberty to the petitioner to take recourse to alternative remedy.

31. It is clarified that the observations made in the order touching upon the merit of the case would have no bearing, the authority/forum to decide independently on merit without being influenced by the observations.

32. No costs.

(2021)04ILR A206
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ A (Rent Control) No. 125 of 2021

M/s A.B. Corp., Kanpur Nagar ...Petitioner
Versus
Vishnu Kumar Agarwal & Ors.
...Respondents

Counsel for the Petitioner:
Sri Saurabh Srivastava

Counsel for the Respondents:
Sri Manish Kumar Nigam

A. Civil Law – Rent Control - The U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 3(j) - One co-owner is competent to maintain an action for eviction of the tenant of the entire premises, since he can be considered as a landlord within the meaning of Section 3(j) of the Act. One co-owner alone would be competent to sign application for release of premises. (Para 12)

In the present case, the applicant was the landlord for the purpose of filing of the release application and is covered under definition of 'landlord' as given Section 3(j) of the Act. (Para 9)

In the appeal three points of determination were framed by the appellate court, (1) landlord and tenant relationship between the parties; (2) bona fide need; and (3) comparative hardship.

Concurrent finding was returned that there was a landlord and tenant relationship between the parties. (Para 7)
On the issue of bonafide need, it was found that the property already in possession of the landlord is being used in different manner to meet out the need of

the landlord as given in the release application. (Para 7, 18)

It was also noticed that the assertions made by the landlord that the property in question is lying locked and is not being used, could not be disputed by the tenant. It was further found that no effort was made by the tenant to search out any other alternative accommodation. Hence, **A concurrent finding on comparative hardship was also recorded in favour of the landlord.** (Para 7, 18)

B. A non-petitioning co-landlord can be arrayed as proforma respondent and omission to sign application by a landlord, in such a case would be of no consequence. (Para 11)

C. No relief can be granted to the tenant on the ground that the person, who was receiving the rent has not filed the release application. (Para 19)

It is, open to even one of the several co-landlords to realise rent from the tenant on behalf of the co-landlords and normally it is convenient for the tenant also to pay rent to one of the several co-landlords. (Para 11)

Whether mere fact that somebody de facto realizes rent, will determine status, is not a correct proposition of law. It has to be found out whether rent is being realised in his independent right and capacity as landlord or the same is being realised in representative capacity for the benefit of another person. If rent is being collected in representative capacity for the benefit of actual owner, then it will be the owner who shall be the landlord. Otherwise a servant or a brother authorised by original owner to realize rent on his behalf from tenant will become landlord. Law does not contemplate such a situation. (Para 13)

The main argument on behalf of tenant-petitioner is that the applicant is not the landlord as the rent was being collected by Virendra Kumar Agrawal as Karta of the HUF and only he could have filed release application. In such matters the term 'landlord' is used in different meaning and if one co-owner files release application, the same, even without impleading the other co-owners, would be maintainable. In the present case, the other co-owners/co-landlords were impleaded as formal parties and even Virendra Kumar Agrawal has filed his written statement. The release of the shop in question in favour of Vishnu Kumar Agrawal has never been disputed. The original owner/landlord was Suraj Bhan Agrawal and his three sons namely, Vishnu Kumar Agrawal, Virendra Kumar Agrawal and Om Prakash Agrawal inherited the property. It is also not in dispute that the rent is being collected by Virendra Kumar Agrawal only as Karta of the family (HUF) for the benefit of all and in the other original proceedings it was held by the civil court that he is co-owner/co-landlord of the property in question. (Para 17)

D. The concept of ownership in a landlord-tenant litigation governed by Rent control laws has to be distinguished from the one in a title suit. (Para 14)

It is settled law that in the rent control matters the landlord-tenant relationship is to be seen. It is also settled law that one co-owner is entitled to initiate the proceedings against the tenant. It may also be noticed that it is not a case of property dispute where filing of the suit on behalf of Karta or any other coparcener may be claimed to have material effect on the proceedings. Suffice to note that a coparcener is any of several people who share an inheritance. (Para 15)

It is well settled that one of the co-owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. This principle is based on the **doctrine of agency**. One co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. (Para 15)

A suit filed by a co-owner, is maintainable in law. It is not necessary for the co-owner to show before initiating the eviction proceeding before the Rent Controller that he had taken option or consent of the other co-owners. (Para 15)

Writ petition dismissed. (E-3)

Precedent followed:

1. Smt. Hamidan Vs Vth A.D.J., Allahabad 1983 ARC 405 (Para 9)

2. Gopal Das & anr.Vs Ist A.D.J., Varanasi & ors., 1987 (1) ARC 281 (Para 9)

3. Om Prakash Mittal Vs Vth A.D.J., Ghaziabad & ors., 2000 (2) ARC 111 (Para 9)

4. Board of Basic Education, U.P. Allahabad & ors. Vs VIth Addl. District & Sessions Judge, Kanpur Nagar & ors., 2007 (3) ARC 591 (Para 9)

5. Boorugi Mahadaev & Sibs (M/s.) & anr. Vs Sirgiri Narsing Rao & ors., 2016 (1) ARC 490 (Para 14)

6. Manoj Kumar Vs Suman Prakash, 2019 (3) ARC 614 (Para 15)

7. Apollo Zipper India Ltd. Vs W. Newman & Comp. Ltd., 2018 (6) SCC 744 (Para 16)

Present petition challenges orders dated 14.10.2019 and 01.12.2020, passed by Prescribed Authority/Civil Judge (J.D.), Kanpur Nagar and Additional District Judge, Kanpur Nagar respectively.

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Saurabh Srivastava, learned counsel for the tenant-petitioner and Sri Manish Kumar Nigam, learned counsel appearing for the landlord-respondent no. 1.

2. Present petition has been filed for quashing the order dated 14.10.2019 passed by the Presribed Authority / Civil Judge (J.D.), Kanpur Nagar in Rent Case No. 2 of 2016 (Vishnu Kumar Agrwal vs. M/s A.B. Corporation and others) as well as order dated 1.12.2020 passed by the Additional District Judge, Court No. 11, Kanpur Nagar in Rent Appeal No. 50 of 2019 (M/s A.B. Corporation vs. Vishnu Kumar Agrwal and others).

3. By the order dated 14.10.2019 the Prescribed Authority allowed the release application filed by Vishnu Kumar Agrawal against the tenant-petitioner herein. The appeal filed by the tenant was dismissed by the impugned judgment dated 1.12.2020.

4. The release application was filed with the specific allegations that Vishnu Kumar Agrawal is the co-owner / co-landlord; the original owner of the property in question was late Suraj Bhan Agrawal and after his death the property was inherited by three sons namely Vishnu Kumar Agrawal (release applicant), Virendra Kumar Agrawal (eldest son and formal opposite party no. 2 in the release application) and Om Prakash Agrawal (formal opposite party no. 3 in the release application). The petitioner is tenant pursuant to the order of the allotment in the year 1965.

5. The release application was contested by the tenant on the ground that the applicant is not the landlord of the shop and as such the release application at his instance is not maintainable. It was submitted that the rent was being collected by Virendra Kumar Agrawal as Karta of HUF and therefore, the release application filed by Vishnu Kumar Agrawal was not maintainable as only Virendra Kumar Agrawal would be landlord in view of the definition of the word 'landlord' as

prescribed in Section 3 (j) of the Act 13 of 1972 (hereinafter referred to as the Act).

6. The landlord and tenant relationship was found between the parties and the bonafide need and the comparative hardship was also decided in favour of the landlord by the Prescribed Authority.

7. In the appeal three points of determination were framed by the appellate court, (1) landlord and tenant relationship between the parties; (2) bonafide need; and (3) comparative hardship. On the issue of landlord and tenant relationship it was found that admittedly, after death of Suraj Bhan Agrawal the rent receipts were issued by Virendra Kumar Agrawal in the name of M/s Kashi Ram Suraj Bhan HUF and admittedly, Virendra Kumar Agrawal was the Karta of the HUF as being eldest son of Suraj Bhan Agrawal. Lower appellate court has considered the documents of OS No. 1201 of 1999, judgment dated 31.10.2005, OS No. 345 of 2009, orders dated 20.12.2012 and 6.8.2016 and found that the applicant was a co-owner / co-landlord of the property in question and the same could not be rebutted by the tenant-appellant. The appellate court had also considered the written statement filed by Virendra Kumar Agrawal, wherein he had stated that since Vishnu Kumar Agrawal is not cooperating in the litigation, therefore, it would not be proper to treat the plaintiff as co-landlord / co-owner and it was further stated by him that the release application was filed without his consultation. It was found that by the judgment dated 31.10.2005 rendered in OS No. 1201 of 1999 the applicant-landlord was found to be co-owner / co-landlord of the property in question. All the co-owerns were made formal parties in the release application and therefore, concurrent finding was returned that there was a landlord and tenant relationship between the parties. On the issue of bonafide need, it was found that the property already in possession of the landlord is being used in different manner to meet out the need of the landlord as given in the release application. It was also noticed that the assertions made by the landlord that the property in question is lying lock and is not being used, could not be disputed by the tenant. It was further found that no effort was made by the tenant to search out any other alternative accommodation. Hence, a concurrent finding on comparative hardship was also recorded in favour of the landlord.

8. Challenging the aforesaid judgments, main contention of learned counsel for the petitioner is that the release applicant was not the landlord in view of definition of Section 3(j) of the Act. He had drawn attention to paragraph 4 of the written statement filed by Vishnu Kumar Agrawal in OS No. 1201 of 1999 to submit that the plaintiff is not the co-landlord and defendant no. 1 in the said suit Virendra Kumar Agrawal was admitted as a sole landlord and therefore, the release application was not maintainable. He has also advanced his arguments on the issue of bonafide need and comparative hardship.

9. Per contra, Sri Manish Kumar Nigam, learned counsel for the respondent submitted that concurrent finding has been recorded by both the courts below that the applicant was the landlord for the purpose of filing of the release application and is covered under the definition of 'landlord' as given in Section 3(j) of the Act. Attention was drawn to the findings recorded by the lower appellate court, wherein contention

raised by learned counsel for the petitioner were dealt with specifically. The finding returned by the lower appellate authority on the point of determination no. 1 regarding landlord and tenant relationship were specifically dealt with in paragraphs 9 to 19. In support of his arguments learned counsel for the respondent has placed reliance on judgments in the cases of **Smt. Hamidan vs. Vth Addl. District Judge, Allahabad 1983 ARC 405 (paragraph 7), Gopal Das and another vs. Ist Additional District Judge, Varanasi and others 1987 (1) ARC 281 (paragraph 17), Om Prakash Mittal vs. Vth Addl. District Judge, Ghaziabad and others 2000 (2) ARC 111 (paragraph 16) and Board of Basic Education, U.P. Allahabad and others vs. VIth Addl. District & Sessions Judge, Kanpur Nagar and others 2007 (3) ARC 591 (paragraph 18).**

10. I have considered the submissions and have perused the record.

11 . Before proceeding further it would be appropriate to refer some case laws. Paragraph 7 **of Smt. Hamidan (supra)** is quoted as under:-

"7. Moreover, as has been held by the Supreme Court in Ambika Prasad v. Ram Ekbal Rai AIR 1966 SC 605 (SC) title cannot pass by mere admission. Apart from the admission in the aforesaid affidavit no other evidence about the private settlement referred to therein seems to have been produced. The petitioner appears to have set up a case that in pursuance of some gift made by her husband she alone was entitled to the house in question. That case has not been believed by the authorities below. Indeed in her affidavit filed subsequently on which reliance has been placed even by counsel for the respondent No. 3 the petitioner had given up her case that she was the exclusive owner of the house in question. In the absence of a valid gift in favour of the petitioner and the admission made by her in the proceedings for mutation not being relevant for determination of the question of tile, it was apparent that on the death of Mohd. Yaqub the house in question devolved on all his heirs, namely, the petitioner and respondents 4 to 7. As such all of them became co-owners of the house in question. Since in their capacity as co-owners of the house they were all entitled to realise rent from the respondent No. 3, they would be co-landlords also. It is, however, open to even one of the several co-landlords to realise rent from the tenant on behalf of the co-landlords and normally it is convenient for the tenant also to pay rent to one of the several co-landlords. In the absence of any finding as to ouster the petitioner even if, she was realising the rent exclusively will be deemed to be realising it not only on her behalf but on behalf of the other co-landlords also. This being the legal position the assertion of the petitioner in one of her affidavits that she was realising rent herself and her assertion in the other affidavit that she was realising it on behalf of her sons would not be material. In Smt. Kamta Goel v. B.P. Pathak and others AIR 1977 SC 1599, while dealing with almost a similar question under the Delhi Rent Control Act it was held by the Supreme Court:

"Where a landlord who had let out his premises to a tenant, dies and his heirs succeed to his estate, one co-heir to whom the rent is being paid by the tenant and who receives it on behalf of the estate, would be landlord for the purpose of the Act. The co-heirs constituted the body of landlords and, by consent, implicit or otherwise, of the plurality of landlords, one

of them representing them all, was collecting rent. In short, he functioned for all practical purposes as the landlord, and was therefore, entitled to institute proceedings for eviction against the tenant quo landlord."

As regards Rule 15(2) of the Rules framed under the Act, it was held in Roop Narain v. Radha Mohan Katiyar 1980 UP (2) RCC 212 that a non-petitioning co-landlord can be arrayed as proforma respondent and omission to sign application by a landlord, in such a case would be of no consequence. Reliance in the case of Roop Narain (supra) was placed on an earlier case of this Court in Yogesh Saran v. Jyoti Prasad and others 1978 ARC 408, wherein it was held that the omission to sign the application by all the landlords is of a formal character and an application made by a landlord cannot be rejected on this basis. In Sangram Singh v. Election Tribunal, Koth and another AIR 1955 SC 425 it was held:

"Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it." (emphasis supplied

12. Paragraphs 12 and 17 of **Gopal Das (supra)** are quoted as under:-

"12. In view of these decisions, there can, therefore, be little doubt as to the maintainability of the action for eviction brought by one co-owner without impleading the other co-owners. The view taken in Devi Charan's case (1980 UPLT NOC 143) cannot be said to have laid down the correct law and it is overruled. The view taken in Ranga Nath's case (1984 All LJ 455) is correct and we reiterate the same.

17. So far as the applicability of this Rule to the present case is concerned, there is no problem. Murlidhar Sah who has brought the action for eviction of the premises in question is undoubtedly the landlord. He has signed the application. He alone is competent to sign the application. However, we may point out that the requirement of Rule 15(2) that an application for release of premises owned by co-owners should be signed by all co-owners would be invalid. One co-owner is competent to maintain an action for eviction of the tenant of the entire premises, since he can be considered as a landlord within the meaning of Section 3(j) of the Act. One co-owner alone would be competent to sign such an application."

(emphasis supplied)

13. Paragraphs 16 and 17 of **Om Prakash Mittal (supra**) are quoted as under:-

"16. The petitioner's main contention is that a landlord is one to whom rent is being paid de facto as per the definition of landlord in the Act. Argument ignores several factual aspects.

17. Whether mere fact that somebody de facto realizes rent, will determine status, is not a correct proposition of law. It has to be found out whether rent is being realised in his

independent right and capacity as landlord or the same is being realised in representative capacity for the benefit of another person. If rent is being collected in representative capacity for the benefit of actual owner, then it will be the owner who shall be the landlord. Otherwise a servant or a brother authorised by original owner to realize rent on his behalf from tenant will become landlord. Law does not contemplate such a situation."

(emphasis supplied)

14. Paragraph 19 of **Boorugi Mahadaev & Sibs (M/s.) & Anr. vs. Sirigiri Narasing Rao and Ors 2016 (1) ARC 490** is quoted as under:-

"19. It is also now a settled principle of law that the concept of ownership in a landlord-tenant litigation governed by Rent control laws has to be distinguished from the one in a title suit. Indeed, ownership is a relative term, the import whereof depends on the context in which it is used. In rent control legislation, the landlord can be said to be the owner if he is entitled in his own legal right, as distinguished from for and on behalf of someone else to evict the tenant and then to retain control, hold and use the premises for himself. What may suffice and hold good as proof of ownership in landlord-tenant litigation probably may or may not be enough to successfully sustain a claim for ownership in a title suit. (vide Sheela & Ors. vs. Firm Prahlad Rai Prem Prakash, (2002) 3 SCC 375)." (emphasis supplied)

15. Paragraphs 11, 12, 13, 14, 15 and 17 of **Manoj Kumar vs. Suman Prakash 2019 (3) ARC 614** are quoted as under:-

11. On perusal of record, I find that the suit has admittedly been filed by Suman Prakash. It was admitted in the replication that the property is of HUF of which plaintiff-respondent is the Karta and he is entitled to file the present suit. It is also pertinent to note that no other person has come forward to claim the ownership or landlordship in the present case. The status of the defendant-petitioner herein as tenant is also not in dispute. It is settled law that in the rent control matters the landlord-tenant relationship is to be seen. It is also settled law that one co-owner is entitled to initiated the proceedings against the tenant. It may also be noticed that it is not a case of property dispute where filing of the suit on behalf of Karta or any other coparcener may be claimed to have material effect on the proceedings. Suffice to note that a coparcener is any of several people who share an inheritance.

12. In Black's Law Dictionary (Eighth Edition) "coparcener" is defined as "A person to whom an estate descends jointly, and who holds it as an entire estate: a person who has become a concurrent owner as a result of descent" and "coowner" is defined as "A person who is in concurrent ownership, possession, and enjoyment of property with one or more others; a tenant in common, a joint tenant, or a tenant by the entirety."

13. As per Legal Glossary (2001 Edition) "Karta" means (1) author; (2) manager; (3) principal.

14. Thus, broadly speaking a karta is a person who is a concurrent owner as a result of a descent and is managing the property as principal or say, manager for the benefit of all members of the HUF.

Thus, his status, within the family may be different, if questioned by any coparcener but his status will be that of a concurrent owner or coowner.

15. In the rent control matters where the proceedings are summary in nature and only landlord-tenant relationship is to be seen. Thus, the law as applicable in a case of co-owner in rent control and eviction proceedings will prevail. A reference made be made to a decision of the Apex Court in Mohinder Prasad Jain vs. Manohar Lal Jain, 2006 (2)SCC 724, para 10 and 11, relevant extract of which are quoted as under:

"10. This question now stands concluded by a decision of this Court in Indian Umbrella Mfg. Co. v. Bhagabandei Agarwalla, 2004 (3) SCC 178 wherein this Court opined (SCC p.183 para 6):

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

11. A suit filed by a co-owner, thus, is maintainable in law. It is not necessary for the co- owner to show before initiating the eviction proceeding before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event, a co-owner objects thereto, the same may be a relevant fact. In the instant case, nothing has been brought on record to show that the co-owners of the respondent had objected to eviction proceedings initiated by the respondent herein....."

17. A reference was also be made to judgment of Hon'ble Apex Court in the case of Boorugu Mahadev and sons and another vs. Sirigiri Narasing Rao and others, (2016) 3 SCC 343, para 18 whereof is quoted as under:

"It is also now a settled principle of law that the concept of ownership in a landlord-tenant litigation governed by Rent control laws has to be distinguished from the one in a title suit. Indeed, ownership is a relative term, the import whereof depends on the context in which it is used. In rent control legislation, the landlord can be said to be the owner if he is entitled in his own legal right, as distinguished from for and on behalf of someone else to evict the tenant and then to retain control, hold and use the premises for himself. What may suffice and hold

good as proof of ownership in landlord-tenant litigation probably may or may not be enough to successfully sustain a claim for ownership in a title suit. (Vide Sheela v. Firm Prahlad Rai Prem Prakash (2002) 3 SCC 375)." (emphasis supplied)

16. Paragraphs 40 and 41 of **Apollo Zipper India Limited vs. W. Newman and Company Limited 2018 (6) SCC 744** are also quoted as under:-

40. It is a settled principle of law laid down by this Court that in an eviction suit filed by the landlord against the tenant under the Rent Laws, when the issue of title over the tenanted premises is raised, the landlord is not expected to prove his title like what he is required to prove in a title suit.

41. 41. In other words, the burden of proving the ownership in an eviction suit is not the same like a title suit. (See Sheela v. Firm Prahlad Rai Prem Prakash 2002 (3) SCC 375, para 10 at SCC p. 383 and also Boorugi Mahadev & Sons & Anr. vs. Sirigiri Narasing Rao & Ors. 2016 (3) SCC 343, Para 18 at page 349)."

(emphasis supplied)

17. On perusal of record I find that the status of the tenant-petitioner herein as tenant in the property in question is not in dispute. The main argument of learned counsel for the tenant-petitioner is that the applicant is not the landlord as the rent was being collected by Virendra Kumar Agrawal as Karta of the HUF and only he could have filed release application. It is not in dispute that in such matters the term 'landlord' is used in different meaning and if one co-owner files release application, the same, even without impleading the other co-owners, would be maintainable. In the present case, the other co-owners / co-landlords were impleaded as formal parties and even Virendra Kumar Agrawal has filed his written statement. It is to be noted that he never disputed the release of the shop in question in favour of Vishnu Kumar Agrawal. He never challenged the order of the Prescribed Authority that the release application has wrongly been allowed in favour of the applicant-landlord Vishnu Kumar Singh. He is also not before this Court opposing the release of the shop in favour of Vishnu Kumar Agrawal. It is also not in dispute that the original owner / landlord was Suraj Bhan Agrawal and his three sons namely, Vishnu Kumar Agrawal, Virendra Kumar Agrawal and Om Prakash Agrawal inherited the property. It is also not in dispute that the rent is being collected by Virendra Kumar Agrawal only as Karta of the family (HUF) for the benefit of all and in the other original proceedings it was held by the civil court that he is co-owner / co-landlord of the property in question.

18. In such view of the matter, for the discussions made hereininabove, I do not find any good ground to interfere in the orders impugned herein. The courts below have recorded concurrent findings of fact on bonafide need as well as on comparative hardship. The scope of interference under Article 226 of the Constitution of India on such finding of fact is extremely limited. Therefore, I do not find any good ground to entertain present petition on the ground of tenant and landlord relationship in the present case between the parties and that it requires any interpretation of Section 3(j) of the Act. The law is already settled on this issue.

19. Status of petitioner as tenant is not in dispute, therefore, if other co-owner / co-

landlord have not come forward to challenge the release in favour of one, who, admittedly, has also inherited the property, no relief can be granted on this ground to the tenant that the person, who was receiving the rent has not filed the release application.

20. In such view of the matter, I do not find any jurisdictional error or perversity in the findings recorded and the conclusion drawn by the courts below. Present petition is devoid of merits and is accordingly dismissed.

21. Having considered the facts and circumstances of the case, subject to filing of an undertaking by the petitioner-tenant before the Court below, it is provided that:

(1) The tenant-petitioner shall handover the peaceful possession of the premises in question to the landlord-opposite party on or before 30.9.2021;

(2) The tenant-petitioner shall file the undertaking before the Court below to the said effect within two weeks;

(3) The tenant-petitioner shall pay entire decretal amount within a period of two months from the date of receipt of copy of this order.

(4) The tenant-petitioner shall pay damages @ Rs. 2,000/- per month by 07th day of every succeeding month and continue to deposit the same in the Court below till 30.9.2021 or till the date he vacates the premises, whichever is earlier and the landlord is at liberty to withdraw the said amount;

(5) In the undertaking the tenant-petitioner shall also state that he will not create any interest in favour of the third party in the premises in dispute;

(6) Subject to filing of the said undertaking, the tenant-petitioner shall not be evicted from the premises in question till the aforesaid period;

(7) It is made clear that in case of default of any of the conditions mentioned herein-above, the protection granted by this Court shall stand vacated automatically.

(8) In case the premises is not vacated as per the undertaking given by the petitioner, he shall also be liable for contempt.

22. There shall be no order as to costs.

(2021)04ILR A215
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ A (Rent Control) No. 4854 of 2021

Satyapal Chopra ...Petitioner
Versus
A.D.J., Lalitpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ravi Anand Agarwal, Sri Shreya Gupta

Counsel for the Respondents:
C.S.C.

A. Civil Law – Rent Control – *Res-judicata* - Code of Civil Procedure, 1908 - Section 11 - Same ground of eviction but based on

different cause of action is not barred by res-judicata. (Para 17)

Perusal of Section 11, Explanations I and IV clearly reflects that existence of a "former suit" which has been 'heard and finally decided' is mandatory, whereas in the present case appeal is pending, which is in continuation of the original suit/release proceedings, wherein due to rejection of amendment application, the amended grounds (as permitted now) were neither in issue nor were heard and finally decided. Thus, the mandatory element of 'former suit' 'heard and finally decided' is missing in respect of the amendment allowed. Therefore, the Explanation IV to Section 11, C.P.C., which also requires 'former suit' would also not be attracted in this case. (Para 15)

Further, while allowing the petition filed by the tenant, the judgments of prescribed authority and the appellate authority both were quashed and amendment in pleading was permitted at appellate stage and as the appellate court is the final court on facts, considering the pendency of release application since the year 2000, the lower appellate court was directed to decide after affording an opportunity of hearing to both the parties afresh. Thus, stage of proceedings being 'former' in nature and 'heard and finally decided' has not come as yet so as to attract Section 11, C.P.C. itself. (Para 16)

B. Scope of applicability of Section 11, C.P.C. in rent laws – Bona fide need may arise after eviction suit and decision thereon - Even if nature of proposed business is not decided by the landlord, still need is bona fide. The bona fide need must be considered with reference to the time when a suit for eviction is filed and it cannot be assumed that once the question of necessity is decided against the plaintiff it has to be assumed that he will not have a bona fide and genuine necessity even in future. (Para 18, 19)

In the present case, the appeal is pending which is in continuation of the proceedings, where a final finding of facts is yet to be recorded between the original parties to the suit/release application. Further, release application was filed in the year 2000 and it is only during pendency of the proceedings, the applicant got himself enrolled as an advocate, therefore, due to change in the facts and circumstances of the case, this subsequent event should not and ought not be prevented to come on record. It may also be noticed that since earlier amendment application dated 16.8.2005 to bring on record the change in circumstance that now release of shop is required for establishing chamber as an advocate was rejected, the prescribed authority once found the bona fide need, had, probably no other option but to release the shop on the ground taken or say, existing on record (i.e., need for opening gift item shop). (Para 23)

Writ petition dismissed. (E-3)

Precedent followed:

1. Dunlop India Ltd. Vs A.A. Rahna & anr.(2011) 5 SCC 778 (Para 17)

2. Suraj Mal Vs Radheyshyam, (1988) 3 SCC 18 (Para 18)

3. Krishna Mohan Vs Krishna Swaroop, 2016 (10) ARC 300 (Para 19)

Precedent distinguished:

1. Asgar & ors. Vs Mohan Varma & ors., 2020 (16) SCC 230 (Para 6, 21, 22)

Present petition challenges order dated 20.02.2021, passed by Additional District Judge. Lalitpur.

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Ms. Shreya Gupta, learned counsel for the petitioner and perused the record.

2. Present petition has been filed challenging the impugned order dated 20.2.2021 passed by the Additional District Judge, Lalitpur (respondent no. 1) in Rent

Appeal No. 3 of 2009 (Satyapal Chopra vs. Mahendra Kumar).

3. By the impugned order dated 20.2.2021 amendment application filed under Order 6 Rule 17 CPC filed by the landlord at the appellate stage was allowed by the lower appellate court after noticing the fact that the amendment in pleadings by substituting the paragraphs and adding the grounds in release application was permitted by this Court vide order dated 13.8.2018 passed in Writ -A No. 535 of 2018 (Shri Satypal Chopra vs. Shri Mahendra Kumar), however, since the amendment was being sought after a delay, therefore, the same was allowed by imposing cost of Rs. 1,000/-.

4. The release application was allowed by the prescribed authority on the ground of bona fide need of the landlord for opening a gift-item Shop. The appeal filed by the tenant was dismissed. The writ petition being Writ-A No. 534 of 2018 filed by the tenant was entertained and interim order was granted vide order dated 31.1.2018. Thereafter, the petition was allowed vide order dated 13.8.2018 on the concession given by the counsel for the landlord that he has no objection in case writ petition is allowed.

5. Thereafter, this amendment application was filed before the appellate court. Several paragraphs are being sought to be amended/substituted and added. Two paragraphs related to need of the landlord and one paragraph was with regard to subsequent developments i.e. purchase of property by the tenant in the year 2018. This application was contested by the tenant-petitioner by filing objections, however, the objections were rejected and since there was delay, the amendment application was allowed by imposing cost of Rs. 1,000/- and the appellate court fixed a date by observing that short dates will be fixed by the lower appellate court in the light of the order of this Court dated 13.8.2018 passed in Writ-A No. 534 of 2018.

6. Challenging the impugned order, submission of learned counsel for the petitioner, placing reliance on the judgement of Hon'ble Apex Court rendered in the case of Asgar & others vs. Mohan Varma & others, 2020 (16) SCC 230, is that in the present case principle of constructive res-judicata would apply and therefore, such amendment cannot be allowed. It is submitted that the grounds that are being sought to be amended now were, in fact, sought in the year 2005 and an affidavit was filed in 2009 that he need shop in question for his chamber for legal profession and were rejected but shop was released on the ground that the shop is needed for starting business of gift items, therefore, the same cannot be permitted now.

7. I have considered the submissions advanced by the learned counsel for the petitioner at length and perused the record.

8. To appreciate the controversy involved in the present case, it would be relevant to take note of the order passed by this Court in Writ-A No. 534 of 2018 (Shri Satyapal Chopra vs. Shri Mahendra Kumar) dated 31.1.2018, which is quoted as under:

"Heard Ms. Shreya Gupta, learned counsel for the defendant-petitioner/ tenant and Sri P.K. Jain,

learned senior advocate assisted by Sri Abu Bakht, learned counsel for the plaintiff-respondent/ landlord.

On 24.01.2018, this petition was heard at length and after incorporating the facts of the case, an order was passed as under:

"Heard Shreya Gupta, learned counsel for the defendant-petitioner/tenant and Sri P.K. Jain, learned Senior Advocate assisted by Sri Abu Bakht, learned counsel for the plaintiff-respondent.

Briefly stated facts of the present case are that House No.307/1 (New No.340/1), Katra Bazar, Lalitpur, was originally owned by one Sri Ratan Chandra Jain. In the said house there is a shop in which the defendant-petitioner is a tenant at a monthly rent of Rs.85/- since the year 1958. After the death of the aforesaid original owner, his wife Smt. Phoola Bai became landlord of the disputed shop, who died on 20.12.1999. Before her death she had executed a will dated 20.10.1998.

As per the aforesaid will, the plaintiff-respondent, who is 'Nati' of Sri Ratan Chandra Jain and Smt. Phoola Bai, became owner and landlord of the disputed house and accordingly, his name was also mutated in municipal records showing him to be the owner and landlord of the disputed house and the defendant-petitioner as tenant. He also apprised the defendant-petitioner that he is owner and landlord of the disputed shop. Consequently, the defendant-petitioner/tenant had sent him a money-order of Rs.850/- towards payment of rent from 18.12.1999 to 17.2.2000. The receipt of money-order has been filed by the plaintiff-respondent in evidence as Paper No.22-C, which bears the message of the defendant-petitioner for payment of rent admitting the plaintiff-respondent to be the owner and landlord. Thus, there is no dispute of landlord and tenant relationship between the plaintiff-respondent and the defendant-petitioner.

On 31.10.2000, the plaintiff-respondent filed an application under Section 21(1)(a) of U.P. Act 13 of 1972 for release of the disputed shop on the ground of his personal need for starting the business of gift items. He sated that he is an unemployed Law Graduate and has experience of trade in gift items, therefore, he is in bonafide need of the disputed shop.

During pendency of the release application, the plaintiff-respondent got himself enrolled in the year 2001 with U.P. Bar Council, Allahabad and started practising in District Court, Lalitpur. Thereafter, he filed an amendment application dated 16.8.2005, praying for amendment in paragraph-6 of the plaint, whereby he sought to amend the pleadings to the effect that he needs the disputed shop to establish his chamber as an Advocate. The application was rejected by the Prescribed Authority by order dated 22.4.2008 against which he filed a civil revision, which was dismissed by the *District Judge,Lalitpur. Both these orders were challenged by the plaintiff-respondent in Writ Petition No.41688 of 2008 (Mahendra Kumar Jain v. Prescribed Authority and another), which was dismissed by order dated 18.8.2008 giving liberty to the plaintiff-respondent/landlord to challenge the impugned order dated 22.4.2008 as well as the order dated 22.5.2008 in the writ petition, which may be filed against final judgment and order on the release application and the decision*

of appeal under Section 22 of the Act. The release application was directed to be decided expeditiously.

Thereafter, the plaintiff-respondent filed his affidavit dated 17.2.2009 in evidence. In paragraph-7 of the affidavit he stated that he is an advocate and is practising in Civil, Revenue and Criminal matters and has no business except the legal profession. He reiterated his need of the disputed shop for his chamber for legal practice. Another affidavit dated 16.10.2008 was also filed making similar averments.

By judgment dated 31.3.2009, the aforesaid release application has been allowed on the ground that the plaintiff-respondent/landlord is in bonafide need of the disputed shop to start his business of gift items. The Rent Control Appeal No.03 of 2009(Satpal Chopra v. Mahendra Kumar) filed by the defendant-petitioner/tenant was dismissed by the impugned judgment dated 14.12.2017 on the ground that the plaintiff-respondent needs the disputed shop for starting business of gift items.

Learned counsel for the defendant-petitioner submits that the plaintiff-respondent has set up his bonafide need for opening his chamber in the disputed shop as an advocate, therefore, the finding of bonafide need on the ground to start the business of gift items, is wholly without application of mind and without consideration to the evidences on record. Therefore, on this ground alone the impugned orders deserve to be set aside and the matter needs to be remanded for decision afresh on the question of bonafide need and comparative hardship. She submits that the defendant-petitioner is not disputing the landlordship of the plaintiff-respondent. The objection is only with respect to the findings on the point of bonafide need and comparative hardship.

In support of her submissions, she has relied upon the judgments of Hon'ble Supreme Court in the case of Prabha Arora and another v. Brij Mohini Anand and others, 2008 CAR210 (SC) (Paragraph 5) and judgment of this Court in Chand Ratan Laddha v. Additional District Judge and others 2012(3) ARC 349 (paragraph Nos. 13,14 and 15).

Sri P.K. Jain, learned Senior Advocate prays for adjournment to complete his instructions.

As prayed, put up tomorrow."

Today, Sri P.K. Jain, learned senior advocate prays for and is granted three weeks' time to file counter affidavit. Defendant-petitioner shall have a week thereafter to file rejoinder affidavit.

List after four weeks before the appropriate court.

Considering the facts of the case as briefly noted in the afore-quoted order dated 24.01.2018, I find that the defendant-petitioner has made out a case for interim relief. Therefore, as an interim measure, it is provided that till the next date of listing, the effect and operation of the impugned judgment and order dated 14.12.2017 in Rent Appeal No.3 of 2009 (Satyapal Chaupra vs. Mahendra Kumar) passed by the Additional District Judge (Fast Track Court-I), Lalitpur and the judgment and order dated 31.03.2009 in P.A. Case No.12

of 2000 (Mahendra Kumar vs. Satyapal Chaupra) passed by the Prescribed Authority/ Civil Judge (S.D.) Lalitpur shall remain stayed." (Emphasis supplied)

9. Thereafter the aforesaid petition was allowed on 13.8.2018 with liberty to both the parties to amend their pleadings. The said order dated 13.8.2018 is also quoted as under:

"Heard Ms. Shreya Gupta, learned counsel for the petitioner and Sri Pramod Kumar Jain, Senior Advocate assisted by Sri Maha Prasad, learned counsel for the respondent.

The present writ petition has been filed for quashing the judgment and order dated 14.12.2017 passed by the Additional District Judge/Fast Track Court 1st, Lalitpur in Rent Appeal No.3 of 2009 and judgment and order dated 31.03.2009 passed by the Prescribed Authority/Civil Judge (Senior Division), Lalitpur in Rent Case No.12 of 2000.

At the very out set Sri P.K.Jain, learned Senior Counsel states that he has no objection in case the writ petition is allowed.

However in the light of the arguments advanced before this Court regarding remanding back the matter, this Court is of the opinion that since the lower appellate court is the final court on facts and the suit is pending since the year 2000, therefore, it would be appropriate to remand back the matter to the lower appellate court with liberty to both the parties to amend their pleadings, if they so desired and lead evidence on all the issues as the parties may be advised.

Accordingly, the present writ petition stands allowed. The impugned orders dated 14.12.2017 and 31.3.2009 are quashed. The matter is remitted back to the lower appellate court below for decision afresh on its own merit. The lower appellate court is directed to provide full opportunity of hearing to both the parties as indicated above.

Since the release application was filed in the year 2000 it would be appropriate that the lower appellate court shall decide the same as expeditiously as possible by fixing short dates and without granting any adjournment."

(Emphasis supplied)

10. In the order dated 31.1.2018, wherein the order dated 24.1.2018 was quoted, this Court has noticed the fact that ultimately the amendment application dated 16.8.2005, though rejection whereof by the prescribed authority was upheld by the revisional court, was kept alive i.e. to be challenged while challenging the final order (obviously, if the need so arise) and that the affidavit 17.2.2009 was filed in evidence wherein it was stated that the landlord is a practising advocate and he has no other means of earning except the legal profession. Contention of learned counsel for the tenant that the release order suffers from non-application of mind as the release application was filed for the need of shop of gift items whereas, the affidavit has come that the shop is required for legal profession, was also noted. Subsequently, the petition was allowed on the concession given by learned counsel for the landlord that he has no objection in case writ petition is allowed. In the light of the arguments advanced before this Court in that petition, the matter was remanded to the lower appellate court with liberty to

both the parties to amend the pleadings as the lower appellate court is the final court on facts and the suit is pending since the year 2000. It may also be noticed that the release application was allowed by the prescribed authority and appeal was filed by the tenant and thus, the landlord obviously, had no occasion and reason to challenge the rejection of amendment application, as left open by this Court while challenging the final order as the final order of the prescribed authority, was in his favour.

11. In such view of the matter, it is not in dispute that the amendment application insofar as the first two paragraphs are concerned, was filed pursuant to the order of this Court. Third amendment is also related to subsequent developments and liberty was granted to both the parties to amend their pleadings. It is not in dispute that both the parties are at liberty to lead their evidence on the issue as already permitted by this Court as noted above.

12. I have gone through the proposed amendments which have been allowed by the court below.

13. Learned counsel for the petitioner has placed reliance on the of Asgar (supra) to contend that principle of constructive res-judicata applies in the present case and hence the proposed amendment cannot be permitted. To deal with the same, it would be appropriate to take note of relevant extract of Section 11 of Civil Procedure Code together with Explanation I and IV, which is quoted as under :

*"**11. Res judicata**- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

***Explanation I**- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*

***Explanation IV**- Any matter which might and ought to have been made ground of defence or attach in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."* (Emphasis supplied)

14. It would also be relevant to take note of paragraphs, 30, 36, 37, 38, 39, 46, 47, 48 of the judgement in Asgar (supra) are quoted as under:

"30. Under Section 11, a matter which has been directly and substantially in issue in a former suit between the same parties or between parties litigating under the same title cannot be raised before a court subsequently, where the issue has been heard and finally decided by a competent court. Explanation IV enacts a deeming fiction. As a result of the fiction, a matter which "might and ought" to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such a suit. In other words, Explanation IV is attracted when twin conditions are

satisfied: the matter should be of a nature which might and ought to have been made a ground of defence or attack in a former suit. S. Rangarajan, J. (as the learned Judge then was) sitting as a Single Judge of the Delhi High Court in Delhi Cloth & General Mills Co. Ltd v Municipal Corporation of Delhi, 1975 SCC OnLine Del 29 noticed this feature :

"35...The words employed -- might and ought -- are cumulative; they are not in the alternative. It is a well-established rule that any plea which if taken would have been inconsistent with or destructive of the title in the earlier suit is not a matter which ought to be raised therein because even though it might also have been raised in the alternative. This aspect was explained by the Judicial Committee of the Privy Council in Kameswar Pershad v. Rajkumari Ruttan Koer (I.L.R. 20 Calcutta 79 at p. 85). The possibility of merely raising it as a ground of attack or defence, at least in the alternative, is alone not sufficient; the test is one which is more compulsive, namely, that the said plea "ought" to have been taken as a ground of attack or defence. These features would of course depend upon the particular facts of each case."

The words "might and ought" are used in a conjunctive sense. They denote that a matter must be of such a nature as could have been raised as a ground of defence or attack and should have been raised in the earlier suit.

36. Mr Giri urged, relying upon the above decision of the House of Lords that in construing the expression "might and ought", it is necessary for the court to bear in mind the fundamental distinction between res judicata and constructive res judicata. He urged that whereas the former encompasses a matter which was directly and substantially in issue in a previous suit between the same parties and has been adjudicated upon, the latter brings in a deeming fiction according to which a matter which might and ought to have been advanced in a previous suit would be deemed to be directly and substantially in issue. He therefore urges that a degree of circumspection must be exercised in the application of the principle of constructive res judicata.

37. We are not inclined to decide this question on a priori consideration, for the simple reason that under the CPC, both res judicata (in the substantive part of Section 11) and constructive res judicata (in Explanation IV) are embodied as statutory principles of the law governing civil procedure. The fundamental policy of the law is that there must be finality to litigation. Multiplicity of litigation enures to the benefit, unfortunately for the decree holder, of those who seek to delay the fruits of a decree reaching those to whom the decree is meant. Constructive res judicata, in the same manner as the principles underlying res judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. In deciding as to whether a matter might have been urged in the earlier proceedings, the court must ask itself as to whether it could have been urged. In deciding whether the matter ought to have been urged in the earlier proceedings, the court will have due regard to the ambit of the earlier proceedings and the nexus which the matter bears to the nature of the controversy. In holding that a matter ought to have been taken as a ground of attack or defence in the earlier

proceedings, the court is indicating that the matter is of such a nature and character and bears such a connection with the controversy in the earlier case that the failure to raise it in that proceeding would debar the party from agitating it in the future.

38. In State of U P v Nawab Hussain, (1977) 2 SCC 806, a three-judge Bench of this C ourt noted that the two principles of res judicata and constructive res judicata seek to achieve the common objective of assuring finality to litigation. P. N. Shinghal, J. observed:

"3. The principle of estoppel per rem judicatam is a rule of evidence. As has been stated in Marginson v. Blackburn Borough Council (1939) 2 KB 426 at p. 437, it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata.

4. But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell, L.J., has answered it as follows in Greenhalgh v. Mallard (1947) 2 All ER 255) :

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

39. A Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v State of Maharashtra, (1990) 2 SCC 715 referred to the decision of a three judge bench of this Court in Forward Construction Co. v Prabhat Mandal, (1986) 1 SCC 100 and noted the following position in law:

"20...an adjudication is conclusive and final not only as to the actual matter determined but as to every

other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence..."

46. In view of the settled position in law, as it emerges from the above decisions, it is evident that the appellants were entitled, though they were strangers to the decree, to get their claim to remain in possession of the property independent of the decree, adjudicated in the course of the execution proceedings. The appellants in fact set up such a claim. They sought a declaration of their entitlement to remain in possession in the character of lessees. Under Order 21 Rule 97, they were entitled to set up an independent claim even prior to their dispossession. Under Order 21 Rule 101, all questions have to be adjudicated upon by the court dealing with the application and not by a separate suit. Upon the determination of the questions referred to in Rule 101, Order 21 Rule 98 empowers the court to issue necessary orders. The consequence of the adjudication is a decree under Rule 103.

47. The claim which the appellants have now sought to assert for compensation under Section 4 (1) of the Act of 1958 is intrinsically related to the claim which they asserted in the earlier round of proceedings to remain in possession. Indeed as we have seen, the appellants seek to resist the execution of the decree on the ground that they are entitled to continue in possession until their claim for compensation is determined upon adjudication and paid. Such a claim falls within the purview of Explanation IV to Section 11 of the CPC. Such a claim could certainly have been made in the earlier round of proceedings. Moreover, the claim ought to have been made in the earlier round of proceedings. The provisions of Order 21 Rules 97 to 103 constitute a complete code and provide the sole remedy both to parties to a suit and to a stranger to a decree. All questions pertaining to the right, title and interest which the appellants claimed had to be urged in the earlier Execution Application and adjudicated therein. To take any other view would only lead to a multiplicity of proceedings and interminably delay the fruits of the decree being realized by the decree holder.

48. This view which we have adopted following the consistent line of precedent on Rules 97 to 103 of Order 21 is buttressed by the provisions of the Act of 1958. A claim under Section 4 (1) has to be addressed to the court which passes a decree for eviction. In the present case, the appellants are strangers to the decree. They were required to get that claim adjudicated in the course of their Execution Application which was referable to the provisions of Order 21 Rule 97. Having failed to assert the claim at that stage, the deeming fiction contained in Explanation IV to Section 11 is clearly attracted. An issue which the appellants might and ought to have asserted in the earlier round of proceedings is deemed to have been directly and substantially in issue. The High Court was, in this view of the matter, entirely justified in coming to the conclusion that the failure of the appellants to raise a claim would result in the application of the principle of constructive res judicata both having regard to the provisions of Sections 4 and 5 of the Act of 1958 and to the provisions of Order 21 Rules 97 to 101 of the CPC."

15. Perusal of Section 11, Explanation I and IV clearly reflects that existence of a "former suit" which has been 'heard and finally decided' is mandatory, whereas in the present case appeal is pending, which is in continuation of the original suit/release proceedings, wherein due to rejection of amendment application, the amended grounds (as permitted now) were neither in issue nor were heard and finally decided. Thus, in my opinion, the mandatory element of 'former suit' 'heard and finally decided' is missing in respect of the amendment allowed. Therefore, the Explanation IV to Section 11 CPC, which also requires 'former suit' would also not be attracted in this case.

16. Further, while allowing the petition being Writ-A No. 534 of 2018 filed by the tenant, the judgements of prescribed authority and the appellate authority both were quashed and amendment in pleading was permitted at appellate stage and as the appellate court is the final court on facts, considering the pendency of release application since the year 2000, the lower appellate court was directed to decide after affording an opportunity of hearing to both the parties afresh. Thus, stage of proceedings being 'former' in nature and 'heard and finally decided' has not come as yet so as to attract Section 11 CPC itself.

17 . In *Dunlop India Limited vs. A.A. Rahna and another,* (2011) 5 SCC 778 it was held that same ground of eviction but based on different cause of action is not barred by res-judicata, paragraph 35 whereof is quoted as under:

"35. The arguments of Shri Nariman that the second set of rent control petitions should have been dismissed as barred by res judicata because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June, 1998. In the second set of petitions, the period of non occupation commenced from September, 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the Appellate Authority because till 2.8.1999, the premises were found kept open and alive for operation. The Appellate Authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September, 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K. Agarwal on 1.10.2001 that the company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1.10.2001; that no activity had been done in the premises with effect from 1.10.2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly

treated as sufficient by the Rent Control Court and the Appellate Authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause." (Emphasis supplied)

18. Similarly, in *Suraj Mal vs. Radheyshyam*, (1988) 3 SCC 18 it was held that bona fide need may arise after eviction suit and decision thereon, paragraph 8 whereof is quoted as under:

"8. The learned counsel for the appellant Sunderbai contended that in substance the case of the plaintiff-respondent in the earlier eviction suit and in the present suit is the same and since the earlier suit was dismissed the present suit also should be dismissed. The High Court in paragraph 4 of its judgement pointed out that the nature of requirement pleaded in the earlier suit was different from that in the present suit. The first appellate court while deciding the issue against the defendant observed that the bona fide need must be considered with reference to the time when a suit for eviction is filed and it cannot be assumed that once the question of necessity is decided against the plaintiff it has to be assumed that he will not have a bona fide and genuine necessity even in future. We are in agreement with the views as expressed by the two court."

(Emphasis supplied)

19. In *Krishna Mohan vs. Krishna Swaroop*, 2016 (1) ARC 300, it was held by this Court that even if nature of proposed business is not decided by the landlord, still need is bona fide.

20. Object of discussing the above law is to highlight the scope of applicability of Section 11 CPC itself, which, obviously includes principle of constructive res-judicata, in rent laws proceedings.

21. I have noted the relevant paragraphs of Asgar (supra) to record that there is no quarrel with the settled law, however, for the reason recorded above the same are of no help to the petitioner.

22. In the totality of the facts and circumstances of the case, more so, once this Court has allowed the parties to amend their pleadings, the case of Asgar (supra), being mainly on interpretation of Order 21 Rule 91-103 CPC, is also distinguishable on facts where a third party who was stranger to the decree was involved at the time of execution proceedings and it was about the claim to receive compensation in land acquisition proceedings.

23. In the present case, the appeal is pending which is in continuation of the proceedings, where a final finding of facts is yet to be recorded between the original parties to the suit/ release application. Further, release application was filed in the year 2000 and it is only during pendency of the proceedings, the applicant got himself enrolled as an advocate, therefore, due to change in the facts and circumstances of the case, this subsequent event should not and ought not be prevented to come on record. It may also be noticed that since earlier amendment application dated 16.8.2005 to bring on record the change in circumstance that now release of shop is required for establishing chamber as an advocate was rejected, the prescribed authority once found the bona fide need, had, probably no other option but to release the shop on the ground taken or say, existing on record (i.e. need for opening gift item shop).

24. In such view of the matter, I do not find any good ground to interfere in the order impugned herein.

25. However, parties are liberty to lead the evidence as permitted by this Court vide order dated 13.8.2018 passed in Writ-A No. 534 of 2018.

26. Present petition is devoid of merit and is, accordingly, dismissed with the observations as made above.

27. No order as to costs.

(2021)04ILR A227
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ – B No. 1848 of 2020

Nirhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohammad Mustafa, Sri Byas Kumar Prasad

Counsel for the Respondents:
C.S.C., Sri Anirudh Kumar Upadhyay

A. Civil Law – Maintainability - U.P. Land Revenue Act, 1901 - Sections 34, 210, 217, 219 - U.P. Land Revenue Code, 2006- Sections 207, 231 - The sole footing on which the learned revising Court by the impugned order dated 09.10.2019 reversed the order of the learned appellate Court was that the appellate proceedings ought to have taken out and heard under the provisions of U.P. Land Revenue Act, 1901, in view of the provisions u/s 231 of the U.P. Land Revenue Code, 2006. The learned appellate Court erred in law by permitting the proceedings to continue under the U.P. Land Revenue Code, 2006 though the same was not applicable to the aforesaid proceedings. (Para 7)

There is no infirmity in the order passed by the learned appellate Court. However, the petitioner cannot be denied his right to substantive justice in view of the provisions of the U.P. Land Revenue Code, 2006. The learned appellate Court is directed to recommence the appellate proceedings u/s 217 of the U.P. Land Revenue Act, 1901 and decide them in terms of the aforesaid Act. In case the proceedings are not maintainable before the earlier appellate Court, the same shall be transferred to the competent Court which has the jurisdiction to hear the appeal u/s 210 of the U.P. Land Revenue Act, 1901. (Para 8)

Writ petition disposed off. (E-3)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Sri Byas Kumar Prasad, learned counsel holding brief of Mohammad Mustafa Khan, learned counsel for the petitioner and Sri Anirudh Kumar Upadhyay, learned counsel for the respondents.

2. Sri Byas Kumar Prasad, learned counsel for the petitioner contends that the Board of Revenue adopted a hyper technical view of the matter by failing to remit the matter to the competent court to proceed with the hearing of the appeal in accordance with the provisions of U.P. Land Revenue Act, 1901. The petitioner has instituted the appeal before the competent court under the relevant provisions. A miscarriage of justice has happened since the appeal of the petitioner

has not been heard on merits by any competent court.

3. Sri Anirudh Kumar Upadhyay, learned counsel for the respondents in his usual fairness does not dispute the aforesaid fact. He however defends the order of Board of Revenue and contends that the appellate authority misdirected itself in law by continuing the proceedings under the U.P. Land Revenue Code, 2006. The same provisions were not applicable to the aforesaid proceedings.

4. Heard learned counsel for the parties.

5. Proceedings were instituted by the petitioner under Section 34 of the U.P. Land Revenue Act, 1901 which came to be registered as Case no. 648 of 2008 (Nirhi Vs Gujrati) before the court of Tehsildar, Shohratgarh, District Sidhharth Nagar. The learned trial court found against the petitioner and dismissed the application under Section 34 of the U.P. Land Revenue Act, 1901; by order dated 02.09.2014.

6. Aggrieved the petitioner took the order of the learned trial court in appeal before the court of Sub-Divisional Magistrate, Shohratgarh, District Siddharth Nagar. The appeal was preferred under Section 210 of the U.P. Land Revenue Act, 1901. However, the appeal was registered by the court under Section 207 of the U.P. Land Revenue Code, 2006 as Case no. T2016176351052266 (Nirhi Vs Muniram). The appeal of the petitioner was allowed by order dated 21.01.2017 and the order passed by the learned trial court was set aside.

7. The respondent no. 7 carried the order of the lower court in revision before the Board of Revenue under Section 219 of the U.P. Land Revenue Act, 1901. The revision was registered as Case no. REV/186/2017, Computer no. R2017176300186 (Muniram Vs Nirhi). The revising court allowed the revision and set aside the order passed by the learned appellate court. The sole footing on which the learned revising court by the impugned order dated 09.10.2019 reversed the order of the learned appellate court was that the appellate proceedings ought to have taken out and heard under the provisions of U.P. Land Revenue Act, 1901, in view of the provisions under Section 231 of the U.P. Land Revenue Code, 2006. The learned appellate court erred in law by permitting the proceedings to continue under the U.P. Land Revenue Code, 2006 though the same was not applicable to the aforesaid proceedings.

8. There is no infirmity in the order passed by the learned appellate court. However, the petitioner cannot be denied his right to substantive justice in view of the provisions of the U.P. Land Revenue Code, 2006. The learned appellate court is directed to recommence the appellate proceedings under Section 217 of the U.P. Land Revenue Act, 1901 and decide them in terms of the aforesaid Act. In case the proceedings are not maintainable before the earlier appellate court, the same shall be transferred to the competent court which has the jurisdiction to hear the appeal under Section 210 of the U.P. Land Revenue Act, 1901. The appellate court shall make all endeavor to decide the said appeal within a period of six months from the date of receipt of a certified copy of this order and implement the above directions.

9. The writ petition is disposed of.

(2021)04ILR A229
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ - C No. 8226 of 2020
and
Writ - C No. 3522 of 2020

Nagar Panchayat Jhunsi Prayagraj & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shashi Nandan, Sri R.K. Mishra, Sri Udayan Nandan

Counsel for the Respondents:
C.S.C., Sri Suresh C. Dwivedi, Sri Vibhu Rai

A. Constitution of India,1950 - Art.243Q - Constitution of Municipal Corporation/ Nagar Nigam - *Merger of Nagar Panchayat into Nagar Nigam* - on the recommendation of the Commissioner - no proposal of the Board of Nagar Nigam Prayagraj - Validity - *Held* - As per G.O. dt 3.4.2018, Para 4, 5 - proposal to merge Nagar Panchayat into Nagar Nigam must emerge from the resolution of the Board or the report of the Commissioner - Commissioner being the delegate of the State Government is empowered to make his recommendation for merger based on inputs supplied by amongst others Mayor, Municipal Commissioner, Addl. Municipal Commissioner of the Nagar Nigam on relevant indicators - absence of resolution of the Board, which is in the alternative, would be of no consequence - Governor is the competent authority under Article 243-Q to take a final call (Para 17)

B. Constitution of India, Art.243Q - U.P. Municipal Corporation Act (2 of 1959) - Constitution of Municipal Corporation/ Nagar Nigam - Merger of Nagar Panchayat into Nagar Nigam - without inviting objections prior to inclusion of a Nagar Panchayat into Nagar Nigam - Legality - *Held* - there is no provision either in the Constitution & in particular in Article 243Q or in the Act of 1959 to put either the inhabitants or the representatives of the merging local bodies to notice or provide any opportunity to the merging local body prior to merger - Absence of prior opportunity does not lead to any absurdity, so as to enable Court to read down the provision of prior opportunity (Para 19)

C. Interpretation of statute - Casus omissus & 'reading down' - Courts are prohibited from filling the gaps in a statute where the omission appears to be deliberate & the omission does not lead to any anomaly or absurdity as it would amount to legislation, which is not intended (Para 20)

Held - Absence of opportunity to the residents / representatives of the merging body prior to merger of an area into municipal corporation was a deliberate omission in the Act of 1959 - since it was case of deliberate omission on the part of legislature to provide a prior opportunity before merger of a local body into municipal corporation - Court refrained to import the principles of "reading down" as that would be in conflict with the legislative intent. (Para 20)

D. Constitution of India, Art.243Q - Governor is empowered to declare the character of an area as transitional area, smaller urban area or larger urban area, on the basis of population, density, revenue generated from the area, population employed in non-agricultural operations, economic importance - there is no embargo to include any area to either in transitional area (Nagar Panchayat) or smaller urban area

(Municipal Council) or larger Urban Area, (Municipal Corporation / Nagar Nigam) - No illegality in straight away merging Gram Panchayat with a larger urban area i.e. municipal corporation. (Para 18)

Dismissed. (E-4)

List of Cases cited:-

1. Champa Lal Vs St. of Raj.(2018) 16 SCC 356

2. St. of Maha & ors. Vs Jalgaon Municipal Council & ors. (2003) 9 SCC 731

3. Sangeeta Singh Vs U.O.I (2005) 7 SCC 484

4. Danckwerts LJ in Artemion Vs Procopiou (1965) 3 All ER 539

(Delivered by Hon'ble Pankaj Naqvi, J. & Hon'ble Piyush Agrawal, J.)

The issues involved in both the petitions are similar, hence are being disposed of by a common judgment. CMWP No. 8226 of 2020 is treated as a leading petition.

1. The petitioner no.1 in CMWP No. 8226 of 2020 is Nagar Panchayat Jhunsi, Prayagraj through its Chairman and petitioner no.2 is the Chairman in her individual capacity. A challenge is laid by them to the notification dated 31.12.2019 issued by the State Government merging Nagar Panchayat, Jhunsi, Prayagraj into Nagar Nigam, Prayagraj and for mandamus declaring paragraphs- 3 and 5 of the Government Order dated 3.4.2018 as unconstitutional with a further prayer to not to interfere in the working of petitioner no.2 as Chairman Nagar Panchayat, Jhunsi and finally inviting the objections of the Board of Nagar Panchayat, Jhunsi for inclusion of Nagar Panchayat, Jhunsi in Nagar Nigam Prayagraj.

The petitioners in the connected petition are All India Panchayat Parishad, a registered society, which claims to have branches, all over India and the District President of District Prayagraj, who also claims himself to be as elected Pradhan of Gram Panchayat Tendui, Block-Bahadurpur, Tehsil- Phulpur, Prayagraj. They too have challenged the notification dated 31.12.2019 including certain villages/ Gram Panchayats of Block Bahadurpur into Nagar Nigam Prayagraj.

2. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Shri Udayan Nandan, Sri R.K. Ojha, learned Senior Counsel assisted by Sri Hardev Singh for the petitioners in the respective petitions and Sri Anoop Trivedi, learned Senior Advocate, assisted by Sri Vibhu Rai for Nagar Nigam Prayagraj and Ms. Shubhra Singh, learned Standing Counsel for the State.

3. Shri Shashi Nandan, learned Senior Counsel assisted by Shri Udayan Nandan for the petitioner in the leading petition broadly raised following contentions:-

i) The impugned notification is issued in purported exercise of the powers conferred under Article 243Q of the Constitution of India sought to be exercised on the recommendation of the Commissioner under the Government Order dated 3.4.2018, wherein in paragraph-4 thereof certain conditions have been mentioned for proposed merger and in paragraph-5 thereof it is provided that either such a proposal must emerge from the resolution of the Board, i.e, of Nagar Nigam Prayagraj or the report of the Commissioner but in the absence of any proposal of the Board of Nagar Nigam

Prayagraj, conferment of alternate power on the Commissioner to forward its report is in blatant violation of the spirit of 74th Constitutional Amendment.

ii) Learned Senior Counsel for the petitioner while placing the provisions of UP Municipal Corporation Act, 1959 (short "the Act of 1959") submitted that in the entire scheme, no power is conferred on the Commissioner but for clause (56) of Section 2 which has no relevance to the present case. It is thus submitted that the recommendation of the Commissioner for merger of Nagar Panchayat, Jhunsi in Nagar Nigam Prayagraj is dehors the law rendering the impugned notification invalid.

iii) Article 243U of the Constitution read with Section 10-A of the U.P. Municipalities Act, 1916 (short "the Act of 1916") confers security of tenure of a municipality for a period of 5 years from the date appointed for its meeting, which in the present case was 27.12.2017, which can only be brought to an end prior to expiry of the said period only in the event of a dissolution but after a reasonable opportunity of being heard not resorted in the present case.

iv) The provisions of Section 4 of the Act of 1916 relating to inviting objections prior to inclusion of a Gram Panchayat into Nagar Panchayat should be read down in case of inclusion of Nagar Panchayat in Nagar Nigam.

4. Shri R.K. Ojha, learned Senior Counsel assisted by Shri Hardev Singh for the petitioners in the connected petition while adopting the submission of Shri Shashi Nandan also submitted that given the Constitutional framework, post 74th Amendment, a Gram Panchayat cannot straight away be merged with a larger urban area called municipal corporation. It was also contended that with above merger the inhabitants of the Gram Panchayat, recipients of various social benefit schemes of Government would be deprived of their rights to receive benefits and that too without any notice.

5. Sri Anoop Trivedi, the learned Senior Counsel assisted by Sri Vibhu Rai for Nagar Nigam, Prayagraj and Ms. Shubhra Singh, the learned Standing Counsel, while assiduously controverting the above submissions contended that the impugned notification does not violate the spirit of 74th Amendment in any manner, Commissioner being the delegate of the State Government is empowered to make his recommendation for merger which is based on prescribed parameters, existence of which is not disputed. He further submitted that impugned notification does not have the effect of dissolution as it presupposes persistent default and incompetency on the part of the municipality in discharging its functions, which is not the case. The provisions of Section 4 of the Act of 1916 according to Sri Trivedi cannot be read down. He further submitted that under law there is no prohibition in including an area of Gram Panchayat into Nagar Nigam as long as prescribed parameters are fulfilled and in so far the contention of withdrawal of beneficial scheme is concerned, same is of no consequence as inhabitants of merging bodies would be entitled to the beneficial scheme operating in urban area.

6. The Constitution (74th Amendment) brought about a

transcendental change in the Constitution of the municipalities by providing a 3 tier hierarchical structure of local bodies so as to provide democratic decentralization and greater accountability between citizens and the State as being effective entities of self-governance.

7. Article 243-Q of the Constitution is quoted hereunder:

"243Q. Constitution of Municipalities

(1) There shall be constituted in every State,

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part: Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township

(2) In this article, a transitional area, a smaller urban area or a larger urban area means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part"

Article 243-Q provides for constitution of 3 tier municipalities in every State with a Nagar Panchayat for a transitional area, i.e, an area in transition from a rural area to urban area; a municipal council for smaller urban area and a municipal corporation for larger urban area in accordance with Part-IX-A.

8. Article 243-U of the Constitution relates to duration of municipalities, which reads as under:

"243-U. Duration of Municipalities, etc.-- (1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,-

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved."

Thus every municipality is entitled to continue for a period of 5 years from the date appointed for its first meeting and no longer. However, the proviso provides a municipality can be subjected to dissolution before expiry of above period provided an opportunity is given to show cause against proposed dissolution. Such power is exercised only when there is a persistent default or any incompetency on the part of the Municipality to discharge its functions, but after notice.

9. The provisions contained in Part-IXA of the Constitution are also incorporated by way of amendments in the Act of 1916 and that of 1959 respectively so as to bring them at par with 74th Amendment. Section 3 of the Act of 1916 relates to declaration etc, of transitional area and smaller urban area while Section 3-A relates to constitution of municipality for every transitional area and smaller urban area as provided under Article 243-Q of the Constitution. Section 10-A of the Act of 1916 relates to the term of municipality for a period of 5 years with effect from the date appointed for its Ist meeting and no longer. Similarly, Section 3 of the Act of 1959 provides for declaration of larger urban area, i.e, Municipal Corporation as provided under Article 243Q of the Constitution, while Section 8 of the Act of 1959 provides for the duration of term of a Municipal Corporation, which too is at par with Article 243U of the Constitution.

10. The entire thrust of the 74th Amendment is on making municipalities which includes a 3 tier structure at the urban level, i.e, a Nagar Panchayat, a municipal council and a municipal corporation as effective institutions of local self governance with full functional and financial autonomy.

11 . The dominant purpose of all the local bodies is to serve the needs of all the local people and post 74th amendment not to depend on the State Government for their day to day functioning. A Finance Commission and a State Election Commission have been constituted for them under the Constitution. The multiple powers conferred on the local bodies is with a view to render efficient discharge of its functions / services in the entire system of local governance and to that extent there is total devolution of power at the grassroot level.

12. We in the light of above position now examine the scope and extent of the Government Order dated 3.4.2018 in order to ascertain as to whether it impinges upon the autonomy of the municipalities

guaranteed under the 74th Amendment? The Government Order dated 3.4.2018 is reproduced hereinbelow.

ष संख्या–690/9–6–2018–181 मिस/2014

प्रेषक,

मनोज कुमार सिंह,
प्रमुख सचिव
उत्तर प्रदेश शासन।

सेवा में,

1– समस्त मंडलायुक्त, उत्तर प्रदेश।

2– समस्त जिलाधिकारी, उत्तर प्रदेश।

3– निदेशक, नगरीय निकाय, उत्तर प्रदेश, लखनऊ।

4– समस्त अधिशासी अधिकारी, नगर पालिका परिषद/नगर पंचायत, उत्तर प्रदेश (द्वारा जिलाधिकारी)।

नगर विकास अनुभाग–6 लखनऊ : दिनांक : 03 अप्रैल, 2018

विषय :– नगर पंचायत को नगर पालिका परिषद के रूप में उच्चीकृत करने, नगर पालिका परिषद के गठन, नगर पालिका परिषद का सीमा विस्तार किये जाने तथा नगर पालिका परिषदों के वर्गीकरण हेतु मानकों का निर्धारण किया जाना।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या–2212/नौ–6–2014–181 मिस/2014 दिनांक 10.11.2014 के द्वारा नगर पंचायत को नगर पालिका परिषद एवं नगर पालिका परिषद को उच्चीकृत करने अथवा निकायों की सीमावृद्धि करने के सम्बन्ध में मानको का निर्धारण किया गया हैं। नगर पालिका परिषदों की आय एवं जनसंख्या के लिए जो मानक निर्धारित किये गये है, उनका विवरण निम्नवत् है :–

नगर पालिका परिषदों की श्रेणी	निकाय की वार्षिक आय	निकाय की जनसंख्या	निकाय की जनसंख्या का घनत्व (प्रति वर्ग कि.मी)
तृतीय श्रेणी	रू. 60 लाख से अधिक रू. 1.75 करोड़ तक	1 लाख से अधिक तथा 1.50 लाख तक	6266
द्वितीय श्रेणी	रू. 1.75 करोड़ से अधिक रू. 3.00 करोड़ तक	1.50 लाख से अधिक तथा 2 लाख तक	6266
प्रथम श्रेणी	रू. 3.00 करोड़ से अधिक	2.00 लाख से अधिक तथा 05 लाख तक	6266

2– बदलते शहरी परिदृश्य, शहरी जनसंख्या में वृद्धि, निकायो पर ब`द्धि, निकायो पर बढते दबाव आदि के परिप्रेक्ष्य में नागरिकों को बेहतर सुविधाएं उपलब्ध कराये जाने के उद्देश्य से सम्यक विचारोपरान्त प्रथम श्रेणी की नगर पालिका हेतु निर्धारित जनसंख्या के उपरोक्त मानक में आंशिक संशोधन करते हुए अब निम्नवत् मानक निर्धारित किया जाता है :–

नगर पालिका परिषदों की श्रेणी	निकाय की वार्षिक आय	निकाय की जनसंख्या	निकाय की जनसंख्या का घनत्व (प्रति वर्ग कि.मी)
तृतीय श्रेणी	रू. 60 लाख से अधिक रू. 1.75 करोड़	1 लाख से अधिक तथा 1.50 लाख तक	6266

	तक		
द्वितीय श्रेणी	रू. 1.75 करोड़ से अधिक रू. 3.00 करोड़ तक	1.50 लाख से अधिक तथा 2 लाख तक	6266
प्रथम श्रेणी	रू. 3.00 करोड़ से अधिक	2.00 लाख से अधिक तथा 05 लाख तक	6266

3— शासनादेश संख्या— 2212/नौ—6—2014—181 मिस/2014 दिनांक 10.11.2014 उक्त सीमा तक संशोधित किया जाता है। उक्त शासनादेश की शेष शर्ते यथावत् रहेंगी।

4— यहाँ यह भी स्पष्ट करना है कि प्रदेश में नगर निगमों की स्थापना अथवा नगर पालिका परिषद से नगर निगम बनाये जाने के सम्बन्ध में स्पष्ट दिशा निर्देश न होने के दृष्टिगत नये नगर निगमों की स्थापना, उच्चीकरण तथा सीमा विस्तार करने के सम्बन्ध में निम्न दिशानिर्देशों के अनुसार अग्रेतर कार्यवाही की जायेगीः—

नवीन नगर निगमों के गठन के मापदण्ड :—

(1) प्रस्तावित क्षेत्र के 75 प्रतिशत या उससे अधिक व्यक्तियों का गैर कृषि कार्यो में नियोजित होना।

(2) प्रस्तावित क्षेत्र में सड़क यातायात का सुदृढ होना।

(3) प्रस्तावित क्षेत्र में शहरीकरण के गुण परिलक्षित होना, यथा—पुलिस थाना, व्यावसायिक केन्द्र, विद्यालय एवं अन्य शिक्षण संस्थानों का स्तर, स्वास्थ्य केंन्द्रो में स्वास्थ्य सुविधाओं की स्थिति/अस्पताल, विद्युत व्यवस्था, विभिन्न बैंको की शाखाओं का होना, डाकघर, सार्वजनिक शौचालय, परिवहन व्यवस्था आदि की स्थिति अच्छी होनी चाहिए।

(4) नगर निगम के अधिनियत—1959 की धारा—6 क के अनुसार 3 लाख से अधिक जनसंख्या वाला क्षेत्र।

(5) यदि उपरोक्त प्रस्तर—4 में उल्लिखित शर्तों/मापदण्डों को प्रस्तावित नगर निगम के गठन के लिये पूर्ण किया जाता है, तो ऐसी स्थिति में निम्नलिखित बिन्दुओ को सम्मिलित करते हुए निकाय के बोर्ड द्वारा पारित प्रस्ताव अथवा मण्डलायुक्त की संस्तुति सहित सुस्पष्ट प्रस्ताव शासन के विचारार्थ उपलब्ध कराया जायेगाः—

(1) प्रस्तावित क्षेत्र की विगत जनगणना के आँकडो के अनुसार जनसंख्या।

(2) प्रस्तावित क्षेत्र की विगत जनगणना के आँकडो के अनुसार जनसंख्या का घनत्व।

(3) नगर निगम के सृजन के फलस्वरूप आय तथा व्यय में कितनी वृद्धि होगी।

(4) सम्बन्धित क्षेत्र के विगत 03 वर्षो के आय तथा व्यय के ऑकडो का पूर्ण विवरण।

(5) प्रस्तावित क्षेत्र में कौन—कौन से शहरी गुण विद्यमान है।

(6) नगर निगम सृजन से उक्त क्षेत्र के निवासियों को कौन—कौन सुविधाएं प्राप्त होंगी।

(7) प्रस्तावित नगर निगम में कितना कृषि क्षेत्र पडता है।

(8) प्रस्तावित क्षेत्र की कुल आबादी के किने प्रतिशत लोगों का जीवन—यापन कृषि पर आधारित है तथा कितने प्रतिशत अन्य व्यवसाय के लोग हैं।

(9) प्रस्तावित क्षेत्र में यदि कोई राज्य मार्ग, राष्ट्रीय राजमार्ग अथवा उसका बाईपास पड़ता हो, तो उसके रखरखाव की वचनबद्धता।

(10) प्रस्तावित क्षेत्र में पड़ने वाली लोक निहित सम्पत्ति की क्या व्यवस्था सुनिश्चित की जायेगी।

(11) प्रस्तावित नगर निगम क्षेत्र का एक सम्यक् मानचित्र, जिसमें सम्मिलित होने वाले ग्रामों/मजरों को स्पष्ट रूप से दर्शाया गया हो तथा लाल रेखा से सीमा प्रदर्शित करते हुए सीमा रेखा से अन्दर की ओर सटी हुई गाटा संख्याओं को भी अंकित किया जाए।

(12) मानचित्र के अनुरूप ही सीमा निर्धारण हेतु सीमा रेखा से अन्दर की ओर सटी हुई गाटा संख्याओ का दिशावर विवरण (पूर्व, पश्चिम, उत्तर, दक्षिण) हिन्दी तथा अंग्रेजी में पृथक–पृथक तीन–तीन प्रतियों में उपलब्ध करायी जाय। सीमा विवरण में दिशा वार गाटा संख्याओं के समक्ष उनसे सम्बन्धित ग्राम/मजरा के नाम का भी उल्लेख किया जाए।"

13. Clause-4 of the above Government Order enumerates the criteria evolved by the state government compatible with the Constitutional spirit of Article 243Q(2), which are to be cumulatively considered before the merger of any area into Municipality. The criteria are as follows –

(i) At least 75% of the inhabitants of the effected area must be involved in non-agricultural operations.

(ii) Good connectivity with the road

(iii) Presence of following indicators

(a) Police Station (b) Commercial Centre (c) Schools and other educational institutions (d) Status of Health facilities at Health Centre, hospitals, (e) electricity arrangements (f) branches of different banks (g) Post Office (h) Public toilet (i) Transport facility etc.

(iv) The merging area must have a population of at least 3 lacs.

14. Clause-5 of the above Government Order further provides that once the conditions indicated in paragraph-4 are satisfied then either the resolution of the Board or recommendation of the Commissioner for inclusion of an area into Nagar Nigam, i.e, Municipal Corporation be forwarded to the State Government. The report by the Commissioner must incorporate parameters mentioned therein.

15. Commissioner may not have been conferred with any power within the four corners of the Act of 1959, so as to include any area into the existing area of Nagar Nigam, which otherwise is well within the exclusive domain of the State Government under Article 243Q. The Commissioner rightly is not the approving authority for the merger. He only submitted a report on the basis of inputs as to the justification for merger of Nagar Panchayat Jhunsi and villages / Gram Panchayats of Block Bahadurpur into Nagar Nigam Prayagraj on the parameters indicated in the Government Order.

16. The Apex Court in ***Champa Lal v. State of Rajasthan, (2018) 16 SCC 356*** held that under Article 243-Q(2), the Governor is not free to notify areas in his absolute discretion but is required to fix the parameters necessary to determine as to whether a particular area is a transitional area or smaller urban area or larger urban area with regard to parameters mentioned

in Article 243-Q (2). It is implicit that such parameters must be uniform for the entire State and that only after determination of the parameters, various municipal bodies contemplated under Article 243-Q (1) could be constituted. The Apex Court in the said case struck down the notification on the premise that they purported to classify municipalities only on the basis of population and not the other parameters required under Article 243-Q(2) of the Constitution. We pointedly and repeatedly inquired from the learned Senior Counsels for the petitioners as to whether the prescribed parameters of Article 243-Q (2) of the Constitution and that of the Government Order dated 3.4.2018 are disputed or not and their answer was "No', which otherwise is also discernible from their writ petitions and rejoinder affidavits as there was no specific challenge to the existence of prescribed parameters but for a bare general denial, as they only stuck to their stand that they ought to have been heard before merger.

17. Governor is the competent authority under Article 243-Q to take a final call as to whether an area of a local body is to be merged with another or not and that decision is to be based on certain materials. The power of the Governor is not under challenge, which otherwise is an executive power exercised with the aid and advise of the council of ministers. The State has its delegate in the form of a Commissioner, who on the basis of inputs supplied by the authorities submitted a report recommending a merger. The recommendation of the Commissioner cannot be faulted, as he is not the final arbiter to take a decision for merger. The report of the Commissioner is based on multiple relevant factors and the contention on behalf of the petitioner that it is based only on financial consideration, is patently misconceived. Once the recommendation of the Commissioner for merger is based on inputs supplied by amongst others, the Mayor, Municipal Commissioner, Addl. Municipal Commissioner of the Nagar Nigam on relevant indicators, thus absence of resolution of the Board, which was in the alternative, would be of no consequence.

18. We find from the provisions of Article- 243-Q as contained in Part-IX-A of the Constitution (The Municipalities) that the Governor is empowered to declare the character of an area as transitional area, smaller urban area or larger urban area, i.e, municipal corporation (Nagar Nigam) as the case may be, on the basis of population, density, revenue generated from the area, population employed in non-agricultural operations, economic importance or such other factors as the Governor may deem fit. Thus, there is no embargo to include any area to either in transitional area (Nagar Panchayat) or smaller urban area (Municipal Council) or larger Urban Area, (Municipal Corporation / Nagar Nigam). Once the petitioners do not dispute the existence of the parameters provided in paragraph-5 of the government order, the logical inference is that the merging area has all the potential to merge with the area of Nagar Nigam. If it were not so, it would give rise to an anomalous situation as even though the merging area may have the potential of a would be urban area, it would still be deprived of the scheme operating at the urban level and continue to be governed by the scheme operating at the merging area. Why a merging area, which has all the portents of becoming an important vehicle in the growth of a Nagar Nigam be

deprived to reap fruits of a SMART CITY, which Nagar Nigam Prayagraj is apprising for?

19. Deprivation of benefits under Government schemes operating at the Gram Panchayat or at Nagar Panchayat Level upon merger with Municipal Corporation ipso facto would not affect the economic status of the inhabitants as they would be eligible under those government schemes operating at urban level. The Counter Affidavit on behalf of respondent no.3 Nagar Nigam Prayagraj in connected petition annexes a letter of State Government dated 5.2.2020, wherein a decision has been taken that development works initiated at village / Gram Panchayats of Block Bahadurpur, now notified to be merged in Nagar Nigam Prayagraj, consequent upon allocation of funds in 2019-20 shall be continued. We only reiterate what the Apex Court said *in* ***State of Maharashtra and others Vs. Jalgaon Municipal Council and others,*** **(2003) 9 SCC 731**, wherein a similar plea was rejected. Para-35 is quoted hereunder:

"So far as the objections preferred by the Municipal Council collectively and the individual 239 objectors are concerned, no one has alleged that any one of the factors contemplated as relevant by Article 243-Q proviso of the Constitution was absent or non-existent. None has disputed the correctness of the population figure as totalled by the census. The contentions raised are that the development works initiated by the Municipal Council may be adversely affected or that the taxes would increase while the quantum of the State's financial aid or grant may be reduced. Though it is for the State Government to apply its mind to the relevance and weight of the objections preferred, still we may note the submissions made by the learned counsel for the appellant State Government that a mere change in the constitution of the local self-government does not necessarily entail discontinuance of development projects and there is no reason to apprehend that they would not be continued. A change in governance is involved at every election though the administration continues with the Municipal Council. At the time of an election certain development works would be pending in progress which would naturally be taken over by the successor Municipal Council. Just as any new Municipal Council would take over the ongoing projects initiated by the predecessor Municipal Council so also a Municipal Corporation newly brought into being shall take over the continuing projects of the previous Municipal Council. Every change in mode of governance needs some readjustments. Need for switching over from a Municipal Council to a Municipal Corporation mode of administration is occasioned by growth of population and prosperity in any particular urban area. People share the prosperity and so must be prepared to pay the additional price by way of additional taxes, submitted the learned counsel for the State Government and we found substance therein."

19. The State Government, while issuing the impugned notification, has taken a conscious decision on the parameters prescribed in the Government Order dated 3.4.2018 to include the respective area of Gram Panchayat/ Nagar Panchayat into Nagar Nigam Prayagraj and there being no provision either in the Constitution and in particular in Article 243Q or in the Act of 1959 to put either the

inhabitants or the representatives of the merging local bodies to notice, the logical inference is that it was a case of causus omissus. The Apex Court in ***Sangeeta Singh v. U.O.I, (2005) 7 SCC 484*** observed that the two principles of construction appear to be well settled, i.e, one relating to causus omissus and the other of reading down the statute, while the former cannot be supplied by the Court except in a case of clear necessity and the reasons therefor are to be found within the 4 corners of the statute, while the latter should not be readily inferred and for that purpose all the parts of a statute or sections must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. "An intention to produce an unreasonable result", said ***Danckwerts LJ in Artemion vs. Procopiou (1965) 3 All ER 539*** is not to be imputed to a statute if there is some other construction available.

20. The Courts are prohibited from filling the gaps in a statute where the omission appears to be deliberate and the omission does not lead to any anomaly or absurdity as it would amount to legislation, which is not intended. Thus, in the light of above interpretative process absence of opportunity to the residents / representatives of the merging body prior to merger of an area into municipal corporation was a deliberate omission in the Act of 1959, as it was open for the State Government while enacting the Act of 1959 to have taken note of the provisions of an earlier law in Section 4 of the Act of 1916 for prior notice. Once it's a case of deliberate omission on the part of legislature to provide a prior opportunity before merger of a local body into municipal corporation, we would refrain to import the principles of "reading down" as that would be in conflict with the legislative intent. The Constitution as amended by the 74th Amendment does not provide any opportunity to the merging local body prior to merger and the only opportunity contemplated is the one, which is granted before dissolution of a municipality under Article 243-U of the Constitution. The State in its wisdom had chosen to provide this opportunity to local bodies merging with Nagar Panchayat and Municipal Council under Section 4 of the Act of 1916. The Act of 1959 is absolutely silent. Absence of prior opportunity in the above backdrop does not lead to any absurdity, so as to enable us to read down the provision of prior opportunity.

21. We before parting also take judicial notice that the area of Jhunsi is situate on G.T. Road (NH-19) across the Shastri Bridge over the Ganges towards Varanasi, which has almost merged with the urban area of Prayagraj. Lawyers, Doctors, Teachers and other professionals are residing in the said area. Jhunsi has residential colonies of Awas Vikas and that of Prayagraj Development Authority and it also takes the credit of various hospitals, educational institutions and institutes of national and international repute, such as G.B. Pant Social Science Institute (a constituent college of Allahabad University) , Harish Chandra Research Institute (An Aided Institute of Department of Atomic Energy, Government of India), an institute dedicated to research in mathematics and theoretical physics.

We in the ultimate analysis are of the considered view that none of the pleas raised by the petitioners has any force, petitions are devoid of merit hence liable to be dismissed.

The writ petitions are **dismissed**. No orders as to cost.

(2021)04ILR A240
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ - C No. 11738 of 2020

All U.P. Stamp Vendors Assc., Fatehpur ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri N.C. Rajvanshi, Sri Vishesh Rajvanshi, Sri Rajkishore Singh

Counsel for the Respondents:
C.S.C., Sri Kshitijn Shailendra, Sri Sumit Kakkar

A. Constitution of India,1950 - Article 226 - Judicial Review - Scope - Personal action vis-a-viz Public Interest Litigation - while an individual action is adversarial, a petition preferred in public interest is not - while dealing with a PIL it may be permissible for the Court to assume an "inquisitorial" role in order to hold the State liable and obliged to give effect to the Constitution - whereas an individual petition must proceed on material gathered by the petitioner and challenge as raised therein - On such a petition it is neither open for the Court to undertake a roving enquiry nor can the respondents be required to produce material in order to grant a relief - scope of the writ petition cannot be expanded beyond the grounds of challenge which are raised and the reliefs sought in order to subserve some larger public interest (Para 28)

B. Constitution of India,1950 - Articles 19 (1) (g), Article 19 (6) - Freedom to carry on any occupation, trade or business - reasonable restrictions - *Held* - Rights conferred by Article 19 are neither absolute nor unfettered - they are entitled to be exercised subject to just restrictions that may be imposed by the Government "in the interest of general public" - validity of such restriction is to be tested on the anvil of reasonableness - Court must evaluate restrictions reasonableness from the viewpoint of the community as a whole & not standing in the shoes of the person upon whom that restriction operates - question to be posed would be whether the restriction has come to be imposed to preserve and protect the larger interests of the community, its social and economic welfare, public order or health (Para 49)

C. Constitution of India,1950 - Articles 19 (1) (g), 21, 38 - Right to profit in trade - *Held* - what the Constitution essentially guarantees is the right to engage in a profession, occupation, trade or business - It neither proffers nor holds forth a guarantee of a profit in that trade or business - petitioner cannot place an obligation upon the government to frame a business model which may necessarily guarantee a return or a profit in a particular trade or business- A business or a trade may become unprofitable or unviable on account of various factors - but vagaries of trade cannot be recognised as constituting the infringement of a fundamental right to carry on that trade or business (Para 43, 45, 48)

D. Indian Stamp Act, 1899- Uttar Pradesh Stamp Rules 1942, 161 - U.P. E- Stamping Rules, 2013- Discount/Commission - petitioners' prayer to fix commission as per Rule 161 of the Rules, 1942 - *Held* - Rule 161 prescribes a discount when a licensed vendor purchases stamp from the

Government treasury - aforesaid Rule cannot be read as governing the sale of e stamps - sale of e stamps is governed exclusively by the 2013 Rules which is a complete and comprehensive code governing the sale, distribution and use of e stamps - Commission fixed under the 1942 Rules not to apply to E stamps - Article 19 of the Constitution cannot be invoked to require the Court to rework the terms of the contract which compel a party to guarantee a particular rate of profit or return (Para 33)

D. Constitution of India,1950 - Article 19 (1) (g) - Right to trade in stamp paper - Indian Stamp Act, 1899- Uttar Pradesh Stamp Rules, 1942 - Petitioner failed to establish existence of unfettered or indefeasible right to trade in stamp paper - petitioners do not possess an inalienable right to carry on the trade or business of stamps except in accordance with the Act and the Rules framed thereunder(Para 36)

E. Constitution of India,1950 - Article 19 (1) (g) - Right to trade in stamp paper in its physical form - U.P. E-Stamping Rules, 2013 - Petitioners engaged in sale of stamp paper in its physical form challenged terms of a proposed agreement drawn by the SHCI, CRA for the appointment of Authorised collection centres - on apprehension of the trade becoming unprofitable if they were forced to engage in the sale of e stamps - *Held* - Submission that proposed contract being unprofitable, wholly conjectural - if one perceive business to be unprofitable, it is open not to pursue the same- Right to trade in e stamps is governed by the 2013 Rules - No challenge either raised to the statutory Rules, 2013 nor was it contended that the proposed agreement is in violation of or ultra vires any provision made in the 2013 Rule - Policy initiative of e stamping was also not questioned - petitioners not deprived of the right to engage in the trade of physical stamp paper (Para 52)

Dismissed. (E-4)

List of Cases cited:-

1. Manish Jitendrakumar Shah Vs St. of Guj. Special C.A. No. 16221 of 2019 dt 24.07.2020

2. Ram Krishnan Kakkanth Vs Govt. of Kerala (1997) 9 SCC 495

3. Stamp Vendors Association Vs St. of U.P. AIR 2001 ALL. 49

4. Malwa Bus Services (P) Ltd. Vs St. of Pun. (1983) 3 SCC 237

5. Mithilesh Garg Vs U.O.I. (1992) 1 SCC 168

6. Karnataka Live Band Restaurants Assn. Vs St. of Karn. (2018) 4 SCC 372

(Delivered by Hon'ble Yashwant Varma, J.)

1. The Court has heard Sri N.C. Rajvanshi, learned senior counsel ably assisted by Sri Vishesh Rajvanshi for the petitioner and Sri Kshitij Shailendra alongwith Sri Sumeet Kakkar learned counsels who have appeared for the fourth respondent. Although the State was duly served and on notice, none has appeared or addressed submissions on its behalf.

2. The papers of this writ petition have come to be placed before this Court in light of the difference of opinion expressed by the Hon'ble members constituting the Division Bench of the Court in accordance with the provisions made in Chapter VIII Rule 3 of the Rules of the Court. While Kesarwani J. upon an examination of the contentions addressed held that the writ petition would merit dismissal, Bhanot J. has held that in light of the issues which arise, the respondents must be required to file their counter affidavits in the matter to

enable the Court to deal with the questions raised in greater detail.

3. The petitioner is an association of stamp vendors engaged in the occupation of distribution and sale of judicial and non-judicial stamp paper in its physical form. They question the terms of a proposed agreement drawn by the **Stock Holding Corporation of India,1 the Central Record Keeping Agency2 appointed as such under the Uttar Pradesh E-Stamping Rules, 20133.** The constituents of the petitioner association are licensed vendors appointed in terms of Rule 151 of the **Uttar Pradesh Stamp Rules, 1942** framed in exercise of the powers conferred on the State Government by Sections 74 and 75 of the **Indian Stamp Act, 1899.**

4. In order to delineate the nature of the challenge which was raised in the writ petition, it would be appropriate to reproduce the reliefs sought therein: -

"1. Issue a Writ order or direction in the nature of certiorari quashing the agreement issued by the Respondent No. 4 for the appointment of Authorised collection centres which has been marked as **Annexure No. 4** to this Writ Petition.

2. Issue a Writ, order or direction in the nature of Mandamus directing the Respondent No. 4 to reconsider the agreement under challenge and to disclose the commission earned by the Respondent No. 4 by the State Government.

3. Issue a Writ, order or direction in the nature of Certiorari quashing the impugned Circular Dated 17.01.2020 marked as **Annexure No. 5** to this Writ Petition.

4. Issue a Writ, order or direction in the nature of Mandamus directing the Respondents Nos. 2 and 3 not to discontinue the printing of physical judicial and non judicial stamps.

5. Issue a Writ, order or direction in the nature of Certiorari quashing the impugned letter/order Dated 25.02.2020 issued by the Respondent No. 3, which has been marked as **Annexure No. 7** to this Writ Petition.

6. Issue a Writ, order or direction in the nature of Mandamus directing the Respondents Nos. 2 and 3 to reconsider the claim of the Petitioner as per **Annexure No. 6** to this Writ Petition.

7. Issue a Writ, order or direction in the nature of Mandamus whereby directing the Respondents Nos. 2 and 3 to fix the commission of the Petitioner's members as per Rule 161 of the Rules, 1942."

5. Since the provisions of the Act, the 1942 and the 2013 Rules have been exhaustively noticed and set forth in the two opinions rendered, this Court deems it unnecessary to extract the contents of those provisions except to briefly notice them in order to appreciate the challenge that is raised.

A. THE STATUTORY REGIME UNDER THE 1942 RULES

6. Under the 1942 Rules, Rule 151 envisages two classes of vendors who are authorised to deal in the distribution and sale of stamps. While the first category comprises of those who are recognised as licensed vendors ex officio, the members of

the petitioner have been appointed by the Collector as licensed stamp vendors in terms of the power granted by clause (x) of Rule 151. Rule 151-B provides for the tenure of a license that may be granted to licensed vendors. Rule 152 provides that no licensed vendor would be entitled to sell court fee or non-judicial stamp paper exceeding the aggregate value of Rs. 15,000 for one instrument to any individual member of the public. In terms of Rule 157, licensed vendors are empowered to purchase stamps from ex officio vendors on payment of "ready money" less the discount that may be prescribed. Rule 161 provides that a licensed vendor would be entitled to receive a discount of Rs. 1 per cent of the face value of the stamp that may be purchased.

B. E- STAMPING AND THE 2013 RULES

7. E stamping was a system that evolved and was created post the "Telgi Stamp Scam" which the country witnessed and led to the Union Government formulating a "Computerised Stamp Duty Administration System" [C-SDAS] which essentially envisaged the stamp duty payment system progressing and transforming into one which would essentially run on an electronic and computerised software platform thus minimizing the chances of forgery and fabrication of physical stamp paper. For the purposes of designing and implementing C-SDAS, SHCIL was chosen as the CRA. The events surrounding the advent and introduction of the e stamping system is duly noticed in the communication of the Union Government dated 28 December 2005 which is reproduced hereinbelow:

New Delhi, the 28th December, 2005

"To,

The Finance/Revenue Secretaries,

All State/UTs Government.

Subject:- Authorisation of Stock Holding Corporation of India Ltd. to act CRA for the proposed computerization of Stamps Duty Administration System - regarding.

Sir,

In pursuance to the announcement made in the Parliament in the wake of Stamp paper scam, the Government of India Ministry of Finance, Department of Economic Affairs appointed Industrial Finance Corporation of India Ltd. (IFCI) as Consultant to suggest alternative methods of collection of Stamp Duty. The purpose was to devise mechanism of electronic method of Stamp duty collection in order to-

i. Prevent the paper and process related fraudulent practices;

ii. Setting up a Secured and Reliable Stamp Duty Collection mechanism;

iii. Storage of information in secured electronic form and building up of a Central Data Repository to facilitate easy verification and generation of MIS reports.

2. The IFCI invited technical and commercial bids to identify the suitable agency to function as Central Record Keeping Agency (CRA) for

computerization of Stamp Duty Administration System (hereinafter called the 'C-SDAS') in select cities on pilot basis on Build - Operate - Transfer (BOT) structure, initially for a period of five years. After due bidding process, M/s Stock Holding Corporation of India Ltd. (SHCIL) has been selected and are being authorized to act as Central Record Keeping Agency (CRA) for the above mentioned purposes with immediate effect.

3. SHCIL will broadly provide the following services to the respective State Governments, desirous to participate in the process in view of the fact that Stamp Duty is a State subject:

i. Creating need based infrastructure, hardware and software in the designated places in consultation with the State Governments and its connectivity with its main server;

ii. Creating need based hardware and software in the offices of sub-Registrar(s) and at authorized collection centers (the point of contact for payment of Stamp Duty) within the identified cities/places;

iii. Training the identified manpower/personnel in the sub-Registrar offices;

iv. Role of facilitation in selection of authorized collection centres for Stamp Duty;

v. Role of coordinator between the Central Server of authorized collection centre (banks, etc.) and the sub-Registrar offices.

4. For the above services, the State Governments would be required to make payment to CRA 0.65% of the value of Stamp Duty collected through this mechanism, as per its financial quote in the competitive bid. After a period of 5 years, SHCIL will hand over the operations to the respective State Governments or the State Governments may retain their services for a further period based on a mutual agreement.

The issues with the approval of competent authority."

8. In order to give effect to the aforesaid policy initiative, the State Government framed the 2013 Rules. The State Government which is defined to be the appointing authority under these Rules is empowered to select and appoint a CRA which meets the qualifying criteria prescribed in Rule 3. The 2013 Rules define "approved intermediaries" to mean the CRA and the **Authorised Collection Centers.** An ACC is defined to mean an agent appointed by the CRA with the prior approval of the Government, to act as an intermediary between the CRA and the person who pays stamp duty for the purposes of collection of tax under the Act. Rule 10 prescribes that the CRA would be entitled to an agreed percentage of commission on the amount of stamp duty collected by ACC's. The rate of commission is required to be published in the Gazette. Rule 12 provides that the CRA would be liable to pay such service charges or commission to ACC's as may be mutually agreed between them at its own level. In essence the liability toward commission payable to ACC's is to be borne by SHCIL and no part of that liability is to be passed onto the Government.

9. Prior to the First Amendment to the 2013 Rules, licensed vendors such as the

constituents of the petitioner association were ineligible to be appointed as ACC's. However, post promulgation of the 2019 amendments, undisputedly they are now entitled to be considered for appointment as ACC's in terms of Rule 13 as it stands now. All that is required is that they be licensed vendors under the 1942 Rules and hold the qualifications that may be prescribed by the Stamp Commissioner.

C. CONTENTIONS ON BEHALF OF THE PETITIONER

10. The petitioner before the Division Bench assailed the proposed agreement principally on the ground of the State action violating the constitutional protections guaranteed by Articles 19(1)(g), 21 and 38 of the Constitution. It was contended that the terms of the agreement as structured were bound to place licensed stamp vendors in a disadvantageous position and necessarily result in them suffering a loss. It was submitted that the commission which was guaranteed to them under the 1942 Rules should also govern the trade and distribution of e stamps. The petitioners invoked Articles 21 and 38 of the Constitution and the right to livelihood as flowing from the aforesaid Articles to seek a direction for the continuance of the system of physical stamping. They further sought to assail the agreement proposed by SHCIL by seeking a direction for the State respondents disclosing the actual commission earned by the CRA from the sale of e stamps in the State.

D. SUBMISSIONS OF THE STATE

11. Controverting the aforesaid submissions, it was urged on behalf of the State that licensed vendors have no fundamental right to trade or carry on the business of physical stamps since the conditions of their engagement is circumscribed by the terms of the license that is granted to them. It was contended that a stock of physical stamp paper valued at Rs. 17,000 crores still existed in the State and therefore the apprehension that licensed vendors would be deprived of a right of livelihood was clearly misplaced. The State also urged that post the amendments to the 2013 Rules, licensed vendors had also became eligible to be appointed as ACC's and therefore it could not be said that their rights as conferred by Article 19 of the Constitution had been violated. Insofar as the issue of commission is concerned, it was urged that no cogent material had been brought on record which may have even prima facie established that the business of an ACC would necessarily be loss making. It was further submitted that the provisions made under the 1942 Rules for payment of commission could have no application to the sale of e stamps since that subject would be governed exclusively by the provisions made in the 2013 Rules.

E. OPINION RENDERED BY KESARWANI J.

12. Dealing with the right of licensed vendors to deal in e stamps Kesarwani J. in his opinion held:

"20. There is no averment in the writ petition that members of the petitioner's Association have applied for appointment as "Authorise Collection Centre" under the E - Stamp Rules, 2013. The allegation of bank charges and expenses are also not supported by any

evidence. It has been well settled by Hon'ble Supreme Court in Bharat Singh Vs. State of Haryana (1988) 4 SCC 534 (Para 13) that "If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the Court will not entertain the point." The petitioners are still not Authorised Collection Centre. They have no right to dictate the terms of contract. It is wholly within their choice to apply for appointment as "Authorised Collection Centre" and enter into contract under Rule 12 to act as an intermediary between the Central Record Keeping Agency and the Stamp duty payer for collection of stamp duty, if they find it beneficial to them. They have no fundamental or legal right to trade in E-Stamp or to act an intermediary for collection of stamp duty which is a tax and is within the exclusive domain of the Government."

13. His Lordship went on to observe: -

"Besides above, as per clause (vii) of the proposed agreement, the "Authorised Collection Centre" shall be entitled to 23% of the commission earned by the respondent No.4 from the State of U.P. for such e-stamps generated by the ACC in Uttar Pradesh which is neither unreasonable looking into the duties of the respondent No.4 specified under the aforequoted Rule 9 nor it could be demonstrated by the petitioners to be unreasonable."

14. Dealing with the challenge to the communication of 17 January 2020, his Lordship held:-

"22. So far as the relief No.3 is concerned, we find that it is a correspondence between the Additional Chief Secretary, Board of Revenue, Uttar Pradesh, Prayagraj and Chief Treasury Officer, Kanpur Nagar, regarding stamps printing. There is no factual foundation in the writ petition that any licenced stamp vendor under the U.P. Rules 1942 has been denied sale of physical stamp under their licence. Learned counsel for the petitioners has also not disputed the submissions of learned Additional Chief Standing Counsel that the State Government has very huge stock of stamps in physical form. Under the circumstances, the challenge to the impugned letter of the Additional Chief Secretary, dated 17.01.2020 is wholly misconceived. Therefore, the relief No.3 sought for its quashing has no merit and is, rejected."

15. Dealing with the prayer of the petitioners for a direction being issued commanding the respondents not to discontinue physical stamps, Kesarwani J. held: -

"24. The relief so sought by the petitioners is wholly misconceived in as much as, firstly, no material has been placed or pleaded in the writ petition which may indicate that despite demand the physical stamp has not been issued to any licenced vendor under the U.P. Rules 1942 and, secondly, the aforementioned notification of the Central Government dated 28.12.2005 indicates that E-Stamp sale is a policy decision of the Government for collection of stamp duty which has been taken pursuant to the announcement made in the Parliament in the wake of stamp paper scam. Now e-stamp is governed by the E-Stamp Rules 2013. The petitioners being licenced stamp vendors under the U.P. Rules 1942 have the right for enforcement of conditions of their licence.

They can not dictate the Government for collection of stamp duty under Section 10 of the Act, in the manner as per their (petitioners) desire."

His Lordship went on to hold: -

".....Thus, stamp duty being a tax and sale of physical stamp or E-stamp for collection of revenue being policy decision of the Government in fiscal matter, no mandamus under Article 226 of the Constitution of India can be issued to the Government at the instance of the petitioner to print physical stamp when the Government has taken a policy decision backed by statutory provision for E-stamp and to permit "ACC" to issue e-stamp of any amount to a person under the E-Stamp Rules.

27. **The petitioners have not disputed that the E-Stamp Rules 2013 has been validly framed.** The decision of the Government for sale of E-Stamp and the legislation made in this regard relates to economic matter/activities which should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. While dealing with economic limitation, Hon'ble Supreme Court in the case of **R.K. Garg Vs. Union of Inida 1981 (4) SCC 675 (para 8)** observed that the court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, every legislation particularly in economic matters is essentially empiric and it is based on experimentation. There, may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."

16. Dealing with the challenge to the rate of commission as prescribed under the proposed contract, Kesarwani J. observed: -

"31. Rule 12 of the E-Stamp Rules 2013 provides that the Central Record Keeping Agency **may appoint agent(s) called "Authorised Collection Centre" to act as an intermediary** between the Central Record - Keeping Agency and the Stamp duty payer for collection of Stamp duty. Thus, if members of the petitioners apply for and are appointed as "Authorised Collection Centre" by the respondent No.4, then their status shall be of an agent of the respondent No.4. As per the aforesaid Rule 12 the Service Charges, Commission or fee etc. payable to the "Authorized Collection Centre" shall be paid by the Central Record - Keeping Agency i.e. the respondent No.4 at their own level as mutually agreed between them. Thus it is wholly within the choice of licenced stamp vendors either to agree to work as agent of respondent No. 4 on the commission/service charge/fee as may be offered to them by the respondent no.4 or not to agree. By no stretch of imagination it infringe Article 19(1) (g) or Article 21 or Article 38 of the Constitution of India. The entire submissions of learned counsel for the petitioners in this regard is totally baseless and without substance. This Court under Article 226 of the Constitution of India cannot direct the respondent no.4 to agree to pay to ACC commission/service charge/fee as may be demanded by the petitioners in contrast to the mutually agreed amount under Rule 12 of the E-stamp Rules and enter into contract on that basis with a licensed

stamp vendor for his appointment as agent (A.C.C.)."

17. The constitutional challenge was negatived with his Lordship holding: -

32. Article 19(1)(g) of the Constitution accords fundamental right to carry on any profession, occupation, trade or business which is subject to imposition of reasonable restriction in general public interest by the State under Article 19(6). The petitioners have no fundamental right to sell E-Stamp or for appointment as an agent under Rule 12 of the E-Stamp Rules. Amount of commission/service charge/fee as may be or has been offered by the respondent no.4 to persons for appointment as agent under Rule 12, does not infringe Article 19(1)(g).

33. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Apprehension of lower income than the desired income as an agent under Rule 12 does not attract Article 21 of the Constitution.

34. Article 38 is the directive principle of State Policy. Learned counsel for the petitioner has completely failed to demonstrate as to how Article 38 is attracted and is enforceable under the facts and circumstances of the present case. Therefore, his submission with regard to Article 38 is also rejected.

18. On recording of the aforesaid conclusions, His Lordship proceeded to hold that the writ petition was liable to be dismissed.

F. OPINION PRONOUNCED BY BHANOT J.

19. Dealing with the validity of the terms of the agreement, Bhanot J. on the other hand observed: -

"15. The commission received by the Central Record-keeping Agency/SHCIL, from the State of Uttar Pradesh is not revealed in the said proforma agreement, nor has it been otherwise disclosed to the petitioner either by the State Government or by the SHCIL. Consequently the amount of commission to which the Authorized Collection Centre is entitled under the proposed contract with SHCIL cannot be determined. This makes the proposed agreement between the Authorized Collection Centre and the Central Record-keeping Agency / SHCIL vague and uncertain."

His Lordship then went on to observe: -

"16. .....Accordingly, the commission to which the Authorized Collection Centre will be entitled upon the sale of e-stamps worth Rs. 1 lakh is Rs. 115/-. The Authorized Collection Centre is required to predeposit an amount of Rs. 1 lakh in its bank account as advance, for purchase of e-stamps from the SHCIL / Central Record-keeping Agency of equivalent value. Upon deposit of said amount, a sum of Rs. 250/- is charged by the bank as cash handling charge. Hence the Authorized Collection Centre is sure to suffer a certain financial loss on each transaction of purchase and sale of stamps.

17. The proposed agreement thus creates an assurance of certain losses for the Authorized Collection Centre. Ordinary prudence would have it that no private entity will enter into a contract where loss is certain. (These consequences are being

drawn on a plain reading of the writ petition, and without the benefit of pleadings from the respondents by counter affidavits)."

20. Evaluating the question of whether SHCIL could be recognised to be discharging a public function and that contracts so entered must be in accord with principles recognised by public law, Bhanot J. held:-

"25. The cumulative effect of the aforesaid facts is that the Central Record-keeping Agency and Authorized Collection Centre, discharge public functions. Consequently their actions including the proposed agreement can be judicially reviewed, and the same are accountable to public law.

26. It is well settled that the court cannot rewrite the contract between the parties. Moreso, in this case it is not the ken of the court to determine the commission to be paid to either party. However, it is very much concern of the court to enquire whether the proposed agreement between the Central Record-keeping Agency/SHCIL and the Authorized Collection Centre is consistent with the law of the land or not."

21. His Lordship then proceeded to notice the body of precedent as has evolved with the Supreme Court expanding the applicability of the principles of unconscionable terms of contracts and unequal bargaining powers of parties to a contract infused with a public element. After noticing various precedents rendered on those subjects, his Lordship observed: -

"28. There are other limitations on the creation of contracts under the public law. Some salient aspects of the proposed agreement between the Central Record-keeping Agency /SHCIL, and the Authorized Collection Centre will now be considered. The proposed agreement is not a simplicitor commercial contract. Public functions will be discharged by the parties in the framework of the said contract. There is a dominant public law element in the aforesaid contract. The parties to the contract also perform statutory functions under the Rules of 2013. The said agreement fulfills a statutory purpose. A contract between the Authorized Collection Centre, and the Central Record-keeping Agency is critical to the existence of the Authorized Collection Centre, and for its efficient functioning to implement the scheme of the Act and the Rules of 2013. The proposed agreement has to be compliant with the requirements of public law.

37. From the pleadings it transpires that the exact commission payable to the SHCIL/Central Record-keeping Agency from the State Government is not known, and remains shrouded in opacity. Consequently, the exact commission to which the Authorized Collection Centre is entitled, cannot be determined. Business decisions cannot be taken in absence of material facts, which are in the knowledge of one of the parties but not disclosed to the other contracting party.

38. These features of the proposed agreement run counter to the requirement of fairness and transparency in contracts coming in the ambit of public law. Vague terms and uncertainty in the contract can exist on the pain of invalidation under Section 29 of the Indian Contract Act.

39. As seen earlier, this is not a business /commercial contract simplicitor. Hence the concept of unequal bargaining power could well apply to the facts of the case. The SHCIL is apparently exerting its superior bargaining power over the Authorized Collection Centre, to induce the latter into an unequal contract. The offending part of the proposed agreement appears to be opposed to public policy, and seems unconscionable. But the issue can be decided with finality only after exchange of pleadings."

22. Dealing with the applicability of Article 19(1)(g), his Lordship held: -

45. The right to trade in e-stamps comes within the embrace of Article 19(1)(g) of the Constitution of India. This, however, does not mean that any person has a fundamental right to be appointed as an Authorized Collection Centre. The appointment of Authorized Collection Centre is strictly governed and regulated by the Rules of 2013, and has to be made according to the said Rules.

46. Thus subject to the restrictions imposed by the law, (in this case the Indian Stamp Act, 1899, read with Uttar Pradesh E-Stamping Rules, 2013), the members of the petitioner have a fundamental right to trade in e-stamps. According to the petitioner, the offending condition in the proposed contract and actions of the respondents, curtail the fundamental right of the petitioner in contravention of the permissible restrictions under Article 19(6) of the Constitution of India, and violate Article 19(1)(g) of the Constitution of India.

23. Bhanot J. ultimately proceeded to frame the following operative directions: -

"54. The respondents are granted four weeks time to file their respective counter affidavits'. While filing the counter affidavit, the respondent no. 4-SHCIL shall also state its organizational details and structure, constitution of its Board, the extent of control of the Government both administrative and financial, and any other like information.

55. The SHCIL and the State Government are directed to make the necessary disclosures regarding the actual commission being given to the Stock Holding Corporation of India Limited by the State Government, and reveal the same to the petitioner within two weeks from the date of receipt of a certified copy of this order."

G. SUBMISSIONS BEFORE THIS COURT

24. Before this Court Sri Rajvanshi learned senior counsel has advanced submissions on lines identical to that as urged before the Division Bench. Additionally, he contended that after opinion had been rendered by the Division Bench, the position has worsened with physical stamp paper not being available for purchase by licensed vendors at all. As noted in the very beginning, the State went unrepresented before this Court with designated counsel choosing not to appear or advance submissions.

25. Sri Kshitij Shailendra and Sri Sumeet Kacker appeared on behalf of SHCIL. Adopting the objections taken on behalf of the State respondents before the Division Bench, the attention of the Court was additionally drawn to the decision rendered by the Division Bench of the Gujarat High Court in **Manish**

Jitendrakumar Shah Vs. State of Gujarat to contend that the ban imposed on the sale and distribution of physical non judicial stamp paper by the Government of Gujarat was upheld for reasons recorded therein. Learned counsels further urged that in the absence of any challenge to the policy of e stamping or the 2013 Rules, no relief could be accorded to the petitioner. It was contended that the policy initiative of e stamping as adopted by numerous States across the country did not merit any interference. Stress was also laid on Rule 12 of the 2013 Rules on the basis whereof it was contended that the proposed agreement was in accord with the provisions made therein. It was further stated that the rate of commission is to be mutually agreed upon by parties after entering into the contract and that the proposed contract also puts in place a dispute resolution mechanism which could always be invoked. The attention of the Court was also invited to Clause VII of the proposed agreement which stipulates an ACC being paid 23% of the commission earned by SHCIL from the State and that any change thereto could be made with mutual consent. It was in that backdrop submitted that the remuneration payable to an ACC would never remain static and it was also not sacrosanct. It would be a subject which would always remain open for resolution between parties.

H.THE PRINCIPAL ISSUE

26. Having noticed the two opinions rendered by the learned members comprising the Division Bench and the submissions advanced, the principal issue which essentially arises for consideration is whether the petitioners have been able to establish a prima facie case against the action taken by the respondents which warranted them being required to file a return in these proceedings. Before proceeding to deal with the aforesaid issue, it would be apposite to enunciate two fundamental pedestals in the backdrop of which the challenge would be liable to be evaluated.

27. Firstly, while approaching the issue as formulated above, the Court must necessarily bear in mind that the proceedings instituted by the petitioners are for a certification of claims which are personal to the Association and its members. It is pertinent to underline and highlight here at the outset that the petition has not been brought in public interest. This is evident from the fact that the petitioners assert that the action of the State violates the guarantees held forth by Articles 19(1)(g), 21 and 38 of the Constitution. This aspect would assume significance when the Court proceeds to deal with the question whether the respondents are obliged to disclose the terms of the arrangement between SHCIL and the State Government.

28. It thus becomes necessary and essential to articulate the clear distinction which must be recognised to exist when the Court under Article 226 of the Constitution exercises its powers of judicial review in respect of an action which is personal as opposed and distinct from a petition preferred in larger public interest and not really for individual relief being accorded. The principal distinction is while an individual action is adversarial, a petition preferred in public interest is not. While it may be permissible for the Court while dealing with a public interest litigation to assume an *"inquisitorial*" role in order to

hold the State liable and obliged to give effect to the Constitution and the laws, as opposed to the above, an individual petition must necessarily rest and proceed on material gathered by the petitioner and the validity of the objection and challenge as raised therein. On such a petition it is neither open for the Court to undertake a roving enquiry in order to satisfy itself with regard to the validity of the impugned action nor can the respondents therein be required to produce material on the basis of interrogatories and directives in order to sustain or grant a relief that may have otherwise been sought. Equally important it would be to bear in mind that the scope of the writ petition also cannot be expanded beyond the grounds of challenge which are raised and the reliefs sought in order to subserve some larger public interest, a course which would otherwise be permissible in the case of a public interest litigation.

29. The second aspect which needs to be clearly and unambiguously spelt out arises from the following narration of facts. Undisputedly, the system of e stamping, the appointment of a CRA, the appointment of an ACC are subjects which are governed and controlled by the **Uttar Pradesh E-Stamping Rules, 2013.** The proposed contract as published by SHCIL and assailed by the petitioners is also traceable to the provisions made in the 2013 Rules. However, no challenge was either raised or laid to the statutory rules as framed nor was it contended that the proposed agreement is in violation of or ultra vires any provision made in the 2013 Rules. The policy initiative of e stamping was also not questioned.

30. Having enumerated the broad contours in the backdrop of which the instant challenge would have to be examined and an opinion formed on the question of whether the writ petition raises triable issues which would warrant the respondents being required to respond, the Court now proceeds to deal with the rival submissions which were addressed.

I. COMMISSION FIXED UNDER THE 1942 RULES TO APPLY TO E STAMPS

31. It would be convenient to firstly deal with and dispose of a minor submission which was addressed in challenge to the commission which is proposed to be paid to the petitioners. Sri Rajvanshi, learned senior counsel, submitted that in terms of the provisions made in the 1942 Rules, the members of the petitioner Association are entitled to a commission of Rupee 1 per cent of the face value of the stamp which is being purchased. He would contend that the same rate of commission would be liable to be extended to the petitioners on the sale of e stamps also. While Bhanot J. has not dealt with this issue, Kesarwani J. has rejected this contention by opining that the discount as fixed under the 1942 Rules cannot be held to apply to the sale of e stamps which is governed by the 2013 Rules and puts in place "*a different scheme exclusively governing sale of E stamps*".

32. While not much would depend or turn upon the difference between a "commission" and a "discount", it may nonetheless be clarified that Rule 161 of the 1942 Rules in fact speaks of a "discount" being extended to licensed vendors as opposed to what was described to be a commission. The Rule enables licensed vendors to purchase stamp essentially at a price lower that its face

value and is thus really not a commission as commonly understood, but clearly a discount and which represents the margin that they can retain upon the sale of such stamps.

33. Reverting then to the merits of the argument aforenoted, in the considered opinion of this Court, the view as expressed by Kesarwani J. is clearly unexceptionable. Undisputedly the 1942 Rules principally govern the sale of physical stamps. Rule 161 prescribes a discount when a licensed vendor purchases stamp from the Government treasury. The aforesaid Rule cannot be read as either expressly or impliedly governing or controlling the sale of e stamps. As rightly found by Kesarwani J., sale of e stamps is governed exclusively by the 2013 Rules which in one sense is a complete and comprehensive code governing the sale, distribution and use of e stamps. This Court thus finds itself unable to accept the submission addressed contrary to the above.

J. THE ARTICLE 19(1)(g), 21 and 38 CHALLENGE

34. The challenge on the anvil of Article 19(1)(g) proceeds on the following lines. According to the petitioners, the proposed contract and the statutory obligations which are otherwise cast upon an ACC including the creation of infrastructure for such a center, imposes an onerous financial burden upon them. Sri Rajvanshi learned senior counsel has referred the Court to the averments made in paragraphs 17 to 20 of the writ petition in order to demonstrate and establish that if the members of the petitioner association were forced to enter into the proposed contract, they would inevitably suffer losses and the trade and business of e stamps itself would be rendered unprofitable. Article 19 (1)(g) is thus essentially invoked on the ground of an apprehension of the trade becoming unprofitable and losses bound to be caused if the petitioners were forced to engage in the sale and distribution of e stamps in accordance with the terms set forth in the proposed agreement. Additionally, it was contended that if the system of physical stamps were to be done away altogether, it would result not just in an infraction of Article 19(1)(g) but also Article 21 and 38 of the Constitution since it would result in a loss of livelihood.

35. In order to assess the validity of the aforesaid submissions, it would firstly be apposite to bear in mind that the Indian Stamp Act, 1899, in essence, empowers the Union and the States to impose a tax on instruments that come to be executed. The tax is so imposed by virtue of the legislative field as enumerated in Entry 91 of List I and Entry 63 of List II as set out in the Seventh Schedule to the Constitution. The tax imposed on instruments is traceable to the sovereign power of the State. Neither the Act nor the U.P. Stamp Rules 1942 recognise or confer a right on any individual to trade in or carry on the business of sale of stamps. The petitioners cannot possibly assert or claim a right to engage in the business or trade of stamps outside the contours of the Act and the Rules of 1942 and 2013 as framed thereunder. The right to distribute and sell stamps is granted by the Rules to a certain class of vendors and authorities, ex officio and licensed, as specified in Rule 161 alone. Undisputedly, the members of the petitioner Association are licensed vendors appointed in terms of the provisions made

in Rule 151(a)(x). Their right to deal in stamps is founded exclusively on this license.

36. It becomes pertinent to state that stamps, as envisaged, essentially denote, evidence and exhibit the payment of tax as imposed by the appropriate Government upon a party to an instrument. A right to engage in the trade, business or occupation of collecting tax for and on behalf of the Government was not one which was recognised even in common law. It therefore needs to be understood that the petitioners do not and cannot in law be recognised in law to possess an inalienable right to carry on the trade or business of stamps except in accordance with the grant as conferred under the Act and the Rules framed thereunder.

37. **In Ram Krishnan Kakkanth Vs. Government of Kerala**, the Supreme Court dealing with a challenge raised by pump set distributors to a Government stipulation that farmers who had been extended financial assistance would purchase pumps only from accredited dealers, aptly observed: -

"28. Under clause (1)(g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest (Saghir Ahmad v. State of U.P. [(1955) 1 SCR 707 : AIR 1954 SC 728]).

32. It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any Government or an individual has got a right to enter into contract with a particular person or to determine a person or persons with whom he or it will deal."

38. In the considered opinion of the Court the dictum laid down in **Krishnan Kakkanth** succinctly enunciates the nature and the extent of the right that the petitioners can possibly assert with reference to Articles 19, 21 and 38 of the Constitution. As held in that decision, the petitioners cannot claim an indefeasible right to the grant of a franchise in their favour nor can they claim a license of exclusivity to deal in stamps. It is within the limits of the licensing provisions alone that they can claim a right to an equal opportunity to apply, not to be treated unfairly or be discriminated in the issuance of the grant and the freedom to pursue that occupation and trade subject to valid statutory restrictions that may be imposed and those which may otherwise be applied by law in larger public interest. While it is true that **Krishnan Kakkanth** speaks of the 'freedom' of the Government to enter into a contract", all that may be observed in light of the law as it has developed on that issue, is that as and when the Government does decide to enter into a contract or invite persons to engage with it, its actions must be in accord with the principles of fairness as flowing from Article 14 of the Constitution.

39. In fact, while dealing with the extent of the right that the petitioners can claim by virtue of Article 19 of the Constitution, Bhanot J. also notices and acknowledges the inherent limitations which would apply when his Lordship observes: -

"46. Thus subject to the restrictions imposed by the law, (in this case the Indian Stamp Act, 1899, read with Uttar Pradesh E-Stamping Rules, 2013), the members of the petitioner have a fundamental right to trade in e-stamps."

40. Dealing with the validity of a restriction imposed by the State which provided that stamp paper not exceeding the face value of Rs. 2000, would be made available to licensed stamp vendors, a Division Bench of the Court in **Stamp Vendors Association Vs. State of U.P.** succinctly highlighted the aforesaid position in the following terms:-

14. If one understands correctly the ratio laid down *in Fedco v. S.N. Bilgramai,* AIR 1960 SC 415, prevention of fraud stands comprised within the phraseology experssed in Article 19(6) of the Constitution.

15. Further as *per Deputy Asst. Iron & Steel Controller v. Manik Chand,* (1972) 3 SCC 324 : AIR 1972 SC 935; Farnandez v. Deputy Chief Controller, (1975) 1 SCC 716 : AIR 1975 SC 1208 and Nagendra v. Commissioner, AIR 1958 SC 398 it is clear that the right to sell the stamps is created by grant of a licence under the Indian Stamp Act and the Rules framed by our State under that Act and thus the exercise of the right to sell the stamps is subject to the terms and conditions imposed by the Statute and no fundamental right is infringed by imposition of terms and condition. *In State of Orissa v. Radhey Shyam(1995) 1 SCC 652* : (AIR 1995 SC 855) it was laid down that business interest of an individual can be overridden by the Government policy in the public interest.

16. In sale of the stamps public interest is apparently invovled. From the facts pleaded by the Petitioner it is clear that the limit of Rs. 5,000/- was enhanced to Rs. 8,000/- but now it has been lowered. The amendment made is clearly permissible under Article 19(6) of the Constitution being in the interest of "general public' imposing a reasonable restriction while permitting sale of Stamps worth to the extent of Rs. 2,000/- only to the Stamp Vendors under the provisions of the Stamp Laws. The business secured under Article 19(1)(g). Only a restriction has been imposed which is not arbitrary. We hold that the amendment was made in order to avoid fraudulent use and avoid misuse of stamp papers in the interest of general public as the income of the revenue of the State is public revenue which is being spent for the interest of the general public. We find the grounds devoid of any substance."

41. In fact, if the submission addressed on behalf of the petitioners be accepted in literal terms, it would essentially mean recognizing a right vesting in them to compel the Government to necessarily engage in business or enter into a contract with the petitioners for the sale of physical stamps in posterity to the exclusion of all other modes. As a necessary corollary, the Court would also have to recognise a right inhering in the petitioners to compel parties to instruments to purchase physical stamps. Neither of the above can be countenanced as a right which can be legitimately traced to Articles 19(1)(g), 21 or 38.

42. While it was vehemently contended that the petitioners were bound to suffer losses if they were compelled to

enter into the proposed contract, it becomes pertinent to note that the assertions made in paragraphs 17 to 21 of the writ petition are based entirely on assumptions and presumptions. No material or evidence has been brought forth to establish conclusively that the petitioners would in fact suffer losses. The commission that is supposedly granted to SHCIL by the Government is based on an assumption. It is similarly urged in paragraph 18 that the petitioner "*has been informed by the officials of the Respondent No. 4 that the commission earned by the Respondent No. 4 by the State Government is fixed 0.5% on the sale of E stamps worth Rs. 1,00,000."* The writ petition carries no other material in support of the aforesaid statement. The calculations of revenue that the petitioners would earn on the sale of e stamps is based solely on the aforesaid unsubstantiated averment. The petitioners have also not disclosed the total revenue that is generated from the sale of e stamps in the State so as to compel the Court to prima facie conclude that the proposed contract places onerous conditions upon them. In paragraph 20 of the writ petition, the petitioners raise the issue of a "cash handling charge" that is allegedly levied and collected by Banks. Even in respect of this charge no authoritative material has been brought on the record.

43. The more fundamental question which arises in the aforesaid backdrop is whether Articles 19, 21 or 38 of the Constitution confer a right as claimed by the petitioners to engage in a business, trade or occupation which would necessarily guarantee or sustain a profit or a reasonable rate of return. It is apposite to note here that what the Constitution essentially guarantees is the right to engage in a profession, occupation, trade or business. It neither proffers nor holds forth a guarantee of a profit in that trade or business.

44. Way back in **Malwa Bus Services (P) Ltd. Vs. State of Punjab**, the Supreme Court while dealing with the validity of a cap imposed on returns that could be earned by bus operators on passenger tickets, held: -

"22. It was lastly urged that the levy is almost confiscatory in character and the petitioners would have to close down their business as stage carriage operators. It is stated that the passenger fares were permitted to be raised by about 43 per cent just before the levy was increased in this case and it is even now open to the operators to move the State Government to increase the rates if they feel that there is a case for doing so. But on the facts and in the circumstances of the case, we feel that it is not possible to hold that the impugned levy imposes an unreasonable restriction on the freedom of the petitioners to carry on business. The considerations similar to those which weighed with this Court in upholding the Mustard Oil Price Control Order, 1977 in *Prag Ice & Oil Mills v. Union of India* [(1978) 3 SCC 459 : AIR 1978 SC 1296 : (1978) 3 SCR 293 :1978 Cri LJ 1281] ought to be applied in this case also. Though patent injustice to the operators of stage carriages in fixing lower returns on the tickets issued to passengers should not be encouraged, a reasonable return on investment or a reasonable rate of profit cannot be the sine qua non of the validity of the order of the Government fixing the maximum fares which the operators may collect from their passengers. It cannot also be said that merely because a business becomes uneconomical as a consequence of a new

levy, the new levy would amount to an unreasonable restriction on the fundamental right to carry on the said business. It is, however, open to the State Government to make any modifications in the fares if it feels that there is a need to do so. But the impugned levy cannot be struck down on the ground that the operation of stage carriages has become uneconomical after the introduction of the impugned levy. Moreover the material placed by the petitioners is not also sufficient to decide whether the business has really become uneconomical or not. We do not, therefore, find any merit in this ground also."

45. A business or a trade may become unprofitable or unviable on account of various factors such as the advent of technology, change in consumer preferences, entrance of new competitors, a policy shift of the Government aimed at subserving larger public interest or security of revenue. But in the end, these are mere vagaries of trade which cannot be recognised as constituting the infringement of a fundamental right to carry on that trade or business. While hearing submissions advanced on behalf of the petitioners, it was more than evident that what the petitioners essentially seek to achieve is a perpetuation of the system of physical stamping and the continuation of a business model which is perceived to be threatened by the advent of e stamping. Articles 19, 21 or 38 of the Constitution cannot possibly be invoked for the aforesaid purpose.

46. The Court lastly deems it apposite to advert to the following data which is available on the official website of the Stamp and Registration Department of the Government of U.P.11 According to the data uploaded on the website, 3097 ACC's have already been appointed and are functioning in the State. This should conclusively lay at rest the contention of the petitioner that the trade of e stamps is uneconomical or unfeasible.

47. In a slightly different factual backdrop but not insignificant for our purpose, the Supreme Court while dealing with the issue of entrance of new competitors and their impact on existing businesses in **Mithilesh Garg Vs. Union of India** observed: -

9. Article 19(1)(g) of the Constitution of India guarantees to all citizens the right to practice any profession, or to carry on any occupation, trade or business subject to reasonable restrictions imposed by the State under Article 19(6) of the Constitution of India. A Constitution Bench of this Court in Saghir Ahmad v. State of U.P. [(1955) 1 SCR 707 : AIR 1954 SC 728] held that the fundamental right under Article 19(1)(g) entitles any member of the public to carry on the business of transporting passengers with the aid of vehicles. Mukherjea, J. speaking for the Court observed as under: (SCR p. 708)

"Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19(1)(g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that article."

It is thus a guaranteed right of every citizen whether rich or poor to take up and carry on, if he so wishes, the motor transport business. It is only the State which can impose reasonable restrictions within the ambit of Article 19(6) of the Constitution of India. Sections 47(3) and 57 of the old Act were some of the restrictions which were imposed by the State on the enjoyment of the right under Article 19(1)(g) so far as the motor transport business was concerned. The said restrictions have been taken away and the provisions of Sections 47(3) and 57 of the old Act have been repealed from the statute book. The Act provides liberal policy for the grant of permits to those who intend to enter the motor transport business. The provisions of the Act are in conformity with Article 19(1)(g) of the Constitution of India. The petitioners are asking this Court to do what the Parliament has undone. When the State has chosen not to impose any restriction under Article 19(6) of the Constitution of India in respect of motor transport business and has left the citizens to enjoy their right under Article 19(1)(g) there can be no cause for complaint by the petitioners.

10. On an earlier occasion this Court dealt with somewhat similar situation. The Uttar Pradesh Government amended the old Act by the Motor Vehicle (U.P. Amendment) Act, 1972 and inserted Section 43-A. The new Section 43-A apart from making certain changes in Section 47 of the old Act also omitted sub-section (3) of Section 47 of the old Act. Section 43-A provided that in the case of non-nationalised routes, if the State Government was of the opinion that it was in the public interest to grant permits to all eligible applicants it might, by notification in the official gazette issue a direction accordingly. The necessary notification was issued with the result that the transport authorities were to proceed to grant permits as if sub-section (3) of Section 47 was omitted and there was no limit for the grant of permits on any specified route within the region. Section 43-A and the consequent notification was challenged by the existing operators before the Allahabad High Court. The High Court dismissed the writ petitions. On appeal this Court in *Hans Raj Kehar v. State of U.P.* [(1975) 1 SCC 40 : (1975) 2 SCR 916 : AIR 1975 SC 389] dismissed the appeal. Khanna, J. speaking for the Court held as under: (SCC pp. 44-45, paras 6 and 8)

"The contention that the impugned notification is violative of the rights of the appellants under Article 19(1)(f) or (g) of the Constitution is equally devoid of force. There is nothing in the notification which prevents the appellants from acquiring, holding and disposing of their property or prevents them from practising any profession or from carrying on any occupation, trade or business. The fact that some others have also been enabled to obtain permits for running buses cannot constitute a violation of the appellants' rights under the above two clauses of Article 19 of the Constitution. The above provisions are not intended to grant a kind of monopoly to a few bus operators to the exclusion of other eligible persons. No right is guaranteed to any private party by Article 19 of the Constitution of carrying on trade and business without competition from other eligible persons. Clause (g) of Article 19(1) gives a right to all citizens subject to Article 19(6) to practise any profession or to carry on any occupation, trade or business. It is an enabling provision and does not confer a right on those already

practising a profession or carrying on any occupation, trade or business to exclude and debar fresh eligible entrants from practising that profession or from carrying on that occupation, trade or business. The said provision is not intended to make any profession, business or trade the exclusive preserve of a few persons. We, therefore, find no valid basis for holding that the impugned provisions are violative of Article 19."

The identical situation has been created by Sections 71, 72 and 80 of the Act by omitting the provisions of Section 47(3) of the old Act. It has been made easier for any person to obtain a stage carriage permit under the Act. The attack of the petitioner on Section 80 on the ground of Article 19 has squarely been answered by this Court in *Hans Raj Kehar case* [(1975) 1 SCC 40 : (1975) 2 SCR 916 : AIR 1975 SC 389] ."

48. Upon noticing the content and extent of the right that can be claimed under or recognised to flow from Article 19, it is manifest that the petitioner cannot possibly assert or place an obligation upon the appropriate government to frame a business model which may necessarily guarantee a return or a profit in a particular trade or business. Ultimately it is for the individual to ascertain and assess whether it would be profitable for him to engage in that business or pursuit. Any existing trade would be susceptible to change or disruption in the business environment. In fact disruption is a specter which always exists as technological advances are made and new and more efficient processes evolve. The Constitution holds forth no guarantees against such fluctuations. Regard must also be had to the fact that the system of e stamping as introduced does not compel the petitioner to engage in the trade of e stamp if it be perceived to be unviable by them. The inevitable reach and adoption of the system of e stamping also cannot be stalled only with a view to perpetuate the sale of physical stamps.

K. ARTICLE 19 (6) AND THE REASONABLE RESTRICTION

49. A brief discussion on the concept of a reasonable restriction that may be imposed under Article 19(6) is necessitated in light of the submission that the impugned measures are also violative of Articles 21 and 38 of the Constitution and that they deprive the petitioners of a right to livelihood. That the right to eke out a livelihood is an integral part of the right to life is indisputable. The question here is whether the petitioner and its constituents are in fact being deprived of that right. The second question is whether the right of the petitioners to practice or carry on a trade or business has been arbitrarily restricted. Undisputedly, the rights conferred by Article 19 of the Constitution are neither absolute nor unfettered. They are entitled to be exercised subject to just restrictions that may be imposed by the Government *"in the interest of general public*". The validity of such a restriction as and when imposed and assailed is liable to be tested on the anvil of reasonableness with the Courts striving to strike a balance between the freedom that is guaranteed and the larger public interest that the restriction seeks to subserve. While adjudging the validity of a restriction so enforced, the Court must evaluate its reasonableness not standing in the shoes of the person upon whom that restriction operates but from the viewpoint of the community as a whole. In all such

situations the question to be posed would be whether the restriction has come to be imposed to preserve and protect the larger interests of the community, its social and economic welfare, public order or health.

50. Explaining the interplay between Article 19(1)(g) and the scope of Article 19(6) of the Constitution, the Supreme Court in **Krishnan Kakkanth** had observed as follows:-

"26. After giving our careful consideration to the facts and circumstances of the case and submissions made by the learned counsel for the parties, it appears to us that the fundamental right for trading activities of the dealers in pumpsets in the State of Kerala as guaranteed under Article 19(1)(g) of the Constitution has not been infringed by the impugned circular. Fundamental rights guaranteed under Article 19 of the Constitution are not absolute but the same are subject to reasonable restrictions to be imposed against enjoyment of such rights. Such reasonable restriction seeks to strike a balance between the freedom guaranteed by any of the clauses under Article 19(1) and the social control permitted by clauses (2) to (6) under Article 19.

27. The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the persons affected be petty traders (Mohd. Hanif v. State of Bihar [AIR 1958 SC 731]). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict (Laxmi Khandsari v. State of U.P. [(1981) 2 SCC 600 : AIR 1981 SC 873] ; D.K. Trivedi and Sons v. State of Gujarat [1986 Supp SCC 20] and Harakchand Ratanchand Banthia v. Union of India [(1969) 2 SCC 166 : AIR 1970 SC 1453])."

51. More recently in **Karnataka Live Band Restaurants Assn. Vs. State of Karnataka** the Supreme Court held: -

46. As and when the question arises as to whether a particular restriction imposed by law under clause (6) of Article 19 is reasonable or not, such question is left for the court to decide. The test of reasonableness is required to be viewed in the context of the issues, which faced the impugned legislature. In construction of such laws and while judging their validity, the court has to approach the issue from the point of furthering the social interest, moral and material progress of the community as a whole. Likewise, while examining such question, the Court cannot proceed on a general notion of what is reasonable in its abstract form nor can the court proceed to decide such question from the point of view of the person on whom such restriction is imposed. What is, therefore, required to be decided in such case is whether the restrictions imposed are reasonable in the interest of general public or not.

47. This Court has laid down the test of reasonableness in *State of Madras v. V.G. Row [State of Madras v. V.G. Row*, AIR 1952 SC 196 :

1952 Cri LJ 966] and very succinctly said that it is important, in this context, to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial mind.

48. This Court has further ruled that the expression "in the interest of general public" occurring in clause (6) of Article 19 is an expression of wide import which comprehends in it public order, public health, public security, morals, economic welfare of the community, and lastly, objects mentioned in Part IV of the Constitution. (See Municipal Corpn., Ahmedabad v. Jan Mohammed Usmanbhai [Municipal Corpn., Ahmedabad v. Jan Mohammed Usmanbhai, (1986) 3 SCC 20] and Deepak Theatre v. State of Punjab [Deepak Theatre v. State of Punjab, 1992 Supp (1) SCC 684]."

52. At the outset it may be noted that the petitioner and its members have not been deprived of the right to engage in the trade of physical stamp paper. The Court has also not been shown any decision of the State Government expressly barring or discontinuing the sale and distribution of physical stamp paper. The agreement proposed by SHCIL and the 2013 Rules additionally empower the petitioner to engage in the sale and distribution of e stamps. The argument of a system of livelihood being totally effaced is thus without substance. The petitioners have also failed to establish that the business of distribution of e stamp is wholly unviable or unprofitable. The arguments addressed on this score, as was noted hereinabove, were wholly conjectural and based on assumptions which were not backed by any reliable material or data. In any case the functioning of more than 3000 ACC's in the State is stark testimony of this contention being bereft of substance. It is equally important to note that the 2013 Rules themselves require the CRA to enter into an agreement with ACC's who would be paid a commission on mutually acceptable terms. The Court also bears in mind the submission of Sri Shailendra that the rate of commission which is fixed is not sacrosanct and that it is open to parties to arrive at a mutually agreeable rate of commission. The agreement also puts in place a dispute redressal mechanism which would clearly take care of situations where a dispute as to the rate of commission arises. In any case the rate of commission which is presently proposed has not been established on the strength of cogent material to be wholly uneconomical or bound to cause a loss. While the petitioner may perceive the arrangement proposed by SHCIL to be unviable, that cannot possibly constitute an infringement of a right to carry on trade or business.

53. In order to place in the balance the rights of the constituents of the petitioner and the introduction of the system of e stamping and in order to evaluate the soundness of the challenge that is raised, it would be apposite to go back in time and briefly recapitulate the events which led to the Union and the States adopting this

methodology. The historical backdrop in which e stamping came to be adopted, the reasons which constrained the Government to adopt this secure system of stamping have been duly noted in the communication of the Department of Economic Affairs, Ministry of Finance of the Union Government dated 28 December 2005 extracted hereinbefore.

54. The unique security features which inform the system of e stamping were noticed by the Division Bench of the Gujarat High Court in **Manish Jitendrakumar Shah as under: -**

The security features of e-stamping certificate are as under:

[1] The contents of e-stamp certificate can be verified from the website, www.shcileststamp.com, from anywhere. Also contents can be verified from the Mobile Application: "Estamping" (Android & IOS).

[2] System Generated Certificate: E-stamping certificate is generated on live web. The necessary data like name of the parties, stamp duty payer, amount of stamp duty along with date and time of the e-stamping certificate are generated.

[3] Unique Certificate number: - Unique e-stamp certificate number is generated for each e-stamp. This is system generated and not in serial order wise.

[4] 2D Bar Code: - All the data in the e-stamping certificate, is encrypted in 2D Barcode, which is on all e-stamp certificates. The data is in encrypted form and can be read by e-stamping mobile application or 2D Barcode reader.

[5] Micro Printing: - e-stamping certificate has micro printing text at 1400 dpi, which bears e- stamping certificate number and anti copy text images. This can be verified through 16X and above magnifying glass.

[6] Optical Water Mark: - E-stamping Security paper has optical water mark image with Asoka image. While taking zerox/copy of the certificate, the pattern of the water mark will change.

[7] The e-Stamping Security Certificate contains security features like coloured background with Lacey Geometric Flexible patterns and Subtle Logo images, Complex Ornamental design borders, Anti - Copy text, micro printing artificial watermarks and Overt and Covert features. Some of the features are visible under UV lights and when put against UV light, the image of "Mahatma Gandhi", with some fiber threads and some images can be seen.

[8] A photocopy of the certificate of stamp duty was also placed on record to demonstrate that if the e-stamping certificate is photocopied, irrespective of the level of sophistication of the photocopying machine, an Anti-copy Text will emerge at the relevant place, where the word "VOID" will be reflected.

55. As is manifest from the above, it was the imperatives of the need to evolve a secure system for collection of tax in the shape of stamp duty and the loopholes that were discovered in the light of the Stamp Scam that led to the evolution of this system of payment of stamp duty. The benefits attendant to a system of secure collection of tax subserves public interest from the point of view of both the depositor

of the tax as well as the general public as a whole with tax being collected through a safe and secure system. The adoption of technology in this respect will undisputedly extend innumerable benefits to the larger public interest. The policy initiative so taken by the Government cannot possibly be viewed as placing an unreasonable restriction upon the petitioner to engage in the trade of stamps, physical or in e form.

L. IMPUGNED COMMUNICATION OF 17 JANUARY 2020

56. It becomes pertinent to note that the communication of 17 January 2020 which is impugned does not impose a bar on the sale or distribution of physical stamps. It also does not embody a decision of the Government to do away with the system of physical stamps being used in respect of instruments that may come to be executed for all times to come. All that it states is that till further orders, no fresh indents or demands for procurement of physical stamps be forwarded. Kesarwani J. in his opinion has noted the statement made on behalf of the State that physical stamps of more than Rs. 17,000 crores were in stock with the Government and as per prevailing rate of consumption shall take more than two years to exhaust. This statement would also explain the decision as embodied in the communication of 17 January 2020. The Court further notes that there is no allegation in the writ petition nor was any oral submission advanced that the petitioner or its constituents have been denied physical stamps or that their demands for supply of physical stamps have not been honoured. While Sri Rajvanshi in the course of his oral submissions did contend that physical stamps are no longer available in the State, in the absence of any material on the record in support of the aforesaid, the Court finds no justification to take note of the same.

M. UNCONSCIONABLE CONTRACT AND BARGAINING POWER OF PARTIES

57. The basic legal principles infusing the concept of public functions, of contracts offered by the State and its instrumentalities being judged on the plinth of public law and the applicability of Sections 23 and 29 of the Indian Contract Act to such contracts as eloquently expounded by Bhanot J. is clearly unexceptionable. However, with due respect to the view so taken by the learned Judge, this Court is of the considered view that the aforesaid questions did not arise or fall for consideration at all. The petitioner nowhere assailed the proposed contract or the action of the State on the aforesaid lines. A detailed examination of the writ petition and the various averments made therein would clearly bear this out. In the absence of even a rudimentary platform having been laid in the writ petition in this regard, no occasion arises for the Court to suo moto examine or adjudge the action of the respondents from that perspective.

N. DIRECTIONS FOR DISCLOSURE

58. The petitioner has abjectly failed to make out a case for the respondents being commanded to make disclosures regarding the actual commission being earned by SHCIL. It becomes pertinent to note that in terms of Rule 10 of the 2013 Rules, the commission which the

Government would pay to the CRA is to be duly published in the Gazette. It was always open to the petitioner if it assumed SHCIL to be a public authority to seek such information in accordance with law. It is in this respect that this Court in the introductory part of this opinion had spelt out when and which situations could the constitutional court exercising powers under Article 226 of the Constitution assume an inquisitorial role. In any case the relief as couched in this respect itself establishes that the case of the petitioner of the trade and business of physical stamp being rendered unviable or loss-making rests solely on surmise and conjecture. This since evidently, they themselves are not in possession of requisite facts or convincing data which may even prima facie sustain their assertion of their trade being rendered unprofitable.

O. TO PRESERVE THE SYSTEM OF PHYSICAL STAMPING

59. The Court has in the preceding parts of this opinion already noticed the factual backdrop surrounding the advent and evolution of the e stamping regime. The introduction of this system rests on sound, germane and weighty reasons such as avoidance of fraud and forgery of stamp paper, securing collection of State revenue and a host of other factors which were taken into consideration. E stamping in essence represents a policy initiative formulated by the State. The aforesaid policy decision has neither been assailed nor has it been established to be arbitrary. Ultimately it is for the State to take a principled decision and formulate its policy with respect to the quantity and value of physical stamp paper that may be permitted to circulate and to determine how much of the total demand of stamp paper is to be in the physical or e stamp form. This Court would be treading down perhaps an impermissible or at least uncertain path if it were to either arrogate to itself this power or decide this issue by way of a judicial fiat and that too in respect of an issue which clearly falls in the realm of policy. This Court concurs with the views expressed by Kesarwani J. on this score.

P. SUMMATION

60. Upon an overall consideration of the aforesaid discussion this Court is of the considered view that the petitioner has abjectly failed to lay even a rudimentary platform for the writ petition being retained on the board of the Court and the respondents being called upon to file a return in the proceedings. The petitioner has failed to establish the existence of an unfettered or indefeasible right to trade in stamp paper. That right rests solely upon the grant of a license under the provisions of the 1942 Rules. The right to engage in that trade would thus stand governed by the provisions contained in the license. The right to trade in stamp paper has also not been found to be a one which existed in common law and thus one entitled to be pursued without any fetter or restraint.

61. The right to trade in e stamps is evidently governed by the 2013 Rules. Neither the validity of these Rules nor the policy initiative of the Government in this regard was either questioned or assailed. The proposed contract was also not established to be ultra vires the aforesaid Rules. The submission of the proposed contract being unprofitable was wholly conjectural with the petitioner failing to establish even prima facie that the business would be unviable. In any case if the petitioner does perceive that business to be

unprofitable, it is open to its members not to pursue the same. Article 19 of the Constitution cannot be invoked to require the Court to rework the terms of the contract which is proposed or compel a party to guarantee a particular rate of profit or return.

62. The submission with regard to Articles 21 and 38 is found to be bereft of substance since the Court has not been shown any decision of the State to discontinue the use of physical stamp altogether. The petitioner has also not brought forth any convincing material which may establish a shortage of physical stamp in the State or that any particular indent so placed by a licensed vendor was not honored.

63. It would be wholly inappropriate for the Court to frame any direction commanding the State to continue the system of physical stamping in perpetuity. That would clearly amount to treading in the field of policy, a province reserved for the Executive. It is ultimately for the appropriate Government to consider what quantity of physical stamps should be permitted to be in circulation. These are clearly not issues which this Court can either rule on or dictate while exercising its powers of judicial review.

Q. CONCLUSION

64. In light of the aforesaid discussion and the conclusions recorded, I would dismiss the writ petition.

65. The papers may now be placed before the appropriate Division Bench for disposal of the writ petition in accordance with the Rules of the Court.

(2021)04ILR A265
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2021

BEFORE

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

Writ - C No. 16750 of 2009

Smt. Chanda Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Aalok Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri K.N.Misra

Constitution of India,1950 - Art.226 - Complainant - Locus standi - Essential Commodities Act (10 of 1955) - Complainant challenged order whereby the fair price shop licence of the respondent restored - *Held* - privity of contract between licencing authority and private respondent shall govern the field if the licence has been restored - complainant, does not enjoy the right to litigate the matter invoking extraordinary jurisdiction under Article 226 of the Constitution (Para 3)

Dismissed. (E-4)

List of Cases cited:-

1. Laxminarayan R. Bhattad & ors. Vs St. Of Maha & anr. (2003) 5 SCC 413

2. Utkal University Vs Dr. Nrusingha Charan Sarangi AIR 1999 SC 943

3. Gadde Venkateswara Rao Vs Govt of A.P. AIR (SC)-1966-0-828

4. The Calcutta Gas Company Vs The State of W.B. & ors. (1962) Suppl. 3 SCR 1

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

1. Heard Shri Alok Kumar Srivastava, learned counsel for the petitioner and learned Standing Counsel for the State-respondents. Shri K. N. Mishra, leaned counsel for the respondent no. 6 is not present though the matter is called in the revised list.

2. By means of this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 7th March, 2009 whereby the licence fair price shop of the respondent no. 6 has come to be restored with a penalty of Rs. 2,000/-. The grievance of the petitioner is that complaint was not properly examination and the reasons assigns are not sufficient enough for restoring the licence of the fair price shop.

3. We find that while the writ petition was entertained by this Court under the order dated 10.4.2009 this Court had questioned the maintainability of the present writ petition and issued notices to the respondent no. 6, but declined to grant any interim stay order. The situation has not changed today either. The petitioner is at the most enjoys status a complainant who had a grievance regarding running of the fair price shop licence. The privity of the contract between licencing authority and the respondent no. 6 shall govern the field if the licence has come to be restored by the State-respondent in favour of respondent no. 6, the complainant, in our considered opinion does not enjoy the right to litigate the matter further invoking our extraordinary jurisdiction under Article 226 of the Constitution. The Apex Court in case of ***Laxminarayan R. Bhattad & Ors vs State Of Maharashtra & Anr (2003) 5 SCC 413*** has held that in order to maintain writ petition one can have locus if he has legally enforceable right and that we do not find in the present case. Further invoking the principle laid down in the case of ***Utkal University vs. Dr. Nrusingha Charan Sarangi, AIR 1999 SC 943*** petitioner herein since would not be benefited by cancellation of fair price shop licence, he cannot be aggrieved person to maintain the writ petition.

4. The learned counsel for the petitioner has relied upon the another judgment of the Apex Court in ***Gadde Venkateswara Rao versus Government of Andhra Pradesh, AIR (SC)-1966-0-828.*** In support of his argument that he being a complainant has a right to file a writ petition challenging the order.

5. We have carefully studied the judgment and find that in that case the appellant's right to file petition was upheld on the ground that he was President of the Panchayat Samiti that formed a Committee headed by the same president to collect money/fund to establish a primary health centre and so the committee were trustees of the amount collected and further appellant in that capacity was dealing with officials regarding location of health centre. It is in the backdrop of the above facts peculiar to the said case that applying the principle laid down by the Apex Court in an earlier judgment ***[The Calcutta Gas Company versus The State of West Bengal and others, (1962) Suppl. 3 SCR 1]*** the Court held that a personal right need not be in respect of a proprietary interest, it can also relate to an interest of trustee and even in exceptional case as the expression

'ordinarily' indicates, a person who has been prejudicially affected by an act or opinion of the authority can file a writ even though he has no proprietary or even fiduciary interest in the subject matter thereof.

6. In the said above case the site of primary health centre was sought to be changed inspite of deposit of money by Committee that collected the fund and the land was also donated. The Court then applying the above principle held that appellant has certainly been prejudiced by the said order and petition, therefore, under Article 226 was maintainable. Thus, on facts of the above case cited by the petitioner is distinguishable and the judgment, in our considered opinion, is of no help to the petitioner. .

7. We further notice that in the present case there were a general complaint, including complaint of the petitioner and the authorities have duly applied their mind and in their well considered opinion they have found that there was no serious illegality in discharge of onerous duty of the distribution of essential commodities by the petitioner. We, therefore, do not find it to be an appropriate case where findings of fact so recorded by the authority should be judicially reviewed.

8. Writ petition accordingly fails and is dismissed.

(2021)04ILR A267
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ - C No. 21887 of 2020

Ajay Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dwijendra Prasad

Counsel for the Respondents:
C.S.C

Constitution of India,1950 - Part IX, Art.243D - Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 - Sections 6-A, 7-A, 18-A, 19-A - Reservation of Seats in Panchayat - Freedom Fighter - Reservation of seats in favour of dependents of freedom fighters- in elections of zila panchayat - *Held* - statutory provisions as contained in the Adhiniyam, 1961, as also the provisions under Article 243D do not contemplate the reservation of seats or the offices for dependents of freedom fighters - aim and object of the reservation policy contained in Part IX is to enable the marginalized sections of society namely the scheduled castes, scheduled tribes, women, to participate in the process of democratic decentralization - No such rationale or nexus to support the claim for providing reservation to dependents of freedom fighters in Panchayat institutions could be pointed out before Court. (Para 22, 27)

Dismissed. (E-4)

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

1. Heard Sri Dwijendra Prasad, learned counsel for the petitioner and Sri

Mata Prasad, learned Standing Counsel for the State respondents.

2. The present writ petition has been filed praying for the following reliefs:-

"(i) Issue a writ, order or direction in nature of mandamus to direct the respondent no. 2 to provide the reservation for dependent of freedom fighter in election of Zila Panchayat election area Gangiri First in District Aligarh Uttar Pradesh.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent no. 2 to decide the representation of the petitioner regarding the reservation for dependent of freedom fighter in election of Zila Panchayat election area Gangiri First in District Aligarh Uttar Pradesh.

(iii) Pass such other and further order which this Hon'ble Court deem fit and proper under the facts and circumstances of the case.

(iv) Award the cost of the petition in favour of the petitioner."

3. The petitioner, claiming himself to be a dependent of freedom fighter, has sought to raise a grievance with regard to his claim for reservation in the elections to the Zila Panchayat from the territorial constituency Gangiri (First), District Aligarh. He claims to have filed a representation in this regard to the District Election Officer/District Magistrate Aligarh, a copy whereof has been annexed as Annexure no. 5 to the writ petition, wherein a claim has been made for grant of reservation to the dependents of freedom fighters, in the Zila Panchayat elections to be held for the territorial constituency Gangiri (First) and also the Gram Panchayat elections to be held for the territorial constituency Village Dadon, Block Bijauli, Tehsil Atrauli. To support his claim, the petitioner has placed reliance upon a chart showing the position of reservation of the Gram Panchayat Dadon during the previous elections which is as under :-

अलीगढ़ जिले के विकास खण्ड बिजौली के ग्राम पंचायत दांदों के प्रधान पद का आरक्षण।

क्र0सं0	ग्राम पंचायत का नाम	प्रधान पद का आरक्षण
01	ग्राम पंचायत दादों 1995	पिछड़ी जाति
02	ग्राम पंचायत दादों 2000	पिछड़ी जाति
03	ग्राम पंचायत दादों 2005	महिला
04	ग्राम पंचायत दादों 2010	अनारक्षित
05	ग्राम पंचायत दादों 2015	अनारक्षित

4. The petitioner submits that while reservations have been granted in favour of the other classes, the respondent authorities are acting in an arbitrary manner in not providing reservation for dependents of freedom fighters in respect of the territorial constituency in question.

5. In order to appreciate the controversy the relevant provisions under law may be referred to.

6. Learned counsel for the petitioner, however, has not been able to point out any specific statutory provision in terms of which the claim, with regard to grant of reservation to dependents of freedom fighters in elections to Zila Panchayats and Gram Panchayats, may be made.

7. The subject matter of Panchayats is dealt with under Part IX of the Constitution. Part IX containing Articles 243, 243A to 243O and a new schedule i.e. Eleventh Schedule were inserted by the Constitution (Seventy-third Amendment Act), 1992 with effect from 24.4.1993. The object of the amendment of the Constitution and the insertion of Part IX was to strengthen the Panchayat system by giving it a constitutional base, so as to ensure that Panchayats become vibrant units of administration in rural areas by establishing strong, effective and democratic local administration for rapid implementation of rural development programmes. In terms of the provision contained under Part-IX, a uniform three-tier system of Panchayats i.e. at village, intermediate and district level has been created throughout the country.

8. The terms "district", "intermediate level" and "village", are defined under Article 243, as follows :-

"(a) "district" means a district in a State;

(c) "intermediate level" means a level between the village and district levels specified by the Governor of a State by public notification to be the intermediate level for the purposes of this Part;

(g) "village" means a village specified by the Governor by public notification to be a village for the purposes of this Part and includes a group of villages so specified."

9. Article 243B provides for constitution of Panchayats at each of the three levels, referred to above, in accordance with the provisions under Part IX. Article 243B reads as follows:-

"243B. Constitution of Panchayats--(1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part.

(2)Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs."

10. The reservation of seats in the Panchayats is provided for under Article 243D of the Constitution, which is being reproduced below :-

"243D. Reservation of seats--(1) Seats shall be reserved for-

(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens."

11. The provision for establishment of Panchayats at the intermediate level and the district level in the State of Uttar Pradesh in furtherance of the principle of democratic decentralisation of governmental functions, is contained under the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 19611

12. Section 3 of the Adhiniyam, 1961 provides for division of rural areas into Khands, and Section 5 envisages that there shall be a Kshettra Panchayat for every *Khand.*

13. In a similar manner, Section 17 provides for establishment and incorporation of Zila Panchayats and in terms thereof there shall be a Zila Panchayat for each district.

14 . Keeping in view the objectives and guidelines incorporated in the Constitution (Seventy-third Amendment) Act, 1992 "The Uttar Pradesh Panchayat Laws (Amendment) Act, 1994" [U.P. Act No. 9 of 1994] was enacted providing for amendments to the United Provinces Panchayat Raj Act, 1947 and the Uttar Pradesh Kshettra Samities and Zila Parishads Adhiniyam, 1961. Amongst the various amendments, the long title of the Act, 1961 was amended to read as "Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961".

15. In order to provide for reservation of seats for scheduled castes, scheduled

tribes, women and backward classes of citizens, as envisaged under Article 243D, Section 6-A and Section 18-A were inserted by the U.P. Act No. 9 of 1994 to provide for reservation of seats at the level of Kshettra Panchayat and Zila Panchayat, respectively. For ease of reference, Section 6-A and Section 18-A of the Adhiniyam, 1961 are reproduced below :-

"**6-A. Reservation of seats**- (1) In every Kshettra Panchayat seats shall be reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes and the number of seats so reserved shall, as nearly as may be, bear the same proportion to the total number of seats to be filed by direct election in the Kshettra Panchayat as the population of the Scheduled Castes in the Khand or of the Scheduled Tribes in the Khand or of the Backward Classes in the Khand bears to the total population of such Khand and such seats may be allotted by rotation to different territorial constituencies in a Kshettra Panchayat in such order as may be prescribed.

Provided that the reservation for the Backward Classes shall not exceed twenty seven per cent of the total number of seats in the Kshettra Panchayat.

Provided further that if the figures of population of the backward classes are not available, their population may be determined by carrying out a survey in the prescribed manner.

(2) Not less than one-third of the seats reserved under sub-section (1) shall be reserved for the women belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes, as the case may be.

(3) Not less than one-third of the total number of seats, including the number of seats reserved under sub-section (2) shall be reserved for women and such seats may be allotted by rotation to different territorial constituencies in a Kshettra Panchayat in such order as may be prescribed.

(4) The reservation of seats for the Scheduled Castes and the Scheduled Tribes shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution.

Explanation - It is clarified that nothing in this section shall prevent the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes and the women from contesting election to unreserved seats.

18-A. Reservation of seats- (1) In every Zila Panchayat, seats shall reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes and the number of seats so reserved shall, as nearly as may be, bear the same proportion to the total number of seats to be filled by direct election in the Zila Panchayat as the population of the Scheduled Castes in the Panchayat area or of the Schedules Tribes in the Panchayat area or of the Backward Classes in the Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different territorial constituencies in a Zila Panchayat in such order as may be prescribed.

Provided that the reservation for the Backward Classes shall not exceed twenty seven per cent of the total number of seats in the Zila Panchayat.

Provided further that if the figures of population of the backward classes are not available, their population may be determined by carrying out a survey in the prescribed manner.

(2) Not less than one third of the seats reserved under sub-section (1) shall be reserved for the women belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes as the case may be.

(3) Not less than one third of the total number of seats, including the number of seats reserved under sub-section (2), shall be reserved for women and such seats may be allotted by rotation to different territorial constituencies in a Zila Panchayat in such order as may be prescribed.

(4) The reservation of seats for the Scheduled Castes and the Scheduled Tribes shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution.

Explanation - It is clarified that nothing in this section shall prevent the persons belonging to the Scheduled Castes, the Scheduled Tribes, the Backward Classes, and the women from contesting election to unreserved seats."

16. Clause (4) of Article 243D contemplates reservation of the offices of the Chairpersons in the Panchayats at the village or any other level for scheduled castes, scheduled tribes and women in such manner as the Legislature of a State may, by law, provide.

17. In terms of Section 7 of the Adhiniyam, 1961 in every Kshettra Panchayat a Pramukh shall be elected by the elected members of the Kshettra Panchayat from amongst themselves and Section 7-A provides that the offices of the Pramukhs of the Kshettra Panchayats shall be reserved for the persons belonging to the scheduled castes, the scheduled tribes and the backward classes. In terms of sub-section (2) thereof not less than one-third of the offices reserved under sub-section (1) shall be reserved for the women belonging to the scheduled castes, the scheduled tribes and the backward classes, as the case may be.

18. Section 7-A of the Adhiniyam, 1961 reads as follows :-

"7-A. Reservation of the offices of Pramukhs- (1) The offices of the Pramukhs of Kshettra Panchayats in the State shall be reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes:

Provided that the number of office of the Pramukhs so reserved shall bear, as nearly as may be, the same proportion to the total number of such offices in the State as the population of the Scheduled Castes in the State or of Scheduled Tribes in the State or of the Backward Classes in the State bears to the total population of the State and the offices so reserved may be allotted by rotation to different Kshettra Panchayats in the State in such order as may be prescribed.

Provided further that the reservation for the Backward Classes shall

not exceed twenty-seven per cent of total number of offices of Pramukhs in the State.

Provided also that if the figures of population of the backward classes are not available, their population may be determined by carrying out a survey in the prescribed manner.

(2) Not less than one-third of the offices reserved under sub-section (1) shall be reserved for the women belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes, as the case may be.

(3) Not less than one-third of the total number of offices of Pramukhs, including the number of offices reserved under sub-section (2), shall be reserved for women and such offices may be allotted by rotation to different Kshettra Panchayats in the State in such order as may be prescribed.

(4) The reservation of the offices of Pramukhs for the Scheduled Castes and the Scheduled Tribes under this section shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution.

Explanation- It is clarified that nothing in this section shall prevent the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes, and the women from contesting election to unreserved offices."

19. The Chairperson of a Zila Panchayat namely "Adhyaksha" is to be elected by the elected members of the Zila Panchayat from amongst themselves as per Section 19 of the Adhiniyam, 1961. The reservation of the offices of Adhyaksha is to be made for the persons belonging to the scheduled castes, scheduled tribes and the backward Classes as provided under sub-section (1) of Section 19-A, and in terms of sub-section (2) thereof not less than one-third of the offices reserved under sub-section (1) shall be reserved for the women belonging to the scheduled castes, the scheduled tribes and the backward classes, as the case may be. For ready reference, Section 19-A is being extracted below :-

"19-A Reservation of the offices of Adhyaksha - (1) The offices of the Adhyakshas of the Zila Panchayats in the State shall be reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Classes:

Provided that the number of offices of the Adhyakshas so reserved shall bear, as nearly as may be the same proportion to the total number of such offices in the State as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or of the Backward Classes in the State bears to the total population of the State and the offices so reserved shall be allotted by rotation to different Zila Panchayats in the State in such order as may be prescribed.

Provided further that the reservation for the Backward Classes shall not exceed twenty seven per cent of the total number of offices of Adhyakshas in the State.

Provided further that if the figures of population of the backward classes are not available, their population

may be determined by carrying out a survey in the prescribed manner.

(2) Not less than one-third of the offices reserved under sub-section (1) shall be reserved for the women belonging to the Scheduled Castes, the Scheduled Tribes, or the Backward Classes as the case may be.

(3) Not less than one third of the total number of offices of Adhyakshas, including the number of offices reserved under sub-section (2), shall be reserved for women and such offices may be allotted by rotation to different Zila Panchayats in the State in such order as may be prescribed.

(4) The reservation of the offices of Adhyaksha for the Scheduled Castes and the Scheduled Tribes under this section shall cease to have effect on the expiration of the period specified in Article 224 of the Constitution.

Explanation- It is clarified that nothing in this section shall prevent the persons belonging to the Scheduled Castes, the Scheduled Tribes, the Backward Classes and the women from contesting election to unreserved offices."

20. From the aforementioned statutory provisions, it is seen that reservation of seats and offices at the intermediate level and the district level under the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, is provided for under Sections 6-A, 7-A, 18-A and 19-A, as envisaged under Article 243D of the Constitution.

21. The reservation of seats and also offices of the Chairpersons, provided for under Article 243D, is for the scheduled castes, the scheduled tribes and women. In terms of clause (6) of Article 243D the Legislature of a State is enabled to make provision for reservation of seats in any Panchayat or offices of the Chairpersons in the Panchayats at any level in favour of backward class of citizens.

22. The statutory provisions as contained in the Adhiniyam, 1961, as also the provisions under Article 243D do not contemplate the reservation of seats or the offices for dependents of freedom fighters.

23. The constitutional basis of reservation in the Panchayat institutions at each of its three levels, is as per the provisions under Article 243D. The reservation provided for under Article 243D has an independent and distinct constitutional basis which cannot be compared to the affirmative action measures in terms of the enabling provisions contained under Articles 15 (4) and 16 (4) of the Constitution. The reservation of seats under Articles 15 (4) and 16 (4) of the Constitution are for distributing benefits of higher education and public employment among beneficiaries with a view that access to higher education and public employment would increase likelihood of a gradual socio-economic empowerment of the beneficiaries whereas the object of providing reservation in the Panchayats is to provide for involvement in local-self government which is intended as an immediate measure for empowerment of individuals as well as the community to which the individuals belong to enable their participation in the development process at the grass root level.

24. In order to appreciate the rationale and object for providing for reservation in panchayat institutions, we may refer to the statement of objects and reasons appended to the Constitution (Seventy Second

Amendment) Bill, 1991, which was enacted as the Constitution (Seventy-Third Amendment) Act, 1992. The statement of objects and reasons reads as follows :-

"(1) Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged supercessions, insufficient representation of weaker sections like Schedule Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.

(2) Article 40 of the Constitution which enshrines one of the directive Principles of State Policy lays down that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayat Raj Institutions to impart certainty, continuity and strength to them.

(3) Accordingly, it is proposed to add a new Part relating to panchayats in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of Chairpersons of panchayats at such levels; reservations of seats for the Scheduled Castes and Schedule Tribes in proportion to their population for membership of panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for panchayats and holding elections within a period of 6 months in the event of supercession of any panchayat; disqualifications for membership of panchayats; devolution by the State Legislature of powers and responsibilities upon the panchayats with respect to the preparation of plans for economic developments and social justice and for the implementation of development schemes; sound finance of the panchayats by securing authorization from State Legislature for grants-in-aid to the panchayats from the Consolidated Fund of the State, as also assignments to, or appropriation by, the panchayats of the revenues of designated taxes, duties, tolls and fees; setting up of a Finance Commission within one year of the proposed amendment and thereafter every 5 years to review the financial position of panchayats; auditing of accounts of the panchayats; powers of State Legislatures to make provisions with respect to elections to panchayats under the superintendence, direction and control of the Chief Electoral Officer of the State; application of the provisions of the said Part to Union territories; excluding certain State and areas from the application of the provisions of the said Part; continuance of existing laws and panchayats until one year from the commencement of the proposed amendment and barring interference by courts in electoral matters relating to panchayats;

(4) The Bill seeks to achieve the aforesaid objectives."

25. The aforementioned statement of objects and reasons clearly takes note of the fact situation that though the Panchayat Raj Institutions have been in existence for a long time, they have not been able to acquire the status and dignity of viable and responsive peoples' bodies due to a number of reasons including insufficient representation of weaker sections like scheduled castes, scheduled tribes and women. It was accordingly proposed to provide reservations of seats for scheduled castes and scheduled tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level and reservation of not less than one-third of the seats for women.

26. The intended beneficiaries to whom reservation is to be provided i.e. scheduled castes, scheduled tribes and other backward class of citizens - are clearly identified under Article 243D which is in consonance with the statement of objects and reasons of the Seventy-third Amendment Act, for furtherance of the contemplated aim of democratic decentralization and in order to pursue the objective of ensuring that the traditionally marginalized groups should progressively gain a foothold in the institutions of local self government. The idea of providing reservation under Article 243D is to ensure that a minimum number of seats are provided for and are filled in by the vulnerable sections of the society so as to safeguard their interests by giving them an effective voice in local self government at each of the three levels of the panchayat institutions. This is more so for the reasons that for democratic decentralization to percolate to the grass root level, it would be necessary to empower the vulnerable sections of the society.

27. Claim of the petitioner with regard to providing reservation for dependents of freedom fighters in panchayat institutions is to be tested in the context of the overall scheme as envisaged under Part IX of the Constitution and the corresponding state legislation brought to implement it. The aim and object of the reservation policy contained in Part IX is to enable the marginalized sections of society namely the scheduled castes, scheduled tribes, women and backward classes of citizens, to participate in the process of democratic decentralization by having a share in governance which was hitherto denied to them. No such rationale or nexus to support the claim for providing reservation to dependents of freedom fighters in Panchayat institutions has been pointed out before us.

28. The reservation of seats and offices in the panchayat institutions being governed in terms of the provisions under Article 243D under Part IX of the Constitution and there being no provision thereunder for providing reservation to dependents of freedom fighters, the claim sought to be raised in the present writ petition does not have any legal foundation.

29. Having regard to the aforementioned facts, we are of the view that the writ petition is devoid of merits and is accordingly dismissed.

(2021)04ILR A276
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ - C No. 27107 of 2020

Smt. Mamta Devi ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Sri Yadavendra Mani Mishra, Sri Prashant Shukla

Counsel for the Respondents:
C.S.C.

Civil Law - Essential Commodities Act (10 of 1955) – Section 3 - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order (2016) , Cl.2(j), Section 8(7) - G.O. dated 05.08.2019 para 2 (I) - Fair price shop licence - Cancellation - *Held* - District Supply Officer is competent authority to suspend or cancel fair price shop owner's license, in entire district, which include both urban and rural area - District Supply Officer is not required to take any prior approval of the District Magistrate - Cancellation of fair price shop licence by the District Supply Officer, without prior approval of D.M. proper (Para 9, 10)

Dismissed. (E-4)

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the State respondents and perused the record.

2. Present petition has been filed challenging the impugned order dated 28.2.2020 passed by the respondent no. 2-District Supply Officer, Etawah whereby fair price shop of the petitioner has been cancelled.

3. The Stamp Reporter has reported laches of 208 days in challenging the impugned order.

4. It was submitted by learned counsel for the petitioner is that the petitioner had earlier approached this Court by filing a writ petition being Writ-C No. 17151 of 2020 (Mamta Devi vs. State of UP and another), which was dismissed with liberty to file fresh petition vide order dated 7.12.2020. By drawing attention to the Government Orders dated 13.4.2017 and 6.9.2018, it was submitted that the District Supply Officer is required to obtain approval from the District Magistrate before passing the impugned order. It was submitted that the order of suspension and cancellation can be passed by him only after obtaining permission from the District Magistrate. By drawing attention to Government Order dated 6.9.2018, it was submitted that in paragraph 3 (i) it has been provided that the Sub Divisional Officer can inspect the shop but for suspension/cancellation of the fair price shop he is required to submit his report to the District Magistrate and the District Magistrate may obtain opinion from the District Supply Officer. Submission, therefore, is that the order passed by the District Supply Officer without taking permission from the District Magistrate is without jurisdiction. Attention was also drawn to paragraphs 7 and 17 of the judgement of this Court passed in Writ-C No. 56555 of 2017 (Surendra Yadav vs. State of UP and 2 others) decided on 1.10.2018 wherein in paragraph 7, the Government Order dated 13.4.2017 has been considered and it was noticed that it could not be pointed out by the learned Standing Counsel that before passing the order of suspension the District Supply Officer had obtained written permission from the District Magistrate and therefore, it was held that suspension order cannot be sustained.

5. Per contra, placing reliance on paragraph 2(1) of Government Order dated 5.8.2019 it was submitted by the learned Standing Counsel that the District Supply

Officer has overall jurisdiction both urban and rural and can pass orders including suspension and cancellation. He submits that powers of Sub Divisional Officer were separately defined and therefore, the District Supply Officer has the jurisdiction over the entire district and for passing such orders he is not required to take any permission from the District Magistrate and it is only the Sub Divisional Officer, who has jurisdiction in rural area that too in his Tehsil, is required to take written approval from the District Magistrate.

6. I have considered the rival submissions and perused the record.

7. For ready reference, paragraph 2(i) of the Government Order dated 5.8.2019 is quoted as under:

ष2ण उचित दर दुकानों के विरूद्ध कार्यवाही–

(1) जिला पूर्ति अधिकारी को सम्पूर्ण जिले के (जिसमे नगरीय एवं ग्रामीण दोनों क्षेत्र सम्मिलित होंगे) लक्षित जन वितरण प्रणाली के सभी दुकानों के निरीक्षण तथा उनके विरूद्ध दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) करने का अधिकार होगा। ग्रामीण क्षेत्र में उपजिलाधिकारी अपने तहसील अन्तर्गत सभी दुकानों का निरीक्षण तो कर सकेंगे, किन्तु विक्रेताओं के विरूद्ध दण्डात्मक (निलम्बन/निरस्तीकरण एवं बहाली) कार्यवाही हेतु अपनी आख्या जिलाधिकारी को प्रेषित करेंगे। जिलाधिकारी द्वारा आवश्यकतानुसार सम्बन्धित प्रकरण में जिला पूर्ति अधिकारी से विभागीय अभिमत प्राप्त किया जायेगा। जिलाधिकारी का लिखित आदेश प्राप्त होने के उपरान्त उप जिलाधिकारी द्वारा विक्रेताओं के विरूद्ध दण्डात्मक (निलम्बन/निरस्तीकरण एवं बहाली) की कार्यवाही करते हुए, प्रश्रगत दुकान की स्थिति के सम्बन्ध में ऑनलाइन प्रविष्टि अंकित की जायेगी। उप जिलाधिकारी द्वारा प्रकरण में कृत कार्यवाही की एक प्रति जिला पूर्ति कार्यालय को अनिवार्य तौर पर उपलब्ध करायी जायेगी, ताकि उचित दर विक्रेताओं के कार्यरत होने की स्थिति को अद्यतन किया जा सके।ष (Emphasis supplied)

8. It is not in dispute that the order has been passed by the District Supply Officer, Etawah. In Surendra Yadav (supra), Government Order dated 13.4.2017 only has been considered. However, in the case of *Arjun vs. State of UP and others*, 2018 (10) ADJ 450 after considering joint reading of Government orders dated 17.8.2002, 30.9.2004 and 13.4.2017 this Court held that the District Supply Officer is competent to pass such orders, paragraphs 1, 2, 3, 4, 6 and 7 whereof are quoted as under:

"1. The instant writ petition challenges the order of cancellation dated 14.8.2017. Initially the writ petition was entertained as there was a confusion as to whether the District Supply Officer could have passed the impugned order. Today the learned Standing Counsel has produced the Government Order dated 17.8.2002 and has relied on Clause -12 which is being been reproduced herein under :

षजिलापूर्ति अधिकारी को यह अधिकार होगा कि ग्रामीण क्षेत्र की दुकानों का निरीक्षण तथा अनियमितता पाये जाने पर दुकानदारों के विरूद्ध दण्डात्मक कार्यवाही कर सकते है।"

2. It shows that District Supply Officer had the authority to inspect and take disciplinary action against all fair price shops in the vllages.

3. The learned Standing Counsel further placed reliance on a Government Order dated 30.9.2004 which is also being reproduced herein under:

ष्खाद्य तथा रसद अनुभाग–5 लखनऊः दिनांक 30 सितम्बर, 2004

विषय :– 'ग्रामीण तथा शहरी क्षेत्रों की उचित दर की दुकानों के चयन, निलम्बन/निरस्त्रीकरण एवं

सम्बद्धीकरण के सम्बन्ध में प्रक्रिया का निर्धारण।'

महोदय,

उपर्युक्त विषयक शासनादेश संख्या–2714/29–6–2002–162 सा0/2001, दिनांक 17 अगस्त, 2002, संख्या–2715/29–6–2002–162सा0/2001, दिनांक 17 अगस्त, 2002, संख्या

3577/29–6–03–8 (113)/03, दिनांक 22–10–2003 एवं सख्या–2260/29–6–2004–300 सा0/2003, दिनांक, 29 जुलाई, 2004 तथा समय≤ पर जारी अन्य शासनादेशों की कृपया संदर्भ ग्रहण करें।

2– विभिन्न जिलों द्वारा शासन से ग्रामीण क्षेत्र एवं शहरी क्षेत्र में उचित दर दुकानों के दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) के अधिकार की स्थिति स्पष्ट करने के सम्बन्ध में मार्गदर्शन की अपेक्षा की गयी है। उक्त के प्ररिप्रेक्ष्य में मुझसे यह कहने की अपेक्षा की गयी है कि जिलाधिकारी तथा जिलापूर्ति अधिकारी को सम्पूर्ण जिले के (जिसमें नगरीय एवं ग्रामीण दोनों क्षेत्र सम्मिलित होंगे) लक्षित जन वितरण प्रणाली के सभी दुकानों के निरीक्षण तथा उनके विरूद्ध दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) करने का अधिकार होगा। उप जिलाधिकारी को अपने तहसील में स्थित सभी दुकानों के निरीक्षण तथा उनके विरूद्ध दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) करने का अधिकार यथावत् रहेगा।

3– उपरोक्त शासनादेश उक्त सीमा तक संशोधित समझे जाये।

4. It shows a further authority had been vested in the Sub-divisional Officer to take action against the fair price shop dealers. Thereafter, the learned Standing Counsel drew the attention of the Court to the Government Order dated 13.4.2017 which is being reproduced herein under:

षविषय :– ग्रामीण एवं शहरी क्षेत्रों की उचित दर की दुकानों के चयन, निलम्बन/निरस्तीकरण एवं

सम्बद्धीकरण के सम्बन्ध में प्रक्रिया का निर्धारण।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या–3126/29–6–2004–300सा0/03टीसी, दिनांक 30.09.2004 का कृपया सन्दर्भ ग्रहण करने का कष्ट करें, जिसमें सार्वजनिक वितरण प्रणाली की सभी दुकानों के निरीक्षण और उनके विरूद्ध दण्डात्मक (निलम्बन/निरस्तीकरण) कार्यवाही का अधिकार जिलाधिकारी/जिला पूर्ति अधिकारी को भी प्रदान किया गया है। विभिन्न स्रोतों से शासन के संज्ञान में यह बात लायी जा रही है कि एक ही बिन्दु पर कार्यवाही जिला पूर्ति अधिकारी/उप जिलाधिकारी अथवा जिलाधिकारी को कार्यवाही का अधिकार प्रदान कर दिया गया है, जबकि सार्वजनिक वितरण प्रणाली के सुचारू संचालन का दायित्व सम्बन्धित जिलाधिकारियों को सौंपा गया है।

2– अतः उक्त शासनादेश में आंशिक संशोधन करते हुए इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि उप जिलाधिकारी अपने तहसील में स्थिति सभी दुकानों का निरीक्षण तो कर सकते हैं, किन्तु उनके विरूद्ध दण्डात्मक (निलम्बन/निरस्तीकरण) एवं बहाल की कार्यवाही जिला पूर्ति अधिकारी के माध्यम से पत्रावली पर जिलाधिकारी की लिखित अनुमति प्राप्त करने के उपरान्त ही करेंगे।

3 उक्त शासनादेश दिनांक 30–09–2004 को इस सीमा तक संशोधित समझा जाय।

6. It has been provided in this Government Order that the records of the case would go to the District Magistrate through the District Supply Officer. A joint reading of the three Government Orders dated 17.8.2002, 30.9.2004 and 13.4.2017 makes it clear that the District Supply Officer has, in a given district, powers to take action against the fair price shop dealers. Additionally, the Sub-divisional Officer has also been given powers under the Government Order dated 30.9.2004 but

the same has been curtailed by the Government Order dated 13.4.2017 and the Sub-divisional Officer, though can take action, can do so only after the approval of the District Magistrate.

7. Under such circumstances, the impugned order which has been passed by the District Supply Officer could have very well been passed by him. It was well within the jurisdiction of the District Supply Officer to pass the orders."

(Emphasis supplied)

9. A reference may also be made to the definition of competent authority as provided in clause 2 (j) and clause 8 (7) of the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter referred to the 'Control Order, 2016'), which are quoted as under:

"2. Definitions.-

(a) .....

(j) "Competent Authority" means Collector and includes Additional District Magistrate (Civil supplies), District Supply Officer and Sub Divisional Magistrate or Area Rationing Officer;

8. Operation of fair price shops.

(1) ....

(7) The Competent Authority shall take prompt action in respect of violation of any condition of license including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop owner's license." (Emphasis supplied)

10. Clearly, the District Supply Officer is also the Competent Authority as provided in the Control Order, 2016. Clause 8 (7) of the Control Order, 2016 clearly provides that Competent Authority shall take prompt action in respect of violation of any condition of license including any irregularity committed by the fair price shop owner, which may include suspension or cancellation of the fair price shop licence. It is, therefore, clear that the District Supply Officer is the competent officer to take prompt action under Clause 8 (7) of the Control Order, 2016. Now this position has been clarified in categorical terms by paragraph 2 (I) of the Government Order dated 5.8.2019 quoted above, which clearly provides that the District Supply Officer has overall jurisdiction over the entire district, which include both, the urban and the rural area. It is only in respect of the powers to be exercised by the Sub Divisional Officer in respect of shops situated in the rural area falling in his Tehsil, before passing the order of suspension or cancellation he is required to submit his report to the District Magistrate, who, in turn, if so desire, may seek opinion of the District Supply Officer and it is after obtaining the written approval from the District Magistrate, the Sub Divisional Officer can pass the orders. Thus, it is clear that the powers of District Supply Officer to pass suspension and cancellation order in the given entire district are unfettered and he is not required to take prior approval of the District Magistrate as is in the case of Sub Divisional Officer, whose jurisdiction is limited to the shops situated in the rural area in his Tehsil only.

11. *In Surendra Yadav (supra)* decided on 1.10.2018 judgement of Arjun (supra) decided on 1.12.2017 has not been considered.

12. In any case, in the Government Order dated 5.8.2019 the authority,

jurisdiction and competence of the District Supply Officer has been clarified in absolute terms to the effect that he has jurisdiction to pass order of suspension or cancellation in respect of the entire given district.

13. In such view of the matter, I do not find any force in the argument of learned counsel for the petitioner that the order passed by the District Supply Officer is without jurisdiction.

14. On this count, this petition is devoid of merit and is accordingly dismissed. No other grounds are pressed before this Court.

15. The petitioner is, however, at liberty to challenge the order by filing statutory appeal, if he so desires.

16. No order as to costs.

(2021)04ILR A281
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.03.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/378/407 No. 1367 of 2021

Ali Mohammad & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Devendra Pratap

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973- Section 482 – Quashing of criminal proceedings under Sections 323, 504, 308, 325 I.P.C on basis of Compromise – Non- Compoundable offence- The offence under Section 308 I.P.C. is with regard to the attempt to commit culpable homicide. The said Section of 308 I.P.C. is not compoundable offence either with or without leave of the court- None of the offences are heinous offence affecting public at large, the parties being members of the family- They have no other criminal case between them, therefore, they are entitled to live peacefully as family members in the society- The inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 Cr.P.C. on either of the twin objectives (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine qua non.

It is settled law that the power u/s 482 Cr.Pc can be exercised to quash the criminal proceedings even in non-compoundable offences where the offence arises out of a family dispute, is not heinous and is private and personal in nature, not effecting public life, and the parties have amicably arrived at a compromise rendering the possibility of conviction remote.(Para 11, 12, 13)

Criminal Application accordingly allowed.
(E-2)

Judgements/ Case law relied upon: -

1. Gyan Singh Vs St. of Punj. & anr. (2012) 10 SCC 303

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

1. The case is called out.

2. Learned counsel for the applicants, Sri Devendra Pratap, Advocate and learned A.G.A. for the State, Sri S.P. Tiwari, Advocate are present in the Court.

3. The present application is moved on behalf of the applicants to quash the criminal proceeding in Session Trial No.26/2018, arising out of Case Crime No.858/2015, under Sections 323, 504, 308, 325 I.P.C., Police Station- Kotwali City, District- Hardoi pending before Additional Sessions Judge, Court No.11, Hardoi on the basis of compromise.

4. Sri Shashank Singh, Advocate holding brief of Ms. Anita Singh Nagore, Advocate, put his appearance on behalf of the opposite parties no.2 to 4 through their Vakalatnama, the same is taken on record. Office is directed to get registered the same and duly place on record.

5. Learned counsels for the accused-applicants drew the attention of the court towards their earlier application under Section 482 Cr.P.C. in Crl. Misc. Case No.666/2021, wherein they expressed their willingness to amicably settle their family dispute, by reason of which criminal proceedings in Session Trial No.26/2018 (State Vs. Rahman and Ors.), Case Crime No.858/2015 under Sections 323, 504, 308, 325 I.P.C., Police Station- Kotwali City, District- Hardoi.

6. In view of the willingness of complainants also to amicably settle their dispute, this Court vide its order dated 18.2.2021 in the aforesaid application (Annexure No.1) issued following direction:-

"In view of above, it is directed that the applicants will produce the compromise deed before trial court within two weeks who will fix a date for appearing of both the parties before court concerned and verify the compromise in presence of all the parties to the litigation in accordance with law.

The applicants may take the certified copy of the order of verification of compromise to the court concerned and may approach to this Court for their further remedy.

With the aforesaid direction, the application is disposed of.

Office is directed to provide original compromise deed to the counsel for the applicants in accordance with rules."

7. It is alleged in the instant application under Section 482 Cr.P.C. that the rival parties to aforesaid Sessions Trial No.26/2018 have entered into compromise to settle their all disputes. However, the materials placed on record is lacking the FIR of the incident which may help to gather the nature of the incident, with regard to which FIR was filed by the complainant. However, in para-3 of the application, it is averred by the accused-applicants that, both the parties are family members and with the permission of Hon'ble High Court, compromise was verified by learned court below.

8. From perusal of the direction dated 18.2.2021 passed by this court in Crl. Misc. Case No.666/2021 under Section 482 Cr.P.C. (Ali Mohammad & Ors. Vs. State of U.P. & Ors.) and the prayer made in the instant application, it can be appreciated with all certainty that the matter alleged to have been settled amicably between the

rival parties to the criminal proceeding of Sessions Trial No.26/2018, instituted upon Case Crime No.858/2015 (State Vs. Rahman & Ors.) under Sections 323, 504, 308 and 325 I.P.C., Police Station- Kotwali City, District- Hardoi. Further, pursuant to the direction dated 18.2.2021, when the rival parties to the aforesaid criminal proceeding in Sessions Trial No.26/2018, personally appeared before the trial court alongwith their compromise agreement for verification, a report was made by the trial court on 2.3.2021 (Annexure No.2). The report reveals that the compromise was taken on record in view of the direction dated 18.2.2021 passed by this Court in Crl. Misc. Case No.666/2021. The signatories of the compromise agreement were personally present before the trial court for presentation of their compromise agreement. Learned counsels for the respective rival parties to the criminal proceeding in the Sessions Trial No.26/2018, identified them. Lastly, the trial court recorded its satisfaction that compromise was entered between the signatories of compromise agreement with their free will without any coercion or undue pressure. The compromise agreement is signed by all the parties to the incident namely the complainant, the injured and the accused-applicants.

9. In para-3 of the instant application, it is very clearly stated that they are family members and as such they prayed to decide the case on the basis of compromise.

10. On perusal of the Annexure No.2, the compromise agreement, though have not expressly stated about the dispute between the parties to the agreement i.e., the present accused-applicants and the opposite party nos.2 to 4, but so far as the intent to settle their dispute is concerned, it is obvious on the face of agreement, that they do not want to continue anymore with the Sessions Trial No.26/2018 arising out of Case Crime No.858/2015, under Sections 323, 504, 308, 325 I.P.C., Police Station- Kotwali City, District- Hardoi.

11. The compromise agreement is thus, lawful agreement. The compromise involves the criminal case being tried upon in Sessions Trial No.26/2018 under Sections 323, 504, 308, 325 I.P.C. The offence under Section 323 I.P.C. provides punishment for voluntarily causing hurt and it is made compoundable in the Code of Criminal Procedure, 1973, on the instance of person to whom the hurt is caused. Likewise, the offence under Section 325 I.P.C. is with regard to voluntarily causing grievous hurt and it is also made compoundable on the instance of person to whom such hurt is caused with the leave of the court. The offence under Section 504 I.P.C. is with regard to the intentional insult with the intent to provoke breach of peace is also made compoundable on the instance of person insulted. Lastly, the offence under Section 308 I.P.C. is with regard to the attempt to commit culpable homicide. The said Section of 308 I.P.C. is not compoundable offence either with or without leave of the court, as such, it is clear that except offence under Section 308 I.P.C., all other offences with which the accused-applicants are arraigned in Sessions Trial No.26/2018 are compoundable by the trial court under Section 320 Cr.P.C. Though, the parties to the instant application before this Court are willing to drop the criminal proceeding under the aforesaid sessions trial on the basis of their amicable settlement by way

of compromise. It is not possible for the trial court to drop the proceeding by reason of it lacking the competence of compounding the offence under Section 308 I.P.C.

12. In view of the above circumstances, it would be in the interest of justice to take into consideration, the compromise of the rival parties i.e., accused-applicants and opposite party nos.2 to 4 to the instant application for the purpose of dropping of the criminal proceeding in view of the law laid down by Hon'ble Apex Court in the case of ***Gyan Singh Vs. State of Punjab & Anr.*** reported in ***2012 (10) SCC 303***, if the signatories of the duly verified lawful agreement of compromise be not permitted to settle their dispute on the basis of compromise and the proceeding of the Sessions Trial No.26/2018 be not quashed, accordingly, the entire exercise of the trial court in continuance of the sessions trial would be futile and against the wishes of the parties. Moreover, none of the offences are heinous offence affecting public at large, the parties being members of the family, it would be just and proper to allow their prayer for quashing of the charge-sheet No.74/2015 and criminal proceeding in Sessions Trial No.26/2018 under Sections 323, 504, 308, 325 I.P.C. They have no other criminal case between them, therefore, they are entitled to live peacefully as family members in the society.

13. ***In Gian Singh Vs. State of Punjab and Anr. (Supra),*** Hon'ble Apex Court in para 41, 42 and 43 has held as under:-

"41. In Rajiv Saxena and others v. State (NCT of Delhi) and another (2012) 5 SCC 627, this Court allowed the quashment of criminal case under Sections 498-A and 496 read with Section 34 IPC by a brief order. It was observed that since the parties had settled their disputes and the complainant agreed that the criminal proceedings need not be continued, the criminal proceedings could be quashed.

42. In a very recent judgment decided by this Court in the month of July, 2012 in Jayrajsinh Digvijaysinh Rana v. State of Gujarat and another[36], this Court was again concerned with the question of quashment of an FIR alleging offences punishable under Sections 467, 468, 471, 420 and 120-B IPC. The High Court refused to quash the criminal case under Section 482 of the Code. The question for consideration was that inasmuch as all those offences, except Section 420 IPC, were non-compoundable offences under Section 320 of the Code, whether it would be possible to quash the FIR by the High Court under Section 482 of the Code or by this Court under Article 136 of the Constitution of India. The Bench elaborately considered the decision of this Court in Shiji alias Pappu33 and by invoking Article 142 of the Constitution quashed the criminal proceedings. It was held as under:-

"10. In the light of the principles mentioned above, inasmuch as Respondent No. 2 - the Complainant has filed an affidavit highlighting the stand taken by the Appellant (Accused No. 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the Constitution, we accept the terms of settlement insofar as the Appellant herein (Accused No. 3) is concerned.

11. In view of the same, we quash and set aside the impugned FIR No. 45/2011 registered with Sanand Police Station, Ahmedabad for offences punishable Under Sections 467, 468, 471, 420 and 120-B of IPC insofar as the Appellant (Accused No. 3) is concerned. The appeal is allowed to the extent mentioned above".

43. In Y. Suresh Babu v. State of A. P. (2005) 1 SCC 347 decided on April 29, 1987, this Court allowed the compounding of an offence under Section 326 IPC even though such compounding was not permitted by Section 320 of the Code. However, in Ram Lal and Anr. v. State of J & K 1999 2 SCC 213, this Court observed that Y. Suresh Babu 2005 1 SCC 347 was per incuriam. It was held that an offence which law declares to be non-compoundable cannot be compounded at all even with the permission of the Court."

14. The question is with regard to the inherent power of the High Court in quashing the criminal proceeding against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 Cr.P.C. Hon'ble Apex Court in ***Gian Singh (Supra)*** has answered that the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 Cr.P.C. on either of the twin objectives (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine qua non.

15. In the case of ***Gian Singh (Supra),*** the concluding para-57 is of much essence to be quoted hereunder so as to form an opinion of this Court to allow the prayer of present accused applicants:-

"57. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of

quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

16. On the basis of aforesaid discussions and considering the dispute with regard to the offences allegedly to have been committed by the present accused-applicants is amicably settled with the victims of the offence. Since they are not heinous and serious offences of mental depravity or offences like murder, rape, dacoity etc., the charge-sheet and further proceeding flowing therefrom in Sessions Trial No.26/2018 may be quashed in view of the compromise.

17. The charge-sheet no.74/2015 filed by the police and the criminal proceedings flowing therefrom in Session Trial No.26/2018, arising out of Case Crime No.858/2015, under Sections 323, 504, 308, 325 I.P.C., Police Station- Kotwali City, District- Hardoi are quashed and the trial court is directed accordingly to drop the proceedings.

18. The prayer made in the instant application by the accused-applicants and opposite parties no.2 to 4 is ***allowed.***

19. The present application under Section 482 Cr.P.C. is ***disposed of.***

20. The Deputy Registrar (Criminal) is to communicate the order of this Court to the learned court below (Additional Sessions Judge, Court No.11, Hardoi) promptly.

(2021)04ILR A286
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.3.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/378/407 No. 1520 of 2021

Babu @ Naseem & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sheikh Mohammad Ali

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973- Section 190- Cognizance of offences by Magistrate- It is settled view that though the Magistrate is not required to pass a detailed order when taking cognizance on the chargesheet but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed format- While passing a judicial order including the order of taking cognizance of offences pursuant to perusal of charge sheet, as the case is in the instant matter, the Court is required to apply it's judicial mind. The order of taking cognizance cannot be passed in stereotype and mechanical manner. The application of mind over the matter must reflect from the order of taking cognizance of offence by the Court, otherwise the same cannot be said a legally passed order.

Although the Magistrate is not required to pass a detailed order while taking cognizance of the offences, but he has to apply his judicial mind and the order taking cognizance must reflect application of mind. An order passed in a stereotyped and mechanical manner in a printed format is wholly impermissible and unsustainable in the eyes of law. (Para 10, 11)

Criminal Application disposed of. (E-2)

Case law/ Judgements relied upon:-

1. Fakhruddin Ahmad Vs St. of Uttaranchal & anr.,(2008) 17 SCC 157

2. Prasad Shrikant Purohit Vs St. of Maha. & anr. (2015) 7 SCC 440

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

1. The case is called out.

2. Learned counsel for the applicants Sri Sheikh Mohammad Ali, Advocate and learned A.G.A. for the State are present in the Court.

3. The present application under Section 482 Cr.P.C. is moved on behalf of accused-applicants with following prayer:-

"That by means of the instant petition petitioners are challenging the impugned summoning order dated 16.9.2020 passed by Additional Civil Judge (J.D.)/Judicial Magsitrate-II, Bahraich in Criminal Case No.9645/2020, State Versus Babu @ Naseem and others, relating to case crime no. 204/2020, under Sections 323, 504, 506, 452, 325 of I.P.C. at police station Huzurpur, District Bahraich by means of which the petitioners have been summoned to face the trial on the basis of false and concocted story and also against the charge sheet dated 11.6.2020."

4. On perusal of record, it seems that vide order dated 16.09.2020, learned Additional Civil Judge (J.D.)/Judicial Magsitrate-II, Bahraich purported to have taken cognizance of offence and issued summons, fixing 13.10.2020, to the accused. It is obvious from the face of the summons that it is a typographical format having several blanks to be filled mutatis mutandis as and when required. It further appears that the blanks are filled up with date only and lastly the initial is put by the concerned Additional Civil Judge (J.D.)/Judicial Magsitrate-II, Bahraich.

5. Nothing has been endorsed with regard to perusal of the charge sheet, consideration upon the evidences, satisfaction as to constitution of offence found thereupon, is recorded in the handwriting of the said Judicial Magsitrate-II, Bahraich. It manifest on it's face that

there is a non-application of judicial mind by the concerned officer.

6. The order dated 16.09.2020 of summoning the accused challenged in the instant application under Section 482 Cr.P.C. is being reproduced hereunder so as to find out the answer whether the concerned court, Additional Civil Judge (J.D.)/Judicial Magsitrate-II, Bahraich has legally taken cognizance of offence, while passing the order aforesaid and to further discuss legality of passing the summoning order against a person in a criminal case, in such a mechanical way, by filling the blanks in the typographed format. The order dated 16.09.2020 is quoted hereunder:-

न्यायालय अपर सिविल जज(अ0ख0)/जे0एम0 द्वितीय,बहराइच

मु0सं0–9645/20

सरकार बनाम– बाबू उर्फ नसीमफ आदि

धारा - 323]504]506]452]325 I.P.C.

अ0सं0– 204/20

थाना–हुजूरपुर

आज यह आरोप पत्र जरिये सी0ओ0 पेरोकार द्वारा प्राप्त हुआ। केस डायरी एवं समस्त प्रपत्रों का अवलोकन किया, संज्ञान लिया गया।

आदेश

दर्ज रजि0 हो। अभियुक्त जरिये सम्मन दिनांक 13–10–2020 को तलब हो।

अपर सिविल जज(अ0ख0)/

/जे0एम0 द्वितीय बहराइच

7. Passing of summoning order in such a mechanical way without reflecting the application of judicial mind over the allegations/police report under Section 190 of the Criminal Procedure Code, 1973 by the Magistrate has become prevalent in their practice, as it is seen in applications moved by aggrieved persons before the High Court under Section 482 of the Cr.P.C.

8 .In para 17 of ***Fakhruddin Ahmad Vs. State of Uttaranchal and Another reported in (2008) 17 SCC 157,*** Hon'ble the Supreme Court held as under :-

"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 little 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."

9. It would be pertinent to cite some more decisions of Hon'ble the Supreme Court which found place in the judgment in the case of ***Prasad Shrikant Purohit Vs. State of Maharashtra and Another reported in (2015) 7 SCC 440***. The relevant paras are quoted hereunder:-

68. Mr Lalit, learned counsel in the course of his submissions relied uponAjit Kumar Palit v. State of W.B. [AIR 1963 SC 765 : (1963) 1 Cri LJ 797] In the said decision with reference to the expression "cognizance" a three-Judge Bench of this Court has explained what is really meant by the said expression in the following words in para 19: (AIR p. 770)

"19. ... The word "cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means--become aware of and when used with reference to a court or Judge, to take notice of judicially. It was stated in Gopal Marwari v. Emperor [1943 SCC OnLine Pat 5 : AIR 1943 Pat 245] , by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in R.R. Chari v. State of U.P. [AIR 1951 SC 207 : (1951) 52 Cri LJ 775 : 1951 SCR 312] (SCR at p. 320 : AIR at p. 210) that the word "cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in Sourindra Mohan Chuckerbutty v. Emperor[1910 SCC OnLine Cal 41 : ILR (1910) 37 Cal 412] : (ILR at p. 416: SCC OnLine Cal)

"...taking cognizance does not involve any formal action, or indeed action of any kind; but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.'

Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled." (emphasis supplied)

In the above-extracted portion the reference made to the earlier judgment inR.R. Chari case reported in R.R. Chari [AIR 1951 SC 207 : (1951) 52 Cri LJ 775 : 1951 SCR 312] (AIR at p. 210, para 8) that the word "cognizance" was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence throws sufficient light to state that at that very moment when a Magistrate takes judicial notice of an offence, the requirement of cognizance of such offence will get fulfilled. Therefore, the said decision also fully supports our conclusion on the question of taking cognizance by the competent court.

72. In R.R. Chari [AIR 1951 SC 207 : (1951) 52 Cri LJ 775 : 1951 SCR 312] , in para 8, this Court made it clear that the word "cognizance" is used by the Court to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. Therefore, primarily cognizance of an offence takes place when a Judicial Magistrate applies his mind and takes judicial notice of the offence. In fact that is what has been even statutorily stipulated under Section 190(1) CrPC.

73. In Darshan Singh Ram Kishan [(1971) 2 SCC 654 : 1971 SCC (Cri) 628 : AIR 1971 SC 2372] , in para 8, with particular reference to Section 190, this Court has held as under: (SCC p. 656)

"8. 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."

(emphasis supplied)

The above passage referred to in the said decision makes the position explicitly clear that cognizance would take place at a point when a Magistrate first takes judicial notice of the offence either on a complaint or on a police report or upon information of a person other than the police officer. Taking judicial notice is nothing but perusing the report of the police officer, proceeding further on that report by opening the file and thereafter taking further steps to ensure the presence of the accused and all other consequential steps including at a later stage, depending upon the nature of offence alleged, to pass necessary order of committal to Court of Session.

74. In Salap Service Station [1994 Supp (3) SCC 318 : 1994 SCC (Cri) 1713] , the question as to what is the implication of a supplementary report filed by the investigating agency under Section 173(8) CrPC was considered. While dealing with the same, it has been stated as under in para 2: (SCC p. 319)

"2. ... It may be mentioned here that in the supplementary charge-sheet allegations are to the effect that there was violation of Direction 12 of the Control Order. The question of taking cognizance does not arise at this stage since cognizance has already been taken on the basis of the main charge-sheet. What all Section 173(8) lays down is that the investigating agency can carry on further investigation in respect of the offence after a report under sub-section (2) has been filed. The further investigation may also disclose some fresh offences but connected with the transaction which is the subject-matter of the earlier report. ... The purpose of sub-section (8) of Section 173 CrPC is to enable the investigating agency to gather further evidence and that cannot be frustrated. If the materials incorporated in the supplementary charge-sheet do not make out any offence, the question of framing any other charge on the basis of that may not arise but in case the court frames a charge it is open to the accused persons to seek discharge in respect of that offence also as they have done already in respect of the offence disclosed in the main charge-sheet. The rejection of the report outright at that stage in our view is not correct." *(emphasis supplied)*

The above statement of law with particular reference to Section 173(8) CrPC makes the position much more clear to the effect that the filing of the supplementary charge-sheet does not and will not amount to taking cognizance by the court afresh against whomsoever again with reference to the very same offence. What all it states is that by virtue of the supplementary charge-sheet further offence may also be alleged and charge to that effect may be filed. In fact, going by Section 173(8) it can be stated like in our case by

way of supplementary charge-sheet some more accused may also be added to the offence with reference to which cognizance is already taken by the Judicial Magistrate. While cognizance is already taken of the main offence against the accused already arrayed, the supplementary charge-sheet may provide scope for taking cognizance of additional charges or against more accused with reference to the offence already taken cognizance of and the only scope would be for the added offender to seek for discharge after the filing of the supplementary charge-sheet against the said offender.

10. On the basis of law laid down by Hon'ble the Apex Court, thus it is settled view that though the Magistrate is not required to pass a detailed order when taking cognizance on the chargesheet but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed format.

11. While passing a judicial order including the order of taking cognizance of offences pursuant to perusal of charge sheet, as the case is in the instant matter, the Court is required to apply it's judicial mind. The order of taking cognizance can not be passed in stereotype and mechanical manner. The application of mind over the matter must reflect from the order of taking cognizance of offence by the Court, otherwise the same cannot be said a legally passed order.

12. The conduct of Judicial Officer concerned in passing such order purporting to be taking cognizance order on typographed format by filling the blanks is condemnable and deserved to be deprecated.

13. Our High Court has repeatedly assailed and deprecated in number of decisions, the practice adopted by some of the Judicial Magistrate, of passing the order of taking cognizance on typographed format filling the blanks only, and summoning persons as accused, without application of mind and set aside such orders remitting the matter to the concerned Court for passing the order taking cognizance of offence afresh. Even then, the habit of passing such orders is extent.

14. It cannot be said that such judicial officers are not aware of the decision given over their practice to pass order on typographed format containing reflection of application of mind while taking cognizance of offence over complaint, allegations/charge sheet or otherwise on information received from other sources but the instances of passing such orders are still found in their practice.

15. The impugned order dated 16.09.2020, is therefore, set aside, the matter is remitted to the Court concerned for passing the order of taking cognizance on perusal of charge sheet submitted by the police on 11.06.2020, in Case Crime No.204/2020, under Sections 323, 504, 506, 452, 325 of I.P.C. at Police Station Huzurpur, District Bahraich recording satisfaction as to the evidences collected by the Investigating Officer so as to make a finding as to the constitution of offence, if any, thereupon specifically stating the relevant Sections of the offences and whether they are triable by them or not then only to issue the process, like summoning the accused accordingly.

16. The District and Sessions Judge, Bahraich is also required to circulate

amongst the officers, the direction issued by the High Court time to time, their decisions alongwith the decision in this case also.

17. Accordingly, the present application under Section 482 Cr.P.C. is ***disposed of.***

18. Deputy Registrar (Criminal) is directed to communicate this order to the Court concerned i.e. Additional Civil Judge (J.D.)/Judicial Magsitrate-II, Bahraich immediately.

(2021)04ILR A292
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.03.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/378/407 No. 1699 of 2021

Patiram & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Nijam Ahamad

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973- Section 482 – Quashing of criminal proceedings under Sections 452, 336, 323, 427 of I.P.C on basis of Compromise – Non-Compoundable offence- None of the offence, in which the present accused-applicants are arraigned, is falling under those heinous offence like murder, rape or dacoity, which falls under the categories, categorized as heinous and inacceptable for mutual settlement between the offender and the victim-The inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 Cr.P.C. on either of the twin objectives (i) to prevent abuse of the process of any court or (ii) to secure the ends of justice, is a sine qua non.

It is settled law that the power u/s 482 Cr.Pc can be exercised to quash the criminal proceedings even in non-compoundable offences where the offence arises out of a family dispute, is not heinous and is private and personal in nature, not effecting public life, and the parties have amicably arrived at a compromise rendering the possibility of conviction remote**.** (Para 13, 17, 18, 19)

Criminal Application disposed of. (E-2)

Case law/ Judgements relied upon:-

1. Gyan Singh Vs St. of Punj. & anr. (2012) 10 SCC 303

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

1. The case is called out.

2. Heard learned counsel for the applicants and learned A.G.A. for the State.

3. The present application under Section 482 Cr.P.C. is filed by applicants Patiram, Suresh Chandra @ Suresh, Smt. Vimla and Sandeep Kumar against private opposite party nos.2 to 4 namely Avadhesh Verma, Raj Bahadur Verma and Sunil Kumar.

4. From the array of parties, it appears that applicant nos.1 & 2 i.e. Patiram and Suresh Chandra @ Suresh are real brothers whereas applicant no.3, Vimla is wife of Patiram and applicant no.4, Sandeep Kumar is son of Patiram. The parties to the

application namely applicant nos.1 to 4 and private opposite party nos.2 to 4 are residents of same village i.e. Rustampur under the Police Station Ibrahimpur, District Ambedkar Nagar.

5. Earlier to this application under Section 482 Cr.P.C., the applicants had filed another application under Section 482 Cr.P.C. bearing Criminal Misc. Case No.777 (U/s 482) of 2021 with averment as to the amicable settlement between rival parties to the Criminal Case No.1817 of 2016, pending in the Court of Chief Judicial Magistrate, Ambedkar Nagar Judgeship. That was disposed of with direction vide order dated 18.02.2021 by this Court to the learned trial court i.e. Chief Judicial Magistrate, Ambedkar Nagar that if any compromise, as informed by parties to that application, has already been entered into by them, is filed before it, it shall issue notice to all it's signatories requiring their personal presence and, thereafter, to proceed to verify the compromise in accordance with law within thirty days from the submission of compromise before it. The Court has further directed that if compromise is verified, a report to that effect shall be endorsed by the trial court on the order sheet of the case making the compromise part of the record. It was further directed, the parties to obtain certified copies thereof. Learned court below was also directed to consider the compromise so as to dispose of the case on the terms of compromise between the parties and if any of the offence is not compoundable under Section 320 Cr.P.C., the applicants were given liberty to approach this Court again alongwith report of learned court below and duly verified compromise.

6. Pursuant to the order of this Court dated 18.02.2021, the compromise entered into between the rival parties of aforesaid criminal case was presented before the trial court where the Criminal Case No.1817 of 2016 (State Vs. Patiram and others), arising out of Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar is pending.

7. The instant application under Section 482 Cr.P.C. is moved by the applicants, Patiram and others with a prayer that the Court, in exercise of power under Section 482 Cr.P.C. be pleased to quash the entire proceeding of Criminal Case No.1817 of 2016 (State Vs. Patiram and others), arising out of Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar pending in the Court of learned Chief Judicial Magistrate, Ambedkar Nagar as well as the impugned chargesheet no.57 of 2016 dated 19.09.2016 submitted against the applicants by the Investigating Officer in aforesaid case as the parties to the aforesaid criminal trial have amicably settled their dispute and the compromise agreement between them has been duly verified in accordance with law. It is alleged that the trial court has not quashed the proceeding on the basis of the said compromise by reason of some of the offences being non-compoundable under Section 320 Cr.P.C.

8. The said duly verified compromise by the trial court and certified copy of the report by the trial court dated 03.03.2021, is annexed in the instant application as annexure nos.6 and 7 respectively.

9. When the instant application under Section 482 Cr.P.C. presented by the applicant nos.1 to 4, the private opposite

party nos.2 to 4 have also put their appearance instantly through their learned counsel in whose favour the private opposite parties (the complainants) have duly executed vakalatnama. Their presence through vakalatnama is taken on record.

10. Learned counsel for the applicants and learned counsel for the private opposite party nos.2 to 4 made a joint prayer to quash the criminal proceeding in aforesaid Criminal Case No.1817 of 2016 (State Vs. Patiram and others), arising out of Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar on the basis of amicable settlement of dispute between them, as reflects from the compromise, made annexure no.6.

11. On perusal of the compromise, annexure no.6, undoubtedly it is a lawful agreement between the aforesaid applicants who are made accused in the Criminal Case No.1817 of 2016 (State Vs. Patiram and others), arising out of Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar, on lodging of first information report by the private opposite party nos.2 to 4, namely Avadhesh Verma, Raj Bahadur Verma and Sunil Kumar. The same is duly verified also by the Trial Court in presence and attendance of signatories' thereof, in accordance with law.

12. From the bare perusal of the first information report, certified copy whereof is made annexure no.2 to this application, it appears that on the date of incident viz. 27.06.2016 at about 02:00 P.M., the present accused-applicants nos.1 to 4 are alleged to demolish the wall, already built on the Ancestral Abadi Land of the private opposite party nos.2 to 4 and, when the complainant, private opposite party no.3 resisted the present accused-applicants from such mischief being done, a fracas occurred, even they chased the private opposite parties, the complainants inside their house and beaten them.

13. From perusal of the F.I.R. version, it appears that the dispute turned violent, as arisen between the parties with regard to a property dispute, none of the offence, in which the present accused-applicants are arraigned, is falling under those heinous offence like murder, rape or dacoity, which falls under the categories, categorized as heinous and inacceptable for mutual settlement between the offender and the victim, in the judgment of ***Gian Singh Vs. State of Punjab and Anr. reported in (2012) 10 SCC 303***.

14. Reverting to the annexure no.6, the compromise entered between the aforesaid parties, obviously the complainants of the Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar (the private opposite party nos.2 to 4 in the instant application) and the accused-applicants in the instant application and both have made their personal appearance before the trial court and the trial court on due identification from their learned counsels, has duly verified the compromise in terms of lawful agreement between the parties. The terms of the agreement make it further clear that, parties to the aforesaid criminal case are permanent resident of the same village and as neighbours, are well conversant with each other since a long, they have cordial relations but by reason of the incident reported in F.I.R on 27.06.2016, the relations became tense,

however, now on mediation of reputed people of the village, friends and relatives, the parties have resiled their inimical relations and do not want to litigate any more, they amicably have settled their dispute without any coercion, with their free will.

15. The offences which were found made out from the evidences collected during investigation, on the basis whereof, the charge sheet dated 19.09.2016 is submitted before the trial court, appears some compoundable and non-compoundable offence both. Since, Section 320 of the Cr.P.C. provides competence of the trial court in compounding offences categorized therein only, therefore, the trial court did not drop the proceedings in terms of compromise, as the case is running before it for trial, involves some non-compoundable offence also. For the reason, the present application under Section 482 Cr.P.C. is submitted before this Court again with the aforesaid prayer of the dropping of the proceeding before the trial court in terms of the compromise.

16. Offence under Section 452 I.P.C. is made punishable for doing House-trespass after preparation for hurt, assault or wrongful restrain, is punishable with imprisonment upto seven years and fine, is non-compoundable. Other offences under Section 323, 427 I.P.C. are compoundable. As such, learned trial court in view of the order dated 18.02.2021 could not drop the proceeding being non-compoundable offence included in the charges with which accused-applicants are arraigned in the trial. The compromise entered into by rival parties with intention to amicably settle their dispute seems to be a lawful agreement. Even before this Court, the parties have representation through their counsels who asserted that the parties to the litigation before the trial court have willingly entered into the compromise with their free will without any undue pressure or coercion and their intention is clear to restore their cordial relations which was existing between them before the incident in question, for the reason of which, the F.I.R. was lodged and they are not willing to make further prosecution through the trial.

17. The trial, irrespective of their compromise, if continued, the entire exercise by the Court will ultimately be futile, therefore, in view of Hon'ble the Supreme Court's judgment in para 43 of the case of ***Gian Singh Vs. State of Punjab and Anr. (Supra). Para 42*** is being quoted hereunder:-

"In a very recent judgment decided by this Court in the month of July, 2012 in Jayrajsinh Digvijaysinh Rana v. State of Gujarat and another[36], this Court was again concerned with the question of quashment of an FIR alleging offences punishable under Sections 467, 468, 471, 420 and 120-B IPC. The High Court refused to quash the criminal case under Section 482 of the Code. The question for consideration was that inasmuch as all those offences, except Section 420 IPC, were non-compoundable offences under Section 320 of the Code, whether it would be possible to quash the FIR by the High Court under Section 482 of the Code or by this Court under Article 136 of the Constitution of India. The Bench elaborately considered the decision of this Court in Shiji alias Pappu33 and by invoking Article 142 of the Constitution quashed the criminal proceedings. It was held as under:-

"10. In the light of the principles mentioned above, inasmuch as Respondent No. 2 - the Complainant has filed an affidavit highlighting the stand taken by the

Appellant (Accused No. 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the Constitution, we accept the terms of settlement insofar as the Appellant herein (Accused No. 3) is concerned.

11. In view of the same, we quash and set aside the impugned FIR No. 45/2011 registered with Sanand Police Station, Ahmedabad for offences punishable Under Sections 467, 468, 471, 420 and 120-B of IPC insofar as the Appellant (Accused No. 3) is concerned. The appeal is allowed to the extent mentioned above".

18. Ultimately the question is whether the offences referred in the present application under Section 482 Cr.P.C. in the trial, whether all the parties have amicably settled their dispute by way of compromise, made annexure no.7, are not willing to litigate any more, be permitted to do so and if it is, then what would be the fate of proceeding in the trial in question. Para 57 of the judgment delivered by Hon'ble the Supreme Court in the case ***of Gian Singh Vs. State of Punjab and Anr. (Supra)*** answers and explains all the situations under such circumstances. Para 57 is quoted hereunder:-

57. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and

continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

19. In view of the above discussions, in exercise of the discretion vested in the Court which is extra ordinary power under Section 482 of the Cr.P.C., (i) to stop the abuse of process of the Court and (ii) to ensure the ends of justice in terms of the compromise showing parties willingness to settle their dispute, the charge sheet dated 19.09.2016 in Criminal Case No.1817 of 2016 (State Vs. Patiram and others), arising out of Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar is quashed consequent thereupon, the learned trial court is directed to drop the proceeding of Criminal Case No.1817 of 2016 (State Vs. Patiram and others), arising out of Case Crime No.106 of 2016, under Sections 452, 336, 323, 427 of I.P.C. relating to Police Station Ibrahimpur, District Ambedkar Nagar.

20. Deputy Registrar (Criminal) to communicate this order of Court to learned trial Court i.e. Chief Judicial Magistrate, Ambedkar Nagar immediately.

21. Accordingly, the present application under Section 482 Cr.P.C. is ***disposed of.***

(2021)04ILR A297
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2021

BEFORE

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

Criminal Appeal No. 4795 of 2012

Smt. Madhu Goswami & Anr.
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Piyush Kumar Shukla

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

Criminal Law - Indian Penal Code, 1860- Section 299- Section- 302- Section 304- Murder or Culpable homicide not amounting to murder- The medical evidence, the complaint and the evidence of witnesses corroborates the injuries caused to the deceased and the other facts of the said incident is proved by the evidence led namely occular as well as documents produced- Section 299 or Section 304 I.P.C.- clear from the F.I.R. that there was a heated discussion and during the quarrel, both the accused had used what can be said to be Sabbal with which about six injuries were caused and

one of them was on the frontal parietal region which seems to have proved fatal to the deceased who was an aged person. The blows were not on other vital parts of the body. It was not any such instrument which can be said to be dangerous weapons- The accused was not carrying weapon rather they brought from the home-The blow was an act of sudden quarrel-There was no pre-meditation there was heat of passion.

Where the offence occurred in a sudden moment of heat and passion, without any pre-meditation, a solitary fatal injury was inflicted on vital part of body and without use of any dangerous weapons, the offence would be one under Section 304 of the IPC instead of Section 302. (Para 13, 19, 20, 21, 22)

Criminal Appeal partly allowed. (E-2)

Judgements/ Case law relied upon:-

1. Stalin Vs St. Rep. by the Inspr. of Police, Crl. Appeal No.577 of 2020 dated 09/09/ 2020 (arising out of SLP (Crl.) No.3171 of 2019)

2. Vijay Bhai Patel Vs Navneet Bhai Nathu Bhai Patel, 2004 SCC (Crl) 2032

3. Pulicherla Nagaraju Vs St. of A.P., (2006) 11 SCC 444

4. Mehir Gope Vs St. of Jhar., AIR 2021 SC 534

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

1. Heard Shri Piyush Kumar Shukla, learned counsel for the appellants and learned AGA for the State. The judgment was ordered to be pronounced on 9.4.2021 but as Courts were closed, we direted matter to be listed on 16.4.2021, but the surge of Covid cases may force Courts to be closed on 16.4.2021, hence, we pronounce judgment today, i.e., 13.4.2021.

2. This appeal has arisen from the judgement and order dated 2.11.2012 passed by learned Additional Sessions Judge, Jhanshi in Sessions Case No.72 of 2010 in State of U.P. v. Jai Prakash Goswami and another (Case Crime No.1498/09) under Section 302 and 504 I.P.C lodged in Police Station Sipri Bazar, District Jhansi. The learned Sessions Judge convicted both the accused for life imprisonment under Section 302 read with section 34 of Indian Penal Code with fine of Rs.5,000/- and in default for one year simple imprisonment.

3. The factual scenario as it unfurls from the record and the F.I.R are that the accused in unison caused death of the deceased on 2.9.2009 in the morning. The genesis of the offence as narrated in the first information report is that the deceased along with his wife and daughter was going to Temple, his wife Kastoori and sister of the complainant Radha Rai also were following him. It is mentioned in the first information that Radha Rai who was married with one Daya Chand Rai. Daya Chand Rai had deserted his sister and had performed another marriage for which maintenacne petition was also pending in the Court at Jhansi. Unfortunatley, Madhu Goshwami and her husband is known to Daya Chand and it was because that the parties are unable to amicably settle the dispute with Madhu Goswami and her husband Jai Prakash and his wife started abusing the deceased and during the ultercation Jai Prakash brought what can be said to be to iron rodes (known as "Sabbal') and after further abusing both husband and wife started assaulting the father and when neighbours entering, both husband and wife ran towards Rasbahar Colony and when the complainant reached the place of the offence, his father was lying injured and he

conveyed to the complainant that Madhu Goswami and her husband Jai Prakash Goshwami had beating with Sabbal. The Complainant tried to arrange for vehicle to take him to hospital, but he succumbed to the injures. The Complainant lodged the complaint with the Police Station Incharge. It is this F.I.R. which gave rise to the investigation being carried out against both the accused.

4. The prosecution started against both the accused who are husband and wife for commission of offence under Section 302 read with section 34 of Indian Penal Code and the charge sheet was laid against them for commission of offence under Section 302 read with section 34 of Indian Penal code. The accused were committed to the court of session as the case was triable exclusively by the court of sessions.

5. It is admitted position of fact that both the accused are in jail. The decision of the trial court was pronounced on 2.11.2012 since the said date they are in jail. The bail application came to be rejected on 8.1.2013. We are not aware as to whether during the trial the accused were enlarged on bail or not.

6. The prosecution examined several witnesses so as to bring home the charge framed against the accused as enumerated hereinbelow:

1.	Deposition of Satya Prakash Rai	25/05/10, 16/06/10 and 30/07/10	PW1
2.	Deposition of Radha Rai	04/09/10, 01/10/10 and 25/10/10	PW2
3.	Deposition of Kasturi	04/12/10, 20/12/10 and 17/01/11	PW3
4.	Deposition of Dr. Anil Kumar Saxena	09/03/11	PW4
5.	Deposition of Sri Ram Patel	04/06/11	PW5
6.	Deposition of Jai Narayan Verma	30/06/11	PW6
7.	Deposition of Rajeev Pratap Singh	29/07/11	PW7

7. In support of ocular version following documents were filed:

1.	First Information Report	02/09/09	Ex.Ka.4
2.	Written Report	02/09/09	Ex.Ka.1
3..	Recovery Memo of blood stained and plain earth	02/09/09	Ex. Ka.2
4	Recovery memo of Sabbal and arrest of accused	07/09/09	Ex. Ka.13
5.	Postmortem Report	02/09/09	Ex.Ka.3
6.	Report of Vidhi Vigyan Prayogshala	01/07/10	Ex. Ka.15
7.	Site Plan with Index	02/09/09	Ex.Ka.12,16

8. Learned counsel for the appellant has contended that if this Court feels that the case is made out against the accused that they have caused the death and that the evidence led is such which proves there presence overt act and the instrument used and that they are not to be accorded benefit of doubt, he presses into service the provisions of Section 304 of the I.P.C as the incident occured on spare of the moment, there was no meeting of the minds to do away with the deceased there was no such great enmity that the accused had any intention to do away with the deceased. The evidence of so called eye witnesses also proves that it was not a pre-planned attempt to do away with the accused in early part of the morning. It is no bodies case that the accused were in waiting for the deceased to pass through their home. It is submitted that even on bare reading of the F.I.R. and the oral testimony as well as the enjuries sustained, the offence would be murdered. According to the learned Advocate, on the evidence of all witnesses has convicted the accused under Section 302 I.P.C., which could not have been done.

9. The following judgments of the Supreme Court are cited by the learned counsel so as to contend that offence under Section 302 is not made out and that the decisions would applying in the facts of this case:

(i) Stalin v. State represented by the Inspector of Police, Criminal Appeal No.577 of 2020 dated 9th September, 2020 (arising out of SLP (Crl.) No.3171 of 2019)

10. It is further submitted in his oral submission that PW-2 Satya Prakash is not an eye witness of the incident and there is material contradiction as regard place of occurrence of the incident It is submitted that the witnesses have in their ocular version stated that incident occurred in front of house of the accused namely Jai Prakash Goswami whereas the site plan shows that the incident is at an another place. As far as the testimony of PW-3, Radha Devi is concerned, her husband has already contracted second marriage and she has not stated as to which side of the sambal was used as an assaulting weapon and her Police statement is recording after seventeen days. It is submitted that accused no.2 did not use any weapon. It is submitted that the projected eye witnesses were in fact not eye witnesses. It is further submitted that in the alternative, if this Court does not accept that there are material contradictions and the offence is proved against the accused, it is submitted that there were no repeating of blows on any of the vital parts of the body, and, therefore appellants have no intention to commit murder. The prosecutions case even if relied cannot take it beyond punishment of part 2 of the IPC and it is fruther submitted that the decision of Stalin (Supra) will apply to the facts of this case.

11. Learned counsel for the State has taken us through the record and has contended that the vital part of the body was attacked by both the accused may be the deceased had no previous enmity, but they were having knowledge that inflection of Sambal would bring about death of the deceased and the intention was also there, otherwise they would not have inflicted blows on the vital parts of the body by the instruments used by them which were recovered during the investigation. It is further submitted that there was prior meeting of minds as sambal was given by Jai Prakash to his wife. It is further

submitted that minor contradictions about stick and sambal cannot be the cause to throw out the case of the prosecution. There are very minor contradictions in the evidence led. It is further submitted that the injuries are found on the deceased on the frontal parietal region and it is submitted that both the accused in unison attacked with sabbal and the use of power also will not show that the case falls in section 304 of the I.P.C..

12. It would be necessary to discuss the evidence of complainant who is son of the deceaced and pw2 who is mother of complainant namely she was examined as PW-2 who was eye witness and PW-3 daughter of deceased who were accompany deceased when the incident occurred and also eye witness. We discuss the finding as far as injuries on the deceased as per post-mortem report as it is submitted that after making submissions, the learned counsel for the appellants has also made his submission that even if the evidence is sifted, it would prove that the accused had no intention of doing away with the deceased and, therefore, sympathy is invoked for a lesser sentence. The evidence of PWs-2 and 3, and proves the fact that incident occurred in the morning and the accused were not armed with Sabbal but brought from their home and assaulted the deceased with Sabbal. The deceased died on the spot and when corss examination is minutely read and sifted the submission of the counsel for the appellants can be tested on the basis of the evidence also. The evidence cannot be said to be any way concocted and is corroborated by the factual data. PW-2 and PW-3 were with the father (deceased) and their narration corroborates the complaint namely incident occurred near the house of the accused from where blood soil was collected during the investigation. The exact place where the accused fled and the direction given by both the eye witnesses was proved. The sambal (Sabbal) was found at the behest of the accused from a place which would be known only to them. The medical evidence shows that the narration which PW-2 and PW-3 was gave impetus to the investigation and no fault can be found with the investigation. The evidence of Doctor also goes to show that the post mortem report corroborated with the weapon used namely sabbal, the medical evidence corroborated the fact that injuries could be possible because of use of sabbal and the death was also possible because of thrashing/beating by the sabbal. In that view of the matter, this evidence is important. We find no reason to differ with the finding of facts by the court below and submissions made by learned counsel for the State that the accused were the persons who had caused the death.

13. The medical evidence, the complaint and the evidence of witnesses and medical evidence corroborates the injuries caused to the deceased and the other facts of the said incident is proved by the evidence led namely occular as well as documents produced and proved which we have gone through. **The finding of facts are not be disturbed holding accused guilty.**

14. The police authorities were examined. The police authrities in their ocular version has stated that the statement of the witnesses were recorded and site plan is prepared and recovery of blood and instrument is proved. The statements are also recorded under Section 313 of the Code of Criminal Procedure wherein

nothing to prove their innocence is brought on record.

15. We are convinced that both oral testimony and documentary evidence on record of the trial court were sufficient so as to record conviction for the following reasons. One the F.I.R. was a prompt F.I.R. The presence of the accused is proved by the eye witnesses. Recovery memo of sabbal was from a place which could have been known only to the accused on which there were bloodstains present, the death occurred near the house of the accused. The medical evidence shows that the death occurred due to use of Sabbal which is proved by the evidence of Dr. Anil Kumar Saxena, PW-4. PW-2 and PW-3 have also identified both the accused. There is no reason to disbelieve the eye witness PW-2 and PW-3 as were following the deceased. Over and obove, there is an oral dying declaration to the son by his father namely deceased that he was beaten by both Madhu and her husband. Just because the statement of PW-2 was recorded on 28th September, it cannot cast doubt on her presence at the scene of offence. The decision of the Apex Court in **Vijay Bhai Patel v. Navneet Bhai Nathu Bhai Patel, 2004 SCC (Crl) 2032**, this judgment has been rightly not applied in favour of the accused as the statements have been proved by cogent evidence as there only minor contradictions. The officer has explained the delay during that period and, the learned Judge has given detail reason for accepting the ocular version of PW-2, Smt. Radha Rai, daughter of the deceased who has been rightly belived by the learned judge below and, therefore, the submission made by learned cousnel for the appellants that the appellants are innoncent and that they have been falsely implicated, cannot be accepted. We are also convinced that the F.I.R. cannot be said to be delayed the submission that it was given after due deliberation just because family members were consulted, cannot be accepte. It cannot be said that the F.I.R. was a forged F.I.R. The fact that PW-2 had narrated the incident to her brother namely the person who lodged the F.I.R. as he not an eye witness. The fact that the learned court below has accepted that in a case of eye witness motive pales into insignificance the learned judge has relied on several judgments which we have gone through, we do not wish to burdent the judgment. We are convinced that the accused and accept the submission of the learne AGA.

16. The accused are in jail since more than nine years. It is an admitted position of fact that from the evidence led PW-2 and PW-3 have opined that they used to go to the temple passsing the house of the accused since last about 3 to 4 years. They are regular ultercation it was on that date is turned viaolent the medical evidence as per the deposition of Dr. Anil Kumar Saxena goes to show that the injuries which were caused to the deceased were mainly as follows:

(i) One lacerated wound on left side of forehead 7 cm x 2 cm between left eye and left eyebrow bone deep on dissect-frontal bone, membrane ruptured and brain matter lacerated and about 100mm blood present in crawel.

(ii) One lacerated wound 5 cm x 2 cm between chin and mouth bone deep under neck maundable frachered situates 3 cm from left bone of chin.

(iii) One lacerated wound on right leg anterior side 7 cm x 1 cm subcutaneous deep situated 15 cm from left knee.

(iv) One lacerated wound on right leg midle side. Bone deep 16 cm from right knee on dissect both tibia and fibula.

(v) One lacerated wound on anterior side of left knee anterior side 3 cm x 2 cm muscle deep.

(vi) One lacerated wound on anterior side of left leg 3 cm x 2 cm muscle deep.

17. The submission of the learned cousnel for the appellants is that looking to post mortem cuppled with the evidence of the eye witnesses and medical evidence, the accused cannot to be said to have committed murder and, therefore, it is further submitted that in a case of **Stalin (supra)** and, benefit was accorded therefore, the accused should be dealt with a similar sentence. The place of incident is where the accused are staying and have their house and all of them were having a verbal sudden quarrel. The external injuries was by an instrument which cannot be said to be such which was used for commiting murder there was no pre-meditation of mind. It is further submitted that the alternative prayer requires to be considered.

18. This takes us to the issue of whether the offence would be punishable under Section 299 or Section 304 I.P.C.

19. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

***"299. Culpable homicide**: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

20. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the	(1) with the

intention of causing death; or	intention of causing death; or
b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

21. It is very clear from the F.I.R. lodged by the son of the deceased which has been proved by the prosecution and other witnesses of facts that there was a heated discussion and during the quarrel, both the accused had used what can be said to be Sabbal with which about six injuries were caused and one of them was on the frontal parietal reason which seems to have proved fatal to the deceased who was an aged person. The blows were not on other vital parts of the body. It was not any such instrument which can be said to be dangerous weapons. There was the evidence of PW-2 and PW-3 and when read as a complete testimony would show that there was no such enmity between the parties. The judgment of Stalin (supra) permit us to hold that the tests given in **Pulicherla Nagaraju v State of A.P., (2006) 11 SCC 444** and as narrated above in our case, the accused was not carrying weapon rather they brought from the home the blow was in act of sudden quarrell there was no pre-meditation there was hit of passion in this view of the matter and the letest decision we are convinced that the case could fall within section 304 of the IPC.

22. We are even fortified in our view by the latest decision of the Apex Court in Khokan alias khokhan Vishwas v. State of Chhattishgarh, AIR 2021 SC 939 which shows that in similar facts the decision we are taking would be in consonance with the facts as proved hereinabove and the said decision and the findings would apply to the facts of our case also. In that view of the matter, we are inclined to substitute life imprisonment to ten years with all benefits of remission under sections 433 and 434 of the I.P.C. namely remissions and also the decision of the Apex Court in case titled as **Mehir Gope v. Sate of Jharkhand, AIR 2021 SC 534** and, therefore, the case would fall within Section 304 of the IPC.

23. The accused are in jail for a period of more than 9 years. It is a matter of fact as it is transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for commission of offence under Section 304 of I.P.C. read with Section 34 but not with 302 read with Section 34 I.P.C. The punishment is reduced to ten years incarceration, the fine is maintained, if the

fine is not paid, the sentence would be default sentence of three months simple imprisonment.

24. The concerned jailor shall immediately compute the period and if remissions are granted, if any, the accused have to be released. He shall do so immediately on completion of the sentence.

25. Record and proceedings be sent back to the trial court.

26. This court is thankful to Shri Piyush Kumar Shukla and learned AGA for ably assisting this Court in getting this old matter disposed off.

(2021)04ILR A305
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.04.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 2868 of 1983

Moosa & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.S.Chaturvedi, Sri S.I.Jafri, Sri Mohammad Khalid, Sri Nazrul Islam Jafri, Sri Prashant Vyas

Counsel for the Opposite Party:
A.G.A., Sri I.M.Khan, Sri Shahabuddin, Sri R.N. Sharma

Evidence Law - Indian Evidence Act, 1872- Section 3- Evidence of related witnesses- The evidence of such witness is to be closely scrutinized, with extra care and caution. It cannot be rejected merely for the reason that they are closely related to the complainant. If on a careful scrutiny, their testimony is found to be intrinsically reliable and trustworthy, then nothing prevents the court from placing reliance upon the same.

It is settled law that relationship of a witness does not effect his credibility, however, the Court has to treat the same with caution and extra care.

Evidence Law - Indian Evidence Act, 1872- Section 3- Minor embellishments which do not go to the root of the case is not fatal to prosecution case- minor inconsistencies or insignificant embellishments in the statement of witnesses should yield to the fallibility of human faculties and be ignored if the evidence is otherwise trustworthy and corroborates in material particulars.

Minor embellishments and exaggerations which do not go to the root of the case of the prosecution are to be ignored provided the evidence is trustworthy and corroborated by other material evidence.

There is clinching evidence to prove the prosecution case. The ocular version stands corroborated by the medical evidence. The accused had come armed with deadly weapons and in prosecution of the common object commited the offence. (Para 28, 34, 35)

Criminal Appeal accordingly rejected.(E-2)

Case Law/ Judgements relied upon:-

1. Yogesh Singh Vs Mahabeer Singh & ors. (2017) 11 SCC 195

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The instant appeal has been preferred against the judgment and order

dated 21.11.1983 passed by the Special Judge, Dacoity Affected Areas, Etah, in S.T. No. 411 of 1982 (leading case), connected with S.T. No.416 of 1982, convicting the appellants under Section 148/302/149 IPC and sentencing them to rigorous imprisonment of two years and life imprisonment and fine of Rs. 1000/- each, with default clause.

2. The prosecution case is that the deceased victim Mohammad Yusuf Khan, brother of the first informant Moosa Khan, was sleeping on the chabutra of his house in village Samaspur in the night of 8/9 July 1982 alongwith other relatives and family members. His cot was on the eastern side of the chabutra, a raised platform 2 - 2½ feet high. His brother Moosa Khan (PW1), uncle Usman Khan (PW2) son of Mohammad Ismail Khan, Abdul Rauf Khan son of Attaullah Khan and son Ishrat Yaar Khan (PW3), were sleeping on his side. At about 2 A.M. in the night, Nawab son of Ayub, Moosa son of Ayub, Kallu son of Naviullah, Kudush son of Yasmeen and Mushir son of Bashir Khan, all residents of village Samsapur came armed with rifles and guns. Nawab exhorted Moosa to fire saying that "maar saale ko bahut bada neta banta hain" and upon which Moosa using his tamancha (pistol) and Kudush using his gun fired at Yusuf hitting him on the left and back side. On shouting of the first informant, Mosina son of Yakub Khan and Nannoo Khan son of Mehmood Khan and other persons came running. They saw all the five accused with their arms in moon light and torch light. Since it was month of Ramzan, a lighted lantern was also hanging from the wall of Masjid on the northern side of the chabutara. They chased the accused but they managed to escape under cover of gunfire. They carried the injured Mohammad Yusuf to the police station but on way, he died. The body was taken to the police station and a FIR was got registered by the brother Moosa Khan (PW1) at Police Station Ganjdundwara, District Etah on 9.7.1982 at 2:55 A.M.

3. The postmortem of the dead body was carried out by Dr. P.K. Jain (PW 6) on 9.7.1982 at 1 P.M. The following anti-mortem injuries were found on the body: -

1. Multiple firearm wounds of entry each 1/4 cm x 1/4 cm x cavity deep on the right back of chest in an area of 15 cm x 12 cm, 4 cm away from midline.

2. Firearm wound of entry 1.5 cm x 1.5 cm x through and through on the left anterior axillary line 10 cm above left anterior superior iliac Spine.

3. Firearm wound of exit 3 cm x 3 cm on the left posterior axillary line, 15 cm above the iliac crest.

4. Firearm wound of entry 1½ cm x 1½ cm x cavity deep on the right mid axillary line, 15 cm above the right iliac crest.

5. Abraded contusion 5 cm x 1 cm on the front of right leg 2 cm below the knee.

4. There was no blackening around wound nos. 1, 2 and 4.

5. On internal examination he found blood present in the tissues below injury no. 1. The right scapula was found fractured, both the pleura were found lacerated and there was about 40 oz. of clotted and liquid blood in the cavity. There were 42 pellets and one yellowish metallic

piece recovered from the right and the left side of the cavity. There was some blood also underneath the muscles of injuries nos. 2 and 4. Peritoneum was grossly lacerated and there was about 20 oz. of blood in the cavity of the stomach. The stomach and the small intestines were found empty but the large intestine was full of faecal matter. According to the doctor, death was due to shock and haemorrhage as a result of antemortem injuries and these injuries were sufficient in the ordinary course of nature to cause death. The doctor was examined as PW6 (Dr. P.K. Jain) and he proved the postmortem report (Ext.Ka-16).

6. Inquest on the dead body was held at 5 A.M. the same day. The Investigating Officer recorded the statement of witnesses and thereafter reached the spot and inspected it. The site plan prepared by him is Ext.Ka-8. He collected blood-stained and ordinary earth from the site of incidence. These are material Exts. 4 and 5. The Fard is Ext. Ka-9. He found one tickli at the spot. It was sealed in a separate packet. The tickli is material Ext. 3. He also inspected the lantern which allegedly lighted the place of incidence. He also inspected the torches allegedly flashed by Moosa Khan, Usman Khan and Nanney. The memos prepared for these materials are Exts. Ka-10 to Ka-12 respectively. As he suffered a fracture in his leg, the remaining investigation was carried out by Sri M.P. Singh Bhadauriya S.I. On 2.8.1982, he recorded the statements of the accused and on 4.8.1982 forwarded charge sheet Ext.Ka-13 against all the accused. The chik report (Ext.Ka-14) and the copy of the entries made in the G.D. at that time (Ext.Ka-15) were also duly proved by PW5.

7. The prosecution examined five witnesses. The informant Moosa Khan was examined as PW1. He is real brother of the deceased victim. PW2 is Usman Khan, uncle of the deceased victim. PW3 Ishratyar Khan is son of the deceased victim. All are eye witnesses of the incidence. PW4 is Constable Atar Singh, a formal witness. He had submitted an affidavit stating that he brought the dead body of Yusuf Khan in a sealed cover to Etah for postmortem. PW5 Dinesh Kumar Sisodiya is the then SHO of police station Ganjdudhwara, who investigated the case. The next witness PW6 is Dr. P.K. Jain of District Hospital, Etah who carried out postmortem on the dead body

8. The accused were confronted with the prosecution case and the incriminating evidence led against them by the prosecution witnesses. They pleaded innocence. The accused Moosa Khan admitted relationship between the accused persons, but denied that he and Kudush are *Sadoos.* He alleged that he was falsely implicated and was not present at the place of occurrence. He admitted that his father Yameen, Ashraf (cousin brother of accused Nawab) and Moosa Khan contested election against Yusuf Khan, but lost the same. He alleged that Munan Khan is his cousin brother to whom Yusuf Khan's sister was married, but she has been deserted. He alleged that it is for the said reason that he was falsely implicated. The other accused Kallu also made similar statement and alleged that he was falsely implicated on account of *partybandi*. He denied that he exhorted others to shoot at Yusuf Khan or himself fired at the deceased. The accused Mushir and Kudush made statements similar to that made by Moosa. They alleged that all the witnesses being of one family, have made false depositions against them. The Trial Court found them guilty of

offences under Section 148 and 302 IPC (read with Section 149 IPC.

9. During pendency of the appeal, Appellant nos. 1, 2 and 5 had died and the appeal in their respect was dismissed as abated. The appeal survives only in relation to Appellant no. 3 Kudush and Appellant no. 4 Mushir.

10. We have heard Sri G.S. Chaturvedi, learned Senior Advocate, assisted by Sri Prashant Vyas, Advocate, Sri N.I. Jafri, learned Senior Advocate, assisted by Sri Mohd. Khalid, Advocate for the appellants, Sri I.M. Khan and Sri Shahabuddin, learned counsel for the complainant and learned AGA Sri Arunendra K. Singh for the State.

11. Sri G.S. Chaturvedi, learned counsel for the appellants, submitted that as per prosecution story, the assailants had attacked at 2 A.M. in the night when the victim and others around him were sleeping. The firing was done from a close distance, barely 5 to 6 paces away. Consequently, there was no occasion to exhort the others to fire. In fact, it was a hit and run case. The prosecution story is apparently false. He further submitted that the prosecution case is not corroborated by the medical evidence. PW6, the doctor, during his cross examination, stated that injury no. 4 was possible if the assailants had fired from the right side of the victim, whereas according to the prosecution case, the firing took place from the left side. This according to him raises doubt about the creditworthiness of the prosecution case. There is no independent witness, although the FIR mentions that the neighbours rushed to the site of occurrence upon hearing the sound of gunshots and the alarm raised by PW1. PW1, PW2 and PW3 are closely related to each other and in view of previous litigation and other reasons, were inimical to the accused and had falsely implicated them. It is also urged that PW1, PW2 and PW3 were chance witnesses; that there was no occasion for them to be present at the place of occurrence, as they had their own houses and families. It is also urged that PW1 tried to improve upon the prosecution case during recordal of his statement by mentioning various things which were not stated in the FIR. Sri N.I. Jafri, learned Senior Advocate also appearing on behalf of the appellants, apart from adopting the above submissions, urged that no blood was found on the cot. Consequently, it was not possible that the blood had trickled down to the ground. The prosecution story that bloodstained earth was collected from the place of occurrence casts doubt about the creditworthiness of the prosecution case. He further submitted that the PW1 had attributed role of firing to Nawab to explain the third gunshot, albeit no such allegation was made in the FIR. The prosecution had not exhibited the lantern and the torches allegedly recovered from the place of occurrence and thus the prosecution case that the assailants were identified in the light of lantern and by flashing of torches, is not worthy of reliance, nor stands proved.

12. On the other hand, learned AGA appearing for the State and Sri I.M. Khan, learned counsel for the complainant, submitted that the prosecution case cannot be doubted as it was proved by ocular evidence, duly corroborated by the medical and circumstantial evidence. It is submitted that the prosecution had successfully proved that there was a long standing enmity between the appellants and the deceased victim and his family and there

was strong animus to commit the crime. The prosecution had successfully proved that the appellants had attacked the victim with a common object to commit murder. It is further submitted that all the three eye witnesses were closely related to the deceased and being month of Ramzan, when they were observing fast and had to rise early to take Sehri, it was very natural that they were not in deep sleep and got up on hearing voices. The exhortation by Nawab was a natural reaction, finding that the victim had got alarmed. It is submitted that PW1, PW2 and PW3 were not chance witnesses and that the prosecution had succeeded in proving to the hilt the place and time of occurrence. Consequently, a small lapse on part of the Investigator in not preparing fard of the cot, or not exhibiting the lantern and torches, is not sufficient to cast doubt on the creditworthiness of the ocular and medical evidence. It is also urged that the statement of the doctor (PW6), if read as a whole, clearly suggests that all injuries received by the deceased victim, were possible even when all assailants had fired from one particular side and submission to the contrary has no force. It is urged that the prosecution had successfully proved the guilt of the appellants beyond any shadow of doubt and the Trial Court was fully justified in convicting the appellants.

13. We have examined the rival submissions and perused the materials on record.

14. The edifice of the prosecution version rests on old enmity between the family of the deceased and the assailants. PW 1 in his statement stated that election for the post of Pradhan took place one month before the incident. In the said election, Yameen (father of accused Kudush), Ashraf (cousin brother of accused Nawab and Moosa) contested election against Yusuf (the deceased). Yusuf won the election by a large margin of votes. Both Yameen and Ashraf lost the election. Apart from it, about 4 - 5 years back, there was other litigation between the accused and Mohd. Yusuf (the deceased). It is for the said reason that the accused were on inimical terms with the deceased Mohd. Yusuf. It has also come in his statement that about 2½ - 3 years back, Afsar, son of Nawab (the accused) lodged FIR under Section 307 IPC against the deceased Mohd. Yusuf, Ishratyar Khan and Usman Khan.

15. PW2 stated that accused Nawab had filed a criminal complaint against him and a cross case was filed by deceased victim Yusuf Khan. Both the cases ended in acquittal. PW2 also admitted that Baqar Khan, brother of Nanhey Khan filed a criminal case against accused Nawab, Moosa and Mushir under Section 307 IPC. Haji Siddiqui got the matter compromised. Another litigation admitted was also a criminal case under Section 307 IPC by one Mahendra Pal Singh against Chandra Bhan Singh, Usman Khan (PW2) and the deceased victim Yusuf Khan. A cross case was also filed. It is evident from of judgment in said case (S.T. No. 161 of 1974) that Haji Siddiqui, who is real uncle of accused Nawab, Moosa and Mushir was a prosecution witness. In the cross case, accused Kudush and Moosa were prosecution witnesses. In the above background, there is considerable force in the prosecution story that the accused had not liked the defeat of their father/brother in election at the hands of Mohd. Yusuf. It is for the said reason that before attacking

the victim, Kudush tried to incite their passion by reminding them of the defeat at the hands of Mohd. Yusuf, describing him as "bada neta" and then exhorting them to strike. Undoubtedly, there was a very strong motive and inducement to commit the crime.

16. The place and time of occurrence has been duly proved. The incidence is said to have taken place at 2 A.M. in the night of 8/9th July, 1982. The place of incidence is the chabutra of the house of the deceased in village Shamashpur. It has come in the prosecution evidence that the place of occurrence was about two miles from police station Ganjdudhwara. The FIR was lodged at 02:55 A.M., i.e. even before expiry of one hour. The fact that the report was registered at 02:55 A.M. is corroborated by the fact that inquest on the dead body was held by the Investigating Officer at 5 A.M. and postmortem on the dead body was held at Etah at 1 P.M. The special report about the crime was dispatched from the police station at 6 A.M. PW1, PW2 and PW3 (all eye witnesses) had duly proved the place of occurrence. The Investigating Officer had clearly shown the place of occurrence in the site plan prepared by him (Ext. Ka-8). He had collected blood stained and ordinary earth from the place of occurrence. These are Exts. 4 and 5. He had found one tickli at the spot which was sealed in a separate packet and is material Ext. 3. All the three eye witnesses were cross examined at great length and all of them had taken a consistent stand regarding place and time of occurrence. It also stands corroborated by the circumstantial evidence.

17. The enmity and presence of common object got cemented by close relationship between the accused persons. According to prosecution witnesses, Nawab and Moosa are real brothers (sons of Ayub Khan), while Mushir is their cousin. The other three, namely Kudush, Moosa and Kallu are second cousins. Moosa in his statement under Section 313 CrPC admitted that he and accused are real brothers, while Mushir is his cousin. He also admitted that accused Kudush and Kallu are cousins. He however denied that Kudush and Moosa are saroos. Kalloo admitted himself to be cousin of Kudush. To same effect is the statement of Nawab. Thus, relationship between accused is clearly admitted.

18. According to the prosecution case, the incident occurred at 2 A.M. in night in the month of July. The deceased and his family are Mohammadan. It was the holy month of Ramzan, during which Muslim community observe fast (Roza) from sunrise to sunset. According to custom, those on fast take food and water (Sehri) before sunrise. PW1 stated that during month of Ramzan, sleep remains light and he got up hearing some noise. A lantern was hanging from the wall of Masjid on the northern side of the 'chabutra' where they were sleeping. He saw Nawab, Moosa, Kallua, Kudush and Mushir, armed with guns and pistols. He shouted seeing them in attacking posture. PW2 who is uncle to the deceased, stated that he got up hearing the alarm raised by PW1 and saw all five accused standing in the galli by the side of the deceased. PW3 made similar statement. All three are eye witnesses of the incident. Their consistent stand is that Nawab exhorted Moosa and Kudush to fire. Immediately thereafter, firing took place with pistol and guns, killing Mohd. Yusuf.

19. Much emphasis has been laid on the plea that it was 'a shot and run case'.

The alleged incident took place at 2 A.M. in the night. The assailants knew their target and also seemed to have identified the same. There was no reason to exhort and thereby alarm the target. The prosecution case that before firing, Nawab exhorted Moosa and Kudush, raises suspicion about the creditworthiness of the prosecution case.

20. There is no force in the submission. PW1 stated that there was very short interval of less than one minute between exhortation and actual shooting. The other two eye witnesses, i.e. PW2 and PW3 made the same statement. The result of exhortation was that the assailants without giving second thought, executed their plan. Had exhortation not taken place, it was possible that the assailants realizing that the victim and those sleeping beside him had seen them, might have retrieved. Thus, the act of exhortation had catalyzed the execution of the plan without giving time to rethink. The act of exhortation instead of pointing needle of suspicion to the prosecution story, lends credence to it.

21. It is true that in the FIR, it is not mentioned that PW1 raised alarm on seeing the assailants standing with their guns and pistols beside the cot of his brother, but in our opinion, that does not weaken the prosecution version. It cannot be overlooked that the real brother of PW1 had died hardly an hour before the FIR actually came to be registered. PW1 had stated that he was in extreme grief. In his cross examination, PW1 explained the omission thus: -

"यह कतल बरसात के मौसम मे हुआ था लेकिन उस समय बरसात नहीं हो रही थी। उस रात्रि में अन्दाजन हम सब लोग 11–12 बजे के करीब सोये थे। पहली नींद थी स्वतः कहा कि रमजानों में नींद नही आती है । जिस आवाज पर मेरी आंख खुली वह मुलजिम नवाब के चिल्लाने की सी आवाज थी। मैं फायरिंग से पहले चिल्लाया था। रिपोर्ट में मैनें ऐसा नहीं लिखाया कि मैं फायरिंग के बाद चिल्लाया न दरोगा जी को बताया। गवाह ने रिपोर्ट देखकर कहा कि मैने रिपोर्ट में फायर होने के बाद अपना चिल्लाना लिखाया था। और दरोगा जी को भी मैंने फायरों के बाद अपना चिल्लाना बताया था रिपोर्ट में जो कुछ मैंने लिखाया था वह सही लिखाया था। यह सही है कि मेरे चिल्लाने पर ही इशरत यार खां व उसमान खां जागे थे। मैंने अपने जागने पर मुलजिमान को चबूतरे के नीचे खड़े देखा रिपोर्ट में नहीं लिखाया लेकिन दरोगा जी को बताया था यह बात मैंने इसलिये रिपोर्ट में नहीं लिखाई क्योंकि उस समय मेरा दिमाग काम नहीं कर रहा था। मैंने अपनी रिपोर्ट में सम्भवतया जो पास सो रहे थे, मेरे चिल्लाने पर जागे उन्होंने भी देखा, नहीं लिखाया। मैंने लेखक को बताया था उसने लिखाया नहीं लिखा। जो चाहा उसने लिखा, जो चाहा नहीं लिखा। मैंने रिपोर्ट सुनने के बाद कोई एतराज नहीं किया था।"

22. The explanation furnished is very natural and there is nothing suspicious in it. It definitely cannot be said to be an afterthought. It is not possible nor expected that FIR should mention each such detail.

23. We now proceed to examine the contention as to whether PW1, PW2 and PW3 are chance witnesses and had not witnessed the crime. According to PW1, he was sleeping on the side of his brother on the night when the incident took place. He is also related to Usman Khan (PW2) being his son-in-law. In his statement, he admitted that he has his house at Kasba Gunjdudhwara, but it is stated that he usually comes to his village during Ramzan and other festivals. He had come to village about 2 - 4 days before the incidence. Whenever he visited his village, it was usual practice that they sleep together. His baithak is common with his deceased brother. He specifically stated that he had no separate house or chabutra in the

village. It is not unusual that during month of Ramzan, he would go to his native village. There is also nothing suspicious in the prosecution story that PW 1 was sleeping on the side of his brother on the night the incident took place, particularly when his baithak was common with his brother. Throughout his statement, he referred to 'chabutra' where incidence occurred, as 'his chabutra'. This lends credence to his version that he shared a common baithak and chabutra with his brother. PW1 was cross examined at great length on different dates. He vehemently denied the suggestion that he was not sleeping by the side of his brother at the time of incidence. PW2 and PW3 who claimed to be sleeping beside PW1, also categorically supported the prosecution version relating to presence of PW1 in village on the fateful night.

24. The circumstantial evidence also supports the presence of PW1 in the village at the time of incidence. The FIR was lodged by him within one hour of the incidence taking place. The police station was at a distance of 5 - 6 kms. from the place of incidence. It seems highly improbable that a person not present at the time of incidence, would come to the village and lodge FIR showing his presence at the time of incidence within a short time of less than one hour. His statement under Section 161 CrPC was recorded at police station soon after lodging of the FIR.

25. The creditworthiness of PW1 was sought to be assailed by contending that his sister was married to Munan Khan, cousin of accused Musheer. It resulted in a divorce. A suggestion was given to him that this was the reason of annoyance in deposing against the accused persons. The suggestion was denied. Moreover, as discussed above, PW1 happens to be real brother of the deceased victim. He was an eye witness. His statement, more or less, is consistent with the prosecution case. The old enmity or divorce reinforces the conclusion that there was severe bitterness among them. But it does not seem, in view of more or less consistent eye witness account and corroboration by other evidence - medical and circumstantial, that it was a case of false implication as a result of his sister being divorced.

26. PW2 Usman Khan is real uncle of the deceased victim Yusuf Khan. He is also father in law of Moosa Khan. He admitted that he had three houses in the village. He further deposed that a house adjoining the place of incidence, belonged to his brother, who died about 10 - 12 years back. His only daughter inherited that house. Usman Khan clarified that in such circumstances, he lives with his niece. There is nothing unusual that he was staying with his niece, after the death of his brother. It is also very normal that on the fateful night, he was sleeping on the chabutra with his brother and other extended family members, being the month of Ramzan.

27. PW3 Ishratyar Khan is the son of the deceased victim and son-in-law of PW1, Moosa Khan. His presence has been questioned on the ground that his marriage took place only a month back, therefore it was unnatural that he was sleeping on the chabutra and not with his wife. In this regard, when questioned, he offered explanation, saying that his wife was not in the village. She had gone to her maternal uncle's place at Aligarh, where her brother and sister were studying. He also stated that at the relevant time, his father in law had come to the village. He has no separate house. There is only a common house, a

stand also taken by PW1 in his deposition. In these circumstances, there is nothing unnatural that they were sleeping on the chabutra, particularly when it was the month of Ramzan and they were observing fast. The contention that PW!, PW2 and PW3 were chance witness is untenable.

28. Another limb of the argument is that PW1, PW2 and PW3 are closely related to each other and because of enmity they have falsely implicated the accused. The law of the point is well settled. The evidence of such witness is to be closely scrutinized, with extra care and caution. It cannot be rejected merely for the reason that they are closely related to the complainant. If on a careful scrutiny, their testimony is found to be intrinsically reliable and trustworthy, then nothing prevents the court from placing reliance upon the same. In **Yogesh Singh vs. Mahabeer Singh & Others, 2017 (11) SCC 195**, the Supreme Court summarized the legal position on the above issue as follows: -

"28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52)."

29. We have held that the presence of PW1, PW2 and PW3 was natural. Their testimony is consistent in respect of time and place of occurrence, the manner it took place and the persons instrumental in the same. They were subjected to lengthy cross examination, but the defence could not succeed in impeaching their creditworthiness by extracting anything suspicious. The accused albeit having set up plea of alibi, did not lead any evidence in defence.

30. We now examine the medical evidence to find out whether it corroborates the prosecution case or not. The contention of learned counsel for the appellants is that the injuries as were received by Mohd. Yusuf are not possible if the gunshots were fired by the assailants standing in the galli from the left side of the person lying supine on a cot.

31. For appreciating the argument, we once again take note of the injuries found on the body of the deceased victim: -

1. Multiple firearm wounds of entry each 1/4 cm x 1/4 cm x cavity deep on the right back of chest in an area of 15 cm x 12 cm, 4 cm away from midline.

2. Firearm wound of entry 1.5 cm x 1.5 cm x through and through on the left anterior axillary line 10 cm above left anterior superior iliac spine.

3. Firearm wound of exit 3 cm x 3 cm on the left posterior axillary line, 15 cm above the iliac crest.

4. Firearm wound of entry 1½ cm x 1½ cm x cavity deep on the right mid axillary line, 15 cm above the right iliac crest.

5. Abraded contusion 5 cm x 1 cm on the front of right leg 2 cm below the knee.

32. Ext. Ka-8 is the site plan where the incident took place. As per prosecution witnesses, the victim was sleeping on chabutra (in front of his house) on a cot. Moosa Khan, Usman Khan, Abdul Rauf Khan and Ishratyar Khan were sleeping on separate cots by his side. The 'chabutra' as per statement of witnesses and the site plan was 2½ feet in height. According to PW1, Moosa Khan was lying on the right side of the victim and thereafter, there were cots of Moosa Khan, Usman Khan, Abdul Rauf Khan and Ishratyar Khan. PW1 in his statement said that the assailants fired standing from galli on the left side of the cot on which Yusuf Khan was sleeping. PW2 stated that they fired flat, aiming at the victim. A specific question was put to the doctor PW6 if it was possible to inflict injuries on the victim while he was lying supine and firing takes place from one side. It was replied by stating that it was both possible and not possible to receive such injuries. He then explained various possibilities in relation to the position of the assailants. His statement when read as a whole, supports the prosecution case that injuries received by the victim were possible even if firing takes place from one side. It has come in the statement of PW1, PW2 and PW3 that the victim did not die immediately despite being badly injured. His death took place while on way to the hospital. It was possible to receive Injury No. 2 as also explained by PW6, if firing takes place from the left of the victim while he was lying supine. The victim after receiving gunshot injury on the left anterior axiliary line above iliac crest (injury no. 2) may have turned to his right, resulting in Injury No. 1 and then fell flat (prone), resulting in Injury No. 4. Injury No. 3 is exit wound of firearm shot of Injury No. 4. Injury No. 5 is abraded contusion 5cm x 1cm on the front of right leg, 2cm below the knee. PW6, the doctor, stated that this injury could be a result of rubbing against hard object. It could be wooden edge of the cot. As noted above, he did not rule out the possibility of receiving the above injuries, depending upon the position from which firing was done. It has come in evidence that firing was done in quick succession. In the above scenario, it cannot be expected from the witnesses to describe with exactitude the order in which injuries came to be inflicted, nor much emphasis could be laid on that part of the statement which seeks to describe the movement of the victim at the time he was being shot. The defence plea that the medical evidence does not corroborate the prosecution version has no force.

33. One of the contentions of learned counsel for the appellants was that the prosecution did not exhibit the cot on which the victim was sleeping at the time of alleged incidence. It is submitted that the Investigating Officer had admitted that he did not find blood on the cot, whereas dari (Ext. 2) was blood stained and according to prosecution case, blood was also found on the ground. PW1 also stated that there was no blood on the cot. It raises doubt about the creditworthiness of the prosecution story that the deceased was attacked while

lying on the cot, or he died on the same cot while being taken to hospital.

34. Although PW5 stated that no blood was found on cot, but he also stated that he himself had not seen the cot. His statement was based on Panchayatnama / inquest report which was not prepared by him. So far as statement of PW1 is concerned, it is noteworthy that his presence on the spot is found to be natural. He has given a natural version regarding the incident. It may be that he could not notice the presence of blood on cot, that is why he said that there was no blood on cot. In this type of heinous crime, no one can expect the witness to pay attention to smallest things. Minor embellishments which do not go to the root of the case is not fatal to prosecution case.

35. In **Yogesh Singh (Supra**), Supreme Court has held that minor inconsistencies or insignificant embellishments in the statement of witnesses should yield to the fallibility of human faculties and be ignored if the evidence is otherwise trustworthy and corroborates in material particulars: -

"29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions. (See Rammi @ Rameshwar Vs. State of M.P. (1999) 8 SCC 649; Leela Ram (dead) through Dulli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

36. One other contention was that lantern and torches were not produced before the Trial Court . It is noteworthy that fard of lantern is Ext. Ka 11 and fard of torches is Ext. Ka 12. Both these documents were duly exhibited and proved by PW5. PW5 in his statement categorically stated that soon after lodging FIR, he went to the place of occurrence and found the lantern and torches. He also stated that the fard in relation to lantern and torches were duly prepared. Moreover, it has been consistently stated by the eye witnesses that it was a moonlit night. The assailants were all known persons. They were hardly at a distance of 5 to 7 paces and thus, not difficult to identify. Nothing material turns on account of non-exhibition of lantern and torches.

37. One more submission was that the prosecution witnesses attributed role of firing the third gunshot to Nawab, although it was not mentioned in the FIR. This was an afterthought, just to explain the third gunshot injury.

38. It has already been held that the assailants were having old enmity with the deceased victim. They were all closely related. They attacked him with a common object to murder him. Thus, even if for argument sake it is assumed that PW1 tried to improve upon the prosecution case by assigning role of firing the third gunshot to Nawab, it will hardly have any effect on the final outcome of the instant case. Moreover, the instant appeal at the behest of Nawab already stands abated.

39. The result of above discussion is that there is clinching evidence to prove the prosecution case. The ocular version stands corroborated by the medical evidence. The accused had come armed with deadly weapons and in prosecution of the common object murdered Yusuf Khan. They succeeded in executing their plan successfully. They were rightly found guilty of offences under Section 148, 302 IPC (read with Section 149 IPC). There is no mitigating circumstance or evidence for taking a different view on the quantum of punishment. The appeal is devoid of merit and is dismissed. If the surviving appellants are on bail, they shall be taken in custody forthwith to serve out their sentence.

40. Let a copy of this judgment be sent to the trial court concerned.
